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: 22 April 2022

Appeal Ref: APP/T5150/X/21/3280741
776 North Circular Road, Neasden, London NW2 7TD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mrs Miriam Becher against the decision of the Council of the London Borough of Brent.
- The application ref 21/2047, dated 1 June 2021, was refused by notice dated 26 July 2021.
- The application was made under section 192(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 change of use to a small HMO (Use Class C4).

Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Mrs Miriam Becher against the Council of the London Borough of Brent. This application is the subject of a separate Decision.

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 192(1)(a) of the Act seeks to establish whether any proposed 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. Schedule 2 Part 3 Class L of the Town and Country Planning (General Permitted Development) Order 2015 (as amended)(GPDO) 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 (HMO)) of that Schedule.

7. On 11 December 2019, an enforcement notice was issued alleging 'without planning permission, the material change of use of the premises to a House in Multiple Occupation (HMO) and flats.' The notice was upheld on appeal on 10 December 2020[1]. The appellant has drawn my attention to *Brent London Borough Council V SSHCLG* [2020] EWHC 3620 (Admin) and suggests that had the Inspector been aware of the judgement, he would not have dismissed the appeal.

8. The appellant appealed on a number of grounds, including ground (b), which is made on the basis that the matters stated in the notice have not occurred as a matter of fact. On the evidence before me, I see no reason why the Inspector would have reached a different conclusion on the ground (b) appeal in light of the judgement above. While I note the principle established in *Mansi v Elstree RDC* [1964] 16 P&CR 153 that the requirements of an enforcement notice must not purport to stop a developer from doing something they are entitled to do, including rights under the GPDO, as confirmed in *Duguid v SSETR & W Lindsay DC* [2001] 82 P&CR, it is not necessary to amend an enforcement notice to safeguard a right permitted by the GPDO.

9. Significantly, it was open to the appellant to appeal to the courts under section 289 of the Act, against the Inspector's decision. The appellant did not do so. Section 285 of the Act sets out that the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought. It is therefore not open to me to question the validity of the notice through this appeal.

10. The enforcement notice required, at STEP 2, the removal of all internal partitions and at STEP 3, that the internal configuration be restored to the original layout. Partitions remained where the en-suite bathrooms were previously installed and the premises was not restored to the internal configuration before the unauthorised change of use took place. From the evidence provided by the Council and from the appellant's own admission, therefore, these steps have not been fully complied with.

11. On 6 April 2021, the appellant wrote to the Council, via email, regarding intended/suggested works at the property. An officer of the Council confirmed on 6 April, via email, that 'this looks ok to me, as long as the 'storage', 'pantry' and 'wardrove' really are as such and don't contain bathroom facilities'. Photographs and a video were sent to the Council on 10 May 2021, and an officer of the Council confirmed that 'the works have been done as per the 6/4/21 plans as agreed. I have [now closed our] file ref. E/17/0327 and no further action is intended.'

12. Section 173A of the Act provides that a local planning authority may (1)(a) withdraw an enforcement notice issued by them; or (b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9).

[1] APP/T5150/C/20/3244883

13. The appellant suggests that there is no formality needed when exercising the powers under section 173A. However, in my view, it must be clear that this is what the Council is doing and, as set out in section 173A(3) immediately after exercising the powers conferred by subsection (1), the local planning authority should have given notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were re-issued, be served with a copy of it.

14. Section 329 of the Act specifically excludes the giving of notice under section 173A of the exercise of powers conferred by subsection (1) from those types of case where electronic communications may be used. The appellant suggests the powers conferred in subsection 173A(1) are not dependant on the requirement in subsection (3) to serve the notice. However, the fact that the Council didn't, is a clear indicator that it has not exercised its powers under section 173A.

15. The Council has provided me with examples where it has varied an enforcement notice. In each case, the Council sets out what it was doing in accordance with its powers under section 173A(1) and sent a copy to anyone with an interest in the land, as required by section 173A(3). No such document appears to have been issued in respect of the appeal site.

16. The Council officer states 'no further action is intended' in an email dated 14 May 2021. Whether or not the officer who wrote the email had the delegated powers to waive or relax the requirements of a notice under section 173A, this is not the same as confirming compliance with a notice for the purposes of the Act. Local planning authorities have powers under section 178 of the Act to take steps where an enforcement notice is not complied with.

17. It is not unusual for a local planning authority to confirm it does not intend to take action (or further action, as in this case). This cannot be construed as the Council having confirmed that building works or a use are lawful. While I note the Council's website identified the status as 'Notice complied (When Last Inspected)', this is not, of itself, a determination, not least because the individual who updates the website is unlikely to have the authority to make such a determination.

18. As established in *R v E Sussex CC ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8, public authorities cannot be estopped from performing their statutory duties. Any representation by a local planning authority as to how it will or will not exercise its powers under section 172 will not give rise to a binding estoppel. Sections 191 to 196 of the Act provides a fully comprehensive code against which a formal determination can be made as to whether something is lawful.

19. Article 3(5) of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(GPDO) sets out that 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.

20. As reaffirmed in *RSBS Developments Ltd v SSHCLG & Brent LBC* [2020] EWHC 3077 (Admin) once unauthorised works are removed and/or regularised, Article

3(5)(a) is no longer engaged and permitted development rights would, once again, be capable of applying. However, the appellant has not removed the unauthorised works, as required by the notice.

21. Whilst I note the provisions of section 173(11) of the Act, which is to grant permission by virtue of section 73A for those works or activities which the notice could have required to be removed or to cease, but did not, it does not assist the appellant in this case, since the notice requires the partitions to be removed. Consequently, it seems at the date of the application, the property did not benefit from permitted development rights.

22. Section 57(4) of the Act provides that 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. There is no dispute that once the notice was complied with, the appellant could have reverted to a C3 use, what is in dispute is whether the property did actually revert to a C3 use.

23. While occupation is not necessary for a property to be regarded as a single dwellinghouse, the GPDO permits development consisting of a change of use of a building 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. In order for the change to a C4 use to be permitted development, whether occupied at the date of application or not, the use of the building must have fallen within use Class C3.

24. Since the notice alleged use of the premises as an HMO and flats, which is not a C3 use, it follows that in order for to benefit from rights under Class L, it would have been necessary for the appellant to show the change of use to a C3 use had occurred by the date of the LDC application. The appellant has drawn my attention to *Impey v SSE & Lake District SPB* [1981] JPL 363; [1984] P&CR 157 and suggests that physical occupation is not necessary for permitted development rights to apply. However, what the court actually held is that it is necessary to look in the round. The physical state of a premises is very important, but it is not decisive. Actual or intended or attempted use is important but not decisive.

25. The appellant asserts in their statement that the change of use back to a dwellinghouse occurred in May 2021 and has provided a copy of a tenancy agreement, dated 25 May 2021, for a six month term, with rent identified as £1280.45 per calendar month. The appellant suggests that the agreement demonstrates that the property is in use as by [sic] a single household. It does not. A tenancy agreement can only show that an individual has a right to occupy a property.

26. The Council has provided me with a listing for a 3 bedroom property on North Circular Road which was advertised to rent at £2200 per calendar month. While the rent a property can command will inevitably vary, this is very low for an entire property and is more consistent with rents commanded for a one or two bedroom flat. The appellant states a lower rent was agreed given the uncertainty of any future use as an HMO, however, I see no reason why this should be so, if the parties had entered into a tenancy agreement, setting out the terms of occupation.

27. The Council state that officers visited the site on Saturday 26 June 2021 and found the premises to be vacant. Council officers also visited the property on Monday 19 July and state they found limited personal belongings, including toiletries and suggest the premises did not have the appearance of being lived in. The Council has provided a series of photographs taken during the visit.

28. The appellant asserts that photographs of the visit taken by the Council purposefully omit all the photos showing person belongings, however, in my view they appear largely consistent with photographs provided by the appellant, said to have been taken on the same day, with the exception of the kitchen, in which a greater number of food stuffs are evident in the photograph provided by the appellant.

29. The Council has drawn my attention to *Rambridge v SSE & East Hertfordshire DC* (QBD 22.11.96 CO-593-96) where it was held that an owner could build his building for a purpose incidental to the enjoyment of the dwellinghouse and then a day later use it for ordinary or primary use, is a sham and there would have been no genuine compliance with Class E. Although the judgement concerned an outbuilding, I consider the principle established to be of relevance here.

30. Although furniture and other various items can be seen in the photographs, I would expect an individual who has lived in a property for nearly two months to have acquired more than just a toothbrush in terms of toiletries. Even if an individual spent a night or two in the premises, the intention of the appellant was clearly to convert the property to an HMO use, as evidenced by the LDC application which was submitted just days after the tenancy agreement is shown to have been agreed. Indeed, at the time of my visit, the property had been converted to an HMO, including the installation of en-suites. In my view, the evidence provided does not show, on the balance of probabilities, that the building had reverted to use as a C3 dwellinghouse by the date of the LDC application.

31. Thus, for the reasons given above, the appellant has not demonstrated compliance with the steps outlined in enforcement notice reference E/17/0327, upheld and as varied by APP/T5150/C/20/3244883 or that, by the date of the application, the site was in use as a C3 dwellinghouse. As such, the appeal premises did not benefit from permitted development rights set out in Schedule 2, Part 3, Class L of the GPDO, and so the change of use to a C4 HMO would not have been lawful.

Conclusion

32. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the change of use to a small HMO (Use Class C4) 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