



Appeal Decisions

Site visit made on 21 September 2022

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 November 2022

Appeal A Ref: APP/T5150/X/20/3261066

35 Rosemead Avenue, Wembley, HA9 7EE

- 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.
 - The appeal is made by Mr Mark Block (CITYNET LTD) against the decision of London Borough of Brent.
 - The application ref 20/1111, dated 7 April 2020, was refused by notice dated 3 June 2020.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is a single storey rear extension.
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Appeal B Ref: APP/T5150/X/20/3261071

35 Rosemead Avenue, Wembley, HA9 7EE

- 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.
 - The appeal is made by Mr Mark Block (CITYNET LTD) against the decision of London Borough of Brent.
 - The application ref 20/1109, dated 7 April 2020, was refused by notice dated 3 June 2020.
 - The application was made under section 192(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 change of use from use as a single family dwelling (Class C3) to use as a small house in multiple occupation for up to 6 people (Class C4) in 6 bedsit units (each with en-suite shower room WC) with 2 shared kitchens (1 each at ground and first floor levels).
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Appeal C Ref: APP/T5150/W/20/3261074

35 Rosemead Avenue, Wembley, HA9 7EE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Mark Block (CITYNET LTD) against the decision of London Borough of Brent.
 - The application Ref 20/1108, dated 7 April 2020, was refused by notice dated 4 June 2020.
 - The development proposed is a single storey rear extension.
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Decisions

Appeal A

1. The appeal is dismissed.

Appeal B

2. The appeal is dismissed.

Appeal C

3. The appeal is dismissed.

Preliminary and Background Matters

Appeals A, B and C

4. The appellant highlights that the Council's officer reports do not comment on the Counsel's opinion or planning statements submitted with the applications. Nor are they included in the Council's decision notices or website. Nevertheless, for the avoidance of doubt, my decisions are based on all of the documents submitted for all three applications and appeals.

Appeals A and B

5. An application under S191(1)(b) of the Town and Country Planning Act 1990 as amended (the 1990 Act) (Appeal A) seeks to establish whether, at the time of the application, any operations which have been carried out are lawful. An application under s192(1)(a) of the 1990 Act (Appeal B) seeks to ascertain whether any proposed use of buildings or other land would be lawful if instituted or begun at the time of the application.
6. Planning merits, including matters relating to any fallback position, noise, refuse and odour can form no part of the assessment of an application for a lawful development certificate (LDC), which must be considered in the light of the facts and the law. The burden of proof lies with the appellant to make his case and the relevant test is 'the balance of probabilities' (that it is more probable than not).
7. For the purposes of the Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO), dwellinghouses fall within Use Class C3 and are defined as the use by a single person or by people to be regarded as forming a single household, or not more than six residents living together as a single household (other than a use within Class C4). The UCO defines Class C4 as use of a dwellinghouse by not more than six residents as a house in multiple occupation (HMO).

Appeal C

8. The Council has confirmed that since making its decision, Brent's Development Management Policies 2016 has been replaced by Brent's Local Plan 2019-2041 (LP). As my decision must be made on the basis of the development plan in place at the time of my decision, the appellants have been offered opportunity to comment on that material change in circumstances.
9. The application form describes the development as retention of existing single storey rear extension. However, 'retention' is not development within the meaning of s55 of the 1990 Act. I have therefore amended the description to a single storey rear extension.

10. The Council query whether the correct certificate of ownership was completed in the application form. However, the appellant has provided a surveyor's report which concludes that the extension has been built within the site boundaries of the appeal property.

Appeal A

Main Issue

11. The main issue is whether the Council's decision to refuse to issue a LDC was well-founded. That turns on:
- whether at the time when the single storey extension was built, the property was a dwellinghouse and eligible to utilise permitted development rights under Schedule 2, Part 1, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (the GPDO); and if so
 - whether planning permission was granted for the single storey rear extension under prior approval application reference 19/2943.

Reasons

Permitted development rights

12. No 35 Rosemead Avenue is a mid-terrace property. The appellant asserts that works were carried out simultaneously to add a single storey ground floor rear extension, a rear roof extension and internal alterations to enable its change of use from a Class C3 dwellinghouse to a Class C4 HMO.
13. Subject to limitations and conditions, Article 3 and Schedule 2, Part 1, Class A of the GPDO (hereafter referred to as Class A) grant planning permission for the enlargement, improvement or other alteration of a dwellinghouse. For the purposes of Class A, a dwellinghouse does not include a building containing one or more flats, or a flat contained within such a building¹. However, it is not a condition of qualifying for Class A permitted development rights that a 'dwellinghouse' is of a particular type or used in accordance with Class C3. HMOs, including those which fall within Class C4, can benefit from the permitted development rights granted to dwellinghouses by the GPDO.
14. The term 'dwellinghouse' is not defined in the 1990 Act but it was accepted in *Gravesham BC v SSE & O'Brien*² that the distinctive characteristic of a dwellinghouse was its ability to afford to those who used it the facilities required for day-to-day private domestic existence. Whether a building is or is not a dwellinghouse is a matter of fact and degree.
15. The appellant states that the property ceased being used as a single family dwelling (Class C3) in June 2019. By the time of making the application, the property had been configured to provide six, single occupancy bedsitting rooms, each with an en-suite shower room, together with two shared kitchens.
16. I appreciate that each of those rooms were intended to be separately let and that they may be rated as flats for Council Tax purposes. However, individually,

¹ Article 2(1) of the GPDO

² [1983] JPL 306

they did not provide the facilities required for day-to-day private existence because they each relied on sharing one or more basic amenity, namely a kitchen for cooking and washing (clothes). Consequently, they did not individually possess the distinctive characteristics of a dwellinghouse, in the form of a flat. Moreover, there would have been no more than six residents. Therefore, as a matter of fact and degree, the property was configured to be used as a small HMO falling within Class C4 and for the purposes of the GPDO was a dwellinghouse.

17. Although those works to facilitate the use of the property as a Class C4 HMO had been substantially completed by the time of making the application, its actual use on that basis had not commenced. That is corroborated by the appellant's contemporaneous photographs which show the property to be vacant.
18. At the time of constructing the rear extension, the property still benefited from a Class C3 use, which was not lost because of other contemporaneous work to facilitate a Class C4 use, or because the extension works were integral to the use of the property for use as a small HMO, or lack of single occupation at that time.
19. In any case, even if the C4 use had commenced, that would make no difference in the circumstances of this case because in either scenario, it was still the enlargement, improvement or other alteration of a dwellinghouse, whether that be a Class C3 or a C4 dwellinghouse. That reasoning is supported by the *London Borough of Brent v SSLUHC and Yehuda Rothchild*³ judgment. Therefore, on the balance of probabilities, the property benefited from Class A permitted development rights when the extension was built.
20. It is next necessary to consider whether planning permission was granted for the single storey rear extension under prior approval application reference 19/2943.
21. Paragraph A.1(g) of the GPDO⁴ states, as applicable to a terrace dwelling, that development is not permitted by Class A if the enlarged part of the dwellinghouse would have a single storey and extend beyond the rear wall of the original dwellinghouse by more than 6m or exceed 4m in height.
22. Paragraph A.4 sets out the conditions that apply to development permitted by Class A.1(g), including the information to be provided to the local planning authority before beginning the development⁵. That includes, a written description of the proposed development including how far the enlarged part of the dwellinghouse extends beyond the rear wall of the original dwellinghouse, its maximum height and eaves height. A plan indicating the site and showing the proposed development is also required.
23. Paragraph A.4(5) requires the local planning authority to notify each adjoining owner or occupier about the proposed development by serving on them a notice which, amongst other things, describes the development by setting out the information provided to the authority by the developer.

³ [2022] EWHC 2051 (Admin)

⁴ Paragraph references hereafter are to the GPDO

⁵ Paragraph A.4.(2)

24. In this case, the single storey extension was proposed to extend 5.9m from the rear wall of the original house, with a maximum height of 3.5m and an eaves height of 3m. In support of the application, a location plan was provided showing an outline of the proposed development along with existing and proposed floor plans, sections and elevations. The proposed plans show the extension as forming part of a single dwellinghouse with a kitchen and living room separated by an off-centre internal partitioning wall, and a corresponding rear elevation with a back door and window serving the kitchen and patio doors leading out from the lounge.
25. As no objection was received in response to the Council's notification, it confirmed on 12 September 2019 that prior approval was not required⁶. However, although remaining within the size parameters of A.1(g), the extension as subsequently built differs from the prior approval scheme. In that regard, the LDC plans show the property configured as a six-bedroom HMO, with the extension being laid out to provide two, single bedsitting rooms either side of a central internal partition wall, as well as part of the ensuite facilities for both and part of the hall leading to each of those room. The rear elevations show each bedroom with a window and door to the rear garden.
26. The prior approval drawings also show the extension straddling both side boundaries, as per the party walls of the main dwelling, whereas the LDC drawings show the extension fully within the site boundary. The Council say that the prior approval extension is therefore approximately 400mm wider than that which is the subject of the LDC application. Moreover, although it is difficult to discern due to the scale of the location plan and the thickness of the delineating lines, the outer edge of at least one side of the outline to the extension appears to protrude beyond the site boundary, contrary to that argued by the appellant.
27. The Council argue that those differences are material and that if neighbouring residents had been consulted on the plans as currently built, they would have objected. Paragraph A.4(7) of the GPDO states that *'Where any owner or occupier of any adjoining premises objects to the proposed development, the prior approval of the local planning authority is required as to the impact of the proposed development on the amenity of any adjoining premises'*. In considering that impact, paragraph A.4(9) stipulates that the local planning authority must take into account any representations made and consider the amenity of all adjoining premises, not just adjoining premises which are the subject of representations.
28. I appreciate that the appellant may have provided more information with the application than that which would have been required for the purposes of paragraph A.4(2) of the GPDO. Nevertheless, proposed elevations, sections and plans were submitted, and the Council consulted on them. Neighbouring occupiers would have relied on that information in deciding whether or not to object.
29. Having regard to the representation now received, it is clearly possible that the occupiers of one or both of the adjoining properties would have objected, which, regardless of their merits, would in turn have triggered the requirement for prior approval from the Council. Moreover, given the Council's decision on

⁶ Application Ref: 19/2943

the retrospective application for the single storey rear extension⁷, it is reasonable to assume that would have been refused.

30. Paragraph A.4(11)(b) of the GPDO states that development must be carried out where prior approval is not required, in accordance with the information provided under sub-paragraph (2). It does not state that development must be carried out in accordance with what is required by sub-paragraph (2). Therefore, regardless of whether the appellant was required to provide elevation or section drawings, that information was provided along with a location plan showing the outline of the extension and floor plans. Save for the location plan, all of those plans are listed as the accompanying plans in the Council's decision notice.
31. The extension was not carried out in accordance with the information provided, as required by paragraph A.4(11)(b) of the GPDO. I've noted the caselaw reference⁸ but the combined differences between that approved and that built are not immaterial as argued, not least because the latter is intended to facilitate a change of use of a single dwelling to a small HMO, which in turn may have its own impacts.
32. The appellant argues that if there was a breach, then the departures would be a breach of the GPDO conditions, not a contravention of the scope of the permitted development rights. However, the as-built scheme differs materially from the permitted development scheme, so it does not have planning permission at all. Moreover, even if the difference were not material, such that only a breach of condition was involved, s191(2) says operations will be lawful if '*no enforcement action may be taken in respect of them*'. Enforcement action may be taken in respect of a breach of condition, so a LDC could not be granted anyway.
33. I therefore find, on the balance of probabilities, that the single storey rear extension as built was not granted planning permission by Class A of the GPDO under prior approval application reference 19/2943.
34. As the appellant confirms that the extension was substantially completed by January 2020, it is not suggested that it has become lawful through the passage of time⁹.
35. It follows, that it has not been demonstrated to the required standard of proof, that no enforcement action could have been taken in respect of the single storey extension. Whether the Council may seek to take enforcement action against the highlighted departures rather than the extension as a whole, is not a matter for this appeal under s195 of the 1990 Act.
36. I therefore conclude that the Council's refusal to grant a LDC was well-founded and the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act.

⁷ Which is the subject of Appeal C

⁸ *Lever Finance Ltd v Westminster City Council* [1971] 1 QB 222

⁹ S171B(1) of the 1990 Act

Appeal B

Main Issue

37. The main issue is whether the Council's decision to refuse to issue the LDC was well-founded. That turns on:

- whether the application can be considered as proposed development under s192 of the 1990 Act; and
- whether the use of the appeal property for Class C4 purposes would be lawful if instituted or begun at the time of the application.

Reasons

38. The application for a LDC was made under s192(1)(a) of the 1990 Act for the proposed change of use from use as a single family dwelling (Class C3) to use as a small HMO for up to six people (Class C4), in six bedsit units (each with an en-suite shower room WC) with two shared kitchens.

39. The Council state that no evidence has been provided on the previous use and that it seems to have been registered as flats by the Valuation Office Agency. However, that is imprecise and ambiguous, and no actual evidence is provided that contradicts the appellant's position that it was in Class C3 use. Indeed, that is consistently shown in the related planning history plans. I have discussed under Appeal A, the reference to the Council Tax valuation list for six flats, but that was in relation to the six bedsit units, rather than any pre-existing use. On the balance of probabilities, the property was previously a single family dwelling.

40. The appellant explains that the property ceased being used as such in June 2019. Evidence shows that by the time of the application, works had been undertaken to facilitate what was intended to be a Class C4 HMO use and that the property was capable of being used on that basis. Nevertheless, it was vacant at that time so the actual use had not commenced. Consequently, the application could have been made under s192 (proposed use) of the 1990 Act, rather than s191 (existing use). In any case, I am able to determine an appeal under s191 even if the application was made under s192.

41. Article 3 and Schedule 2, Part 3, Class L of the GPDO (hereafter referred to as Class L) provide permitted development rights for development consisting of a change of use of a building from a use falling within Class C3 to a use falling within Class C4, and vice versa.

42. The Council argues that the property was neither in use as a Class C3 dwellinghouse nor a Class C4 HMO at the time of the application and thus was not afforded those permitted development rights. However, facilitating the change of use from Class C3 to C4 does not result in the Class C3 use being lost if the Class C4 use had not commenced. Moreover, for the reasons explained under Appeal A, it is more likely than not, having regard to the nature of the accommodation, that the proposed use would fall within Class C4 for the purposes of the UCO and GPDO.

43. However, by virtue of Article 3(5) of the GPDO, the permission granted by Schedule 2, including Class L, does not apply if: (a) in the case of permission

- granted in connection with an existing building, the building operations involved in the construction of that building are unlawful; (b) in the case of permission granted in connection with an existing use, that use is unlawful.
44. It was held in *RSBS Developments Ltd v SSHCLG & Brent LBC*¹⁰ that the two sub-paragraphs of Article 3(5) are not mutually exclusive. Consequently, Article 3(5) is engaged because I have found under Appeal A that the building operations, namely the single storey rear extension, involved in the construction of the building is unlawful, and the LDC for the change of use of the building from Class C3 to C4 was sought after that extension had been built.
45. In *Evans v SSCLG*¹¹ it was held that since the GPDO defines 'building' as 'including part of a building' then if the building operations involved in the construction of any part of an existing building are unlawful, the permitted development rights granted in connection with the existing building do not apply. It therefore follows, that the planning permission granted by Class L did not apply
46. The appellant argues that the 'existing building' and 'that building' are the same so 'part of a building' would have to be read into 'existing building' as well as 'that building' and that consequently permitted development rights could subsist if they were in connection with the lawful part of a building. However, that would be inconsistent with the above; which is essentially that if part of the building is unlawful, the permitted development rights for the whole of the building are lost, until such time as any lawfulness issues are resolved.
47. I conclude that the use of the appeal property for Class C4 purposes would not be lawful if instituted or begun at the time of the application. It follows that the Council's refusal to grant an LDC was well-founded, and the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act.

Appeal C

Main Issue

48. The main issue is the effect of the single storey rear extension on the living conditions of the occupiers of neighbouring dwellings with particular regard to outlook and light.

Reasons

49. The Council's Residential Extensions and Alterations SPD 2 states that an extension up to 6m in depth may be acceptable providing that for every additional metre beyond 3m in depth, the extension should be set in from the boundary by an additional metre to protect neighbouring residential amenity.
50. The single storey rear extension to the mid-terrace appeal property is approximately 5.9m long and 3m high on the side eaves, rising to a maximum height of 3.5m. It extends across the full width of the plot for its entire depth so is not set in from the boundary at any point.

¹⁰ [2020] EWHC 3077 (Admin)

¹¹ [2014] EWHC 4111 (Admin); [2015] JPL 589

51. The neighbouring property at No 33 Rosemead Avenue has not been extended beyond the main rear elevation of the house. Occupants are therefore subjected to the effects of the full length of the extension. Because of its height and substantial length, immediately adjacent to a significant proportion of the boundary, the extension appears as a visually imposing and intrusive form of development that dominates the outlook from the rear elevation patio doors of No 33, as well as from its patio and garden area. It is inevitable, due to its size and orientation, that the extension also results in a loss of sunlight entering the neighbouring dwelling and garden. I note the personal circumstances of the occupants of No 33 and the value placed on their rear garden space, which compounds the degree of harm experienced.
52. The adjoining dwelling at No 37 Rosemead Avenue has been extended at ground floor level across nearly the full width of its plot. Due to the lesser extent of the projection beyond the back wall of that extension (compared to No 33) and the positioning of the patio doors at the rear of No 37 close to the opposite side boundary with No 39, the appeal extension does not unacceptably affect the outlook from the neighbouring dwelling at No 37. Although, the extension has an obvious presence from within the garden of No 37, the lesser extent of projection does not result in unacceptable harm in terms of outlook and loss of light.
53. Nevertheless, the extension results in significant harm to the living conditions of the occupants of No 33, contrary to LP Policy DMP1 and SPD 2. Those state, amongst other things, that development will be acceptable provided it is of a siting, layout, scale and design that provides high levels of internal and external amenity. The Council also cite conflict with LP Policy BD1 but that relates to urban design and has limited relevance to the main issue identified.

Other Matters and Planning Balance

54. The appellant refers to the fallback position as being fundamental to the appeal. However, for the reasons explained under Appeal A, the whole of the extension is unlawful, not just the parts that differ from the prior approval scheme. Consequently, the fallback position is not restricted to merely addressing the differences with what has been built.
55. The fallback position available to the appellant is to demolish the existing single storey extension and rebuild in accordance with the prior approval scheme. That would replicate the harm arising to the living conditions of No 33, in terms of outlook and loss of sunlight. Indeed, it would be made slightly worse presuming it could be built wider by straddling both side boundaries. Neighbouring residents would also be affected by demolition and rebuilding works.
56. If the fallback position was simply that and the Class C4 use could continue or recommence, then there would be a real prospect of it being utilised. However, the fallback position is an extension to a single family dwelling, not a Class C4 HMO. Therefore, significant reconfiguration works would also be necessary to revert to a Class C3 use.
57. Moreover, I have found under Appeal B, that the change of use of the property to a Class C4 use was not lawful. The Council has also confirmed that a Direction under Article 4(1) of the 2015 GPDO came into force on 1 November

2022 to the effect that the permission granted by Article 3 shall not apply to Class L(b) development¹². Therefore, although the prior approval extension could be rebuilt, the Class C4 use could not lawfully continue or recommence as argued, without the express permission from the Council. That is significant, because the purpose of the extension is clearly to facilitate the use of the property as a Class C4 HMO.

58. Consequently, in the fact specific circumstances of this case, there is not a real prospect of the extension being rebuilt. I therefore attach limited weight to the fallback position identified.
59. I appreciate that the prior approval application attracted no objections but that isn't the case for the retrospective application, which is the subject of this appeal. It cannot therefore be reasonably assumed that a different prior approval application could be made without objection. Indeed, that prospect appears very unlikely. Moreover, prior approval cannot be sought for what is in place because the GPDO does not grant retrospective planning permission.
60. I have noted the objections received regarding the use of the property as a HMO, including those relating to safety, refuse (with associated religious concerns regarding waste meat), odour and noise. However, Appeal C is concerned with the effects of the extension building and does not include a retrospective change of use to a Class C4 HMO. In the circumstances, it would not be appropriate to comment on the acceptability or otherwise of the HMO use as to do so would usurp the local decision-making process.
61. Concerns are raised over roof tiles falling into neighbouring properties but that cannot be from the extension, which has a felt type roof. Moreover, additional run-off entering neighbouring properties and damaged fences are civil matters between the parties.
62. Drawing the above together, I find that the weight given to the fallback position does not outweigh the harm I have found to the living conditions of No 33 and the associated development plan and SPD conflict.
63. How the above conclusions affect potential enforcement action will be a matter for the Council. If an enforcement notice is served and subsequently appealed, any ground (f) considerations will be a matter for the appointed Inspector.

Conclusion

64. For the reasons given above, and having considered all other matters raised, I conclude that the appeal should be dismissed.

Richard S Jones

INSPECTOR

¹² As that date is later than the date of the LDC application for a HMO, it makes no difference to my reasoning under Appeal B

Appendix 1

List of those who have appealed

Reference	Case Reference	Appellant
Appeal A	APP/T5150/X/20/3261066	CITYNET LTD
Appeal B	APP/T5150/W/20/3261074	CITYNET LTD
Appeal C	APP/T5150/X/20/3261071	CITYNET LTD