

Appeal Decision

Site inspection on 23 May 2022

by Graham Self MA MSc FRTPI

Inspector appointed by the Secretary of State

Decision date: 25 May 2022

Appeal Reference: APP/E0345/X/22/3291832

Site at: 24 Donnington Gardens, Reading RG1 5LY

- The appeal is made by Mr Sunderpal (Sunny) Mangat under Section 195 of the Town and Country Planning Act 1990 as amended against the refusal by Reading Borough Council to grant a certificate of lawfulness.
- The application (Reference No. 191663/CLE) dated 9 October 2019 (see "Procedural Matters" below) was refused on 29 April 2021.
- The application was made under Section 191 of the Town and Country Planning Act 1990 as amended.
- The description of the use as stated in the application was: "C4 small HMO use".

Summary of Decision: The appeal succeeds and a certificate of lawfulness is issued.

Procedural Matters

1. The application was evidently amended by an email dated 27 January 2020, such that the application sought a certificate that the existing lawful use of the property as a 4-bedroom (4 person) house in multiple occupation ("HMO").
2. As the internal layout of the appeal property has not appeared to be a matter of dispute in this case, my inspection was arranged as "unaccompanied", that is to say with no representatives of the appellant or council present. I could not see inside the property as the windows were obscured by internal blinds.

Reasons

3. The basic principle applying here is that an unauthorised use must have continued throughout a ten-year period before it can achieve lawfulness, although minor interruptions will not normally stop the period running. Whether an interruption in activity "on the ground" has resulted in a cessation of the use for the purposes of planning law has to be assessed as a matter of fact and degree in each case.
4. The appeal site is evidently within an area where an Article 4 Direction¹ applies, preventing changes of use from dwellinghouse (Class C3 of the Use Classes Order) to Class C4 HMO; but this Order was introduced in May 2013, and it is undisputed that a change of use to HMO occurred before then, so the Direction does not appear to be a material consideration unless the HMO use is found not to be lawful for other reasons and/or the use of the property were to revert to Class C3 dwellinghouse.

¹ This refers to Article 4 of the Town and Country Planning (General Permitted Development) Order, under which "permitted development" rights which would normally apply can be removed.

5. The dispute in this instance is centred upon a period during 2016 and 2017. Mr Mangat evidently bought the property in October 2016 after exchange of contracts in September 2016. The property had been empty since June 2016, following a period of use as an HMO (I refer again to this period in paragraph 12 below). Mr Mangat then obtained quotations for refurbishment work, which was apparently needed in order to meet Building Regulations and other standards. A contractor started work in December 2016.
6. According to a statement by Mr Mangat, the work involved every room, and included replacing wiring and plumbing, installing fire-rated plaster-boarding and doors, and providing bathroom and kitchen facilities. A written statement by a contractor describes work including stripping the entire property down to bare brick, rebuilding the back wall of the house, re-routing drainage, building a rear extension, repairing and replacing parts of the roof and removing internal chimney breasts. The contractor also states that the work was due to start in October but because of his other commitments was delayed until December.
7. The refurbishment work was completed about five months later in April 2017, after which the property was advertised for rent. New tenants entered into tenancy agreements beginning in late July 2017, though it is not clear whether actual occupation then started immediately.
8. In a letter to the Borough Council dated 20 February 2020, solicitors acting on the appellant's behalf referred to the period of non-occupation in the history outlined above and stated: "This should not be seen as a break in occupation". That statement is misguided - for the purposes of planning law, the issue here is not whether there was a break in *occupation* (which clearly there was), but whether there was a break in the *use of the property*. Under planning law a use of land or property can continue even when it is not actively being pursued, just as - to take a simple example - the residential use of a house continues while the occupants are away on holiday. Once a change of use has occurred in breach of planning control, the use has to continue without substantial interruption for 10 years in order to accrue lawfulness. As has been established in several court judgments and as has also been pointed out on the appellant's behalf, there is no requirement for continuous actual occupation throughout the ten-year period.
9. The extent of building work carried out in 2016-17 was evidently such that it was impracticable for any of the accommodation to be let or occupied while the work was under way. However, the break in letting and occupancy evidently lasted for over a year, between 3 June 2016 and 30 July 2017. Part of this period appears to have occurred because of the timing of student terms, as the property has been aimed at the student letting market.
10. A key question I have to consider is whether enforcement action could have been successfully taken against the use during the period of non-occupation. The assessment is finely balanced, and it is necessary to bear in mind relevant court judgments mentioned by both sides.²
11. One reason for the overall time of the gap in occupation appears to have been the change of ownership after the property became vacant in June 2016. The

² Examples are *Secretary of State for the Environment v Thurrock BC* [2002] EWCA Civ 226 quoted in support of the council's case; and *Basingstoke and Deane BC v SSCLG & Sir Thomas Stockdale* [2009] EWHC 1012 (Admin), quoted in support of the appellant's case.

evidence indicates that the purpose of the refurbishment work which the appellant as new owner then commissioned was to enable the property to continue to be let as an HMO and maintain the breach of planning control. Indeed, the work was apparently necessary to meet local authority requirements for HMOs. The time taken to obtain quotations, then wait for the contractor to start (not an unusual happening for this type of work), then carry out the work (taking about a month longer than originally expected), then to advertise and re-let the property to fit in with the student letting market, all shows an intention to continue the HMO use and I consider it reasonable to count this period towards the continuation of the HMO use.

12. In addition to the above assessment, a statement by a previous owner indicates that the appeal property was used as an HMO for four people from at least June 2006. This was more than ten years before the October 2016 date when Mr Mangat bought the property and suggests on the balance of probability that HMO use had become lawful by that date, in which case more than merely a cessation of the use would be needed to take away lawfulness - the concept of abandonment would apply and use rights would have to be abandoned by clear steps such as the introduction of an intervening materially different use, or what the courts have termed a "new chapter" in the planning history of the site.

Conclusion

13. In summary, I can see why the council considered the gap between June 2016 and July 2017 to be more than *de minimis*, or too long to be regarded as continuing the unauthorised use; but on balance I judge that the appellant's case is justified on the basis that despite the period during which the property was not in active occupation, the continuity of use as an HMO was maintained to an extent sufficient to conserve use rights. I have taken into account that in this type of case the onus of proof is on the appellant. I consider that the appellant has discharged that onus.

Formal Decision

14. For the reasons given above I conclude that the council's refusal to grant a certificate of lawfulness was not well-founded. Therefore the appeal succeeds. I will exercise accordingly the powers transferred to me under section 195(2) of the 1990 Act as amended. A certificate of lawfulness is attached.

G F Self

Inspector

Certificate of Lawfulness

APPEAL REFERENCE APP/E0345/X/22/3291832
TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by section 10 of the Planning and Compensation Act 1991)

THE TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE)
(ENGLAND) ORDER 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 16 October 2019 the use described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 as amended, for the following reason:

The use had been carried on in breach of planning control for at least 10 years before the date of the application and so had become lawful by that date.

G F Self

Inspector

Date 25 May 2022

First Schedule

Use of the property as a 4-bedroom (4-person) house in multiple occupation.

Second Schedule

The property at 24 Donnington Gardens, Reading RG1 5LY.

NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 as amended.
2. 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 would not have been liable to enforcement action under section 172 of the 1990 Act on that date.
3. This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule. Any use or matter 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.
4. The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted, in any of the matters which were relevant to the decision about lawfulness.

[These notes must go on the back of the lawful development certificate itself]