



Appeal Decision

by Elaine Gray MA, MSc, IHBC

an Inspector appointed by the Secretary of State

Decision date: 14 July 2023

Appeal Ref: APP/X5990/X/22/3308386

239 Portnall Road, LONDON, W9 3BL

- 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 Shabir Hussain Gillani against the decision of City of Westminster Council.
 - The application ref 22/01108/CLEUD, dated 21 February 2022, was refused by notice dated 4 August 2022.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is: Conversion of Flat C to three flats, (two x 2 Bed and 1 x studio) at second and third floor.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. As the determination of this appeal turns on matters of law, it was not necessary for me to carry out a site inspection.

Main Issue

3. An LDC appeal is confined to reviewing the Council's decision, to establish whether the refusal to grant a certificate was well-founded.

Reasons

The Council's reasons for refusing to grant a certificate

4. The reason for refusal is: 'The City Council served an Enforcement Notice dated 7 December 2011 which came into effect on 24 January 2012 in respect of the unauthorised self contained flat created in the roof of this property. This Enforcement Notice runs with the land and therefore the use of this floor as a flat would not be lawful and therefore your certificate of lawfulness fails for the use of three flats.'

The scope of a Lawful Development Certificate

5. A LDC is not a planning permission. Its purpose is to enable owners and others to ascertain whether specific uses, operations or other activities are or would be lawful. Lawfulness is equated with immunity from enforcement action. The issue of a certificate depends entirely on factual evidence about the history and planning status of the building or land in question and the interpretation of any relevant planning law or judicial authority. The planning merits are not relevant in deciding a LDC application or appeal. The burden of proof regarding decisive

matters of fact rests on the appellant. The relevant test of the evidence is 'the balance of probability' (i.e., that it is more probable than not).

Definition of lawfulness and its limits

6. Lawful development is development against which no enforcement action may be taken and where no enforcement notice is in force, or, for which planning permission is not required. An enforcement notice is not in force where an enforcement appeal is outstanding or an appeal has been upheld and the decision has been remitted to the Secretary of State for redetermination, but that redetermination is still outstanding.

The enforcement notice

7. In this case, an enforcement notice is in force. On 7 December 2011, the Council issued an enforcement notice alleging 'Without planning permission and within the last four years the material change of use of the second and third floors of the Property from the use as one self-contained residential flat, to the use as two self-contained residential flats comprising one self-contained two bedroom flat on the second floor and one self-contained one bedroom flat on the third floor' at 239 Portnall Road, London.
8. In terms of the reasons for issuing the notice, the Council were concerned that the new flat in the roofspace appeared to provide substandard accommodation when assessed against the standards and policies identified in paragraph 4 of the notice. The requirement of the notice is to cease the use of the third floor as a self-contained one-bedroom flat.
9. Section 6 of the notice state that 'This notice takes effect on 24 January 2012 unless an appeal is made against it beforehand.' I note that an appeal was made, but was withdrawn. Therefore, in the absence of any evidence to the contrary, the notice came into force on the specified date.

Assessment

10. Although the notice alleged development on both the second and third floors of No 293, the requirements related only to the flat on the third floor within the loft space. The appellant argues that, due to the length of time the notice has subsisted without further action from the Council, it is now irrelevant.
11. Whilst I acknowledge the appellant's concern, as noted above, LDC appeals turn on the facts of the case and the interpretation of relevant legislation. The enforcement notice either remains in force, or it does not. It is not open to me to interpret this matter or, in effect, to set aside the notice due to the time that has passed since it was issued. Because the notice remains in force, an LDC cannot be granted for the material change of use of the third floor unit.
12. Turning then to the development of the second floor, a number of issues arise. Firstly, it is evident from the wording of the notice that the Council chose to under-enforce by not requiring action to be taken to remedy the whole of the breach of planning control. Where an enforcement notice identifies a breach of planning control which could have required a use to stop, but has stipulated some lesser requirements, and all the requirements of the notice have been complied with, then planning permission is deemed to be granted for those remaining elements of the use under section 173(11) of the Town and Country Planning Act 1990.

13. However, the evidence in this case indicates that the requirements of the notice have not been complied with. That being the case, no lawfulness has accrued through this mechanism for the one two-bedroom flat on the second floor that was identified in the allegation.
14. Secondly, there is a discrepancy between the enforcement notice, which alleges one two bedroom flat on the second floor, and the development described on the LDC application form. The LDC application sought to establish the lawfulness of the conversion of the floors into three separate flats. These are Flat 239C, located within the rear closet wing at second floor level, Flat 239D, within the main property at second floor level, and Flat 239E, which is a studio flat at third floor level in the roof. The reason for this variance is unclear, and neither party comments on it.
15. Nonetheless, it is clear that the appellant seeks to establish the lawfulness of two flats on the second floor. In this case, the relevant period for issuing an LDC on the basis of immunity is ten years before the date of the application. In order to succeed, the appellant needs to show that the use of two flats on the second floor commenced on or before 21 February 2012, and continued without a material break for ten years.
16. On the LDC application form, the appellant states that the conversion work was substantially completed in 2007 and that the use began on 1 March 2008. He says that council tax payments have been made for all the flats for over ten years. However, this documentation has not been made available to me, and even if it had, the payment of council tax in itself is not determinative of continual physical occupation of a residence.
17. The appellant contends that the use of the three flats has continued in the intervening period since the notice was issued. However, as established above, this information does not tally with the enforcement notice, which indicates that only one flat existed on the second floor in 2011.
18. I note that, in support of his LDC application, the appellant submitted bank statements from 2016 to 2021 illustrating rent being received, and tenancy agreements for the three flats dated from 2015 to 2021. However, these documents have not been made available to me through the appeal process, and in any event, they do not cover a ten year period prior to the date of the application.

Conclusion

19. In conclusion, then, I have found that the material change of use of the third floor to a flat cannot have become lawful due to the fact that the 2011 enforcement notice remains in force. With regard to the material change of use to two flats on the second floor, I find that the appellant's evidence is not sufficiently precise and unambiguous to establish that immunity from enforcement has accrued, having regard to the time limits for enforcement action.
20. I therefore conclude that the Council's decision not to issue an LDC was well-founded, and the appeal should not succeed. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Elaine Gray INSPECTOR