The Planning Inspectorate

Appeal Decision

by K A Taylor MSC URP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17th June 2024

Appeal Ref: APP/Q3060/X/23/3324496
44 St. Matthias Road, Nottingham NG3 2FE

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) ("The Act") against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Donovan Lewis against the decision of Nottingham City Council.
- The application ref 22/01440/PCLE, dated 30 June 2022, was refused by notice dated 17 January 2023.
- The application was made under section 191(1)(a) of the Act.
- The use for which a LDC is sought is a house of multiple occupancy.

Decision

1. The appeal is dismissed.

Preliminary Matter

2. It has not been necessary to carry out a site visit in this case, as the appeal involves consideration of relevant planning law and the facts, and I have been able to reach a decision based on the documentary evidence submitted.

Main Issue

3. The main issue is whether the Council's refusal to grant a LDC was well founded.

Reasons

4. S191(2) of the Act states that uses and operations 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.

5. S191(4) of the Act, indicates 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, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

6. The PPG[1] advises that, if a local planning authority has no evidence itself, or any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

[1] Planning Practice Guidance: Paragraph 006 Reference ID:17c-006-20140306, Revision date: 06 03 2014

7. As set out in the LDC application form, the grounds being sought are that the use began more than 10 years before the date of the application. The Council's notice of refusal indicates that the relevant period for determining lawfulness in this case is 4 years and it appears that the appellant's evidence had been made on this basis.

8. Section 171B of the Act sets out the relevant time limits for enforcement action and s171B(2) applies to the time period of 4 years where there has been a breach of planning control consisting of the change of use of any building to use as a single dwellinghouse. For the purposes of the Use Classes Order[2], (Use Class C3) relates to the use as a dwellinghouse subject to criterion and (Use Class C4) the use of a dwellinghouse by not more than 6 residents as a house in multiple occupation (HMO).

9. Therefore, in this case it does not involve the change of use to 'use as a dwellinghouse', and it would therefore fall outside the remit of s171B(2) of the Act as it does not apply in cases where there has been a change of use to an HMO, even if there may have been a change of use from Use Class C3 to Class C4 it is not a change of use to use as a single dwellinghouse. Therefore, the relevant period in this instance is 10 years in accordance with the provisions of s171B(3). I have therefore dealt with the appeal on this basis.

10. Consequently, for the appeal to succeed, the onus is on the appellant to demonstrate their case on the balance of probabilities, and it must be shown that the use in question commenced more than 10 years before the date of the LDC application that being 30 June 2022, and that the use subsisted without interruption for 10 years thereafter. The assessment is therefore made on the specific facts and based upon the evidence before me. For the avoidance of doubt, planning merits in the case of a LDC are not relevant at any stage.

11. The change of use from a single dwelling (Use Class C3) to an HMO for up to six residents (Use Class C4) is normally permitted development under the terms of Schedule 2 Part 3 Class L of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). For the purposes of Class C4, an HMO is interpretated as the same meaning as s254 of the Housing Act 2004 but does not include a converted block of flats. Section 258 of the Housing Act 2004 indicates that Use Class C3 relates to a single person or by people regarded as forming a single household. However, it is undisputed that the Council made an Article 4 Direction which came into force on 11 March 2012 removing the permitted development right.

12. The appeal site comprises of a mid-terrace property and the appellant's evidence states that the property has been operating as an HMO for up to 5 individuals since 4 January 2013 by Windrush Alliance UK Community Interest Company (Windrush*)*. The Council assert that the evidence does not show continuous use of the property as a HMO, or the precise nature of the use of the premises during the relevant period. From the information provided there does not appear to be any evidence from the period of 30 June 2012 to the 3 January 2013 prior to Windrush, that would demonstrate a period of 10 years from the date of the LDC application.

13. Nevertheless, the appellant asserts that the premises has been exempt from applying for an HMO licence as Windrush is a registered charity, and they were

[2] The Town and Country Planning (Use Classes) Order 1987 (as amended)

unaware it was not on an HMO register. The plans provided by the appellant show that the property consists of a kitchen/diner, living room with 1 bedroom on the ground floor, a bathroom and W.C on the first floor with 2 bedrooms and 2 further bedrooms on the second floor.

14. The Council state that the premises does not hold an HMO licence, and there is no licensing history. The Council also assert that there is no information relating to Council tax records between 4 January 2013 and 3 July 2013 but that a charity exemption existed noting the property was unoccupied and recorded as empty but furnished since 4 July 2013. They further assert that benefit records indicate that the premises were unoccupied from 4 January 2013 to date. They state that records show that there were active benefit claims at one point during the period, but they have not received any occupancy details or notifications of tenants at the premises.

15. The appellant has provided supporting evidence including 2 identical sworn declarations[3] dated 30 June 2022 which confirm that the appellant owns the property and from 4 January 2013 the property has been continually occupied by Windrush with the company previously owned as WALHA. They state that the property was first leased on 4 January 2013 and again on 4 April 2018. The declarations state that Windrush provides shared accommodation to vulnerable members of society who are in receipt of social security benefits and for those purposes the property is utilised as an HMO and consists of 5 private lockable bedrooms with shared facilities and communal areas.

16. Windrush have provided an email[4] confirming that the property was leased to them for social housing purposes from 2013 – June 2022. However, a further letter[5] confirms that Windrush used the property from 4 January 2019 to 29 September 2022 when they handed the property back to the landlord. There is a further statutory declaration[6] from the director of Windrush who states the company used the property as an HMO from 4 January 2013. There are also 2 lease agreements provided between the landlord and WALHA/Windrush dated 4 January 2013 and 4 April 2018. Although this shows there were lease agreements between the landlord and the company details are absent of any individual tenants or who had resided at the premises continuously during the relevant period.

17. There are further email documents provided by the appellant, these include observations from neighbouring owners of nearby properties ranging between September - October 2022 stating that they saw the property was used as an HMO in the past. There is also a letter from the appellants accountant[7] which states that the property was occupied by tenants since 2014. However, none of the correspondences collaborate or provide precise dates when the use began, and the weight I can give to these is limited as they are unsworn. In addition, the supporting information of liability for Windrush confirms they were liable which would only correspond with any lease agreements. The accompanying account summary of benefits appears to only relate to the year 2022 and has been blanked out in sections.

[3] Donal Augustus Morgan and Sinetta Anne-Louise Williams
[4] Email dated 28/6/22 from Tracey Gardener
[5] Document 23 - Windrush Housing signed by Arthur Milanzi (not dated)
[6] Trevor Fothergill dated 13 March 2013
[7] M Aslam Accountants dated 7 October 2022

18. The appellant also asserts that insurance for an HMO was in place at the property and has provided documents. The insurance documents stipulate that the property type is a house and premises use is a private dwelling. They only show cover between 1 June and 5 November 2022, with documents from 2019-2020 being renewal schedules. Therefore, it is uncertain over what longer period insurance may or may not have been in place or exactly for what purpose.

19. I have also been provided with 2 letters dated 7 November 2019 and 2 December 2019 which were served on the appellant as the 'free holder of the property'. These related to an initial site visit to be carried out by the Council for general housing disrepair. It appears that a site visit was carried out and identified several hazards and safety works that needed to be undertaken as remedial works served by Notice under the Housing Act 2004. The appellant states these show that the property has not been empty. Nevertheless, the correspondence does not refer to the property as an HMO nor that it was occupied at the time of any visit.

20. I acknowledge there was an agreement and lease between the landlord and Windrush which commenced on 4 January 2013 for the property and at some point, in time between the periods of June 2022 to September 2022 the property and keys were handed back to the appellant with Windrush no longer having access. However, it is unclear on the precise nature of the use which was undertaken at the property and how occupation was utilised at the property.

21. Therefore, taking the whole of the evidence submitted by the appellant, I consider that while they are not inconsistent with their case, they somewhat do not assist in providing clear and convincing justification. They do not add with any certainty evidential weight due to the degree of inconsistency, ambiguity, and lack of precision that the use of the property as an HMO began 10 years before the date of the LDC application and continued thereafter without interruption. Moreover, the evidence provided has significant gaps in the timelines, and I have not been presented with any evidence that the use of the premises was in fact occupied by individuals in receipt of benefits, needing support and it continued with occupation over the relevant time period.

22. Therefore, I find that the appellant has provided insufficient evidence to demonstrate on the balance of probability that the use as an HMO was instituted on or before 30 June 2012, 10 years before the date of the application, and continued thereafter without significant interruption. It was therefore not too late for the Council to take enforcement action as set out in the time limits of s171B(3) of the Act when the application was made. The burden of proof that lies with the appellant has therefore not been discharged.

Conclusion

23. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of a house in multiple occupancy 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).

K A Taylor

INSPECTOR