



Appeal Decision

Site visit made on 11 July 2023

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

an Inspector appointed by the Secretary of State

Decision date: 14 September 2023

Appeal Ref: APP/D1780/X/22/3299532

110 Milton Road, Southampton, SO15 2HW

- 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 Mark Denton against the decision of Southampton City Council.
- The application ref 21/00591/ELDC, dated 30 March 2021, was refused by notice dated 28 January 2022.
- 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 as an existing HMO.

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 found to be lawful.

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 his 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 his evidence alone is sufficiently precise and unambiguous, that is enough. Evidence should not be rejected simply because it is uncorroborated.
4. On 6 April 2010, an amendment to the Use Classes Order¹ introduced a definition of small-scale houses in multiple occupation (HMO) into the planning system. It effectively split the old Class C3 (dwellinghouse) class into 2 separate classes – Class C3 (dwellinghouse) and Class C4 (HMO). Consequently, development previously falling under Class C3 was reclassified into either the new C3 or C4 Classes. The reclassification did not amount to a change of use requiring planning permission.
5. For the purposes of the Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO), Class C3 dwellinghouses is now formed by 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.

¹ The Town and Country Planning (Use Classes) (Amendment) (England) Order 2010

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)².

6. 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 the Housing Act 2004.
7. The change of use from C3 to C4 and vice versa is normally permitted development under Schedule 2, Part 3, Class L of the GPDO³. However, it is undisputed that the Council introduced a city-wide Article 4 Direction on 23 March 2012 to remove permitted development rights for a change of use from Class C3 to Class C4.

Main Issue

8. 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 appeal property changed to a HMO on or before 30 March 2011⁴, at a time when such a change was not permitted development, 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

9. The appellant's joint statutory declaration (SD) (with his wife) states that the property has been let, or available to let, to three unrelated tenants as a HMO continuously since 2004.
10. The appellant refers to pre-application advice from the Council which states that, rather than there being a requirement to provide evidence of 10 years continuous occupation, an application for a LDC need only demonstrate that No 110 Milton Road was in a Class C4 use at the time as the Article 4 direction was introduced on 23 March 2012, and has remained in a continuous Class C4 use since that date.
11. That approach is incorrect. S191(2)(a) of the 1990 Act explains that uses are lawful at any time if '*no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason)*'. S171B(3) 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 have become immune from enforcement action. Having regard to s171A(1), use, in itself, is not an act of development.
12. The permitted development rights for a change of use from Class C3 to C4 came into force on 1 October 2010⁵. Consequently, if the Class C4 use of the property commenced between that date and the date of the Article 4 direction coming into force (23 March 2012), there would not have been a breach of

² 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

³ The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)

⁴ This being the date 10 years prior to the LDC application.

⁵ The Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2010

planning control. For there to have been a breach of planning control, the material change of use to a HMO must have commenced before the permitted development rights came into force or after the Article 4 direction came into effect.

13. As there isn't sufficient time between the date of the application and the Article 4 direction coming into force to achieve the 10-year immunity period to be a Class C4 HMO, a breach to that effect must have commenced in the relatively short window between 6 April 2010, when Class C4 HMO was introduced as a use class, and 1 October 2010, when the permitted development rights came into force. However, that can be ruled out in this case because the appellant's SD states that the use commenced in 2004.
14. Therefore, although the appellant has questioned the Council's interpretation of the definition of Class C4, as requiring a minimum of three occupants, that is not relevant in this case, as a LDC cannot be granted in those terms for the reasons explained.
15. Prior to 6 April 2010, Class C3 amounted to use as a dwellinghouse by a single person or by people living together as a family, or by not more than six residents living together as a single household. The pertinent issue is whether there was a material change of use from a Class C3 dwellinghouse to a HMO, rather than specifically a Class C4 HMO.
16. As noted, the appellant's SD states that the appeal property has been let, or available to let, to three unrelated tenants as a HMO continuously since 2004. The appellant's accountant, who has acted for him since February 2004, corroborates the same.
17. 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 occupants of a single household, who would have been more likely to carry out activities on a communal basis.
18. 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.
19. It is, therefore, more probable than not, that the commencement of the use of the property by three unrelated tenants, marked the date of a breach comprising a material change of use from a Class C3 dwellinghouse to a HMO.
20. The Council Tax records show No 110 as a multi occupancy household since 2008 but, as payment is made by the owners, no details are held regarding the tenants or the number of tenants in occupation. The Council's Electoral Roll published on 1 December 2011 indicates that there were three occupants living in the property at the time of the Article 4 direction and that they have different surnames, thereby indicating that there were three unrelated adults. The Council further acknowledge that the names provided on the Electoral Roll are consistent with the names provided on the submitted tenancy list for this

- period. The Council therefore accept that the property was operating as a Class C4 HMO at the time of the Article 4 direction (March 2012).
21. Whilst the above, largely corroborating evidence does not start until 2008, the Council does not provide any evidence that contradicts the appellant's version of events, which is set out in a SD and therefore capable of attracting significant weight, that the HMO use commenced in 2004. Consequently, on the balance of probabilities, the property was used as HMO from sometime in 2004 to at least March 2012.
 22. For the period between March 2012 and April 2021 a record of the tenant activity at the property has been provided by the appellant's accountants. That shows that between March 2012 and September 2018 the property was occupied without material interruption by three persons with different surnames. That is further corroborated by the appellant's bank statements which show rent being paid into his wife's bank account by the corresponding tenants for each individual month between June 2012 to August 2018.
 23. An unsigned letter from Amy Fenna dated 18 June 2020 states that she had been the 'lead' tenant of No 110 since March 2009. She confirms that over this period the house was always operated as an HMO with three unrelated tenants occupying it throughout.
 24. Five sworn affidavits are provided from different tenants who occupied the property between March 2014 to February 2015, May 2015 to June 2017, August 2015 to May 2016, July 2016 to August 2018 and July 2017 to August 2018. All confirm that during their respective tenancy periods the house was run as a HMO with three separate tenants or households in residence.
 25. The evidence therefore shows that even taking a date at the end of 2004 for the initial breach, the property had been used as a HMO without material interruption for a period of more than 10 years by August 2018, on the balance of probabilities.
 26. Nevertheless, it is undisputed that the tenant record and the corresponding bank statements show that between September 2018 and March 2020 the property was occupied by two people. The Council's view is this level of occupancy falls outside the definition of a HMO and that given the use on that basis continued for more than a year, a change of use to Class C3 took place, pursuant to Class L permitted development rights. The Council argue that the subsequent change back to a Class C4 HMO represents an unlawful material change of use which is not immune from enforcement action.
 27. However, over the extended vacancy period the appellant confirms in his SD that he marketed the vacant room to potential HMO tenants but found it difficult to find someone suitable. In that regard, the appellant's accountant confirms that the VAT receipts from SpareRoom relate to the adverts placed advertising rooms within the house when they became available. It is evident from the same that adverts were placed between September 2018 and January 2019. A signed letter from Tenant Direct also confirms that, following a site visit in February 2019 they were appointed by the appellant to advertise a bedroom at the property through to April 2020. This evidence and that discussed below, therefore corroborates the appellant's SD that he was actively marketing the third room during the extended vacancy period.

28. Moreover, the unsigned letter from Amy Fenna acknowledges that there were occasional times when there were less occupants due to the natural turnover of tenants, but whenever this was the case either she or the landlord were always advertising to fill the rooms. Although the unsigned letter on its own carries limited weight, the Council acknowledge the consistency of her occupation with its Electoral Roll.
29. The SD of Kate Alderson states that she was a tenant of a room at No 110 from October 2018 to March 2020, which covers most of the extended vacancy period for the third bedroom. She confirms that throughout her tenancy there was only one other unrelated HMO tenant and that they lived as separate households. She also states that she was well aware she was taking a tenancy in a HMO with three letting rooms and that although the third room was vacant she expected another tenant to move in as the room was advertised, and that there were several viewings by letting agents.
30. The appellant also argues that the way in which the property was used by the other tenants did not change because the third bedroom was vacant. He also explains that the bedroom was locked and unavailable for their use and that there was no intention to change the use of the property to Class C3 and no such steps were taken.
31. In that regard, the tenancy records show that after May 2020 the property was largely continuously occupied by three people up to and beyond the date of the application on 30 March 2021. Signed and witnessed tenancy agreements are provided for those individual tenants. Bank statements corroborating the rent payments for the individual tenants are also provided up to September 2020.
32. Therefore, although September 2018 to April/May 2020 is a significant period of time, taking matters in the round, it is more likely than not that the use of the property as a HMO did not cease during the time when it was occupied by only two people and thus, as a matter of fact and degree, did not revert to a Class C3 use. Moreover, up to the date of the application, there was no intervening material change of use which extinguished the lawfulness established by September 2018.
33. Under s191(4) of the 1990 Act, any LDC granted must describe the existing use or development found to be lawful. That may not be exactly what was written on the application form, and so s191(5) enables a local planning authority to modify the description. An Inspector may exercise that power on appeal and is indeed obliged to issue an LDC for any existing use or development that is shown to be lawful on the facts and evidence.
34. In this case, the use which has become immune from enforcement action is a HMO for three unrelated residents.

Other Matters

35. The appellant highlights that the Council decision certifies that the use is not lawful. However, s191(4) of the 1990 Act states that *'If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use..., they shall issue a certificate to that effect; and in any other case they shall refuse the application.'* It is not therefore open to the Council to certify that a use is not lawful. A LDC should be granted or refused.

Conclusion

36. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a LDC 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.

Richard S Jones

INSPECTOR



The Planning Inspectorate

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 30 March 2021 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:

It has been demonstrated, on the balance of probabilities, that the use of the property as a HMO for three people had taken place for a period of more than ten years without material interruption by the date of the application so the time for taking enforcement action under s171B(3) of the Town and Country Planning Act 1990 had expired.

Signed

Richard S Jones

INSPECTOR

Date: [14 September 2023]

Reference: APP/D1780/X/22/3299532

First Schedule

Use as a house in multiple occupation for three unrelated residents

Second Schedule

Land at 110 Milton Road, Southampton, SO15 2HW

IMPORTANT NOTES – SEE OVER

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 described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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.



The Planning Inspectorate

Plan

The plan referred to in the Lawful Development Certificate dated: 14 September 2023

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

Land at: 110 Milton Road, Southampton, SO15 2HW

Reference: APP/D1780/X/22/3299532

Scale: not to scale

H.M. LAND REGISTRY		TITLE NUMBER	
		HP341346	
ORDNANCE SURVEY PLAN REFERENCE @	SU 4112	SECTION F	Scale 1/1250
COUNTY HAMPSHIRE	DISTRICT SOUTHAMPTON	© Crown copyright 1975	

