



Appeal Decision

Site visit made on 25 October 2023

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

an Inspector appointed by the Secretary of State

Decision date: 23 January 2024

Appeal Ref: APP/U5930/X/22/3304365

First Floor Flat 2, 76 Ruckholt Road, Leyton, London, E10 5NP

- 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 Fai Lee against the decision of London Borough of Waltham Forest.
- The application ref 220692, dated 8 March 2022, was refused by notice dated 16 June 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 use of first floor flat as house in multiple occupation (HMO) comprised of four bedrooms (Use Class C4).

Decision

1. The appeal is dismissed.

Preliminary Matters

2. An application under s191(1)(a) of the Town and Country Planning Act 1990 (the 1990 Act) seeks to establish whether, at the time of the application, any existing use of buildings or other land is lawful. S191(2) explains that uses are lawful at any time if: (a) *'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)'*; and (b) *'they do not constitute a contravention of any of the requirements of any enforcement notice then in force'*.
3. The burden of proof lies with the appellant to make his case on the balance of probabilities. 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 (UCO) introduced a definition of small-scale HMOs into the planning system. The changes were made so that those HMOs became a separate class (Class C4) rather than a sui generis use. Prior to the introduction of Class C4, a change from Class C3 (dwellinghouses) to a HMO or vice versa would not necessarily have amounted to a material change of use; it would be a question of fact and degree as to whether there was a fundamental change to the character of the use.
5. A material change of use from Class C3 to C4 and vice versa is normally permitted development under Schedule 2, Part 3, Class L of the GPDO².

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

² The Town and Country Planning (General Permitted Development) (England) Order 2015

However, the Council introduced a Borough-wide Article 4 Direction on 16 September 2014 to remove permitted development rights for a change of use from Class C3 to Class C4.

Main Issue

6. 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 change of use was lawful because it wasn't a material change from the previous lawful use or whether the use of the appeal property materially changed to a HMO:
 - a) ten or more years before the date of the application, 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; or
 - b) when such a change was permitted development.

Reasons

7. The appeal relates to a first floor flat in a mid-terrace property. The floor plans associated with a previous LDC application show bedrooms one and two at first floor level, and three and four in the extended roof space. They also show an arrangement whereby the occupants of each room share one or more basic amenity, namely a first floor kitchen. Occupants of the two, first floor rooms also share a bathroom whilst the two bedrooms in the roof space benefit from ensuite bathrooms.
8. The Council state that the application should provide sufficient evidence to demonstrate that the use of the property as a Class C4 HMO commenced prior to 15 September 2014, which is the day before its Article 4 direction came into force. The appellant similarly states that the application sought to establish that the property was already in use as a HMO on that date and has been in continuous use since.
9. However, 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 become immune from enforcement action through the passage of time. Having regard to s171A(1), use, in itself, is not an act of development.
10. The permitted development rights for a change of use from Class C3 to C4 came into force on 1 October 2010³. Consequently, if a material change of use of the property to a Class C4 HMO commenced between that date and the date of the Article 4 direction coming into force on 16 September 2014, it would have been permitted development. For there to have been a breach of planning control, and for the ten year immunity period to be met in this case, a material change of use to a HMO must have commenced before the permitted development rights came into force on 1 October 2010.
11. The appellant submits that he bought the property in 2007 and began renting the upper floor flat to sharers. His statutory declaration (SD) explains that he

³ The Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2010

- runs a letting business and that soon after he bought the appeal property he began renting it out on a room-by-room basis, and has done so ever since. The SD goes on to explain that the house has four rooms with a total of two double beds and two single beds.
12. He attests that since 2014, when the Article 4 direction came into force, there has never been more than six people living there. Based on his understanding he considers that the house has been in Class C4 HMO use on a continuous basis at least since 14 September 2014, although for the reasons explained, that time period is not sufficient to gain immunity from enforcement action.
 13. The appellant submits that it would be implausible that he has in some years rented some rooms but in others rented the whole flat to a family. He says that would be a strange way to do business and that room rentals generate more rent than single family lets. He also submits that as rooms are let out individually, at different times of the year, there is never a time when all rooms are empty at once so that the flat is available to be let as a whole to a single family.
 14. In support of his case, the appellant has submitted a series of tenancy agreements relating to No 76. All of which refer to a first floor flat, rather than a HMO bedroom, although the rental amounts are more likely to apply to the latter, rather than the former.
 15. Based on the earliest rental agreement, the property may well have been occupied by one person from February 2010 to April 2011. Although, the signed letter from that occupant refers to her rental of a double loft room with her friend, and that is further corroborated in the SD from the subsequent occupier, sharing the same bedroom points towards a single household arrangement.
 16. The next tenancy agreement is for two people for 12 months commencing on 1 April 2011. The statutory declaration (SD) from one of those tenants confirms their occupancy from that date to June 2014, in a double room of a shared flat that consisted of a kitchen and a bathroom.
 17. She states that tenants came and went while they were living there and that the flat usually had not more than four to five people living there. However, that is imprecise and ambiguous.
 18. During her entire stay she recalls two different couples living in the loft roof room. The names given for the first correspond with the tenancy agreement and supporting letter. No tenancy agreement is provided for the second couple. Reference is made to a single person living in the next room who continued living there after she moved out in the summer of 2014. However, as no dates are provided of when that person moved in, I am unable to ascertain the length of the purported occupation.
 19. Nevertheless, based on the SD and in the absence of contradictory evidence, it is likely that two separate households occupied the property between April 2011 and June 2014, although the beginning of that period is later than the material date of 1 October 2010.
 20. There is then a gap of around a year in the rental agreement evidence, until occupancy by another couple in June 2015. An agreement for a third person commences in August 2015 and a fourth in January 2016. There is then a

period of around five months where there are four occupants (in three rooms), before dropping to two, and then to one for around three months.

21. From November/December 2016 the tenancy agreements point to four different occupiers at the same time. Although two of the tenants share the same surname, a household relationship would be more likely if they co-signed the same rental agreement. Nevertheless, I am mindful of the appellant's explanation that when he bought the property in 2007, the flat had three bedrooms. The fourth wasn't added until he extended the rear dormer in 2017. On that basis only three rooms would have been available when those tenancy agreements commenced. That in itself would preclude a LDC for a four bedroom HMO, as 2017 would not allow sufficient time to gain immunity. At most, a LDC could only be granted for a three bedroom HMO.
22. After the end of those tenancy agreements there is a period of around nine to 10 months where no occupancy is demonstrated. Thereafter, the tenancy agreements likely point to a single household occupancy by a couple from September 2018 until July 2019, when a third person took occupancy. The crossover is only for a few months before the evidence again suggests single occupancy for around seven months until a second tenancy period commences in April 2020. Once more, the crossover is only a matter of a few months before single occupancy resumes for about eight months, and then occupancy by one couple and one individual from March 2021 to February 2022.
23. Therefore, taken together, the rental agreement evidence points to significant periods of single household occupancy. There are also significant gaps, with no rental agreements indicating any occupancy between July 2014 and May 2015 and between January 2018 and August 2018. Whether or not a HMO use commenced in 2007, in accordance with the appellant's general assertion, or February 2010 from when the first rental agreement is available, those gaps of 11 months and 8 months respectively represent significant breaks in the continuity of the use. I acknowledge that people may remain in occupation, 'holding over' after the end of their contractual term, but I cannot assume they did, and there is no positive evidence to show they did.
24. I am satisfied that occupation by up to four individuals who did not form a single household would have given rise to a material change of use. There is evidence of this for a period from around 2016, when it is likely that there would have been additional impacts from those individuals coming and going separately from one another for work, shopping and other day-to-day activities, whilst also generating a greater number of separate visitors and deliveries to the property.
25. However, a material change in 2016 would not allow for 10 years' continuous use, even if there was no gap in the evidence thereafter or likely use as a single household.
26. It may be that a less intensive use would have given rise to a material change. However, even if such a material change took place sometime between 2007 and the creation of the new permitted development right in 2010, there have been significant breaks in the continuity.
27. Furthermore, there is no evidence to indicate that a material change of use to an HMO took place in the window of opportunity between October 2010, when Class L permitted development rights were introduced, and September 2014,

- when the Article 4 direction was made. The change cannot be lawful on that basis either.
28. A signed letter from a chartered accountant confirms the appellant as a client since 2012. However, that is around two years later than the material date. Moreover, although the accountant confirms that he rents out properties which are let out as individual rooms in a number of houses he owns, and that he has received rental income on a consistent basis since 2012, no specific reference is made to the appeal property in that context. Nor are any details provided on the number of rooms and tenants. The letter therefore provides limited assistance to the appellant's case.
29. The appellant argues that if he had rented to a family, it would be likely that they would have registered for council tax in one of the years since 2010, but no such records exist. Nevertheless, the Council's Property Licencing Team advise that records indicate that the property has only been licenced for use as a HMO, for five people in three households, since May 2018. Prior to which it was declared as a single family dwellinghouse. The appellant argues that is because a HMO licence was not required prior to 2018, however, I have no evidence to that effect.
30. The appellant states that for a previous LDC application, the Council accepted that the flat was a HMO from August 2015 and refers to evidence and likely scenarios for the prior period from June 2014. In that context, I appreciate that the appellant and Council have misapplied the immunity period requirements. However, that does not prevent the appellant from submitting a fresh application in an attempt to resolve the deficiencies identified.
31. I appreciate that the appellant may not have kept tenancy records because of the volume and/or evidence may have been lost. However, the appellant also explains that he is a professional landlord running a portfolio and relying on room lettings for his income. In such circumstances, I would expect a greater amount of supporting evidence to be available.
32. In any event, the evidential burden lies with the appellant to make his case. However, the evidence before me is fragmented, and insufficiently precise and unambiguous to demonstrate that at the time of the application, the use of the property as a HMO would have been lawful on the balance of probabilities.

Conclusion

33. For the reasons given above I conclude that the Council's refusal to grant a LDC 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.

Richard S Jones

INSPECTOR