



Appeal Decision

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 August 2023

Appeal Ref: APP/N5660/X/23/3320645
35 Tunstall Road, London SW9 8BZ

- 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 Bankway Properties Ltd against the decision of the Council of the London Borough of Lambeth.
 - The application Ref 22/04451/LDCE, dated 14 December 2022, was refused by notice dated 8 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 use of the property as a house in multiple occupation (HMO) (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.

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 Council changed the description of the development by adding that the use sought was in respect of the ground, first and second floor of the property. The Planning Practice Guidance (PPG) advises that 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. As the appeal site comprises a large property, I believe the Council were correct to clarify the description of the use, for the avoidance of doubt and there would be no injustice if I were to proceed on the basis of the amended description.

Main Issue

4. The main issue is whether the Council's decision was well-founded.
5. The appellant is seeking to establish that the claimed HMO use is lawful. In order to demonstrate lawfulness, he has to show the use began either ten

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."

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 period, was not abandoned and that another inconsistent use has not taken place until the date of the application.

Reasons

The site

6. The appeal property comprises a mid-terrace building with three floors of accommodation laid out as three non self-contained flats. At ground level there are two bedrooms, a shower and kitchen accessed from the communal hallway with a WC accessed from the kitchen. At first floor level there is a similar layout but with the WC accessed from one of the bedrooms and a shower accessed from the communal hallway. At second floor level there are two bedrooms and a kitchen accessed from the communal hallway with the WC accessed from the kitchen. This layout is shown on the submitted plan accompanied by a small selection of photographs.

The evidence

7. The appellant has submitted the following documentary evidence:

- Statutory declaration of Annette Wooff
- Rent register documents, ground floor
- Rent register documents, second floor
- Valuation Office Agency registration document and
- Council Tax records.

The Council refer to the planning history of the property but do not appear to have any other evidence of their own.

Assessment

8. 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.
9. 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 14 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.
10. The appellant states that he has owned the property since 1 April 2004 and that the HMO use began on 24 August 2005. It appears from the 2010 Rent Register evidence though that the ground floor of the property has had a

regulated tenancy since 1976 and was last registered by the appellant on 21 November 2007 for non self-contained rooms, a shared shower room and an outside WC. The second floor Rent Register information dates from 2002 and lists the name of what appears to be the previous company landlord, who last registered the property in 1991. The facilities are described as three rooms on the second floor with a shared shower room on the ground floor and an outside WC.

11. It would appear from this evidence that the property in the first instance has not been a Class C3 dwellinghouse for a long time and that a material change of use probably took place prior to the 2010 amendments to the Use Classes Order and the Town and Country Planning (General Permitted Development)(England) Order 2015 (the GPDO).² Some Councils have introduced Article 4 Directions to remove such permitted development rights. This is in order that they can control the numbers of HMOs in certain areas, through decisions on express planning applications. However, the Council's Officer report states that the site does not lie within a conservation area, the dwelling is not a listed building and there are no other relevant planning constraints on the property.
12. Notwithstanding this, the appellant no doubt relies on the August 2005 date as from that date until 21 March 2019 (that is a period of 14 years) the property was inspected and managed by the appellant's agent, Hamways. A statutory declaration from Ms Wooff of Hamways states that she carried out those inspections. During this time, she states that the "site was used continuously as" three non self-contained flats with a shower on the first floor shared between the occupants of the first and second floor. Ms Wooff describes the property as being occupied by three tenants which means the use fell within that of a HMO where a basic amenity (the shower) is shared between at least two people and the property is occupied by at least three occupants.³ She also states that "during my involvement" the property was not used as a single dwelling or on a self-contained basis.
13. The Rent Register documents for the ground floor show Tenant 1's name appears on the register on 11 January 2010 and thereafter every two years until 9 February 2016. Tenant 2's name appears from 28 February 2018 until 28 February 2020. With regard to the second floor, Tenant 3's name appears from 10 April 2002 and recurs 21 November 2009, 2011, 2013, 2015 and 2017.
14. Although there are gaps in the register, it is more likely than not that Tenant 1 continued to occupy the ground floor in between the recorded dates as opposed to moving out and then re-occupying the space. The same goes for Tenant 2 and therefore the occupation of the ground floor amounts to 10 years of uninterrupted use. There is a more pronounced gap between 2002 and 2009 for Tenant 3 but together with the sworn declaration by Ms Wooff, I find it is still more likely than not that there was continuous uninterrupted use by Tenant 3 of 15 years.

² The Town and Country Planning (Use Classes) Order 1987 was amended in 2010 with the introduction of Class C4 and a new permitted development right (Class L) was introduced to the GPDO to change from Use Class C3 Dwelling house to Use Class C4 HMO.

³ Use Class C4, Interpretation section refers to the Housing Act 2004 definition of a HMO

15. As there is no Rent Register evidence for the first floor, the appellant has submitted an extract from the Valuation Office Agency (VOA) Register of Fair Rents, dated 2011. This shows that the landlord made an application for a fair rent on 7 September 2011 for the first floor, which it records comprised a shared shower room and three rooms. The extract shows that the tenancy began before 15 January 1989 and that there had been a previous registration for a fair rent in November 2009. The extract records the name of the appellant's agent as being Hamways, which correlates with the information given in the statutory declaration, and also provides the name of the tenant. The appellant states there has been no change in the VOA registration status of the first floor of the property since 2011 and on that basis, it appears that the first floor has been used as part of the HMO for at least 11 years.
16. The appellant has also submitted evidence of Council Tax bands but these show each floor is labelled as a flat. Although the appellant submits this is helpful as the records do not show banding for a dwelling house use, I find it does not assist the appellant's case as the flats are simply described as flats, not non self-contained flats.
17. The Council's evidence to contradict what has been submitted relies on statements made within a planning application (dated 2020) and an LDC application (dated 2022) to the effect that the property was in use as a dwelling house at the time of the applications. The appellant has explained the property was described as such as there had been no investigation by the agent into the history of the property when making the applications.
18. Having regard to the totality of the evidence and its overall consistency, I find it has been demonstrated that the layout of the property has not changed since at least 2005, and that the layout has probably been the same since before that date. It has also been demonstrated, on the balance of probabilities, that three various individuals have shared the property for over 10 years.
19. It is inevitable when seeking to document a material change of use that has occurred over 10 years ago that sometimes there are gaps in the evidence. This is why the test for the evidence is "on the balance of probabilities", namely what is more likely than not. That balance of the evidence need only be slightly more than half in order to satisfy the test.
20. The property has gradually been vacated to allow for a proposed extension and refurbishment works. The non self-contained flats were emptied on the following dates: the second floor: September 2018, the ground floor: August 2021 and the first floor: November 2021. An application for an existing LDC is essentially seeking to confirm that *on the date of the application* (my emphasis), which in this case is 14 December 2022, the described use is lawful. The described use had ceased by the date of the application but there is no evidence from the Council to contradict the appellant's statement that the HMO use had neither been abandoned nor that another inconsistent use had taken place.
21. Notwithstanding some gaps in the evidence, I find they do not make the appellant's version of events less than probable. In my view, the appellant's evidence is sufficiently precise and unambiguous to support the claimed use and, as such, I conclude that the HMO use is therefore lawful.

Conclusion

22. 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 HMO use of the property 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.

D Fleming

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 14 December 2022 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black 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:

On the date on which the application was made, the use described in the First Schedule was an established lawful use that had not been supplanted or abandoned.

Signed

D Fleming

Inspector

Date 17 August 2023

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First Schedule

Use of the ground, first and second floor as a house in multiple occupation (HMO), (Use Class C4).

Second Schedule

Land at 35 Tunstall Road, London SW9 8BZ

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 /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were 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: 17 August 2023

by **D Fleming BA (Hons) MRTPI**

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Scale: not to scale

