



Appeal Decision

Site visit made on 15 March 2022

by Roy Curnow MA BSc(Hons) CMS MRTPI

An Inspector appointed by the Secretary of State

Decision date: 30th May 2022

Appeal Ref: APP/T5150/X/20/3259512

Connaught House, 20A Acton Lane, London NW10 8TT

- The appeal is made under section 195 of the Town and Country Planning Act 1990 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 Ahmed Basrawi of Basrah Developments Ltd against the decision of the Council of the London Borough of Brent.
 - The application Ref 20/1775, dated 16 June 2020, was refused by notice dated 28 August 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 use of 3 residential units in basement of development for a continuous period of 4 years or more.
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Decision

1. The appeal is dismissed.

Reasons

2. The main issue is whether the Council's decision to refuse to issue a certificate of lawfulness was well-founded.
3. Section 191(a) of the 1990 Act (the Act) states that if any person wishes to ascertain whether any existing use of buildings or other land is lawful he may make an application for a certificate of lawfulness. S191(2) sets out that the use will be lawful if no enforcement action can be taken against it or that it does not constitute a contravention of any of the requirements of any enforcement notice ('a Notice') then in force.
4. The time limits in which enforcement action might be taken against development are set out in s171B of the 1990 Act. For the development applied for it is necessary to show that the use was carried out continuously for a period of 4 years (the 'relevant period') at the time that the application was made, and that the use had not been lost thereafter. Therefore, it is necessary to show that the use commenced by 16 June 2016 (the 'relevant date').
5. The onus is on the Appellant to make his case on the balance of probability.

Whether an Enforcement Notice was in force?

6. As the parties have begun by addressing the question of whether there is a Notice in force that would preclude the issuing of a certificate first in their cases, I will do likewise. The Council issued an Enforcement Notice ('the

Notice') on 19 August 2019 against the material change of use of a dwellinghouse to five self-contained flats. The address of the land or premises affected was given as 'Connaught House, 20A-E Acton Lane'. This, the Council tells me, is the address given by the Post Office.

7. The plan attached to the Notice identified the whole of the land at Connaught House. This Notice was the subject of an unsuccessful appeal¹. The decision letter from that appeal does not provide definitive evidence as to what floors the five flats were on.
8. Following this, in September 2018, an application² was approved by the Council for the conversion and extension of the property into 4 flats with a family sized unit on the ground floor. However, the Notice remained extant.
9. The Appellant states that the Notice related to flats on the ground, first and second floors of Connaught House. He says that these floors are expressly referred to in the Notice, specifically in Step 4 of its requirements. This is not the case, however. There is no reference to the second floor in the Notice. I agree with him, however, where he says that the Notice makes no reference to the flats being at basement level.
10. Notwithstanding this, the Appellant makes the point that flats A-E were the five flats that were set across the ground, first and second floors. The Council does not counter this. He also says that the application 18/0838 was drawn up to address the refusal of the creation of the five flats. To my mind, this is confirmed in the Officer's report recommending approval of this planning application. The existing plans submitted with that application show five flats across the ground, first and second floors.
11. In addition, the Appellant points to the Council's statement that when its Officers visited the site in 2014, June 2016 and April 2018 they did not see any evidence of flats at basement level. Having no knowledge of flats at basement level, it seems inconceivable that they would have issued a Notice in respect of them. S173(2) requires a Notice to enable "any person on whom a copy of it is served to know what those matters are", that is to say what the breach of planning control is. Established case law³ set out that the test to be applied is that the Notice tells the recipient fairly what they have done wrong and what they must do to remedy it. In this regard, a Notice needs to be specific and I find that its reference to flats A-E was specific.
12. On the balance of probability, the evidence points to the Notice being directed against flats A-E that were set across the ground, first and second floors. I find that flats at basement level, were they there at that time, were not its subject and the terms of the Notice do not apply to them. Therefore, the development that is the subject of this appeal does not contravene any of the requirements of a Notice in force at the time that the application was made.

Use for 4 years

13. The Appellant has submitted an Invoice from Fullers Construction, which was raised for the "Conversion of basement to provide 3 no. self-contained units with kitchenette and bathroom facilities". It is dated 14 January 2016, which is

¹ PINS Reference APP/T5150/C/17/3182667

² Council Reference 18/0838

³ *Miller Mead v MHLG* [1963] 1 A11 ER 459

prior to the relevant date. I find the Appellant's case that the reason there was no record of the builder in a Companies House search was that he was a sole trader at that time to be persuasive. At £12 500, I understand the Council's argument that this is a very low amount for the work that was cited.

Nonetheless, in the absence of any evidence to contradict this, I find that it is precise and unambiguous and should be accepted at face value.

14. Having said this, whilst it may add to the broader picture of events at the property, it does not take the Appellant's case forward appreciably, as this does not provide any evidence of the use of the flats.
15. I find similarly with regards to the letter from the London Consulting Group Limited. This shows that it was instructed to let Flats A-E and, more pertinently, B1, B2 and B3 on 5 May 2016. Again, whilst prior to the relevant date, this gives no proof of actual use of the flats as it does not provide evidence of the letting of the flats.
16. A number of Assured Shorthold Tenancy Agreements (AST) were submitted relating to the three flats. Save for a period of around two months at the start of 2017 in the case of Flat B1, these show that agreements were entered into throughout the relevant period for the three flats. The break, in respect of Flat B1, is not sufficient to break the required continuous use, had this occurred.
17. Of themselves, the ASTs do not demonstrate this continuous use, but I do find that they provide a certain amount of evidence to show that the flats were used. However, they do not show, on the balance of probability, that there was continuous use of the flats for the relevant period. For example, although there were signed ASTs in place for the year up to and beyond the relevant date, without corroboratory evidence I cannot be sure that their use did not end before the relevant date for some reason. In this respect, evidence from their tenants would have helped.
18. What was entitled as an 'Affidavit sworn by' residents of Flats B and D of the property is not an affidavit. I have taken this as a letter in support of the claimed use and, as such, does not carry the same weight as a properly sworn statement. Its signatories confirm that they were aware of the basement flats since early 2016, and that they have always been tenanted. However, this does not provide substantive evidence that was the case, nor how they can be sure of the continuous use of the flats. Their position, as set out in the Appellant's statement of case, is that this was "their belief". Whilst I have nothing to counter what is said, I do not find this evidence to be precise and unambiguous.
19. I am unable to comment on why the Council's Officers did not see the flats during their visits to the site. I do not find this to be substantive evidence that they were not there. I find similarly with regards to the visit to the site by the Inspector in the 2017 appeal. That their decision letter does not refer to the basement flats is not entirely unexpected, given that the appeal did not relate to them.
20. The Council puts forward that as Energy Performance Certificates (EPCs) were not issued for the flats until 23 April 2020, this shows that the flats were not in use until then. Although there might be a legal requirement for EPCs, the lack of them does not demonstrate that there were no flats; it could just show that no application was made for them. The Council has made reference to evidence

from Council Tax and Building Control that contradicts the Appellant's version of events. However, I have not been provided with this; in any event, given my findings above, this is not determinative.

21. A number of photographs were submitted by the Appellant that show, amongst other things, windows installed in the property that serve the basement flats and the intercom system for flats B1-B3. However, as they are undated, I cannot be sure of their relevance. Notwithstanding this, they do not provide evidence of the use of the flats.
22. My finding on this issue is that the Appellant has provided evidence that shows that on the balance of probability the flats were constructed before the relevant period. However, the evidence does not show precisely and unambiguously that they were used continuously.

Concealment

23. It is argued by the Council that there has been deliberate concealment of the flats, in the manner of *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15. In part, this is based on the fact that Officers did not see the flats, which I have addressed above. The Officer's report into the certificate application states that a Planning Contravention Notice was served, but not returned. A copy of this was not submitted by the Council with its statement, so I cannot be sure of its relevance. That report also refers to "evidence that was requested" in respect of the alleged concealment, but this is not expanded upon in either that report or in the Council's statement. Whilst drawings from various planning applications that have been submitted show neither the flats at basement level nor the windows serving them, I do not take this to be evidence of deliberate concealment. There might be a number of reasons for this, including that it might merely reflect the remit given to the practice that produced the drawings.
24. Overall, on the basis of the evidence before me, I do not find that there has been deliberate concealment.

Conclusion

25. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of 3 residential units in basement of development for a continuous period of 4 years or more 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.

Roy Curnow

Inspector