



Appeal Decision

Site visit made on 16 July 2024

by R Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 August 2024

Appeal Ref: APP/M4510/X/23/3329628

97A Osborne Avenue, Jesmond, Newcastle Upon Tyne NE2 1JT

- 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 Andrew Pellegrino, Pellegrino Lets, against the decision of Newcastle-upon-Tyne City Council.
 - The application Ref 2022/1975/01/LDC, dated 25 November 2022, was refused by notice dated 8 September 2023.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 (the Act) as amended.
 - The use for which a certificate of lawful use or development is sought is "Ground floor independent residential flat as a single, use class C3 dwellinghouse."
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Formal Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr Andrew Pellegrino, Pellegrino Lets, against Newcastle-upon-Tyne City Council. This application is the subject of a separate Decision.

Legislation

3. Uses and operations are lawful at any time if no enforcement action may be taken in respect of them, whether because they did not involve development, require planning permission or because the time for enforcement action has expired (s191(2) of the Act).
4. There is a further proviso that the development must not contravene the requirements of any enforcement notice then in force. I have not been told that there was any extant enforcement notice relating to the property at the time of this application.
5. In this case the appellant is relying on the passage of time.

Main Issues

6. It is necessary to consider whether, on the balance of probability, i) the appeal property is being used as an independent dwelling such that a material change of use has occurred and ii) if it is being so used whether, in accordance with Section 171B(2) of the Act, that use has continued for a period of four years or

more prior to the date of the application, therefore from at least 25 November 2018, so as to be immune from enforcement.

7. Responsibility for satisfying the aforementioned tests rests with the appellant.

Reasons

Change of Use

8. 97 Osborne Avenue is a two-storey end of terrace property, with roads to the immediate side and rear. Externally, the appeal site (No 97A) comprises a single storey extension to this property, constructed in brick, with a tiled roof.
9. S55(3)(a) of the 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.
10. Direct access to the interior of 97A is gained from the aforementioned side road. It is also possible to gain access to a small external patio, serving the property, from the rear lane. The property, however, may not be accessed from the interior of No 97, with permanent plaster boarding having been securely fixed to prevent access between the two units.
11. There is no dispute between the parties, and it was evident from my visit, that the appeal building contains the facilities such as living space, cooking, washing and sleeping accommodation, that allow for its use as an independent dwelling. I have no reason to doubt that as things stand the occupiers of the appeal building would have no need to share any accommodation within No 97.
12. It appears the two properties may share a boiler, which is situated within No 97. However, there is nothing to suggest that access to hot water and heating at No 97A is restricted, or that if this was the case, that such facilities could not be facilitated through other means. I noted during my visit that heating within No 97A may be controlled through the presence of radiators. I consider the absence of a boiler would not be fatal to the test of whether 97A is a separate residential unit.
13. The Council states that the appeal property does not have its own letterbox and identification numbering on the front door; also that it has not been registered separately for Council tax. It says that 97A should therefore be regarded as an annexe to No 97, rather than as a separate dwelling.
14. However, I concur with the appellant that it is not uncommon, in flatted accommodation, for post to arrive via a single letterbox, and am not persuaded this and identification numbering are tests for whether the unit of accommodation is independent; so too the absence of registration for Council tax purposes.
15. I conclude, on the balance of probability, that Nos 97 and 97A enjoy sufficient physical and functional separation such that they comprise independent, self-contained dwellings. Accordingly, I am satisfied that a material change of use of land has occurred which has yielded a new residential unit.

Continuity of Use

16. The onus is on the appellant to demonstrate that, on the balance of probability, the use has continued for the aforementioned four-year period, without any

significant interruption. I am mindful that planning practice guidance states "*In the case of applications for existing use, if a local planning authority has no evidence itself, nor 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.*"

17. The appellant has provided a 'statement of truth' in which he confirms that he is the landlord of the property; that the appeal property has been in separate residential use since 2007, when the door to the adjoining property was boarded up; he lived there between 2008 and 2010; a named tenant has lived there between September 2013 and the 'current day', with utility bills included in the rent.
18. Although described as a statement of truth, the document is undated and does not constitute 'sworn' evidence, not having been witnessed and countersigned by a person of appropriate professional standing. I therefore afford this document limited weight, given that there can be no sanction, such as a fine or jail term, if found to be untruthful.
19. However, even if the statement submitted had been properly sworn, it still refers only vaguely to a certain tenant living there from September 2013, there having been significant interruption to residential use prior to this. It is unclear whether No 97A was the tenant's only place of residency during the stated period of occupation. In addition, occupation is not corroborated by documents such as tenancy agreements and bank statements, showing regular rental payments, which would assist in supporting the claimed continuity of residential use.
20. It is also unclear whether the separation from No 97 was maintained over this period. Although the appellant claims the properties were separated in 2007, the Council's evidence indicates that when the appeal property was inspected regarding a previous case in May 2011, at that time there was a door linking the main house from the rear. This suggests that any previous separating works may have been reversed at that time. Furthermore, it is undisputed that the HMO licence for No 97 extends to 97A as a single unit. This is a formal record suggesting facilities across the two units have been shared in the past.
21. Despite the Council not providing any further detailed information to contradict the appellant's own evidence, for the above reasons I am not persuaded that the appellant's evidence is sufficiently precise and unambiguous to demonstrate the necessary continuity of use on the balance of probability.

Conclusion

22. I therefore conclude that the Council's refusal to grant a certificate of lawful use or development in respect of "Ground floor independent residential flat as a single, use class C3 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.

R. Merrett

INSPECTOR