



Appeal Decision

Site visit made on 18 March 2022

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 28 March 2022

Appeal Ref: APP/Z4310/X/21/3289727

11 Cretan Road, Liverpool L15 0HR

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr T N Smithson against the decision of Liverpool City Council.
- The application Ref 21LE/2314, dated 1 August 2021, was refused by notice dated 3 December 2021.
- The application was made under section 191(1)(a) of the 1990 Act as amended.
- The use for which a certificate of lawful use or development is sought is a small HMO (Use Class C4).

Summary of Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision.

Preliminary Matters

1. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case. For the avoidance of doubt, the planning merits of the use are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act as amended.
2. The application was seeking to establish that the use of the building as a small (HMO) was lawful at the date of the application. Section 191(2) of the 1990 Act provides that uses are lawful at any time if no enforcement action may be taken in respect of them ... because they did not require planning permission. The appellant's case is that the material change of use to a small HMO comprised development 'permitted' under Article 3 and Schedule 2, Part 3, Class L(b) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). This concerns development consisting in the change of use of a building from a use falling within Class C3 (dwellinghouses) of the Schedule to the Town and Country Planning (Use Classes) Order 1987 to a use falling within Class C4 (houses in multiple occupation).

3. The Council has provided a copy of a Direction made under Article 4(1) of the GPDO relating to the area in which the appeal premises is located. This has the effect of revoking 'permitted development' rights conferred by Schedule 2, Part 3, Class L(b). The Article 4 Direction was confirmed on 17 June 2021 and came into force on that date.
4. The appeal property is in use as a small HMO and is occupied by four students. The dispute between the parties is whether or not the material change of use took place before the Article 4 Direction came into force, in which case it would have been lawful.

Main Issue

5. The main issue is whether the Council's refusal to grant a lawful development certificate was well-founded.

Reasons

Evidence

6. The appellant has provided a sworn statement setting out key dates and the property history. This states that the house was let on 25 January 2021, the conversion was substantially complete by 28 May 2021 and the tenancy began on 1 July 2021. A copy of the Tenancy Agreement has been provided setting out the first rental payment date of 1 October 2021.
7. A second sworn statement has been provided by the appellant's chartered surveyor. This also states that the works to convert the property into a C4 HMO were substantially completed on 28 May 2021. The works included reconfiguration of the house, an extra staircase to the second floor, two additional bedrooms, an additional shower room and other fixtures and fittings appropriate to the intended use as student accommodation. The statements carry significant weight as sworn evidence.
8. Other evidence includes a property management contract between the appellant and Luxury Student Homes, dated 18 December 2020, and a property owner statement for the period November 2021. Also provided are an emergency lighting completion certificate for new installations and a declaration of conformity; a Building Regulations Completion Certificate for electrical works; a domestic electrical installation certificate and an alarm system installation certificate, all dated 7 July 2021. A landlord gas safety record, dated 9 July 2021, has been submitted along with a Deposit Protection Service certificate, dated 12 July 2021, a United Utilities bill for the period July 2021 to March 2022 and a furniture invoice dated 2 April 2021 with delivery date 24 May 2021.

Analysis

9. There is no dispute that the conversion was carried out in order to facilitate the use of the premises as a small HMO. It is acknowledged that occupation did not commence until after the Article 4 Direction came into force, which the Council claims is crucial. The Council maintains that the use must be operational and occupation is necessary in order for a material change of use to take place. In their opinion, the change of use occurred on 1 July 2021 when the tenancy started.

10. The appellant draws my attention to the Supreme Court judgment in *Welwyn Hatfield BC*¹. Lord Mance held that “too much stress... [has] been placed on the need for ‘actual use’...it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is.” Thus, it is incorrect to regard the commencement of use as automatically giving rise to the change of use or, conversely, to conclude that there had not been a change of use because the building was not actively occupied.
11. The parties also refer to the High Court judgment in *Impey*², which concerned the conversion of dog kennels to residential accommodation. In that case, the Secretary of State had concluded that there was no breach of planning control, as the former kennels had not begun to be used for their new purpose. The Court held that Secretary of State was entitled to say that, on the evidence, there had been no change of use, but was wrong to say, as the wording of the decision letter implied, that the fact that the permission had not begun to be used was crucial. It was held that this was important, but not decisive.
12. Taking account of the relevant caselaw, I must have regard to when the building was capable of being used as a small HMO, as a matter of fact and degree, bearing in mind that it is possible to find that a change of use took place before the building was actually occupied. ‘Actual use’ remains a factor, but it is necessary to look at the evidence in the round. This includes the former use of the building, the physical state of the building at the relevant date, the actual use of the building at that date, the intended use and the whole chronology. Intended use should be considered objectively and with regard to evidence of, for example, any active marketing of the property for letting.
13. The sworn evidence states that the property was purchased in December 2020 and was, at that time, a two-bedroomed dwelling house in a poor state of repair. The house was taken on by Luxury Student Homes at the date of purchase and was let to students in January 2021. The conversion works were largely completed in May 2021. The clear intention was to purchase the house and convert it into student accommodation. This is evident from the contractual arrangement between the appellant and Luxury Student Homes, the Tenancy Agreement and all the relevant certification required for use as an HMO. In addition, the layout reflects the intended use, for example, the large communal kitchen and lounge area, the number of bedrooms and the additional shower room. Furniture was purchased appropriate to the needs of students.
14. The works necessary for the property to be used as small HMO for student occupation were completed before the Article 4 Direction came into force and the property had been let. The Council argues that the physical works provide little about the use of the property, as it could be used as a family house any time up until it was occupied by students. However, the appellant is not relying on the physical works alone. He was contractually bound to provide accommodation for students. Use of the property by a family after the relevant contracts were entered into is highly unlikely. Occupation had not commenced, due to term dates, but this in itself is not decisive.
15. The purchase of the property, the contractual arrangement with Luxury Student Homes, the Tenancy Agreement and certification, combined with the

¹ *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15.

² *Impey v SSE & Lake District SPB* [1981] JPL 363, [1984] 47 P&CR 157 and *Backer v SSE* [1983] JPL 167.

physical works, in my opinion gave rise to a material change of use to a small HMO prior to the Article 4 Direction coming into force. I find that, on the balance of probabilities the use of the building as a small (HMO) was lawful at the date of the application.

Conclusion

16. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of a small HMO (Use Class C4) was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Formal Decision

17. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Debbie Moore

Inspector



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 1 August 2021 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The purchase of the property, the contractual arrangement with Luxury Student Homes, the Tenancy Agreement and certification, combined with the physical works, in my opinion gave rise to a material change of use to a small HMO prior to the Article 4 Direction coming into force. I find that, on the balance of probabilities the use of the building as a small (HMO) was lawful at the date of the application.

Signed

Debbie Moore

Inspector

Date: 28 March 2022

Reference: APP/Z4310/X/21/3289727

First Schedule

Small HMO (Use Class C4)

Second Schedule

Land at 11 Cretan Road, Liverpool L15 0HR

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 28 March 2022

by **Debbie Moore BSc (HONS), MCD, MRTPI, PGDip**

Land at: 11 Cretan Road, Liverpool L15 0HR

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Scale: NTS

