



Appeal Decision

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 August 2023

Appeal Ref: APP/B5480/X/23/3320794

84B Upminster Road South, Rainham, Havering, Essex RM13 9AA

- The appeal is made under section 195 of the Town and Country Planning Act 1990 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 Mr John Kirkwood against the decision of the Council of the London Borough of Havering.
 - The application Ref E0047.22, dated 20 December 2022, was refused by notice dated 24 February 2023.
 - 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 one bedroom flat at rear of business.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. No site visit has been carried out as the appeal can be decided purely on the basis of the technical and/or legal interpretation of the facts. All the information needed is included with the application and appeal documents and so a decision can be reached on the papers.¹ There are no objections from the parties to proceeding in this way.
3. The appellant has submitted additional evidence with the appeal and the Council has addressed this in their Statement of Case. If only evidence from the time of the application was to be considered as part of the appeal, it denies the purpose of the LDC procedure. This is to arrive at an objective decision based on the best facts and evidence available at the time the decision is taken. In any event, it would always be open to the applicant to re-apply and it would serve no useful purpose to refuse an LDC on the basis only of the evidence submitted with the application, if subsequent evidence had come to light proving the case, on the balance of probability.
4. In addition, some of the evidence submitted with the application was not included with the appeal. The appellant was unclear whether this had been destroyed and so, in the interests of fairness, I asked the Council to provide copies if it was still available, which it was.

¹ Certificate of lawful use or development appeals- procedural guide, updated 26 July 2023, states at paragraph 7.2.11.5. "A site visit won't be needed for every appeal. It is for the Inspector to decide whether to conduct one."

Main Issue

5. The main issue is whether the Council's decision was well-founded.
6. The appellant is seeking to establish that the claimed use of the rear ground floor of the premises as a self-contained flat is lawful. In order to demonstrate lawfulness, the appellant has to show the use began either four years before the date of the application and continued without interruption until the date of the application or that the use became immune from enforcement action in another four year period, was not abandoned and that another inconsistent use has not taken place until the date of the application.

Reasons

The site

7. The appeal property comprises an end of terrace building situated on the corner of Upminster Road South and Cowper Road. There is an osteopath clinic on the ground floor and a self-contained flat above it on the first floor, both of which are accessed from Upminster Road South. The premises have been extended in the past on the ground floor to the side and rear. The side extension forms part of the clinic and the rear extension is laid out as a one bedroom self-contained flat accessed from Cowper Road.

The evidence

8. The appellant has submitted the following documentary evidence:
 - A copy of the plans accompanying planning application ref: P0706.00,
 - A letter from the appellant's accountant,
 - A letter from the 2009/2012 tenant,
 - A letter from the 2013/2014 tenant,
 - A letter and email from the 1 February 2019 to 24 January 2022 tenant,
 - A copy of a tenancy agreement dated 10 October 2016,
 - A copy of a tenancy agreement dated 1 April 2017,
 - A copy of the first page of a tenancy agreement dated 28 June 2022,
 - Copies of bank statement extracts from 23 January 2019 until 21 January 2022,
 - Gas Safety Records,
 - Copy of letter sent to Street Naming and Numbering dated 10 March 2022 and
 - Tax records for Mrs Kirkwood for tax years ending 5 April 2017 to 2021.

Other than liaising with the Council Tax team, the Council do not appear to have any other evidence of their own.

Assessment

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. Section 191(2) of the 1990 Act indicates that uses and operational development are lawful at any time if (a) no enforcement action may then be taken in respect of them because, for instance, the time for enforcement action has expired and (b) they do not contravene the requirements of any enforcement notice or breach of condition notice in force. Lawfulness in this case is to be decided at the time of the application, which is 20 December 2022 or, as set above, in an earlier period. Subsection 191(2)(b) is met here as there is no enforcement notice or breach of condition notice in force.
11. It appears the flat was formed sometime after 2000. The appellant applied for planning permission (P0706.00) to change the former shop to an osteopath clinic, to create a new front door for the flat above and to change the use of the rear extension to a one bedroom flat. The Council issued a split decision in August 2000 approving the osteopath clinic and new front door but refusing the new flat.
12. The appellant states the Council were concerned over parking provision and so he re-applied for permission for the proposed flat at some point between 2001 and 2003. He states permission was granted but neither the Council nor the appellant can produce a copy of the decision notice. This is the background to the current application.
13. Having regard to the evidence, the appellant submits that Tenant 1 rented the flat "from January 2009/2012". There is no copy of a tenancy agreement but the former tenant has signed a letter dated 7 March 2023 to confirm those dates.
14. Tenant 2 rented the flat "from January 2013/2014" and again, as there is no tenancy agreement, they have signed a letter dated 7 March 2023 confirming the occupation dates.
15. During 2015 the flat was occupied by the appellant's son (Tenant 3) but there is nothing further to support this submission such as a statutory declaration.
16. Tenant 4 signed a tenancy agreement on 10 October 2016 for a period expiring 8 April 2017. The agreement is not accompanied by any proof of identity such as a photocopy of a passport or a driving licence and it is not known how long it continued. This is unclear because Tenants 5 and 6 signed their tenancy agreement on 1 April 2017. This was for a period expiring 1 October 2017 but again there is no proof of identity. It is not known whether this became a periodic tenancy or whether Tenants 5 and 6 continued their occupation until October 2017. There is also no evidence of rent paid. As such, it appears there was a gap in occupation between October 2017 and February 2019, a period of 14 months.

17. However, Tenant 7 confirmed in a letter dated 19 March 2023 and by e-mail dated 7 December 2022 that they occupied the flat between 1 February 2019 until 24 January 2022. The extracts from the bank statements show rent payments in the name of Tenant 7 begin on 6 February 2019 and end 4 January 2022.²
18. There is a 4 month gap after Tenant 7 vacated the flat as this is when the appellant uncoupled the flat from the clinic. He sent a letter dated 10 March 2022 to the Council's Street Naming and Numbering Team to register a separate address for the flat as 84B Upminster Road South. This enabled him to organise the provision of separate utilities for the flat and the payment of Council Tax as opposed to Business Rates (the utilities were previously linked to the clinic) and to redecorate before Tenant 8 signed their tenancy agreement, which began on 1 June 2022. They have remained in occupation up to the date of the application.
19. In addition to the 4 month and 14 month gaps, the appellant has not been very specific about the end dates for occupation by Tenants 1, 2 and 3. It is not clear whether there has been continuous use with, for example, Tenant 1 vacating by the end of December 2012 and Tenant 2 moving in at the start of January 2013.
20. The appellant has also provided a letter from his accountant which confirms he has been acting for the appellant since the 2011/2012 tax year. The accountant states income generated from the flats has been declared through self-assessment tax returns as part of the appellant's sole trader business since 2011/2012. Extracts from the submitted tax records are in relation to Mrs Kirkwood and this accords with the bank statements showing the receipt of rent, which are in Mrs Kirkwood's name.
21. I find the gas safety records do not assist the appellant's case as they are in relation to flat 84A Upminster Road South. The appellant now accepts this.
22. Having regard to the totality of the evidence, the appellant has shown periods of residential use for the flat. However, it has not been possible to identify any period of 4 years continuous use. Whilst it is accepted that there can often be *de minimus* breaks in the use, for example, a fortnight to redecorate a flat, the 4 months and 14 months are significant breaks. They amount to a substantial interruption in the use either between Tenants 5/6 and 7 or between Tenants 7 and 8. In addition, the evidence submitted to support occupation by Tenants 1 to 3 is imprecise and ambiguous. There is nothing to contradict the evidence of the accountant but it does not show that rent was paid every month for 4 continuous tax return years.
23. The Council submit that no Council Tax has been paid for the flat which accords with the appellant's submission that up until 2022 he paid Business Rates. Therefore, whilst there is no evidence to contradict the appellant's submissions, on the balance of probabilities they do not demonstrate that the use is lawful.
24. As with all LDC applications, it is open for fresh applications to be made if, for example, other evidence comes to light.

² Other payment dates are: 2 Dec 2019, 3 Jan 2020, 4 Jan 2021, 3 Nov 2021 and 31 Dec 2021.

Conclusion

25. For the reasons given above, I conclude the Council's refusal to grant a certificate of lawful use or development in respect of the use of the rear extension as a one bedroom flat was well-founded and that the appeal should fail. I will exercise the powers transferred to me under section 195(3) of the 1990 Act as amended.

D Fleming

INSPECTOR