



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/21/3285232

36 Brookfield Road, Soho, Birmingham B18 7JG

- 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 Quoc Vo against the decision of Birmingham City Council.
 - The application ref 2021/01374/PA, dated 17 February 2021, was refused by notice dated 3 September 2021.
 - The application was made under sections 192(1)(a) and 192(1)(b) of the 1990 Act.
 - The use and development for which a certificate of lawful use or development is sought is permitted development to create another room in the loft and the house has been operating as a small HMO since 2016 and the client would like to regularise this use.
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Decision

1. The appeal is allowed in so far as it relates to the proposed dormer windows and attached to this decision is a certificate of lawful development describing the extent of the proposed operation which is considered to be lawful. The appeal is dismissed in so far as it relates to the use of the property as a small HMO.

Preliminary Matters and Background

2. The description in the banner heading above is taken from section 4 of the application form. The Council modified the description to "*Application for a Lawful Development Certificate for the proposed use as a 4 bedroom HMO (Use Class C4) and installation of dormer window to rear*" and that description is included on the appellant's appeal form. However, from the application form and the evidence before me it appears that the appellant applied for a certificate of lawful development for proposed dormer windows that would facilitate a fourth bedroom – through section 192(1)(b) of the 1990 Act. He also appears to have applied for a certificate of lawful use for the use of the property as a small House in Multiple Occupation (HMO) since 2016 through section 191(1)(a) of the 1990 Act even though only one application form under section 192 was submitted.
3. An Inspector can determine an appeal under section 191 even if the application was made under section 192, where it is clear that the appellant is in reality seeking to ascertain that an existing use or development is lawful. Section 191(4) of the 1990 Act allows the Council (or an Inspector on appeal) to modify or substitute the description of the development, so as to accord with the facts and evidence. Both parties were given the chance to comment on a number of issues arising from the above facts.

4. The Council responded by stating that *'the LPA accepts that the proposed dormer window can be determined under S192 and the existing use as a Small HMO under S191 The LPA confirms that the description of the proposed development and the existing use can be amended to **Lawful Development Certificate for the existing use as a 3-bedroom HMO (Use Class C4) and installation of dormer window to rear to create a 4th bedroom.** The LPA considers that the description needs to specify the number of bedrooms and furthermore, the use as a 3-bed HMO needs to be considered before any consideration of Permitted Development Rights to create a 4th bedroom..... The proposed rear dormer would constitute Permitted Development and, therefore, does not require full planning permission. The LPA advises that, if the application had been submitted for a lawful use certificate for a 3-bed HMO, the LPA would likely to have issued the certificate.'*
5. 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)).
6. A property being used within Class C4 is therefore a dwelling used by **not more than 6 residents** (my emphasis) who are not living as a single household but sharing facilities for everyday living such as kitchens and bathrooms. The number of residents and not the number of bedrooms is a limitation within Class C4 as a bedroom can be used by more than one resident. Therefore it is irrelevant to refer to the number of bedrooms within the description of the use that the LDC is being sought for. A Class 4 HMO is normally cited as a small HMO.
7. Taking into account all of the above, I will deal with the appeal on the basis that the LDC application was made under section 191(1)(a) of the 1990 Act with regard to the use of the property as a small HMO and section 192(1)(b) of that Act with regard to the proposed dormer windows to facilitate a fourth bedroom.
8. 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. 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.
9. The appellant sought clarification from the Council, by email in 2021, whether the use of the property by a group of friends (three) on one tenancy agreement

made that use an HMO. The Council replied stating, amongst other things, that *'the permitted use of the above-mentioned address would appear to be a dwellinghouse.....on the basis of the details you have provided it would appear that the house has been operating as a small HMO since 2016 should you wish to regularise this use then you would need to submit a Lawful Development Certificate application.'*

10. 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 rests on the facts of the case, on relevant planning law and judicial authority.
11. The appeal site is a terraced house at the end of a row of similar properties in a residential street. It contains 2 bedrooms and a bathroom on the first floor, one bedroom and a store/office on the second floor and a kitchen and lounge on the ground floor.

Reasons

12. The main issue is whether the Council's decision to refuse to grant an LDC 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, and that the proposed dormer windows, would have been lawful at the date the LDC application was made, 17 February 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.
13. 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.

Small HMO

14. With regards to the use as a small HMO the appellant maintains that he bought the property in 2016 as a Class C3 dwelling as it *'allows for groups of people (up to six) living together in a single household'* and he did not consider it as small HMO until the advice received from the Council. Class C3(c) of the UCO permits a dwellinghouse to be occupied by not more than six residents living together as a single household where no care is provided to residents (other than a use within C4).
15. The Council considered that insufficient precise and unambiguous evidence had been provided to demonstrate on the balance of probability that the property was in use as a 4-bedroom HMO prior to the Article 4 Direction coming into

force. However, as stated previously it has subsequently stated that '*if the application had been submitted for a lawful use certificate for a 3-bed HMO, the LPA would likely to have issued the certificate.*'

16. I consider that whether the use of the property as a small HMO is lawful turns on 3 issues. Firstly, whether the use falls within Class C3(c) or not, 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. And, thirdly whether through the passage of time the use as a small HMO would have become immune from enforcement action.
17. The key difference between a Class C3(c) use and a Class C4 use is the relationship of the occupants and the manner in which they live together. There is no definition within the UCO of what constitutes a 'single household' in relation to Class C3(c). In my judgement the factors to be considered include whether the persons living in the house came to it as a single group or whether they were independently recruited; what facilities were shared; whether the occupants were responsible for the whole house or just their particular rooms; whether individual tenants were able to lock other occupiers out of their rooms; whose responsibility it was to recruit new occupiers when individuals left; who allocated rooms; the size of the property; how stable the group composition was; and whether the mode of living was communal.
18. I have been provided with copies of 4 assured shorthold tenancy agreements (ASTA) for terms of 12 months; from 12 August 2016; 14 August 2017 until 13 August 2018; 14 August 2018 until 13 August 2019 and 19 August 2019 until 18 August 2020. From these documents, some relevant conclusions can be drawn against the factors cited above. Firstly, the agreements are all for the rental of the whole house by three jointly named tenants. It is thus clear that the individuals came to the house as a group and were not independently recruited.
19. The latter three ASTA (Amber Court Lettings) also indicate that the tenants are responsible for the property as a whole, and not just their own rooms. If any tenant left during the term of the agreement, it appears that the responsibility to find a new tenant would fall to the remaining tenants, or else they would be liable to cover the outstanding rent. There is no suggestion that rooms were allocated to the tenants, and it is reasonable to assume that each group is left to themselves to choose their rooms. On my site visit, I observed that there were no locks on the bedroom doors. These circumstances all point to the presence of a single household, in contrast to a small HMO, where rooms would normally be let on an individual basis. Furthermore, 2 of the ASTA (2017- 2018 and 2018 -2019) indicate that the 3 tenants cited in each of those ASTA were the same group of people, strongly pointing to an established relationship between them, and thus a stable group composition for that period of time.
20. With regard to the other factors, namely the size of the property and the shared facilities, these do not point conclusively to either a Class C3(c) or a Class C4 use in this case. There is little evidence of how communal the mode of living is or was at the appeal property, but in the light of the considerations above, this is not determinative. The evidence above strongly points to a Class C3(c) use, whereby the appeal property is occupied by a group of individuals living together as a single household. The Council has stated that it considers

that the lawful use of the property appears to be as a dwellinghouse (Class C3). As a Class C3(c) use is within Class C3 planning permission would not have been required for that use. Nevertheless, there is no evidence to indicate how the property has been used between August 2020 and the date of the LDC application.

21. The last ASTA finishes after the Article 4 Direction was brought into force. As a matter of fact and degree the evidence presented indicates that on the balance of probabilities that between July 2016 and August 2020 that the property was in a Class C3(c) use and not used as a small HMO. Therefore, it has not been shown that the property had changed to a use as a small HMO prior to the Article 4 Direction coming into force. In addition, there is no evidence before me to indicate that a use as a small HMO commenced 10 years or more before the date of the LDC application, namely 17 February 2011, and continued thereafter without significant interruption. Therefore I am not satisfied that the use as a small HMO has been shown to be immune from enforcement action based on the passage of time.

Conclusion – Small HMO

22. Consequently, the appellant has failed to show that the use of the property as a small HMO was lawful at the date of the LDC application. In this regard, on the evidence now available, the Council's decision to refuse the LDC application was well founded and that part of the appeal is dismissed. For that part of the appeal I will exercise the powers transferred to me under section 195(3) of the 1990 Act.

Dormer Windows

23. In relation to the dormer windows Class B of Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) applies to the enlargement of a dwellinghouse consisting of an addition or alteration to its roof. It states that development is not permitted by Class B if-
 - a) permission to use the dwellinghouse as a dwellinghouse has been granted only by virtue of [Class M, MA, N, P, PA or Q of Part 3] of this Schedule (changes of use);*
 - (b) any part of the dwellinghouse would, as a result of the works, exceed the height of the highest part of the existing roof;*
 - (c) any part of the dwellinghouse would, as a result of the works, extend beyond the plan of any existing roof slope which forms the principal elevation of the dwellinghouse and fronts a highway;*
 - (d) the cubic content of the resulting roof space would exceed the cubic content of the original roof space by more than—*
 - (i) 40 cubic metres in the case of a terrace house, or*
 - (ii) 50 cubic metres in any other case;*
 - (e) it would consist of or include—*
 - (i) the construction or provision of a verandah, balcony or raised platform, or*
 - (ii) the installation, alteration or replacement of a chimney, flue or soil and vent pipe;*
 - (f) the dwellinghouse is on article 2(3) land*
 - (g) the dwellinghouse is built under Part 20 of this Schedule (construction of new dwellinghouses)*

(h) the existing dwellinghouse has been enlarged in reliance on the permission granted by Class AA (enlargement of a dwellinghouse by construction of additional storeys).

24. The Council have stated that the cubic content increase to the roof space associated with the dormer windows would be approximately 24 m³ and I have no reason to dispute that figure. As a result, the proposal would meet the limitation at (d). Based on the evidence before me and my observations the proposal would also meet limitations (b) and (c) and limitations (a), (f), (g) and (h) are not relevant to this case. The submitted drawings indicate that the proposal would include the removal of a chimney that for the purposes of this class would not meet the limitation at (e). However, the removal of the chimney would be permitted development through Class G, Part 1 Schedule 2 of the GPDO.
25. I find that the proposed dormer windows to facilitate a fourth bedroom would constitute the enlargement of a dwellinghouse consisting of an addition or alteration to its roof for which development is permitted under Article 3, Schedule 2, Part 1 of the GPDO.

Conclusion – Dormer Windows

26. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful development in respect of the dormer windows to facilitate a fourth bedroom was not well-founded and that part of the appeal should succeed. For that part of the appeal I will exercise the powers transferred to me under section 195(2) of the 1990 Act.

D Boffin

INSPECTOR



The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(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 17 February 2021 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red and hatched in black on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The building operations would be development permitted under the provisions of Classes B and G of Part 1 of Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015.

Signed

D. Boffin
Inspector

Date: 22nd July 2022

Reference: APP/P4605/X/21/3285232

First Schedule

Dormer windows to facilitate fourth bedroom as shown on drawings numbered 50005-01-04 revision B and 50005-01-05 revision A

Second Schedule

Land at 36 Brookfield Road, Hockley, Birmingham B18 7JG

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, 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 operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any 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.

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 or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 22nd July 2022

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

Land at: 36 Brookfield Road, Hockley, BIRMINGHAM, B18 7JG

Reference: APP/P4605/X/21/3285232

Scale: Not to Scale



PROPOSED BLOCK PLAN

FOR COMMENT



Client
MR Q VO

Project
36 BROOKFIELD ROAD,
BIRMINGHAM

Title
LOCATION PLAN, SITE &
BLOCK PLAN