Appeal Decision

Site visit made on 17 May 2022

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16th June 2022

Appeal Ref: APP/H5390/X/21/3274030
7 Gunterstone Road, London, W14 9BP

- 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 Mr Patel against the decision of the Council of the London Borough of Hammersmith and Fulham.
- The application ref 2020/02255/CLE, dated 1 September 2020, was refused by notice dated 29 October 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 the building as eleven self-contained flats.

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Main Issue

2. The main issue in this appeal is whether the Council's refusal to grant an LDC was well-founded. This turns on whether the appellant has been able to show that, on the balance of probability, the use of the building as eleven self-contained flats began more than four years prior to the date of the application and has been continuous thereafter.

Reasons

3. The appeal property contains a mid-terrace residential building in which the living accommodation is arranged over five floor levels. Each floor is accessed by communal hallways, with stairs to the upper floors. There are three flats in the basement, with two flats each on the ground, first, second and third floors. The flats are all self-contained and have individual kitchen and bathroom facilities. Apart from flat 5 on the ground floor, which has a separate bedroom, all of the flats provide studio accommodation.

4. An LDC is sought on the basis that at the application date, it was too late to take enforcement action in respect of the use of the building as eleven flats. The effect of s191(2) of the Act is that the use as eleven flats would be lawful if no enforcement action can be taken because the time for taking such action has expired. At s171B (2), the Act provides that where there has been a breach of planning control consisting in the change of use of any building (which includes part of a building) to use as a single dwelling, no enforcement action may be taken after the end of the period of four years beginning with

the date of the breach. Any four-year period is relevant, not just the four years immediately preceding the application date.

5. The onus is on the appellant to show that the use of the building as eleven flats is immune from enforcement action and consequently, lawful. This is qualified by the Planning Practice Guidance (PPG) 'Lawful Development Certificates', which advises that where a Council has no evidence itself, nor any from others, to contradict or otherwise make an applicant's version of events less than probable there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous in order to justify the grant of a certificate on the balance of probability[1].

6. According to the appellant's Statutory Declaration (SD), following acquisition of the building in February 2011 planning permission was obtained in March that year for rear extensions, the conversion works in respect of eleven flats beginning shortly after. The appellant stated that the flats began to be let out from 21 November 2011, with all eleven flats occupied by September 2012. They went on to explain that in 2013 permission was obtained for a rear extension to the ground floor, enabling flat 5 to have a separate bedroom. Furthermore, the appellant stated that flats 2 and 3 had been occupied by the same tenants since July 2012 and July 2013 respectively and that in relation to the other flats there had been no gaps in occupation apart from changes in the tenants or during decoration. The appellant stated that the internal layout of the building, shown on a drawing which accompanied their SD, had been unchanged since 2013.

7. The tenants of flats 2, 3 and 11 provided four SDs attesting to their continuous residence at the building since respectively, 7 July 2012, 25 July 2013 and 21 November 2011. These witnesses all asserted that the building had been in continuous use as eleven flats whilst they had lived there. An SD was also provided from the owner of a firm contracted to fit carpets and flooring in the building. This witness referred to the fitting of a carpet in the communal hallway on 1 September 2012 and described the building as being laid out as eleven flats at that time, exhibiting a similar layout drawing to that described above with their SD.

8. The documentary evidence accompanying the application was not supplied with the appeal. However, the contents and accuracy of this evidence was not challenged by the Council. A summary table of the Assured Shorthold Tenancy agreements (ASTs) indicates that the eleven flats had been let out to tenants under either a fixed term or rolling tenancy for a continuous period of more than four years prior to the application date. Additionally, a summary table of the tenancy deposit protection scheme certificates for eleven flats from 2015 up to and including the application date supported the letting out of the building as eleven flats for the required period.

9. The appellant provided first-hand evidence of the use of the building as eleven flats commencing by September 2012 and continuing over a period of more than four years up to the date of the application. The internal layout of the building accords with the drawing exhibited by the appellant and other witnesses. The other witness accounts are consistent with that of the

[1] Paragraph: 006 Reference ID: 17c-006-20140306.

appellant. Four of the witnesses have resided at the building continuously throughout the claimed period of use as eleven flats. It is not unreasonable to think that these witnesses would have become familiar with the total number of flats in the building over the time that they have lived there. The fifth witness would clearly have had some knowledge of the building layout and of the number of flats from their visits in connection with work they undertook there. Whilst for the most part this witness did not detail the dates that they visited the building, the fitting of hallway carpets in September 2012 and what they described as eleven flats at that time also supports the appellant's account of events.

10. The fifth witness SD lacks detailed information regarding the dates that they visited the building during the required period. Otherwise, the SDs are sufficiently precise and unambiguous. The evidence in the witness accounts is consistent. All of the SDs are signed, dated and witnessed by a solicitor. The information in the AST and deposit protection scheme certificate summary tables is also consistent with the witness evidence. Consequently, unless there are sound reasons to indicate otherwise, the appellant's evidence should be afforded considerable weight.

11. Tenancies which start out as a fixed term AST often end up continuing on a rolling basis. The appellant's summary table clearly shows the existence of rolling tenancies during periods between the ASTs. As many of the ASTs will have simply continued on a rolling basis after expiry of their fixed term, entering into a further AST would have been unnecessary. Therefore, it is entirely possible that the flats were still occupied by tenants during periods between the expiry of an AST and a new AST being entered into. Therefore, the tenancy information does not cast doubt on the continuity of the use as eleven flats for the required period. In any event, periods of non-occupation between tenants do not necessarily mean that a flat is incapable of being physically occupied as such. Although I understand that the deposit protection scheme certificates were unsigned, in the absence of anything which might question the authenticity of the documentation on which the summary table is based the information therein nevertheless contributes to the evidential nexus.

12. I am given to understand that an investigation concerning an allegation of conversion of the basement to two flats, undertaken by the Council's planning enforcement team in early 2014, was subsequently discontinued as it was found that there was no such conversion at that time. However, the Council was unable to provide details of this investigation. It is unclear whether there was any inspection of the building interior by Council officers and if so, what that had ascertained. The basis on which the decision was taken to discontinue the investigation is also unclear. In any event, given its date, the investigation has little implication in respect of the continuity of the use as eleven flats for the required period. Therefore, I give this matter little weight when set against the appellant's evidence.

13. Planning permission was granted for works including a rear extension to the building in March 2013[2]. Presumably, this is the same extension to flat 5 referred to by the appellant. I understand that an internal layout drawing

[2] Council Ref: 2013/00338/FUL.

accompanying that application showed two bedrooms and a bathroom on the ground floor, not two separate flats. It is unclear whether Council officers inspected the interior of the building, by which the ground floor living arrangements might have been established. The appellant explained that the drawing accompanying that application reflected the interior layout when the building was purchased rather than that which actually existed at the time. Quite why that was the case is uncertain. Nevertheless, given the date of this application there are also no implications in respect of the continuity of the use as eleven flats for the required period. Therefore, this matter is given limited weight.

14. I understand that until recently, the building was rated as three flats for Council Tax purposes. However, a Council Tax rating is not conclusive insofar as the use for planning purposes is concerned. There may be a number of reasons why the Council Tax rating does not accurately reflect the use of a building. Consequently, Council Tax/Valuation Office records are insufficient to indicate that the use as eleven flats has not been continuous for the required period.

15. Additional documentary evidence, for example utility bills or electoral records, might well have provided assistance in verifying the appellant's claim. Even so, having regard to the other evidence available, the absence of such information does not create uncertainty concerning the use of the building for the required period. There is no requirement for utility bills or other records to be provided to support an LDC application. The Courts have confirmed that an appellant's evidence should not be rejected simply because it is not corroborated by independent evidence[3].

16. For the above reasons, on the balance of probability, when taken together the SDs from the appellant and supporting witnesses alongside the other information provided, represents sufficiently precise and unambiguous evidence in respect of the continuity in the use of the building as eleven flats for a period of more than four years before the date of the application. None of the matters raised by the Council materially affect the weight that should be given to the appellant's evidence; those matters do not contradict the appellant's evidence or make their version of events less than probable. It follows that on the date of the application it was too late for the Council to take enforcement action in respect of the use of the building as eleven flats.

Conclusion

17. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the building as eleven self-contained flats was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Stephen Hawkins

INSPECTOR

[3] *Gabbitas v SSE & Newham LBC* [1985] JPL630.