The Planning Inspectorate

Appeal Decision

Site visit made on 12 July 2022

by D Boffin BSc(Hons), DipTP, MRTPI, DipBldg Cons(RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 22nd July 2022

Appeal Ref: APP/P4605/X/22/3295627
39 Daisy Road, Birmingham B16 9DY

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (the 1990 Act) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Martyn Roberts against the decision of Birmingham City Council.
- The application ref 2021/08405/PA, dated 28 September 2021, was refused by notice dated 15 December 2021.
- The application was made under section 191(1)(a) of the 1990 Act.
- The use for which a certificate of lawful use or development is sought is a small HMO.

Decision

1. The appeal is dismissed.

Preliminary Matters and Background

2. An accompanied site visit was attempted on the date above but access inside the dwelling was not possible as the appellant did not attend the site visit. Both parties were informed an additional site visit was not necessary as, this type of case, is determined purely based on technical and/or legal interpretation of the facts, and no-one would be prejudiced.

3. Class L(b) of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) states that development consisting of a change of use from a use falling within Class C3 (dwellinghouses) to a use falling within Class C4 (houses in multiple occupation) is permitted development.

4. Use Class C4 (Class C4) is defined, within the Town and Country Planning (Use Classes) Order 1987 (UCO), as use of a dwelling by not more than six residents as a 'house in multiple occupation' (HMO). The Class C4 interpretation, within the UCO, states that HMO has the same meaning as in section 254 of the Housing Act 2004. For the purposes of the Housing Act 2004, a building is a HMO if the living accommodation is occupied by persons who do not form a single household (section 254(2)(b)) and two or more of the households who occupy the living accommodation share one or more basic amenities (section 254(2)(f)). A Class 4 HMO is normally cited as a small HMO.

5. A local planning authority may make a Direction removing a permitted development right under Article 4(1) of the GPDO (an Article 4 Direction). On 8 June 2020 an Article 4 Direction came into force in the Council's area, including the appeal site. It removed permitted development rights relating to Class L(b) of the GPDO. Thus, after 8 June 2020, if a property was not already

a lawful small HMO, an application for specific planning permission would need to be made to change the use from a dwellinghouse to a small HMO.

6. I note that the evidence before me refers to the planning merits of the case. Nevertheless, the planning merits are not relevant in this appeal which relates to an application for an LDC. My decision rest on the facts of the case, on relevant planning law and judicial authority.

7. The appeal site is a terraced house in a row of similar properties in a residential street. The submitted floor plans indicate that it contains 2 bedrooms on the first floor, one bedroom on the second floor and a kitchen, bathroom and 2 reception rooms on the ground floor.

Reasons

8. The main issue is whether the Council's refusal to issue a certificate of lawfulness was well-founded. In order for an LDC to be granted under section 191 of the 1990 Act, the burden of proof is with the appellant and the appropriate test of the evidence is the balance of probabilities. The onus is firmly on the appellant to show that the use as a small HMO was lawful at the date the LDC application was made, 28 September 2021. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided his evidence alone is sufficiently precise and unambiguous.

9. Section 191(2) of the 1990 Act states that *'For the purposes of this Act uses and operations are lawful at any time if— (a) no enforcement action may then 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 (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.'* Subsection 191(2)(b) is met in this case as there is no evidence before me to indicate that there was an enforcement notice in force at the date of the LDC application.

10. The appellant maintains that the property has operated as a small HMO since 2015 or earlier with up to 4 tenants. However, the Council states that the evidence submitted is not sufficiently precise and unambiguous to demonstrate on the balance of probability that the property was continuously in use as a small HMO, prior to the Article 4 Direction coming into force.

11. I consider that whether the use of the property as a small HMO is lawful turns on 2 issues. Firstly, whether through the passage of time the use as a small HMO would have become immune from enforcement action. And, secondly as the Council brought in the Article 4 Direction on 8 June 2020, whether the use of the property had changed to a small HMO use prior to that date and continued in that use until the date of the LDC application.

12. As regards the first issue, in order for the appeal to succeed it has to be shown that the use as a small HMO commenced on or before 28 September 2011 and has continued thereafter for at least 10 years without significant interruption. According to the appellant, the appeal property has been used as a small HMO since 2015 or earlier. Nonetheless, 2015 is after the relevant date of 28

September 2011 and no indication of just when the use began has been given, nor has any evidence, documentary or otherwise, that could help to shed light on this matter been put forward either. The documentary evidence relating to the use of the property includes certificates of tenancy deposits, tenancy agreements, a lettings and management services contract, an email exchange between a previous owner of the property and the appellant and a Law Society Property Information Form (LSPIF). All those documents relate to the period 2018 to 2020 therefore the use has not been shown to be immune from enforcement action on the basis of the passage of time.

13. Turning to the second issue, as stated above, there is no documentary evidence to indicate exactly when the change of use began other than the appellant's statement that it was in 2015 or earlier. The documentary evidence before me indicates that in May 2018, on the LSPIF, the previous owner stated that 3 people were living in the property at that time. The email exchange between the previous owner and the appellant also indicates that by June 2019 when the property purchase was completed that 3 people were living in the house. One of those people named in May 2018 and in June 2019 appears to be the same person. Furthermore, a signed assured shorthold tenancy agreement (ASTA) in that name dated 13 January 2018 is before me and a corresponding certificate of tenancy deposit. These details relate to a Room 2 within the property and indicate that facilities within the house were to be shared. It is not clear if this person is still living in the property or not or when they moved out.

14. The email exchange cited above also indicates how much rent each tenant was paying in June 2019. The previous landlord indicated that 2 of the tenants were due to move out later in June 2019[1]. There is a certificate of tenancy deposit for a tenant whose tenancy started on the 27 August 2018 and that could be one of the other tenants named in the email exchange. Consequently, it is clear that when the appellant purchased the property there were 3 tenants living in it and using it as a small HMO. However, 2 of those tenants would have moved out that same month according to the previous owner's email.

15. There is an ASTA starting on 5 October 2019 until 25 May 2020 for a Room 4. There is no signature within the specific box on that document. A duplicate copy of the page with a signature on it has been appended onto the document and there is no date associated with that signature. There is a certificate for the tenancy deposit in the same name as the ASTA but the issue with the signature/lack of date introduces a lack of clarity.

16. Another ASTA in respect of a Room 3 is dated 12 September 2019 and the period it covers is 25 September 2019 through to 25 May 2020. Again the box on the form does not contain a signature. An additional page has also been appended to this ASTA and it has a signature on it but it is dated 15 September 2020. It appears that this ASTA may relate to one of the people that the previous landlord had said was moving out as they have the same first name[2]. It could be a different person and that person may have signed another ASTA in September 2020 and the signature page from that later ASTA may have been appended by mistake. However, these issues mean that there is also a lack of clarity with this document.

[1] Kasia – 28 June & Jurij – 11 June
[2] Jurij

17. The lack of clarity in respect of these ASTAs means they can only be given modest weight in support of the appellant's case. Moreover, there is no explanation as to why the appellant completed the lettings and management services contract which, according to the copy supplied, was to run from 1 December 2019 through to 30 November 2020 when there could have been 2 ASTAs in place running until May 2020. In any case, that contract only indicates that the appellant entered into a contract with a lettings agency for the property to be let to four tenants. It does not show that the property was actually in use as a small HMO by four tenants.

18. There is no evidence before me to indicate that the appellant has received any rental payments from individual tenants or the lettings agency since that cited within the email exchange in June 2019. There are no statutory declarations from any tenants indicating when they occupied the property nor from the appellant explaining how the property has been used since he purchased it including the names and dates of occupancy of his tenants. Furthermore, there is no evidence before me to indicate how the property was being used in June 2020 when the Article 4 Direction came into force through until the date of the LDC application, 28 September 2021.

19. As a matter of fact and degree the evidence presented indicates that on the balance of probabilities that the previous owner changed the use of the property to a small HMO prior to June 2019 when the appellant purchased it. This is on the basis of the information within the LSPIF and the email exchange. Nevertheless, the evidence before me relating to the period that the appellant has owned the property is insufficiently precise and unambiguous for the reasons given above. As such, he has failed to show that the property was still in use as a small HMO in June 2020 when the Article 4 came into force and that that use continued until the date of the application, 28 September 2021, so as to be immune from enforcement action. As with all LDC applications, it is open for fresh applications to be made if, for example, other evidence comes to light.

Conclusion

20. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a small HMO 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.

D Boffin

INSPECTOR