



Appeal Decision

by Debbie Moore BSc (HONS), MCD, PGDip, MRTPI, IHBC

an Inspector appointed by the Secretary of State

Decision date: 24 October 2022

Appeal Ref: APP/Y1110/X/22/3299304

2A Blackboy Road, Exeter EX4 6SG

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) 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 Mr Theobald Power against the decision of Exeter City Council.
 - The application Ref 22/0346/LED, dated 12 March 2022, was refused by notice dated 20 April 2022.
 - The application was made under section 191(1)(a) of the 1990 Act as amended.
 - The use for which a certificate of lawful use or development is sought is "C4 Small House in Multiple Occupation".
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr Theobald Power against Exeter City Council. This application is the subject of a separate Decision.

Preliminary Matters

3. 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.
4. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. 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 their evidence alone is sufficiently precise and unambiguous.
5. The planning merits of the use are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.
6. The application was seeking to establish that the use of the building as a small house in multiple occupation (HMO), within Class C4 of the Schedule to the Town and Country Planning (Use Classes) Order 1987, was lawful at the date of the application. Section 191(2) of the 1990 Act provides that uses are lawful at any time if no enforcement action may be taken in respect of them ... because

the time for enforcement action has expired. The time limits are set out in Section 171B of the 1990 Act. Subsection (3) applies in this case, which relates to “any other breach of planning control” and provides that no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

7. I note that the Council assessed the application against the premise that “a minimum of four years of evidence is required to clarify the lawful use of a dwellinghouse or HMO”. However, Section 171B(2) of the 1990 Act concerns a change of use to a single dwelling house. This does not apply in cases where there has been a change of use to an HMO or some other residential use where units are not self-contained. The ten year rule set out under s171B(3) applies in such cases and I have determined the appeal accordingly.

Main Issue

8. The application sought confirmation that the use of No 2A Blackboy Road as a small HMO (Use Class C4) was lawful at the date of the application. This was on the basis that the use began 10 or more years prior to the date of the application and continued thereafter without significant interruption, such that it is now too late for the Council to take enforcement action.
9. The main issue is whether the Council’s refusal to grant an LDC was well-founded.

Reasons

Evidence

10. The appellant has submitted sworn evidence in the form of a Statutory Declaration¹. This explains that the premises was purchased in September 1989. At that time, it was a shop with an upper floor flat that was let as bedsits. The property was empty for about two years for refurbishment and then it was let as shared accommodation for six years. In around 2008, the property was let to students under the management of a letting agent. This continued until 2017, when a different letting agent took over. The premises remains as a student let. Details from the agent’s website advertising the property are provided.
11. Copies of Assured Shorthold Tenancy Agreements (ASTs) have been provided as follows:
 - AST commencing 29 May 2009 for 12 months for four occupants;
 - AST commencing 29 May 2010 for 12 months for four occupants;
 - AST commencing 29 May 2011 for 12 months for three occupants;
 - AST commencing 29 June 2012 for 13 months for four occupants;
 - AST commencing 20 September 2013 for six months for three occupants;
 - AST commencing 29 August 2019 for 11 months for four occupants, dated February 2019;
 - AST commencing 28 August 2020 for 11 months for four occupants;
 - AST commencing 24 August 2021 for 11 months for four occupants.

¹ Under the Statutory Declarations Act 1835.

12. Emails between the appellant and their managing agents have been provided with statements as follows:
- Email confirming tenant named on 20.09.13 tenancy had remained in residence until 19.11.18;
 - Email confirming property had been let by managing agents from 05.08.08 until 19.11.18;
 - Email confirming tenancy would terminate on 19.11.18;
 - Email confirming tenancy from 20.09.13 had continued until 20.11.18.
13. It is further explained that between 19 November 2018 and 29 August 2019 the property was unoccupied to reflect the academic year. The use continued although there was no occupation until the start of the next academic year. Other gaps between one group vacating and another taking up residence, for example July to August 2020 and 2021, are explained as normal in the student rental market.

Analysis

14. The sworn evidence carries significant weight, however, it is limited in terms of detail. It is not specific about relevant dates and fails to adequately explain how the premises has been occupied as a small HMO for a continuous period of ten years.
15. The ASTs lend support to the appellant's case but not all were signed and dated by the relevant parties, and duly witnessed. There is no information from the tenants corroborating their residence and no record of any utilities or Council Tax payments. None of these show how the premises was used and occupied as a small HMO. Other information could include the relevant certification required for use as an HMO.
16. Furthermore, the Council points out that there are gaps in the tenancy, in particular, between November 2018 and 29 August 2019. The appellant explains that this was a void period. The property was vacated in November, due to the term dates of foreign language students, but was let again in February 2019. However, on the basis of the evidence before me, it is unclear whether the property was available for use and occupation as a small HMO during the intervening period. This is important because if the building was not in use for residential purposes, the Council could not have taken enforcement action against that use². Despite the intentions of the appellant, the period of vacancy is relatively long. It goes beyond that which would correspond with a change in tenants, which may be considered 'de minimis'. In the absence of substantive evidence to the contrary, I consider that, as a matter of fact and degree, the time could not count towards immunity. It amounts to a break in occupancy and residential use.
17. In any event, even if I were to accept the arguments on this point, the evidence does not show how the premises was used and occupied throughout the relevant period. The ASTs which were not signed or witnessed carry limited weight.
18. I have taken account of the claim that the use had gained immunity and become lawful prior to the 2018 void period when the HMO use was 'existing'

² *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226; *Swale BC v FSS & Lee* [2005] EWCA Civ 1568; [2006] JPL 886 and *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin); [2020] JPL 532.

but merely dormant or inactive³. The then managing agents have confirmed in a short email that the property was let out by themselves from 5 August 2008 until 19 November 2018, which would allow for the appropriate ten year period. However, as explained, the statutory declaration is vague on dates, the email is similarly limited in detail and there is very little supporting evidence prior to 2009.

19. Overall, the evidence presented in support of the appellant's claim is incomplete and ambiguous.

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 C4 Small House in Multiple Occupation 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 as amended.

Debbie Moore

Inspector

³ Having regard to *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461.