
Appeal Decision

Site visit made on 29 June 2022

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 22 August 2022

Appeal Ref: APP/X5990/X/21/3288981

1 Clifton Road, London W9 1SZ

- 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 Ms Derya & Ms Leyla Kusak against the decision of City of Westminster Council.
 - The application Ref 21/03118/CLEUD, dated 12 May 2021, was refused by notice dated 27 October 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 florist business within Class E(a).
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The issue of an LDC depends entirely on factual evidence about the history and planning status of the building or land in question and the interpretation of any relevant planning law or judicial authority. The burden of proof regarding decisive matters of fact rests on the appellant and the relevant test of the evidence is 'the balance of probability'.

Main Issue

3. The main issue is whether the Council's decision to refuse to grant an LDC was well-founded.

Reasons

4. For lawfulness to accrue, the appeal site must have been used continuously for the relevant period for such purposes with an intensity, regularity and frequency that is more than de minimis, so as to have triggered a material change of use. The appellants therefore need to show that the appeal site has been in continuous use for floristry for 10 years or more prior to 12 May 2021, which is the date of the LDC application.
5. The appellants go into some detail in relation to the planning history of the appeal site, the gist of their argument being that the Council's actions, or lack of actions, corroborate the appellants' position regarding the lawfulness of the florist use.

6. The appeal site is within the forecourt of the property at 1 Clifton Road. It comprises two areas separated by a wall that faces Clifton Road. The part of the site inside the wall measures approximately 5 metres by 4.5 metres. The area outside the wall that faces Clifton Road measures approximately 5 metres wide by 1.5 metres deep.
7. The appellants refer to enforcement action that was taken by the Council in 2015 against operational development at the site. They note that the Council did not challenge the use of the land at that time. A planning application, ref: 15/02026/FULL, was made to regularise the unauthorised development at the 'garden supplies retail premises', which was refused, and dismissed at appeal, ref: APP/X5990/W/15/3135946. The appellants point to the Council's willingness to discuss an alternative to the dismissed scheme as further evidence of their acceptance of the lawfulness of the use.
8. In 2016, planning permission, ref: 16/00804/FULL, was sought and granted for development at No 1. The attached Condition 8 required the approval of further details relating to cycle storage for that development. In relation to that condition, a further application, ref: 16/06257/FULL was made which included Drawing No. 201H. This drawing showed the proposed forecourt layout, and referred to the 'retained florist accommodation'.
9. I note also that part of the forecourt was included in the Clifton Road Local Centre on the proposals map of the recently adopted Westminster City Plan 2019-2040. This, the appellants say, points to the historic permanence of the florist use at the site.
10. However, it would be highly unusual for a Council to establish the lawfulness of every land use for the purposes of a proposals map, or by the same token, for an applicant to do so in order to make an annotation on a plan. Therefore, whilst evidence of this nature points to the presence of the florist use on the appeal site from 2015 onwards, none of these circumstances in themselves can confer lawfulness.
11. The earliest document relating to the use of the appeal site appears to be an agreement, dated 21st May 2002, allowing Thomas Lowe to use an area known as 'the Designated Space' for the siting of a florist's stall and for storage. I note that in paragraphs (C) and 2.1, the date is partially struck out and 'April 2011' and '2011' added above. It is not clear from the document how long the license period lasted.
12. The next available license agreement of 1 April 2011 allows for 'the Designated Space' to be used for the location of a shed/summerhouse for a floristry business. Unfortunately, the plan referred to is not available. The license period given was for six months. A further license agreement for the same arrangement was made on 1 October 2013 and was to last for 24 months. Again, the plan is not available.
13. The next license agreement document does have a plan attached with land outlined in blue and a yellow box within. Had this agreement been signed, it would have lasted for twelve months from the date of 1 October 2015. There is no explanation as to why this document is unsigned. The most recent lease agreement is dated 17 December 2019, and a site plan is included in this document clearly defining the land in question.

14. The first issue arising from this documentary evidence is that there are significant time gaps that are unaccounted for. There is a gap between October 2011 and October 2013, and a gap from October 2015, given that there is no evidence that a lease was signed for that period. Secondly, the lease agreements in themselves do not amount to positive evidence that the use physically started on the appeal site and continued without a material break for ten years.
15. I turn then to the statutory declaration from Mrs Farrokhnia, dated and witnessed on 30 April 2021. Mrs Farrokhnia states that she has been associated with the florist business at 1 Clifton Road on a continuous basis since 1 April 2011, which ties in with the license agreement of the same date. However, the bulk of her commentary relates to matters that occurred from 2015 onwards. She makes reference to the operation of the business by Thomas Lowe on the site since May 2002, but includes no further detail. For the period between 2011 and 2015, there is little further detail to show affirmatively that the site was used continuously for the florist business during that time.
16. The Planning Policy Guidance (PPG) states that, in cases relating to an existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the 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 to justify the grant of a certificate on the balance of probability¹.
17. Therefore, although the statutory declaration is to be given significant weight, it cannot be solely relied upon. This is especially the case when the evidence as a whole lacks sufficient detail. It would be expected that a business that had been carried on continuously for 10 years or more would be able to produce considerably more documentary evidence, for example, receipts for deliveries or services, or utility bills.
18. In the absence of such detailed evidence, and in view of the substantial time gaps alluded to above, I am satisfied that the submissions fall significantly short of demonstrating, on the balance of probability, that the appeal site was used continuously for floristry for 10 years preceding the submission of the LDC application.

Conclusion

19. As set out in the PPG², the refusal of an LDC does not preclude another application being submitted at a later date, if more information can be produced.
20. Nevertheless, on this occasion, I conclude that the Council's refusal to grant an LDC in respect of the use of the appeal site for floristry was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me under s195(3) of the Act.

Elaine Gray

INSPECTOR

¹ Paragraph: 006 Reference ID: 17c-006-20140306

² Paragraph: 005 Reference ID: 17c-005-20140306