



Appeal Decision

Site visit made on 5 April 2023

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

an Inspector appointed by the Secretary of State

Decision date: 18 April 2023

Appeal Ref: APP/Z4310/X/22/3294852
23 Kempton Road, Liverpool L15 1HE

- 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 Mrs T Fyffe of Spacewell Ltd against the decision of Liverpool City Council.
 - The application Ref 21LE/2304, dated 25 August 2021, was refused by notice dated 10 February 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 existing use of premises as a house in multiple occupation for 3-6 persons (Use Class C4).
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is considered to be lawful.

Preliminary Matters

2. 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.
3. The planning merits of the use, such as parking, 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.
4. The application was seeking to establish that the use of the building as a 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 they did not require planning permission.
5. The appellant's case is the change of use to a HMO comprised development 'permitted' under Article 3 and Schedule 2, Part 3, Class L(b) of the Town and

Country Planning (General Permitted Development) (England) Order 2015 (GPDO). This concerns the change of use of a building from a use falling within Class C3 (dwellinghouses) to a use falling within Class C4 (houses in multiple occupation).

6. The Council has provided a copy of a Direction made under Article 4(1) of the GPDO relating to the area in which the appeal premises is located. This has the effect of revoking 'permitted development' rights conferred by Schedule 2, Part 3, Class L(b). The Article 4 Direction was confirmed on 17 June 2021 and came into force on that date. The dispute between the parties is whether or not the change of use took place before the Article 4 Direction came into force, in which case it would have been lawful.

Main Issue

7. I must decide whether the use of the building as an HMO for 3-6 persons (Use Class C4) was lawful on the date of the application. The main issue is whether the Council's refusal to grant an LDC was well-founded.

Reasons

Evidence

8. The appellant has submitted a sworn statement, dated 1 March 2022. This states the appeal premises was renovated between October 2020 and early June 2021, to enable its use as a HMO within Use Class C4. The appellant was aware of the impending confirmation of the Article 4(1) Direction. Consequently, efforts were made to ensure the works were completed and the rooms let before 17 June 2021, when the Direction would come into force. It is explained that tenancies for three unrelated occupants commenced on 16 June 2021. The appellant argues the change of use occurred on this date and, hence, the development would not have required planning permission at that time. I understand that two further tenants moved into the property on 1 July 2021. A statement of fact has been submitted by the building contractor, dated 10 March 2022, which supports the appellant's version of events.
9. Further statements of fact have been submitted by Dr N Adbulshukoor, H Gray and J Riva confirming they have occupied the property since 16 June 2021. These correspond with Assured Shorthold Tenancy Agreements (ASTs), dated 15 June 2021, for the period 16 June 2021 to 16 December 2021 for Rooms E, B and C. Individual room applications dated May and early June have been supplied.
10. A site inspection report from the approved Building Inspector, dated 8 June 2021, is provided. This confirms the internal completion of works for "Single Storey Rear Extension, Loft conversion and conversion to form 5 bed HMO" and there is a corresponding completion certificate, dated 9 July 2021.
11. Details from utilities providers confirm new accounts at the premises for gas and electricity, commencing 19 May 2021, and for broadband services which appears to have commenced on 20 May 2021. Statutory certificates have been submitted as follows; Electrical Installation Certificate, dated 14 June 2021; Fire Certificate, dated 16 June 2021 and associated risk assessment, dated 16 June 2021; Gas Safety Record, dated 10 June 2021.

12. The appellant has also submitted a copy of the business insurance schedule for private rental, effective from 9 June 2021 and a Council Tax Bill for 2021/22, dated 9 March 2021.
13. In addition, there is a screenshot from 'OpenRent' showing a payment for advertising, dated 14 April 2021, and a screenshot advertising the property for let but this has no address. Bank statements have been provided but it is not clear what these are intended to show. There is a furniture invoice for five bed mattresses, dated 8 June 2021.
14. Finally, I note the neighbour letter which states that the work was completed during the summer of 2021.

Analysis

15. The sworn evidence has been duly signed and witnessed and this carries significant weight. In addition, there is a range of other evidence including statements of fact, tenancy agreements and relevant documentation that supports the appellant's version of events. Nonetheless, the Council maintains there is insufficient proof of occupancy prior to the relevant date.
16. I am mindful of relevant caselaw, in particular the Supreme Court judgment in *Welwyn Hatfield BC*¹. Lord Mance held that "too much stress... [has] been placed on the need for 'actual use'...it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is." Thus, it is incorrect to regard the commencement of use as automatically giving rise to the change of use or, conversely, to conclude that there had not been a change of use because the building was not actively occupied.
17. Also relevant is the High Court judgment in *Impey*², which concerned the conversion of dog kennels to residential accommodation. In that case, the Secretary of State had concluded that there was no breach of planning control, as the former kennels had not begun to be used for their new purpose. The Court held that Secretary of State was entitled to say that, on the evidence, there had been no change of use, but was wrong to say, as the wording of the decision letter implied, that the fact that the permission had not begun to be used was crucial. It was held that this was important, but not decisive.
18. Taking account of the relevant caselaw, I must have regard to when the building was capable of being used as a HMO, as a matter of fact and degree, bearing in mind that it is possible to find a change of use took place before the building was actually occupied. 'Actual use' remains a factor, but it is necessary to look at the evidence in the round. This includes the former use of the building, the physical state of the building at the relevant date, the actual use of the building at that date, the intended use and the whole chronology.
19. The sworn evidence shows there was a definite and clear intention to let the property as a small HMO. It is apparent that building works took place to make it suitable for that use. In addition, there is evidence of active marketing of the property for letting, the relevant certification required for use as an HMO has been provided and there are receipts for the purchase of appropriate furniture. Crucially, there are tenancy agreements and statements of fact from the occupants, confirming they lived in the house from 16 June 2021.

¹ *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15.

² *Impey v SSE & Lake District SPB* [1981] JPL 363, [1984] 47 P&CR 157 and *Backer v SSE* [1983] JPL 167.

20. Overall, I am satisfied that the building was capable of being occupied as a HMO from before the date of the Article 4(1) Direction and, moreover, actual occupation commenced prior to it coming into force. The appellant's evidence is sufficiently precise and unambiguous. I am satisfied that it has been shown, on the balance of probabilities, that the use of the building as a HMO was lawful at the date of the application.

Conclusion

21. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the existing use of the premises as a house in multiple occupation for 3-6 persons (Use Class C4) was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Debbie Moore

Inspector

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 25 August 2021 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The building was capable of being occupied as a HMO from before the date of the Article 4(1) Direction (of the Town and Country Planning (General Permitted Development) (England) Order 2015) and, moreover, there is significant evidence that actual occupation commenced prior to the Direction coming into force. The appellant's evidence is sufficiently precise and unambiguous and it has been shown, on the balance of probabilities, that the use of the building as an HMO was lawful at the date of the application.

Signed

Debbie Moore

Inspector

Date: 18 April 2023

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First Schedule

The existing use of the premises as a house in multiple occupation for 3-6 persons (Use Class C4)

Second Schedule

Land at 23 Kempton Road, Liverpool L15 1HE

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use/operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 18 April 2023

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

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Scale: NTS

