



Appeal Decision

by **N Thomas MA MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 8 December 2023

Appeal Ref: APP/N5660/X/23/3319486

115 St. Julians Farm Road, London SE27 0RP

- 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 Fairlie Properties Ltd against the decision of London Borough of Lambeth.
 - The application ref 22/01273/LDCP, dated 7 April 2022, was refused by notice dated 31 May 2022.
 - The application was made under section 192(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 as a single dwellinghouse.
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Fairlie Properties Ltd against the London Borough of Lambeth. This application is the subject of a separate Decision.

Preliminary Matter

3. As the decision turns on a legal matter, a site visit was not necessary in order to determine the appeal.

Reasons

4. In an application for an LDC, the onus is on the applicant to provide all the relevant information and evidence to support their case. On appeal, the Inspector's role is to decide whether, on the evidence, the Council's refusal to issue an LDC was well-founded or not. The case must be considered solely on the relevant legal tests and the planning merits are of no relevance. The burden of proof lies with the appellant, who must show, on the balance of probabilities, that the development proposed would, at the date of the application, be lawful. The decision turns on whether it would be lawful for the use of the building to change from a House in Multiple Occupation (HMO) and a flat, to a single dwellinghouse.
5. The property was acquired by the appellant as a single dwellinghouse in 2011. From 2012 to 2018 it was used as two self-contained units. One was a small HMO and the other was a two bedroom flat. From 2018 to 2021 it was used as two units but with a different internal configuration, so that it provided a small HMO and a four bedroom flat. Between late October and early November 2021, the property was empty and was renovated. The Council has not provided any factual evidence to contradict the appellant's version of events.

6. It has been established by case law that a lawful use is lost in specific circumstances, one of which is if there has been a material change of use to some other use.
7. Section 55(3)(a) of the 1990 Act states that 'the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used.'
8. The supporting information confirms that in both configurations there were two physically and functionally separate units that provided all the facilities required for day to day private domestic existence with their own access points. The evidence therefore indicates, on the balance of probabilities, that a material change of use took place in 2012 to two dwellinghouses.
9. There is no legal right to revert to a previous lawful use of the land, because section 57(1) of the 1990 Act sets out that planning permission is required for the carrying out of any development of the land. Under section 57(4) of the 1990 Act, where an enforcement notice has been issued, planning permission is not required for the use of land for the purpose for which it could lawfully have been used if that development had not been carried out. As an enforcement notice has not been issued, the exception in section 57(4) does not apply. Even though planning permission was not sought for the change of use to two residential units, the previous lawful use of the property as a single dwellinghouse was lost through the material change of use. Planning permission is therefore required for a material change in the use of the building to a single dwellinghouse.
10. In order to determine whether a material change of use would occur, the lawfulness of the primary use of the land must be established, as a valid starting point from which to assess the materiality of any proposed use. Section 191(2)(a) of the 1990 Act provides that uses are lawful at any time if no enforcement action may be taken in respect of them because the time for enforcement action has expired. As the time limit for enforcement action in relation to an HMO is 10 years, the appellant's evidence indicates, on the balance of probabilities, that immunity is unlikely to have been achieved.
11. The appellant suggests that the HMO could revert to a dwellinghouse using permitted development rights. However, the permitted development right to change from use class C4 (HMO) to C3 dwellinghouse¹ is not available as the evidence indicates that the use as an HMO has not achieved immunity from enforcement action. Article 3(5)(b) of the GPDO sets out that the permitted development rights do not apply if the existing use is unlawful.
12. The case of *Fairstate*² relates to a deemed material change of use in Greater London of long-term residential accommodation to short-term sleeping accommodation, as a result of section 25 of the Greater London (General Powers) Act 1973 as amended. In that case, the change of use from temporary sleeping accommodation back to longer term residential accommodation was found not to be a material change of use and therefore did not require planning permission. It therefore differs from this case. I note that *Fairstate* also makes

¹ Under Class L Part 3 Schedule 2 of the General Permitted Development (England) Order 2015 as amended (GPDO)

² *Fairstate Ltd v First Secretary of State & Westminster City Council* [2005] EWCA Civ 283, [2005] JPL 1333

it clear that there is no legal right to revert back to the previous lawful use unless an enforcement notice is in force.

13. Councils have discretion as to the use of their powers of enforcement. In some cases they may consider it expedient to seek to secure the cessation of an undesirable or harmful use prior to taking formal enforcement action and may encourage the land owner or developer to revert to the previous use. In this case, the unauthorised subdivision of the property occurred some considerable time ago and carried on without any intervention from the Council and a material change of use has taken place. It is not therefore the case that the reinstatement of the use as a single dwellinghouse would allow the breach of planning control to be resolved.
14. On the balance of probabilities, I therefore conclude that the proposed use of the site as a single dwellinghouse would not be lawful on the date of application.

Conclusion

15. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use as a single dwellinghouse 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.

N Thomas

INSPECTOR