



Appeal Decision

Site visit made on 14 March 2022

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 April 2022

Appeal Ref: APP/T5150/X/21/3268128

23 Brenthurst Road, London NW10 2DX

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended ('the Act') against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Nectar Property Investments Limited against the decision of the Council of the London Borough of Brent.
 - The application ref 20/3277, dated 12 October 2020, was refused by notice dated 22 December 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 a C4 use.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. Planning merits form no part of the assessment of an application for a LDC under S191 of the Act. The proposed development must be considered in the light of the facts and the law.

Main Issue

3. The main issue is whether the Council's decision to refuse an LDC was well-founded.

Reasons

4. An application under Section 191(1)(a) of the Act seeks to establish whether any existing use of buildings or other land is lawful at the time of the application. Section 191(2)(a) and (b) sets out that uses and operations are lawful at any time if: i) No enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and ii) They do not constitute a contravention of any enforcement notice then in force.
5. In an LDC, the burden of proof is on the appellant, on the balance of probabilities. As held in *Gabbitas v SSE and Newham LBC* [1985] JPL 630, an appellant's evidence should not be rejected simply because it is not corroborated. If there is no evidence to contradict their version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted.

6. The main thrust of the appellant's case is that, at the date of the application, the building had been the subject of a lawful change of use from a C3¹ use to a C4² use which is permitted by Schedule 2 Part 3 Class L of the Town and Country Planning (General Permitted Development) Order 2015 (as amended), which permits development consisting of a change of use of a building... (b) from a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order, to a use falling within Class C4 (houses in multiple occupation) of that Schedule.
7. The appellant submitted a certificate of lawfulness for proposed L-shaped rear dormer windows with two front rooflights to the dwellinghouse on 18 December 2017, which the Council certified was lawful on 12 February 2018. The layout of the building on the submitted plans is consistent with a dwelling, having two shared bathrooms rather than each bedroom having an en-suite, and a living room, dining room and kitchen. A Council officer visited the site on 5 February 2018 and states 'The property appears to be in use as a single dwellinghouse'.
8. Planning permission 17/5388 was granted on 7 March 2018 for the demolition of a single storey rear extension and creation of a new single storey rear extension. Although not explicitly stated within the report, it appears from the plans that the property was still a dwellinghouse at this point.
9. An application for the retention of a 9 person House in Multiple Occupation (HMO), reference 20/1295, was refused on 25 June 2020. The Council advise that the application form confirms the change of use to a large HMO was completed on 15 October 2018. The plans describe the plans as 'existing' and the Council dealt with the application on the basis that the application was retrospective. The layout of the building appears to be quite different to the previously approved layouts, with three ensuite bedrooms on the ground floor, two ensuite bedrooms and a kitchen on the first floor and two ensuite bedrooms on the second floor.
10. The appellant does not dispute that the property was used as a 9 person HMO and states that they reduced the number of occupants and changed the second bedroom to a dining room. The appellant's agent states they advised their client to revert to a 6-person HMO under Class L and that by natural wastage, the property was reduced from the larger HMO occupancy to fall within the parameters of Class L. This is stated to have been the situation at the time of the application and is also consistent with what I saw on site.
11. The appellant asserts that the lawful use of the property at the time of the change of use was a 'C3 house'. The appellant accepts that, since planning permission was never granted for the *sui generis*³ HMO use and it did not become lawful through the passage of time, it was unlawful. However, the appellant suggests 'the unauthorised use does not count'. I respectfully disagree.
12. Article 3(5) of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(GPD0) sets out that

¹ Use as a dwellinghouse (whether or not as a sole or main residence) by (a) a single person or by people to be regarded as forming a single household; (b) not more than six residents living together as a single household where care is provided for residents; or (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within class C4).

² Use of a dwellinghouse by not more than six residents as a "house in multiple occupation".

³ Latin expression, meaning 'of its own kind'.

permission granted by Schedule 2 does not apply if (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful; (b) in the case of permission granted in connection with an existing use, that use is unlawful.

13. From the evidence, it seems the appeal property went from a dwellinghouse in C3 use to a *sui generis* HMO to a C4 HMO. The appellant has drawn my attention to *Pioneer Aggregates (UK) Ltd v SSE* [1984] 2 ALL ER 358, which considered whether the right to develop land by virtue of a planning permission can by the actions of the relevant parties be abandoned. Whilst I have had regard to this case, in the appeal before me there has been a material change of use from a C3 use to a *sui generis* HMO. An existing lawful use of land which is authorised by a planning permission is capable of being extinguished by a material change of use.
14. There is no suggestion that the property reverted back to use as a C3 dwellinghouse following the *sui generis* HMO use and even if there were, since the Council has not issued an enforcement notice, there was no right of reversion under section 57(4) of the Act⁴. The use of the building as a *sui generis* HMO was unlawful and so Article 3(5) was engaged and permission granted by Schedule 2 of the GDPO did not apply.
15. The change of use to a small House in Multiple Occupation (Use Class C4) did not, therefore, constitute permitted development and was development for which planning permission is required. Consequently, the appeal must fail.

Conclusion

16. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a C4 use was well-founded 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.

M Savage

INSPECTOR

⁴ Where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out.