The Planning Inspectorate

Appeal Decision

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 13 January 2025

Appeal Ref: APP/V2004/X/23/3334817
13 Ryde Street, Hull HU5 1PA

- 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 Josef Dolan against the decision of Kingston-upon-Hull City Council.
- The application Ref 23/02834/LAW, dated 28 June 2023, was refused by notice dated 6 December 2023.
- The application was made under section 192(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 as a House in Multiple Occupation (HMO).

Decision: the appeal is dismissed

Procedural Matters

1. The appeal does not require me to make any subjective judgments in terms of, for example, the adequacy of the living space provided or the effect of the development on the living conditions of the occupiers of any neighbouring residential properties. I am therefore satisfied that I can determine these appeals on the written evidence submitted and that there is no need for me to visit the appeal site.

Reasons

2. Section 192(2) of the Town and Country Planning Act 1990 (the 1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development (LDC) was well founded. In this respect, the burden of proof is on the appellant to show that, on the balance of probability, the development proposed would have been lawful on the date on which the application was made.

3. The time limits for taking enforcement action are set out in section 171 of the 1990 Act. Section 171B(3) applies to any material change of use of the land and/or buildings, except for a change of use of a building to use as a single dwelling, and it provides that no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. Under section 192(2) of the 1990 Act, the relevant date for ascertaining whether the existing development is lawful is the date of the LDC application. In this case, the application was made on 28 June 2023.

4. It is settled case law that a use can only become lawful if it continues throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time. Accordingly, the Courts have held that the correct approach is to ask whether there was any time during the relevant period when the local planning authority could not have taken enforcement action against the use, even if it was available for use, because it was not actually occupied. In this respect, a few days of non-occupation might be judged to be de-minimis: for example, if there is a short gap between one tenant moving out and another moving in. However, significant periods of non-occupation may result in the 'clock' starting again.

5. The appellant has provided a copy of a letter issued by Hull Housing granting a Licence of House in Multiple Occupation (HMO Licence) in relation to the appeal property on 11 July 2006. That licence remained in effect until 21 October 2006. There is then a letter form Hull Private Property dated 16 May 2008 enclosing a copy of a further HMO Licence. That Licence remained in effect until 10 August 2012.

6. These HMO Licences are provided in isolation, and there is no evidence before me that the property was actually occupied as an HMO at that time. Moreover, this is prior to the ten-year period that I need to consider under this appeal, and as such is relevant only as background information.

7. The appellant has, however, provided a copy of a letter from Hull City Council dated 7 November 2013 also granting an HMO Licence for the appeal property. This is supported by an Assured Shorthold Tenancy Agreement (AST) dated 11 February 2014, signed by eight individuals whose personal details are set out on the form. This is good evidence that the appeal property was occupied as an HMO at that time.

8. The appellant has provided a copy of the AST for the period between 30 September 2016 and 30 September 2017. The AST appears to be in draft form and is not signed by the tenants. Nonetheless, it clearly states the identity of seven different tenants.

9. The appellant has also provided a copy of the Council Tax Demand for 2016/2017 for the appeal property. However, whilst it may be deduced from the document that the appeal property was not occupied as a single dwelling at that time, it does not state in terms that the property was taxed as an HMO. Nevertheless, taken together with the AST for the period between 30 September 2016 and 30 September 2017, this supports the appellant's case.

10. The AST for the period between 1 September 2017 and 30 August 2018 lists eight tenants as residing at the appeal property. The eight tenants have all signed the AST and this is again good evidence that the appeal property was occupied as an HMO at that time.

11. The same can be said for the ASTs for the periods between 1 September 2018 and 30 August 2019, and between 1 September 2019 and 31 January 2020.

12. There is, however, a significant difference in the AST for the period 2020 to 2021. This AST was signed by just three tenants, on my reading relating to just 2 'flats' (as described in the AST). The appellant provides no commentary to explain why this AST is not in the same format as the previous one and appears to relate to only 2 'flats'.

13. The appellant has provided ASTs for the periods between 28 October 2021 and 30 August 2022, and 1 October 2022 and 30 August 2023, all of which also list eight tenants as residing at the appeal property.

14. The last AST provided is that for the period 1 September 2023 to 30 August 2024 is in a different format to the previous ASTs. This shows that the appeal property was occupied by eight tenants during that period (albeit only the first two months or so of that period are relevant to my consideration of this appeal).

15. From the evidence provided by the appellant, I am satisfied that the property was occupied as an HMO in 2014, between September 2016 and 30 January 2020 and between October 2021 and the date on which the application was made. At other times, the evidence is simply not there or is incomplete: for example, relating to occupation in 2015 and between 2020 and 2021.

16. There are, therefore, some significant periods of the relevant 10-year period for which there is no documentary evidence to show that the use of the appeal property as an HMO was actually taking place. Even though there is evidence to show that the appeal property was occupied as an HMO on dates either side of those dates, it is not reasonable to assume on the balance of probabilities that the use of the appeal property as an HMO was ongoing during those periods for which there is no evidence to that effect. There are any number of reasons why the use may have ceased during those periods.

17. The evidence before me suggests that there were significant periods of non-occupation within the relevant 10-year period which, in the absence of any explanation from the appellant, are too long to be judged as being de-minimis. The local planning authority could not have initiated enforcement action during those periods.

18. In an appeal of this type, the burden of proof is on the appellant to show that, on the balance of probability, the use would have been lawful on the date on which the application was made. The evidence provided by the appellant is not sufficiently precise and unambiguous on its own to show, on the balance of probability, that the use of the appeal property as an HMO had been taking place continuously for a period of ten years prior to the date on which the LDC application was made. Accordingly, I conclude that the Council's decision to refuse to grant a LDC was well founded.

Paul Freer

INSPECTOR