Appeal Decision

Site visit made on 6 December 2022

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

an Inspector appointed by the Secretary of State

Decision date: 10 February 2023

Appeal Ref: APP/G5750/X/21/3279182
7 East Road, Stratford, London, E15 3QS

- 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 Ms N Mir against the decision of London Borough of Newham.
- The application ref 21/00952/CLE, dated 16 April 2021, was refused by notice dated 9 June 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 lawful use of the property as a Class C4 HMO.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. An application under s191(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act) seeks to establish whether, at the time of the application, any existing use of buildings or other land is lawful.

3. The burden of proof lies with the appellant to make her case and the relevant test is 'the balance of probabilities' (that it is more probable than not). If there is no evidence to contradict or make the appellant's version of events less than probable and her evidence alone is sufficiently precise and unambiguous, that is enough. Evidence should not be rejected simply because it is uncorroborated.

4. For the purposes of the Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO), dwellinghouses fall within Use Class C3, which itself is formed of three parts. Class C3(a) is use by a single person or by people to be regarded as forming a single household. The term 'single household' is to be construed in accordance with s258 of Housing Act 2004 as including persons who are all members of the same family or persons whose circumstances are described in regulations. Class C3(c) is not more than six residents living together as a single household where no care is provided to residents (other than a use within Class C4)[1].

5. Class C4 is the use of a dwellinghouse by not more than six residents as a HMO. For the purposes of Class C4, a HMO has the same meaning as in s254 of

[1] The third part is C3(b), which is not more than six residents living together as a single household where care is provided for residents

the Housing Act 2004, and a building will be used as such if it meets the relevant tests contained therein.

6. The change of use from C3 to C4 and vice versa is normally permitted development under Schedule 2, Part 3, Class L of the GPDO[2]. However, it is undisputed that the Council introduced a Borough wide Article 4 Direction on 31 July 2013 to remove those permitted development rights. The effect is that planning permission is required for a change of use from Class C3 to Class C4.

Main Issue

7. The main issue is whether the Council's decision to refuse to issue a LDC was well-founded. From the evidence before me, that turns on whether the use of the two storey, mid-terrace appeal property changed to a Class C4 HMO use at least ten years before the date of the LDC application (16 April 2011) and then continued without material interruption for a period of at least ten years thereafter, so as to meet the immunity period from enforcement action under s171B(3) of the 1990 Act.

Reasons

8. The appellant submitted a statutory declaration (SD) in support of the LDC application, which is signed and witnessed by a solicitor. In it, she confirms that after being let to a housing association in 2009, the appeal property was let by an estate agent to three unrelated tenants from 24 March 2010 to August 2015. It is argued that March 2010 marks the commencement of the HMO use.

9. It is also argued that as that date is prior to the Article 4 Direction coming into effect, the change from Class C3 to C4 was permitted development. However, permitted development rights for changes from Class C4 to C3 and from C3 to C4 came into force on 6 April 2010 and 1 October 2010 respectively[3], and therefore after the stated commencement of the Class C4 use in March 2010. Planning permission was not therefore granted by Article 3 of the GPDO at the time of the purported change.

10. In terms of immunity, s171B(3) of the 1990 Act states that '*no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach'*. For a breach of planning control to have occurred in this case, there must have been a material change of use and it is only a material change of use which can become immune from enforcement action.

11. A 'Certificate of tenancy registration' is provided between the appellant and the individual tenants named in her SD, beginning on 24 March 2010. Invoices and statements from the estate agent dated 22 November 2011, 23 May 2012, 26 June 2013, 25 June 2014 and 23 June 2015 are also provided for the rent paid by the same individuals. Separate insurance policy documents (rent guarantees and legal expenses) are provided for each of those tenants dated 22 March 2010.

12. The use of the property by the three unrelated individuals is more likely than not to have resulted in different patterns of usage, compared to the previous

[2] The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)
[3] The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2010 and The Town and Country Planning (General Permitted Development) (Amendment) (England) (No.2) Order 2010

occupants of a single household, who would have been more likely to carry out activities on a communal basis. Indeed, use by three individuals is likely to generate more activity as they come and go separately from one another for work, shopping and other day-to-day activities, whilst generating a greater number of separate visitors and deliveries to the property. Moreover, a greater number of unconnected individuals living within one property will likely result in differing noise and disturbance effects on neighbouring occupants. Consequently, it is likely that there was a significant difference to the character of the activities from that which had gone on previously, as a matter of fact and degree.

13. Moreover, the plan exhibited with the SD shows a layout whereby three basic amenities are shared (kitchen, dining room and bathroom), and none of the individual bedrooms replicate those amenities.

14. It is therefore, more probable than not, that the building met the 'standard test' of a HMO under s254(2) of the Housing Act 2004 and that 24 March 2010 marked the date of the breach arising from a material change in the use of the property from a Class C3 dwelling house to a HMO (rather than a Class C4 HMO, which was not introduced as a use class until 6 April 2010). It is also more probable than not, that the HMO use continued until August 2015, based on the SD and corroborating invoice and statement, which covered the period up to the end of July 2015.

15. As of August 2015, two of the named tenants moved out. A signed tenancy agreement between the appellant and one of the original tenants and three other tenants is provided for the period between September 2015 and September 2017 and another for the term starting in January 2019 and ending in July 2021. The three new tenants shared the same surname, and the appellant understood them to be related. They also share the same surname as the sole tenant remaining from the three original tenants[4]. That scenario strongly points towards a single, Class C3 family household.

16. The appellant however states that the property was sub-let to multiple tenants through that period until they were evicted in 2020. In support of that position, reference is made to an electoral register search. That shows one resident in 2009 and 2010, none for the years 2011 to 3013 (inclusive), and one of the original listed tenants from 2014 to 2020. One of the residents that signed the tenancy agreement starting in September 2015 is listed as a resident from 2014 to 2016. Only one additional resident is listed (who is not named on any of the tenancy agreements) and only for the years 2016 and 2017[5].

17. That evidence does not therefore support the appellants submission that the property was sub-let to multiple tenants between 2015 and 2020. Although she states in her SD that she came across different individual adults residing there from her periodic inspections during that period, that is imprecise and ambiguous.

18. An inventory report from 27 October 2018 describes the property as a three bedroom house. Although referring to a reception room, the photos show a bunk bed above a double bed. It appears that at least one child occupied that

[4] The appellant notes that his first name and surname are used interchangeably on some documentation but refer to the same individual. In that regard, nearly all of the supporting documents order his name such that his surname matched that of the new tenants.

[5] Other residents are listed but for years prior to 2010

room, possibly with an adult(s). There does not appear to be a lock on the door.

19. A woman with a young child in her arms can be seen in one of the pictures taken in the kitchen. Personal items are attached to the fridge door and a laptop is open on the kitchen table. In the dining room there also appeared to be personal items including a picture of a baby attached to a fridge. The pictures of the rear garden include toys and a bike for a young child. A small child can also be seen in the photograph taken in the bathroom.

20. Bedroom one also appeared to have been occupied by a child, although adult size clothes are hung up. There is an inner security chain and keep to the door. Bedroom two (middle) appears to have been occupied by an adult. The door has a keyhole but it is unclear whether that could be locked. Bedroom three (rear) appears similarly occupied. The door has a security chain, a keep and two locks.

21. A further report is provided dated 20 January 2020, when the property was vacant. The single bunk and double bed can be seen in the front reception room. In reception room two (the dining room) there is a single bed, which was not there in the 2018 photographs. The first floor bedrooms are essentially the same in terms of provision. The rear garden is shown to be unkempt with various items including children's toys.

22. Although it is evident from the above, that there were multiple beds at the property at the time of the inspections, it is difficult to ascertain how the property was being occupied. There were at least two children living in it, which again points towards a family dwelling. I appreciate there were locks to a number of bedrooms, but not all. In any case, the locks could be a legacy from the HMO use between 2010 and 2015.

23. Documentary evidence from September and November 2019 is provided which shows that that the original tenant (from 2010) and three others were to be evicted from the property. However, that evidence does not explain or link the reason for eviction, to the property being illegally sub-let and used as a HMO.

24. The Council also advise that landlords in the Borough seeking to rent out their properties to single-family households are required to obtain a Selective Licence, and that as part of the application process, landlords are explicitly asked how their property is occupied, including the number of households and lettings. The Council state that the property licencing records show that the owner had specifically applied for a Selective Licence in January 2013, when the previous licence expired, and then again in March 2018. That is not disputed by the appellant. Although applying for those licenses does not prevent a Class C4 use from occurring, it does, nonetheless, contradict the appellant's version of events, as set out below.

25. The Council confirm that a HMO license was approved in December 2020 for four people living as four households. The appellant also provides a signed tenancy agreement for three different occupants for the period 14 August 2020 to 13 August 2021.

26. The appellant submits that she was not aware that the property was being illegally sub-let and used as an HMO, so she would not have had any reason not to apply for the standard single family dwelling licence, until obtaining the

HMO licence in 2020, when it was then known that the premises was being let for that purpose. However, that contradicts her SD because the application for a Selective Licence in 2013 would have been made in the knowledge that she had already entered into a tenancy agreement in March 2010 with three unrelated tenants, who went on to occupy the property until 2015.

27. Pulling the above together, it is more probable than not that the property was used as a Class C4 HMO between 2010 and 2015 and from 2020 onwards. However, between 2015 and 2020, it is more probable than not that it was used as a Class C3 single household. That is clearly a material interruption. Although the appellant's SD is capable of attracting significant weight, I do not consider it to be sufficiently precise and unambiguous for that period. It is also contradicted by the Council and her own evidence.

28. Accordingly, it has not been demonstrated, on the balance of probabilities, that from the date of the breach the property continued to be used for Class C4 purposes without material interruption for a period of at least ten years so as to meet the immunity period from enforcement action under s171B(3) of the 1990 Act.

Conclusion

29. I conclude that the Council's refusal to grant a LDC 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.

Richard S Jones

INSPECTOR