Appeal Decision

by G Robbie BA(Hons) BPl MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6 November 2023

Appeal Ref: APP/N4720/X/22/3310229
4 Broomfield Terrace, Headingley, Leeds LS6 3DQ

- 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 Jonathan Rostron (J & L Homes Limited) against the decision of Leeds City Council.
- The application ref 22/02010/CLE, dated 23 March 2022, was refused by notice dated 19 May 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 the use of the property as a small House in Multiple Occupation (C4 use).

Summary Decision: The appeal is dismissed.

Formal 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. Whilst I am satisfied that the information needed to determine the appeal was included with the application and appeal documents so that a decision may be reached on the papers[1], the views of both main parties were sought regarding changes made to the Use Classes Order[2] (UCO), General Permitted Development Order[3] (GPDO) and Circular guidance[4] in 2010 regarding the Use Class classification of small houses in multiple occupation (HMO). I have determined the appeal accordingly.

3. For the avoidance of doubt, I have taken the date of the LDC application as being that set out by the appellant on the initial application form.

Main Issue

4. The main issue is whether or not the Council's decision to refuse the LDC was well-founded.

[1] '*Certificate of lawful use or development appeals: procedural guide*' (updated 18 August 2023). Paragraph 7.2.11.5 states '*A site visit won't be needed for every appeal. It is for the Inspector to decide whether to conduct one.*'
[2] The Town and Country Planning (Use Classes) Order 1987 as amended by the Town and Country Planning (Use Classes) (Amendment) (England) Order 2010 (SI 2010/653)
[3] The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2010 (SI 2010/654) and The Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2010 (SI 2010/2134)
[4] Department for Communities and Local Government Circular 08/2010 (November 2010)

Reasons

5. In an appeal against refusal of an LDC, the onus is on the appellant to make out their case to the standard of 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, provided that it is sufficiently precise and unambiguous.

6. 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 in force. With regard to s191(2)(a) lawfulness is to be determined at the time of the application, which is 23 March 2022. S191(2)(b) of the Act is met here as there is no enforcement notice in force.

7. In order for the application to succeed, in accordance with s171B(3) of the Act, it is necessary for the appellant to demonstrate, on the balance of probability, the use of the property as a small HMO (C4) use has continued for a period of ten years or more prior to the date of the application, therefore since at least 23 March 2012. Any 10-year period of continuous use prior to the application date would potentially be sufficient to accrue lawfulness. Within the appellant's appendices I and II, a list of tenancies and copies of the tenancy agreements ostensibly show at least 3, and mostly 5 people living together in a manner provided for as a small HMO.

8. There are some gaps in this timeline, however. As initially submitted, the first periods of tenancy appear to commence individually between August and October 2012. After that, there are generally short summer breaks which appear to correspond with the student summer break. Such breaks would support the notion that the property contributes towards the provision of student accommodation based around an academic year. For a property described by the appellant as providing student accommodation as an HMO I consider these short gaps to be neither exceptional nor fatal to the appellant's case.

9. The relevant date in this instance is that of the application, namely 23 March 2022. However, the submitted evidence leaves an undocumented and unevidenced period from June 2020 up to the date of the application. The Council is correct in noting that the indication that tenants at the end of the documented period in June 2020 continued their tenancies forward on a 'rolling' basis is not demonstrated or supported by evidence. Nor, if indeed the tenants did roll forward on that basis, how many continued to do so or the manner of that occupation whilst neither witnessed statement addresses the period after 30 June / 1 July 2020.

10. The appellant maintains that an application was made to the Council for an HMO licence in July 2020, closely following the end of the most recent documented tenancy. Whilst there might be no record of an HMO licence having been refused since 2020 there is, equally, no record of one having been granted. Although I have no reason to believe that this matter would not be resolved I cannot be certain that it would do so favourably for the appellant. In any event, this would not necessarily demonstrate continued use since 2020.

Furthermore, although other, more anecdotally based, references suggest that the property was occupied in a manner consistent with current small HMO use going back as far as the mid-1970s, this is largely unsubstantiated to the extent that the weight I can give it is limited.

11. Both main parties cite various appeal decisions and cases to support their respective positions regarding this matter. The appellant refers to an appeal decision[5] which, in turn, cites *Ocado*[6] that the 10-year period required for a use to gain immunity from enforcement action, and thus be capable of being certified lawful, must end prior to the date of an LDC application, but need not be the 10 years immediately preceding it. Thus, the right accrued is not lost even if it has not been exercised for a period of time, provided that it has not been abandoned or a new use introduced.

12. The Council for its part, cites *Thurrock*[7] stating the necessity to establish continuous use and that whether any break in use is sufficient to 'stop the clock' is a matter of fact and degree. A further, un-referenced appeal decision regarding motorcycling activities at a farm in South Wales concluded that an 18-month break brought about by foot-and-mouth disease restrictions was sufficient to 'stop the clock', notwithstanding an intention to resume and factors outside the appellant's control.

13. During the course of this appeal, the appellant has submitted further tenancy agreements for the period 2008-'09 to 2011-'12. These take the same format as those initially submitted for subsequent years and show occupancy by between 3 and 5 persons across that period. With the qualification previously expressed regarding academic year-based occupancy and tenancy periods, these additional tenancy examples extend the documented period back to at least 2008.

14. Notwithstanding the claim, on the face of it, of HMO use going back to 1976, there is a lack of supporting evidence to corroborate this, and that the use was continuous prior to the first of the (submitted) tenancy agreements commencing in 2008. Whilst the tenancy agreements and tenancy information that has been submitted indicates lengthy periods of small HMO use between 2008 and 2020, these do not account for a period between mid-March 2015 and start of October 2015 between tenancies when the property was not occupied.

15. This break represents a significant deviation from the shorter, more typical summer break pattern seen elsewhere across the tenancy summary. The appellant has explained that this was to allow a period for a 'full refurbishment' of the property. Whilst periods of refurbishment of HMOs, particularly for those properties with a regular turnover of occupants such as student HMOs, may not necessarily be exceptional or unexpected, the length of this break and the otherwise relatively consistent pattern of occupation at the appeal property either side of it is somewhat incongruous.

16. The stated period of refurbishment from 3 March 2015 to 1 October 2015 (the 2015 refurbishment) is supported by the witnessed statements. However, what

[5] APP/N4720/X/21/3286837
[6] Ocado Retail Ltd v Islington LBC [2021] EWHC 1509 (Admin)
[7] Thurrock BC v SSETR & Holding [2002] EWCA Civ 226

constitutes a 'full refurbishment' is not explained. Nor have I been provided with any other evidence relating to the refurbishment such as, for example, receipts or delivery notes for materials or 'before and after' floor plans. Whilst I do not doubt the veracity of these statements regarding the period of refurbishment, a period of almost 7 months nevertheless represents a significant, and in my judgement, fatal break in the continuity of use of the appeal property as an HMO. During this period I am not persuaded that a breach would have been apparent, that is that the building was being put to a small HMO use, and therefore that the Council could have taken enforcement action during this time. The presence of an HMO licence at the appeal property since 2007[8] does not alter this conclusion.

17. There is, therefore, considerable uncertainty regarding the most recent use of the appeal property given the relative absence of documented evidence for that period, compared with tenancy agreements provided for earlier periods. It is also clear that the period of refurbishment in 2015 was sufficiently lengthy to go beyond the regular 'student summer holiday' break periods regularly documented by the appellant's tenancy agreements. Thus, the evidence provided does not clearly or unambiguously demonstrate, on the balance of probability, that the appeal property was occupied as a small HMO at the time of the application. Nor, having regard to *Ocado* and *Thurrock,* am I persuaded that the appellant has demonstrated on the balance of probability the required 10-year period of continuous use during a period prior to the date of the application.

18. Additional tenancy agreements submitted during the course of the appeal support the appellant's case that the property had been in use as a C4 small HMO for a further period of at least 4 years prior to 2012. The evidence submitted in this respect, in the form of tenancy agreements, is similar to that for the period from 2012 until 2020. This, the appellant argues, means that the property was in use in a manner akin to what was to become a C4 small HMO use by virtue of the amendments made to the UCO[2], the GPDO[3] and Circular guidance[4] prior to those amendments coming in to force in 2010 and prior to the removal of permitted development rights by the Council in February 2012. As such, it is argued, such use was in fact permitted development.

19. However, the rights conferred by these changes would only have applied from October 2010 until February 2012, when the Council made an Article 4 Direction to restrict such changes. It is clear from the appellant's submissions that it is argued that the small HMO (C4) use of the appeal property pre-dated the changes to the UCO and GPDO from 2010. However, there was no provision within those amendments for the retrospective approval of a change of use to a small HMO that had, as the appellant seeks to set out, occurred before 1 October 2010. Furthermore, if, as the appellant has also sought to argue, the property was occupied in a manner akin to a C4 small HMO prior to the 2010 changes, it did not fall within the remit of a C3 dwellinghouse use and the C4 Use Class did not, at that time, exist. As such, it would have been beyond any Use Class (therefore, a *sui-generis* use) and could not therefore benefit from any such allowance.

[8] Figure 3 / paragraph 6.4 Appellant's Statement of Case

Conclusion

20. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the appeal property as a small House in Multiple Occupation (C4 use) was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

G Robbie

INSPECTOR