Appeal Decision

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th July 2022

Appeal Ref: APP/U5930/X/21/3288008
40 Frith Road, London E11 4EY

- 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 Petr Krizan against the decision of the Council of the London Borough of Waltham Forest.
- The application ref 211688, dated 27 May 2021, was refused by notice dated 12 August 2021.
- 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 described as: *"This 2-storey property has been used as small HMO since December 2011. There was no breach when this HMO was created. It was only after we applied for additional HMO licence under the reference WAL-198563-1 back in April 2020 when we were prompted by LBWF to regularise the planning status of this property".*

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.

Preliminary Matters

2. I consider that the appeal can be determined without the need for a site visit. This is because I have been able to reach a decision based on the information already available.

3. The description in the banner heading of the use for which an LDC is sought is taken from the application form. However, in determining the appeal I have used the description on the Council's decision notice, as that better reflects what has been applied for. The appellant also used that description on the appeal form.

Main Issue

4. 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 appeal property as a House in Multiple Occupation (HMO) within Class C4 was lawful at the date of the application.

Reasons

5. The property contains an enlarged mid-terrace residential building in which the living accommodation is arranged over two floor levels. The layout drawing provided shows a bedroom, communal room and kitchen on the ground floor, with three further bedrooms and a bathroom on the first floor.

6. The Town and Country Planning (Use Classes) Order 1987 (as amended) defines Class C4 as the use of a dwelling by not more than six residents as an HMO. For the purposes of Class C4 an HMO has a similar meaning as that set out in s254 of the Housing Act 2004, which refers *inter alia* to living accommodation occupied by persons who do not form a single household. The effect of s191(2)(a) of the Act is that the use of the property as a Class C4 HMO would be lawful at the date of the application if no enforcement action may be taken because that use did not require planning permission.

7. On 16 September 2014, a Direction under Article 4(1) of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) (GPDO) came into force throughout the Council's administrative area. The effect of this Direction is that a change of use from a Class C3 dwelling to a Class C4 HMO, otherwise permitted development by virtue of Article 3, Schedule 2, Part 3, Class I of the 1995 Order (Article 3, Schedule 2, Part 3, Class L in the 2015 version of the GPDO), has required express planning permission since the above date.

8. The appellant claimed that the commencement of the use of the property as a Class C4 HMO pre-dated the coming into force of the Article 4(1) Direction and so did not require planning permission. The onus is firmly on the appellant to prove their case in this respect. This is qualified in the Planning Practice Guidance, 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].

9. Documentary evidence supplied on behalf of the appellant included a detailed history of the occupiers in respect of each of four bedrooms, with records of the accommodation fees charged, beginning in mid-January 2012 and continuing up to the application date. The room history shows a pattern of almost continuous occupation of the four bedrooms over the recorded period. The exact address to which the room history relates is not shown on those documents. Also supplied however are copies of several signed and dated tenancy agreements carrying the address of the property. The first such agreement is dated 21 December 2011, with later agreements referring to the subsequent period up to the application date. The tenancy agreements are mostly accompanied by details which confirm the respective tenants' identity.

10. The Council's case largely rests on what is perceived as a lack of clarity and information in the documentation supplied. Be that as it may, cross-referencing the above sets of documents reveals that for the most part, the tenancy agreements were signed by individuals named as tenants in the room history. The tenancy agreements are in the main dated at or around the time when, according to the room history, the individual named in that agreement commenced residing at the property. As a result, there can be little doubt that the room history refers to the four bedrooms at the property and not to another address.

11. Moreover, when taken together the above sets of documents show that there have been at or around four unrelated individuals residing at the property more or less continuously since prior to 16 September 2014 and throughout the

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

period up to the application date. Isolated instances where the tenancy agreements supplied are not reflected in the room history has had no significant bearing on the overall pattern of occupation. Each individual residing at the property has entered into a separate tenancy agreement, meaning that multiple separate tenancies have been in place at most times. The tenants have all tended to reside at the property for differing lengths of time. This and the absence of any obvious factors in common such as, for example, persons sharing a surname, suggests it is highly likely that none of the tenants arrived at the property as part of a pre-formed group.

12. Due to the above factors, the available evidence indicates that the character of the use of the property has, as a matter of fact and degree, been consistent with the definition of a Class C4 HMO throughout the period in question; it is unlikely that any of the tenants residing at the property during that period lived together as a family or a single household so as to constitute the use as a dwelling within Class C3. Consequently, this evidence supports the use of the property as a Class C4 HMO as having commenced prior to 16 September 2014, with such use then being continuous up to the application date. I afford this evidence considerable weight in the absence of sound reasons to indicate otherwise.

13. Three signed and witnessed Statutory Declarations (SDs) were also supplied. The witnesses are employees, and in two instances also close relatives, of the appellant. By and large, the SDs lack sufficient precision, as the witnesses state little beyond their conviction that the property was in use as an HMO following dealings with tenants and occasional visits. None of the witnesses offered a detailed explanation as to exactly when they believed that the use as an HMO had commenced and why that was the case, or provided other information describing its nature, scale and continuity. Nevertheless, as the witnesses contribute to the evidential nexus the SDs should be afforded some weight.

14. Other items of documentary evidence were supplied relating to prior to as well as after 16 September 2014, up to the application date. These included details of e-mail correspondence referring to the property and extracts from the appellant’s company bank account showing rental income. In isolation, those items do not show what use was being made of the property over the period in question. Similarly, representations from interested local residents give little indication as to the use that has been occurring at the property. However, as the above evidence does not cast doubt on what has been applied for, it does not weigh against the granting of an LDC. The Council also seem to be referring to other documentation supplied with the application which I have not seen. Even so, there is nothing to suggest that any information contained in other documents would have any material bearing on my findings on the submitted evidence set out above.

15. I understand that the property was not licensed as an HMO prior to or since 16 September 2014, the Council’s only record of a licence being for a family of five between 2015 and March 2020. However, the existence or otherwise of an HMO licence is not conclusive insofar as the use for planning purposes is concerned. In any event, there may be a number of reasons why the property has not been licensed as an HMO; for example, it may be that licensing requirements have altered over time without the appellant’s knowledge. Therefore, the absence of an HMO licence in respect of the property is a factor

which carries only limited weight. The Council did not refer to any other evidence which might have cast doubt on the appellant's evidence or make their version of events less than probable.

16. For the above reasons, the available evidence is sufficiently precise and unambiguous to show that on the balance of probability, the use of the property as a Class C4 HMO commenced prior to the Article 4(1) Direction coming into force on 16 September 2014 and therefore being permitted development under the GPDO, such use also having been continuous thereafter up to the application date, so that no enforcement action may be taken.

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 property as a Class C4 HMO 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

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 27 May 2021 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

On the balance of probability, the available evidence shows that the change of use from a dwelling (Class C3) to use as a House in Multiple Occupation (Class C4) occurred prior to the coming into force of an Article 4(1) Direction on 16 September 2014 and was therefore granted planning permission by virtue of Article 3, Schedule 2, Part 3, Class I of the Town and Country Planning (General Permitted Development) Order 1995, such use having been continuous thereafter so that no enforcement action may be taken.

Signed

Stephen Hawkins

Inspector

Date:
Reference: APP/U5930/X/21/3288008

First Schedule

Use of the property as a House in Multiple Occupation (HMO) (Class C4).

Second Schedule

Land at 40 Frith Road, London E11 4EY

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation 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.

Plan

This is the plan referred to in the Lawful Development Certificate dated:

by Stephen Hawkins MA, MRTPI

Land at: 40 Frith Road, London E11 4EY

Reference: APP/U5930/X/21/3288008

Scale: Not to Scale