The Planning Inspectorate

Appeal Decision

by S A Hanson BA(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 January 2023

Appeal Ref: APP/P4605/X/22/3297091
140 Bournbrook Road, Selly Park, Birmingham B29 7DD

- 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 (LDC).
- The appeal is made by Mr R Masaud against the decision of Birmingham City Council.
- The application ref 2022/00947/PA, dated 7 February 2022, was refused by notice dated 23 March 2022.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the Act).
- The use for which an LDC is sought is a Large House in Multiple Occupation - Sui Generis

Decision

1. The appeal is dismissed.

Preliminary Matters

2. It has not been necessary to carry out a site visit as, in this particular case, where all the required information is included with the application and appeal documents, a decision can be reached on the papers.

3. The question being asked in any application for an LDC under section 191(1)(a) is whether any existing use of buildings or other land is lawful. Section 191(4) of the Act indicates that if, on an application under this section, the local planning authority is provided with sufficient information satisfying them of the lawfulness of the use at the time of the application, that is 7 February 2022, they shall issue a certificate to that effect. In any other case they shall refuse the application. The planning merits of the matters applied for do not fall to be considered. The decision will be based strictly on factual evidence and relevant planning law.

4. The use for which an LDC is sought is described by the appellant as in the banner heading above. The description was modified by the council to *'Application for a lawful development certificate for an existing use as 8-bed HMO (Sui-Generis)'.* This description was given to reflect the most recent use of the property as simply describing it as a large HMO was considered too broad. The council say it notified the applicant by letter dated 17 February 2022 to check the development description, which had been amended, and to respond to the council if there was disagreement over the change. The appellant states that they did not agree to the change of description. The council say that no response was received. While s191(4) of the Act allows the council to modify the description of the existing use, operation or other matter, there is no absolute requirement for the applicant's agreement to a change in the description.

5. Nevertheless, National Planning Policy Guidance provides that an application for an LDC needs to describe precisely what is being applied for (not simply the use class)[1] and the land to which the application relates. Without sufficient or precise information, a local planning authority may be justified in refusing a certificate. Precision in the terms of any certificate is vital, so there is no room for doubt about what was lawful at a particular date, as any subsequent change may be assessed against it. It is important to note that a certificate for existing use must include a description of the use, operations or other matter for which it is granted regardless of whether the matters fall within a use class. But where it is within a "use class", a certificate must also specify the relevant "class".

6. In all cases, the description needs to be more than simply a title or label if future problems interpreting it are to be avoided. It is not open to an applicant to pose a general enquiry as to what is or might be lawful. The certificate needs to therefore spell out the characteristics of the matter so as to define it unambiguously and with precision. This is particularly important for uses which do not fall within any "use class" (ie "sui generis" use).

7. The LDC application sought to establish the lawful use of the property by more than 6 residents as a large HMO. This falls outside the defined limits of any use class. In respect of the above, the terms of the application should be specific so as to describe precisely what is being applied for. In this case, they are not. The council considered that the property was most recently occupied by 8 tenants and that is what has been put forward by the appellant. Consequently, I will determine the appeal on the basis of establishing whether the lawful use of the property is a large HMO[2] for 8 people.

Main Issue

8. This is whether the council's refusal to issue an LDC was well-founded. In this particular case this turns on whether the appellant can show that the lawful use sought has continued for 10 years prior to 7 February 2022, without any other intervening uses until the date of the application, so as to be immune from enforcement action in accordance with s171B(3) of the Act.

Reasons

9. In an appeal relating to an LDC, the burden of proving relevant facts rests with the appellant and the test of the evidence is the balance of probabilities. The appellant's own evidence does not have to be corroborated by 'independent' evidence. If there is no evidence to contradict or otherwise make the appellant's version of events less than probable, the appellant's evidence alone may be sufficient to justify the grant of a certificate. This is on the basis that it is sufficiently precise and unambiguous.

10. There appears to be no dispute between the parties that the property was in use as an HMO from October 2008. I also note from the submissions that an initial enforcement case was opened by the council and subsequently closed on 20 November 2009, concluding that the property was in use as an HMO and occupied by 7 people at that time. A further enforcement case opened and subsequently closed on 10 February 2010, also concluded that the property was occupied as an HMO by 7 people.

[1] Paragraph: 005 Reference ID: 17c-005-20140306
[2] HMOs with more than six occupiers which fall outside of any use class.

Assessment of evidence

11. The appellant has supplied a signed statutory declaration (SD), copies of tenancy agreements (TAs) and copies of two HMO licences.

12. The SD declares that the property has usually been let to at least 7 students for every academic year with tenancies running over 12 months from 1 July to 30 June. An extension and refurbishment works to the property were completed in 2016 and this enabled the property to house up to 8 people. The appellant says he let and managed the property from its purchase in 2008 to 2021. However, he also says that letting agents found and let the property for the 2015/2016 letting year and another letting agents let the property for the academic years between 2017 and 2021. They have since assumed responsibility for managing the property and collecting rent.

13. To support the appellant's case, the SD lists the TAs submitted as part of the application for the LDC. The list includes TAs from October 2008 through to June 2022. The single period for which a TA is not listed as being submitted is for the period 1 July 2015 to 30 August 2016. The SD declares that:

    Between 26 October 2008 and 30 June 2015, the TAs were signed by 7 individuals.

    Between 1 September 2016 and 30 June 2022, the TAs were signed by 8 individuals.

14. However, my review of the evidence provided by the appellant, has highlighted some variance between the TAs listed in the SD as being provided and what has actually been submitted. Reading the copies of the TAs provided, these show the following:

    28 October 2008 – 30 June 2014 - The property was let to 7 individuals at any one time during this period without interruption.

    1 July 2014 - 30 June 2015 - There is no TA for this 12 month period to indicate whether or how the property was occupied.

    1 July 2015 - 30 June 2016 - The property was let to 6 individuals.

    July 2016 and August 2016 - There is no TA for these two months to show whether or how the property was occupied.

    1 September 2016 - 30 June 2017 - The property was let to 8 individuals.

    1 July 2017 and 30 June 2018 - There is no TA for this 12 month period to indicate whether or how the property was occupied.

    From 1 July 2018 up to and beyond the date of the application for an LDC - For 44 months (roughly 3 and a half years) the TAs show that the property has been let to 8 individuals.

15. There is also a discrepancy in the information provided by the appellant in the SD concerning the HMO licence provided under s64 of the Housing Act 2004. The appellant states on the SD that the licence for the period from 19 February 2015 to 19 February 2020 is for up to 9 people. However, the copy of the licence says that the house is reasonably suitable for occupation by not more than 7 households or 7 persons.

16. Drawing these threads together, the evidence shows that there were two periods of 12 months that are not covered by a signed TA and no further details, such as records of rent paid, to show how the property was occupied during these periods. Furthermore, between 1 July 2015 and 30 June 2016 the property was occupied by 6 tenants. I consider this period of 12 months to be more than a minor interruption and one during which enforcement action could have been taken for a change between sui generis and a C4 use. Such a change of use would have required express planning permission, if that change was material, likewise for a change in the use of the property from accommodating 6 students to accommodating 8 (C4 to sui generis).

17. While the appellant may have had no intention of ceasing the use of the property as a large HMO, there was potentially a material interruption in its use when 6 students occupied the property and possibly a further material interruption during the periods for which there is no evidence of how the property was occupied.

18. Overall, without sufficient precise and unambiguous evidence, I find that on the balance of probabilities the lawfulness of the existing use of the appeal property as a large HMO for 8 people has not been established.

Conclusion

19. For the reasons given above and having regard to all other matters raised, I conclude that the Council's deemed refusal to grant an LDC was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act as amended.

S A Hanson

INSPECTOR