
Appeal Decision

Site visit made on 16 February 2022

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 March 2022

Appeal Ref: APP/Q1445/X/21/3270782
64B Preston Road, Brighton BN1 4QF

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Richard Little against the decision of Brighton & Hove City Council.
- The application Ref BH2020/00065, dated 8 January 2020, was refused by notice dated 4 November 2020.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is existing use, as a dwellinghouse occupied by no more than 5 persons unrelated to each other, is lawful (outside Use Class C4) as it does not constitute development.

Summary Decision: The appeal is dismissed.

Background and Preliminary Matters

1. The appellant sought an LDC for the development set out in the header above. However, that issued by the Council defined the lawful use as an "existing use, as a dwellinghouse occupied by no more than 5 persons unrelated to each other (outside Use Class C4)". Section 195(4) of the Act enables an appeal against a decision of the Council to refuse an application in part, including a modification or substitution of the description in the application of the use, operations or other matter in question. Section 195 of the Act indicates that I should treat the LDC as having been refused in part for the purposes of my decision.
2. The appellant objects to the removal of the sections of the description stating that the use is lawful as it does not constitute development. The purpose of an LDC under section 191(1)(a) of the Act is to ascertain whether the existing use of the land is lawful. Such a use may be lawful for a number of reasons, including if any change of use was not material under section 55 of the Act (i.e. it does not constitute development), if planning permission has been granted for the use, or where it has become lawful through the passage of time under section 171B of the Act.
3. The description of development indicates that the use of the property is not within Class C4 of the Town & Country Planning (Use Classes) Order 1987 (UCO). However, it does not clearly describe how the property is actually used. Section 191(4) of the Act allowed the Council to modify or substitute the description given in the application for the LDC. On that basis, it was legitimate

for them to amend the description and I have the same powers. I will either use them to clearly specify the use of the property in any LDC I decide to issue or dismiss the appeal, subject to my conclusion as to what I conclude the existing and lawful uses of the property to be.

4. The reason for granting the LDC was given as:

The evidence submitted shows that on the balance of probability the lawful use of 64B Preston Road was, when the application was submitted, as a dwellinghouse occupied by no more than 5 persons unrelated to each other (outside Use Class C4). By virtue of the property being leased by the YMCA Downslink Group and it being occupied by not more than six residents living together as a single household the use is considered to be within Class C3 of the Town & Country Planning (Use Classes) Order 1987 (as amended).

5. The appellant objects to the reason referring to Class C3 of the UCO. In their view, the use does not fall within Class C3. The reason for the decision simply sets out why the Council concluded they were right to issue the decision. It is not a binding part of the decision; it doesn't condition, limit or restrict the description of development. I am able to provide different reasoning and could issue an LDC in different terms, such as using the description suggested by the appellant or with a more precise definition of any lawful use. However, that would not affect the existing LDC issued by the Council.
6. The burden of proof for an LDC is on the appellant, with the relevant test of the evidence being on the balance of probability. Case law indicates that evidence needs to be sufficiently precise and unambiguous, even if there is no evidence to contradict it. My decision needs to consider the lawful use of the property on the date of application for the LDC, being 8 January 2020 (the relevant date).
7. For clarity, the Council and appellant both indicate that it was not necessary to enter the site to check relevant facts. On that basis, I have not viewed inside the property, although did view externally from Preston Road and Ditchling Rise.
8. My attention has been drawn to guidance and case law relating to the Housing Act 2004, such as a guide to the licensing and management provisions in Parts 2, 3 and 4 of that Act. However, the definitions used in relation to Housing Acts and those relating to planning matters may differ. Consequently, I have taken these into account only insofar as they are relevant to my decision.
9. Taking account of all the above, I will consider whether the Council's decision was well-founded in respect to the lawful use of the property.

Reasons

10. The property is leased by the YMCA Downslink Group. They then let the property to not more than five residents who are unrelated to each other and have done so since 2015. The tenants change over time and don't know each other prior to renting, joining at different times and staying for different lengths of time. The YMCA describe the individual tenants as forming separate households and not living as a single household. The Council describe the accommodation as comprising five bedrooms and a communal room that provides a lounge, kitchen and dining area.

11. The way in which the property is occupied appears to be as a house in multiple occupation (HMO) for up to six residents under Class C4 of the UCO. However, an HMO under Class C4 has the same meaning as provided at section 254 of the Housing Act 2004. Paragraph 5 of that section notes that for the purposes of the Act a property or part of a property is not an HMO if it is listed in Schedule 14. That schedule includes where the property is a property controlled or managed by public sector bodies etc. The Council has accepted that, as the property is managed by the YMCA, it falls within that exclusion. I see no reason to disagree. Consequently, the property is not used as an HMO for the purposes of the Housing Act 2004. Given the definition of an HMO in the UCO, the use cannot fall within Class C4.
12. The Council allege that the use is as a dwellinghouse under class C3 of the UCO. The definition of Class C3 includes where not more than six residents are living together as a single household where no care is provided to residents (other than a use within Class C4).
13. It is clear from the YMCA description of the way in which the property is occupied that the residents do not live together as a single household. They are clearly living as individual residents but sharing some facilities. On that basis, the use does not fall within Class C3 of the UCO.
14. There is no suggestion that the use would fall within any other use class contained within the UCO.
15. My attention has been drawn to an appeal decision¹ relating to another property in Brighton. In that case, the property had been managed by the University of Brighton to provide accommodation for up to six people. At that time, the Inspector found that the use fell within neither Classes C3 nor C4. As such, they concluded that it was sui generis.
16. For these reasons, I conclude that the use of the property does not fall within Classes C3 or C4 of the UCO. Consequently, I agree with the appellant that the residential use of the property falls outside the use classes contained within the UCO such that it is sui generis.

Lawfulness of the use

17. I can only issue an LDC if the appellant satisfies me on the balance of probability that the use of the property at the relevant date was lawful. No planning permission has been applied for or granted for a change to the sui generis use.
18. I understand that the YMCA began occupying the property in November or December 2015. The Council have assumed that the previous use was under Class C3 of the UCO. The letter from the appellant's solicitor also indicates the previous use was under Class C3. I have not been provided with a description of how the property was used before that date, nor who occupied it. For that reason, the evidence is not conclusive. However, on the balance of probability I consider the use prior to occupation of the YMCA was under Class C3. That suggests that the current sui generis use began in November or December 2015. Consequently, the use could only have continued for a period of just over four years before the relevant date.

¹ Appeal references APP/Q1445/C/18/3209774 and APP/Q1445/C/18/3209775

19. The appellant indicates that the appeal decision referred to above is relevant. In that case, the property had subsequently moved outside University management, but continued to be occupied in essentially the same way. The Inspector concluded that use was under Class C4 of the UCO but, given the similarities of the uses, the change of use was not material. As a result, it did not constitute development as defined at section 55 of the Act as there was no material change of use. However, that is not analogous to this situation, where the change of use was from a Class C3 dwellinghouse.
20. In this case, should the management change from the YMCA to be managed, for example, by the freeholder, it would likely become an HMO under Class C4. As the appellant says, the use is not materially different in character depending on who manages the property. However, the last lawful use of the building was under Class C3, so the issue is whether the change from Class C3 to the sui generis use was material.
21. The change of use of a building between use classes requires planning permission where they constitute a material change of use. The change of use in 2015 was from Class C3 to a use comprising up to five residents, who each effectively form their own household. That results in more comings and goings by the residents, their visitors and for deliveries than would a single household with the same number of residents. As a result, this is a more intense use than a single household under Class C3. For these reasons, that change of use was material. It, therefore, comprised development as defined at section 55 of the Act.
22. Planning permission is granted in certain instances by the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), known as "permitted development". This includes Class L, Part 3, Schedule 2 of the GPDO that allows the change of use of properties from small HMOs to dwellinghouses and vice versa. This enables changes of use between classes C3 and C4 of the UCO.
23. A number of areas of Brighton are subject of directions under Article 4 of the GPDO restricting this permitted development right, but I understand these did not apply to the area in which this property is located at the relevant date.
24. I note that the appeal decision referred to above indicated that the sui generis and subsequent class C4 uses in that case were not materially different. The same may be true in this case. However, the permitted development right is clear that it only relates to changes of use between classes C3 and C4. As the current use is sui generis, it cannot benefit from the planning permission granted by the GPDO.
25. Under section 171B of the Act, use as a single dwellinghouse would become lawful were it to have continued for a period of four years beginning with the date on which the use had started. For any other use, the relevant period is ten years. The property would need to have been occupied for that period without significant interruption by the relevant date.
26. I have concluded above that the property is occupied in a similar way to an HMO. As such, like an HMO, it is not a single dwellinghouse. Consequently, the relevant period of lawfulness as required by section 171B of the Act would be ten years.

27. As the sui generis use has not continued for a period of ten years since the material change of use from a Class C3 dwellinghouse, it cannot have become lawful through the passage of time.
28. Taking account of all the above, I conclude that the sui generis residential use is not lawful as there has been a material change of use that constitutes development and planning permission has not been granted for the use, including by the GPDO. In addition, it has not become lawful through the passage of time under section 171B of the Act. As the use is not lawful, it is not possible for me to issue an LDC.

Formal Decision

29. For the reasons given above I conclude that the Council's refusal in part to grant a certificate of lawful use or development in respect of existing use, as a dwellinghouse occupied by no more than 5 persons unrelated to each other (outside Use Class C4) was well-founded, albeit not for the reasons given, and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.
30. The appeal is dismissed.

AJ Steen

INSPECTOR