



Appeal Decision

Inquiry Held on 12 December 2023

Site visit made on 13 December 2023

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 January 2024

Appeal Ref: APP/C5690/X/22/3295403 6 Havelock Walk, London SE23 3HG

- 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 Donall McCusker against the decision of the Council of the London Borough of Lewisham.
 - The application Ref DC/21/124681, dated 07 December 2021, was refused by notice dated 01 February 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 described as "Change of use from live-work unit to single family dwellinghouse (use class C3)".
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Decision

1. The appeal is dismissed.

Procedural Matters

2. All oral evidence to the Inquiry was given on oath or sworn affirmation.
3. The description of the development varies between the application form (as outlined in the banner heading) and the Council's decision letter which describes the development as "Lawful Development Certificate (Existing Use) to establish that building 6 Havelock Walk, SE23 has been in use as a single-family dwelling (use class C3) for the last four years". This description also appears in the appellant's appeal statement. During the Inquiry, counsel for the appellant confirmed that they agree to this revised wording. Therefore, I am satisfied that neither party would be prejudiced by this change, and I have determined the appeal on this basis.
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 its planning merits are of no relevance in the context of an appeal made under section 195 of the 1990 Act as amended. The appellant must show, on the balance of probability, that the development at the date of application is lawful.

Main Issue

5. The main issue is whether the Council's refusal of an LDC was well founded. It is necessary to consider whether the appellant has proved on the balance of probability that the use of the site at 6 Havelock Walk, changed to a single family dwellinghouse (use class C3) on or before 7 December 2017 (that being 4 years prior to the date of the LDC application) and that the use then continued without substantial interruption for 4 years after the date of the change; and if so
 - whether that breach of planning control was deliberately concealed in a manner which should result in the appellant being deprived of the immunity offered by section 171B of the Act.

Reasons

6. The site relates to a three-storey building, which historically formed part of a larger commercial unit, 6-12A Havelock Walk. Planning permission was granted in January 2004 for the 'alteration and conversion of the existing warehouse at 6 Havelock Walk, SE23, together with the construction of an additional floor, to provide 2, two bedroom live/work units and the provision of a balcony at first floor level and roof terrace at second floor level' (the 2004 permission¹).
7. Conditions 5-8 of the 2004 permission deal with the live/work use permitted. The related s106 agreement makes clear that the work aspect will be on the ground floor and residential part will be located at first and second floors of the respective units created. The work aspect is defined as the Workshop/Studio Area or Workshop Area, which is to be used within use class B1 only. This permission resulted in the subdivision and creation of Nos 6 and 6A Havelock Walk which exist today.
8. The appellant's case is that the use of the property, including the ground floor work part, changed to a single family dwellinghouse (use class C3) on or before 7 December 2017 (that being 4 years prior to the date of the LDC application) and that the use then continued without substantial interruption for 4 years after the date of the change. In support of the LDC application, the appellant has sought to provide evidence that the site has been a single family dwellinghouse for a period of approximately 10 years (since 26 October 2011). However, the Council maintains its reason for refusing the application, which essentially is that insufficient and contradictory evidence has been provided to support this claim.
9. I shall focus on the appellant's own evidence, the starting point being Mr. McCusker's statutory declaration dated 6 December 2021 (the declaration). The declaration states that Mr. McCusker has lived at 6 Havelock Walk since 26 October 2011, following the purchase of the property with his partner Karen Wagg, and that they have continued to occupy the property continuously up to the present day and during that period the property has been used solely as a single-family dwelling. To corroborate this, Council tax bills (between the years 2013-2021), in addition to floor plans and photographs of the appeal site are submitted, which the appellant considers demonstrates that the use of the property as a domestic dwelling.

¹ Council ref: DC/02/052945

10. However, the appellant accepted during the Inquiry, that the first photograph within the supporting statement shows “nothing,” and that the second photograph pre-dates his family’s occupation of the site in October 2011, and was taken from the 2011 sales particulars for the site which is described as a live/workspace used as a studio and gallery. The sales particular included a photograph of the gallery space in a view from the office area. Therefore, it is unclear how these photographs support the appellant’s case.
11. Indeed, the second photograph simply shows the rear part of the site laid out as an office with general office equipment including office desks and chairs, computer workstations with a printer, together with filing cupboards and a mezzanine area incorporating tall storage and shelves. Such a layout is consistent with a ‘work’ part or use class B1 of a live/workspace.
12. The only other photographic evidence submitted, which does not feature in the appellant’s sworn evidence, is a single undated photograph within Ms. Mankad’s (previous architect/agent for the appellant) letter, which she considers is not a dedicated workspace but a multi-purpose space including an extension of the living space and storage. Whilst this photograph does show some residential paraphernalia stored at the front part of the ground floor, the rear part also appears laid out as an office, with the office desk, chairs, shelves and storage and computer workstations as mentioned above. Therefore, the photographic evidence does not support the appellant’s case, and indeed contradicts it. Nor do the floor plans submitted demonstrate a solely residential use over the relevant 4-year period.
13. The appellant also contends that the absence of a record of business rates being paid for the property demonstrates that the property has not been in use as a live/work unit. However, the Planning Officer contacted the Council Tax and Non-domestic Rates Officers, who advised that live/work units are classified as composite and that ordinarily both Council tax and business rates are paid in respect of such units, with Council Tax billed in relation to the living part and business rates billed in relation to the work part. The business rates officer also confirmed that business rates were paid for the site before the property was split into two live/work units in 2005 and that after the split there is no record for business rates being paid for the site at No.6 Havelock Walk, even in the period it was agreed by the appellant that it was in live/work use (from around 2005 to 2011). Therefore, the fact that only Council tax has been paid since the appellant’s occupation in late 2011 is not necessarily determinative of a solely residential use of the site. Therefore, I place little weight on the Council tax records submitted.
14. The appellant refers to a sentence within a previous Inspector’s decision² which states “.... with the doors in particular on the first floor of the rear elevation, reinforcing the previous commercial use of the building.” However, very little can be inferred from this single sentence, given that that appeal was dealing specifically with a number of external alterations to the building, namely the replacement of the windows and doors and not the use of the site. Furthermore, from reading the decision as whole it is clear that the Inspector was most likely referring to the historical use of the site, where it formed part of a larger commercial/warehouse unit at 6-12 Havelock Walk. Therefore, the appeal decision does not assist the appellant’s case.

² Appeal Ref: APP/C5690/W/22/3303847 dismissed on 20 April 2023 for the replacement of all windows and doors, raising of cill height at first floor level to rear, along with re-rendering & painting of front and side elevations.

15. Although the appellant now considers that the site is and has only been in solely residential use since his ownership and occupation in late 2011, a number of conflicting and contradictory statements have been previously submitted by the appellant, or his professional agents, to the Council's planning department.
16. Firstly, in 2019 (during the pertinent 4-year period to this LDC appeal) the appellant, through his professional agent, sought pre-application advice (PRE/19/1133092) for the 'construction of an additional storey and associated alterations to an existing live/work building at 6 Havelock Walk, SE23'. A meeting was held with officers in September 2019 to discuss these proposals. The Design, Access and Heritage Statement Pre-APP Rev. A, prepared by Beep Studio dated 31 July 2019, submitted with the pre-application enquiry refers to the existing building as a live/work unit throughout. For instance:
- The Introduction describes the site as the appellant's *"two-bedroom family Live/Work home"* and states that the existing building comprises the following on the ground floor: *"A ground floor gallery and office space, namely the Work portion of the Property's Live/Work status, with associated external parking space."* The Baseline brief stated, *"The family are looking to make adaptations to their home and workspace in order to better accommodate the changing needs of their family and working lives."*
 - The application description states *"Alterations to create additional accommodation to an existing live/work building on Havelock Walk. This application seeks..... to intensify employment opportunities on the site through enhancements to gallery/workspace provision."*
 - The character section states *"The building at 6 Havelock Walk serves a unique purpose as a Community Gallery and activity hub"* for Havelock Walk events.
 - The Design Development section states the *"The gallery at 6a is unique in offering a community space for the whole street for use at Open Studios."* It is clear that reference to 6A in this sentence is a typographical error and should be '6' given that the remainder of the pre-application document and plans submitted refer to No 6 only and not 6A.
 - The existing 'Ground Floor Plan' clearly labels the front part of the ground floor as a 'Gallery' and the rear part as a 'Office.'
 - The Planning Context and Strategy highlights the relevant planning policy for live/work development.
17. The subsequent planning application (Ref: DC/21/120265³) submitted in February 2021 (also within the pertinent time period for this LDC application), by the appellant's second agent, Ms Mankad, make a number of similar statements regarding the live/work use of the site. For instance:
- Within the application form, in response to the question "please describe the current use of the site, the completed form states: "the building is used as a live work unit" and under the section 13 of the form entitled 'Existing and Proposed uses', the use is listed as 'other'. The declaration is signed by the appellant's professional agent on 1 February 2021;

³ Council ref: DC/21/120265 for the 'construction of an extension at roof level and the raising of the parapet wall to create a roof terrace at 6 Havelock Walk SE23, together with lowering the back area of the workspace on the ground floor to create a mezzanine to be used as additional office space, reconfiguring internal layout on all floors and replacement doors and windows and render to front façade' refused on the 14 May 2021.

- The design and access statement submitted with the application states:
 - *"This planning statement is in support of the proposed changes to live/work unit at 6 Havelock Walk⁴".*
 - *"No.6 Havelock is a 2-bed unit live/work units located at the top of Havelock Walk. Ground floor is workspace with a separate entrance. First and second floor make the live part of the unit⁵".*
 - *"The existing live-work unit is comprised of 145sqm of living vs 78sqm of work, which makes the live work ratio approx. 65%:35%" "The 'work' part of the unit is expanded to allow for additional office space"..... "It is also proposed that the access for this central staircase leads off from the workspace thereby integrating the live and work functions better. The existing wall will be opened up as much as possible (depending on the existing structure) to integrate this into the main front gallery. Since the gallery is used as part of the annual open studios Artist showcase at Havelock walk there will need to be some screening to secure the back workspace and upper living areas. Two entrances are still maintained as this is useful when the galleries are opened to the public⁶."*
 - The site is described as a "live work unit" under the Internal Amenity section and that "much of the proposal has been designed to improve the special quality of both the live and work functions."
 - The existing ground floor drawing (HW_P_00) submitted with this application labels the front part of the ground floor as a 'Gallery 32.7m²' and the rear part of the ground floor as an 'Office 35m²' and 'Mezzanine 4.6m²'. The ground floor is also shown to contain a storeroom, small kitchenette and a WC. Access to the upper floors of the building is via a separate external door to the front of the building.
18. The above emphatic responses and statements about the existing live/work unit at the premises do not suggest any ambiguity or confusion at the time. There are multiple references to 'work' and also that they are proposing to 'extend the work part' of the site 'To increase employment opportunities'. Reference is also made to the relevant live/work policies in the Local Plan and highlights that gallery is unique in offering a community space for the whole street for use at Open Studios every year. It is also difficult to see how a simple question asking for a description of the existing use of the site could be misunderstood, by two professional agents.
19. Further reference to the live/work use of the site appears in the appellant's own proof of evidence, in paragraph 3.4, where he quotes a line from the submitted Heritage and Design Statement which states that both he and his wife work at the site. Therefore, it is clear from the volume of references that when the pre-application and planning application were submitted in 2019 and 2021 respectively, by two different professional agents/architects, during the pertinent time period, the appellant believed that the site was in live/work use,

⁴ First paragraph, page 1.

⁵ The General Information section

⁶ The Land use and density implications section .

and in 2019 and 2021 was seeking to extend the work part of the site and carry-on taking part in the open studio events annually.

20. The appellant refers to Ms Mankad's letter appended to the appellant's evidence, where she attempts to explain that those earlier statements have been mis-construed and that she was simply setting out what they believed was the 'lawful' or 'official' use of the site based on the planning history. However, this is not a satisfactory explanation, because on the appellant's case advanced at the Inquiry, the residential use of the ground floor was lawful from October/November 2015 (4 years following when the residential use allegedly began), and the two planning agents, acting on the appellant's behalf, should have been aware that. Furthermore, Ms Mankad dealt with the planning application and not the pre-application enquiry and it is highly unlikely that both professional agents were acting unilaterally when making these statements and would have been aware of the need to provide honest and factually correct information when submitting these applications and supporting documents to the Council for approval.
21. Therefore, it was the appellant and his professional agents who were responsible for the ambiguity regarding the use of the site and the Council understanding that the site was in live/work use. This is clear from the Council's pre-application response dated 14 October 2019 which throughout refers to the live/work use. Furthermore, one of the reasons for refusal in application Ref: DC/21/120265, refused on the 14 May 2021, specifically cites the live/work use and that the Council seeks to preserve the longevity of that use. However, the appellant did not appeal this decision or correct the Council of this apparent erroneous assumption, despite the 'work' use apparently having ceased approximately 10 years ago and ceased being lawful for around 6 years. This casts further doubt on the appellant's assertion that the site was being used as for solely residential use.
22. The appellant states he is "obliged to do almost all my work from film locations or studios" and that neither he nor his wife use the appeal site as a business premises, and a letter from the appellant's account further states that he has never had any employees, incurred business rates, business premises insurance, employers' insurances nor claimed any expenses. Nevertheless, the appellant's own proof of evidence refers to a previous submitted planning application document which state that he and his wife both work from the appeal site. It is further stated that he works from home, on his computer and making phone and video calls, and that, in addition with the storage of some residential items, this area is used for storage of work detritus, including thousands of DVDs and books, associated with the appellant's work in film and tv.
23. In addition, from the extremely limited photographic evidence submitted in support of this appeal and from my own observations during my site inspection, it is clear that a significant part of the ground floor area is relatively large in height and floorspace and includes a mezzanine level incorporating tall storage for amongst other things, DVDs, books and files. The ground floor area also has its own small kitchenette and toilet, and is separated from the upper residential floors, with no internal connection to the residential floors above, and thus is physically separate. Indeed, a large part of the ground floor has an office/storage character which is distinctly different and separate from the

- upper floors which are in residential use. Such a use would fall within a use class B1, consistent with the 2004 permission.
24. Furthermore, the appellant's proof of evidence states that it is not connected to the rest of the house and as such remains a rather unused space; the 'gallery' has no power sockets, the lighting is for an art gallery and the walls are cracking with damp; there is no hot water; it is not connected to the heating system, so it is cold in winter. Therefore, based on the appellant's own statements the ground floor has not become a habitable space, is not connected to the residential dwelling above has its own independent access from the front, and remains a rather unused space.
25. During the Inquiry, in response to my specific question regarding the use of the ground floor during the pertinent time period, the appellant stated that he has used this area as a "man cave" for "watching movies," "kids spend time there in the summer", and that "it's good for running children parties". Despite the evidence being sworn and given on oath, when considering the contradictory nature of all the evidence before me, I do not find this oral evidence to be sufficiently reliable to conclude on the balance of probability that the use of the site, changed to a single family dwellinghouse (use class C3) on or before 7 December 2017.
26. The supporting statements provided by various third parties, appended to the appellant's evidence do not overcome this ambiguity. Given that the appellant's family have occupied the site for approximately ten years, the lack of documentary evidence is particularly noteworthy. Even if I were to agree with the appellant and find that the participation in the annual Open Studio events, did not represent a 'work' use, this does not detract from the other evidence before me, which is either insufficient or contradictory and ambiguous.
27. An appellant's own uncorroborated evidence can be sufficient. However, the appellant's evidence is far from precise and unambiguous and is internally inconsistent. In these circumstances, given the lack of clear evidence of residential use of the ground floor, in combination with the contradictory and ambiguous evidence provided to the Council in 2019 and 2021, there are too many inconsistencies in the appellant's account to demonstrate, on the balance of probability, that the change of use of the appeal site to a single family dwellinghouse residential use (Class C3) had occurred on or before the 7 December 2017.
28. The point raised by the appellant that both current and emerging policies of the Development Plan strongly indicate that a live/work use requires running a business in the 'work' part of the site is not relevant given that the 2004 permission and s106 agreement clearly defines what live/work means (as summarised in paragraph 7 above). Therefore, using the ordinary meaning of the language in broad, common-sense terms, it is a live/work unit, and not a live/running a business unit. Similarly, the use class B1 referred to within the s106 agreement does not expressly state that this means running a business from the site. Case law has also established that 'work' in the context of live/work units does not require running a business⁷, and that it depends on each planning permission and is a question of interpretation of that permission.

⁷ *AHGR Limited v Kane-Laverack* [2022] EWHC 2025 at §13

Furthermore, the planning policies referred to all significantly post-date the 2004 permission and therefore cannot be relevant to the meaning of live/work in this case⁸.

29. The appellant highlights that LDCs have been issued in recent years elsewhere in Lewisham. However, little information regarding these other applications have been submitted as part of this appeal, and therefore I cannot be certain that they are directly comparable to the appeal before me. Nevertheless, the Council state that they have interrogated those other cases and can confirm that all three certificates were issued because the Council had no contradictory evidence to dispute those applications. However, for the above-mentioned reasons, that is not the case with the current appeal. Therefore, those other LDCs do not lend support for the appellant's case.
30. I conclude that the appellant has failed to discharge the burden on him to show on the balance of probability that the use of the site at 6 Havelock Walk, changed to a single family dwellinghouse (use class C3) on or before 7 December 2017, such that the refusal of the LDC was well-founded. In these circumstances, I need not consider whether the use then continued for at least 4 years after the date of the change, or whether the breach of planning control was deliberately concealed.

Conclusion

31. For the above reasons, I therefore conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the "change of use from live-work unit to single family dwellinghouse (use class C3)" was well-founded, and the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

R Satheesan

INSPECTOR

⁸ *AHGR Limited v Kane-Laverack* [2022] EWHC 2025 at §18

APPEARANCES

FOR THE APPELLANT:

Mark O'Brien O'Reilly of counsel instructed by Rob Hewson on behalf of allPlanning

He called:

Donall McCusker, Appellant

Rob Hewson, Director of allPlanning

FOR THE LOCAL PLANNING AUTHORITY:

Charles Forrest of counsel instructed by the London Borough of Lewisham

He called:

Amanda Ghani, Planning Officer for the London Borough of Lewisham

DOCUMENTS SUBMITTED DURING THE INQUIRY

1. Appellant's opening submissions.
2. Council's closing submissions.
3. Appellant's closing submissions.