



Appeal Decisions

by Ms S Watson BA(Hons), MCD, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 August 2024

Appeal A Ref: APP/T5150/X/23/3318744

2 Brentfield Close, Brent, London, NW10 0QJ

- 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 Abraham Spitzer against the decision of the Council of the London Borough of Brent.
 - The application ref 23/0028, dated 4 January 2023, was refused by notice dated 6 March 2023.
 - 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 C4 house in multiple occupation.
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Appeal B Ref: APP/T5150/X/23/3322000

2 Brentfield Close, Brent, London, NW10 0QJ

- 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 Abraham Spitzer against the decision of the Council of the London Borough of Brent.
 - The application ref 23/0832, dated 15 March 2023, was refused by notice dated 10 May 2023.
 - 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 C4 house in multiple occupation.
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Decisions

1. Appeal A: The appeal is dismissed.
2. Appeal B: The appeal is dismissed.

Applications for costs

3. A costs application in respect of Appeal A has been made by Mr Abraham Spitzer against the Council of the London Borough of Brent. A costs application has been made by the Council of the London Borough of Brent in respect of both appeals against Mr Abraham Spitzer. These applications are subject of a separate decision.

Preliminary Matters

4. An LDC is not a planning permission. Therefore, for the avoidance of doubt, the planning merits of the use are not relevant to this appeal.
5. The two appeals are for the same existing use. The difference between the appeals is that further information was submitted for the second LDC

application. As the evidence is all before me, I will have regard to the totality of it for both appeals.

Main Issue (Appeals A and B)

6. The main issue is whether the Council's decisions to refuse to issue the LDCs were well-founded. This turns on whether the use for which the certificates are sought were lawful on the date the applications were made.

Reasons

7. The appellant's case is that a change of use occurred from a C3 use to a C4 use under Schedule 2 Part 3 Class L(b) of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) which grants planning permission from a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order, to a use falling within Class C4 (houses in multiple occupation) of that Schedule. He maintains that the change of use occurred before an Article 4 Direction removing the permitted development (PD) right came into force on 1 November 2022.
8. The Town and Country Planning (Use Classes) Order 1987 (as amended) defines Class C4 houses in multiple occupation as the "use of a dwellinghouse by not more than six residents as a 'house in multiple occupation'".
9. In order to benefit from permitted development (PD) rights for a change of use from a C3 use to a C4 use, the C3 use must first be lawful¹. In this case, the property is subject to an enforcement notice (EN) which was upheld on appeal. The breach of planning control in that EN was the material change of use of the premises from a single family dwellinghouse to a house in multiple occupation.
10. The appellant maintains that after the enforcement notice was upheld on appeal, there was a lawful change of use back to a C3 use on 4 July 2022 when a family moved in and it was after that, in the following October, before the Article 4 Direction came into force removing Class L PD rights, that the dwelling changed its use to C4.
11. In claiming that the change back to C3 was lawful, the appellant relies on S.57(4) of the Act which provides that where an EN has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which it could lawfully have been used if that development had not been carried out.
12. However, there was no lawful right to revert to C3 use. The reasons are clearly set out in the Inspector's decision letter upholding the enforcement notice in paragraphs 12-14. In response to a fallback argument presented in his ground (a) appeal the Inspector found:

"Following the appellant's purchase of the property in December 2014, and notwithstanding that on 8 January 2015 the property was registered as 6 flats with the Valuation Office, the appellant submits that it was let from April 2015 as six single occupancy HMO rooms with communal kitchens. In that regard I note an inconsistency in the appellant's evidence since he replied to a Planning

¹ Article 3(5) of the GPDO

Contravention Notice (PCN) on 21 January 2016 (served by the Council alleging a material change of use to 6 flats) stating that he subdivided the property and started using the property as a 6 person HMO under class C4 of the UCO in "late 2015".

However, and very significantly, Housing Benefit records submitted by the Council show that in April 2015, when the appeal property was first let, it was divided into 6 units of accommodation, 2 of which were occupied by 2 persons, 1 by 3 persons and the remainder by 1 person, making a total of 10 residents using the property as a sui generis HMO (or flats). This is materially different to use within C3 or C4. In January 2016, when the PCN was returned, the appeal property appears to have been in use as a C4 HMO. Between February and May 2016, 2 of the units were occupied by 2 persons and the remainder by 1 person, making a total of 8 residents using a sui generis HMO. By 24 July 2017 the appeal property appears to have been occupied by 6 residents as a C4 HMO, and in that regard I note that the tenancy agreements and tenancy management evidence provided by the appellant substantially relate to 2017 onwards.

I am persuaded from the Housing Benefit evidence provided by the Council that the appeal property was occupied by up to 10 individuals, involving at least one material change of a use to/from use as a sui generis HMO, which intervened in time between the appeal property's use within C3 and use within C4. Accordingly, the permitted development rights argued by the appellant do not apply. In addition, there is not an immediately preceding lawful use of C3 to which the property can revert and to which permitted development rights apply in respect of change of use."

13. To summarise, the property had a lawful use as a C3 dwelling when the appellant acquired it in 2014. In April 2015 the house was occupied by 10 people so it was either a *sui generis* HMO or flats at that time. When the enforcement notice was served on 21 November 2018, it was occupied as a C4 HMO and demonstrably had been since 24 July 2017. Section 57(4) does not provide for a resumption of a past lawful use when there has been one or more intervening unlawful uses between that and the current unlawful use². The intervening *sui generis* HMO/flats means that the C3 use has been extinguished.
14. Furthermore, the appellant could have pursued a ground (c) appeal if he believed at the time that the change of use to C4 did not require planning permission. The validity of the EN cannot be questioned by way of a lawful development certificate application. Section 285(1) says that the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought.
15. The appellant questions whether the breach in the enforcement notice related to a C4 HMO or a *sui generis* HMO. The property was being used as a C4 HMO when the notice was served. He could have pursued an appeal on ground (b) if he believed the matters alleged had not occurred (i.e., if he thought the allegation was wrong). What matters is the undisputed fact that there was an

² Young v SSE [1983] JPL 677

intervening unlawful use between the cessation of the C3 use and becoming a C4 HMO.

16. The appellant also claims that the enforcement notice granted permission for the house to be a C3 dwelling. It did not do that. Its requirements were to cease the use as an HMO and to remove the items which facilitated the change of use. The effect of the enforcement notice was that the premises had a nil use.
17. I accept that it is a well-established principle of planning law (*Mansi v Elstree RDC* (1965) 16 P&CR 153 and *Duguid v SSETR* (2001) 82 P&CR 6) that enforcement action cannot take away permitted development rights or existing lawful uses. However, there is no implementable lawful use for a C3 dwelling so there can be no PD right for a change of use from C3 to C4. Therefore, *Mansi* does not apply in this instance.
18. Even if the appellant had complied with the EN, as he claims to have done, S.181(1) of the Act says that compliance with an enforcement notice, shall not discharge the notice. Section 181(2) of the Act requires that any provision of an enforcement notice requiring a use of land to be discontinued, shall operate as a requirement that it shall be discontinued permanently. This means that the HMO use is required by the enforcement notice to cease permanently.
19. Furthermore, even if it were the case that the house could have lawfully reverted back to a C3 use and then gained PD rights to change to C4, I would have to accept, on the balance of probabilities, that there had been a material change of use back to a C3 use before there was a change of use to C4.
20. The appellant claims that the premises were used as a dwellinghouse between 4 July 2023 – and 22 October 2023. Evidence submitted are two statutory declarations from a purported tenant (the tenant). The tenant says that he signed an AST on 1 July 2022, moved in with his family on 4th July, occupied the entire property, paid half a month's rent in cash of £1,000, and then paid his first monthly rental by bank transfer of £2200 on 18th July.
21. The appellant also submitted a 12-month AST agreement for this tenant and his wife. This AST began on 1st July and required £2200 rent payable in advance on the 1st of each month. In addition, a £2200 deposit was required. A bank statement from the tenant shows a payment of £2,200 on 18 July 2022, which, although the tenant's statutory declaration says was for rent, it does not correspond to the 1st of the month payment requirement. No evidence of other transactions have been submitted.
22. The second statutory declaration by the same tenant says that in early October 2022 he was informed that further works needed to be carried out within the property. These included the widening of the opening within the front living room, and the removal of all partitioning separating between the two ground floor backrooms. He says the works were completed by mid-October 2022 and that he and his family moved out on 22 October 2022. Even though he says he moved out in October 2022, the address he gave as his when he signed the statutory declaration on 2 January 2023 was the appeal property. A later "corrected" version was submitted but the two are in conflict.
23. A statutory declaration by the appellant says the same kind of thing. Apart from the statutory declarations and one bank payment, which is not even on

the date the tenancy requires it to be, there is no other corroborating evidence that the premises were used for a C3 use. Moreover, a HMO licence existed for the entire time that the premises were claimed to be used as C3 dwelling. I note the appellant's statement that he forgot to send a document to the Council to revoke the licence, but the fact remains that he did not get it revoked.

24. Furthermore, it is claimed that internal works were undertaken in order to comply with the enforcement notice during the short time that a family is claimed to have been living in the property. Such works would be highly disruptive to a family and this makes it less probable that a family would have occupied the property during that time. In addition, some of the features of the HMO were not removed, such as door numbers, internal locks and spy holes. The house remained set up for a HMO use when the family were claimed to have been living there. I am not satisfied that such a use has been demonstrated in an unambiguous and precise way.
25. The onus of proof is firmly on the appellant to provide evidence which is sufficiently precise and unambiguous to justify the grant of a certificate. Overall, I find that the appellant's evidence, on the balance of probabilities, does not meet this requirement. Nevertheless, even if I had found that the property had changed to a C3 use, this would not help the appellant.
26. The Council disputes that a change of use to C4 occurred before the A4 Direction came into force but as I have found that there could be no lawful change of use anyway, this factor is irrelevant to my conclusions. For the same reasons, the appellant's evidence of a change of use occurring to a C4 use after the claimed C3 use is also irrelevant.

Conclusions

27. For the reasons given above I conclude that the Council's refusal to grant both certificates of lawful use or development in respect of "C4 house in multiple occupation" was well-founded and that both Appeal A and Appeal B should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Ms S Watson

INSPECTOR