



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/23/3330295

Punjab Kitchen, 207 Beverley Road, Hull HU5 2TX

- 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 Abdul Jabbar against the decision of Kingston-upon-Hull City Council.
 - The application Ref 22/01562/LAW, dated 24 November 2022, was refused by notice dated 26 May 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 an existing use as a 1-bedroom ground floor flat.
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Decision: the appeal is dismissed

Procedural Matters

1. The appeal has been lodged using the wrong appeal form. The appellant's agent submitted the form used for appeals made under section 78 of the Town and Country Planning Act (the 1990 Act) against the refusal or non-determination of an application for planning permission rather the specific form for appeals against the refusal or non-determination of an application for a certificate of lawful use or development under section 195 of that Act. Nonetheless, all the information needed to register the appeal was provided on the form submitted and I am satisfied that the appeal was validly made.
2. 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.
3. The appeal was lodged before the changes to the time limits for taking enforcement action were made on 25 April 2024. Consequently, in this case the relevant time limit for taking enforcement action remains that as section 171B(2) stood prior to that change, which is within 4 years for an unauthorised change of use to a single dwellinghouse where the change of use took place before 25 April 2024. Individual flats are dwellinghouses for the purposes of the 1990 Act.

Reasons

4. Section 192(2) of 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.
5. 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, 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.
6. The appellant purchased the property in or around 2014. The sales brochure at the time describes the appeal property as a ground floor retail unit with a large well-presented 2-bedroom flat. The sales brochure goes on to explain that projecting to the rear of the property is a large single-storey extension that forms part of the ground floor rental demise but that, subject to an agreement with the commercial tenant, this extension *has scope to be converted into 2 flats* (emphasis added). It is therefore immediately apparent from the sales brochure that the single-storey extension was not used as a 1-bedroom ground floor flat when the appellant purchased the property.
7. The appellant then produces a document that purports to be from the Information and Data Management Team at Hull City Council showing approved addresses with UPRN and Eastings and Northings. The document, which is undated, indicates that there is an existing ground floor flat at the appeal property identified as 207B Beverley Road, which has its own letterbox. As evidence intended to show that the property has been occupied continuously for a period of four years, this document is next to useless. At the very most, all it shows is that there was a ground floor flat at the appeal property at an unknown date and that it was occupied at some point. Even that has to be taken at face value, given that the source of the document is not verified.
8. Finally, the appellant claims that Hull City Council confirmed the address as being Flat 207B on 19 October 2018. However, it is not indicated what form that confirmation took, in terms of whether it was provided verbally or in writing. If the latter, the appellant has not provided a copy of any document to confirm that. Without that corroborating evidence, the appellant's claim that Flat 207B was in existence on the 19 October 2018 is evidentially worthless.

9. The above represents the totality of the appellant's evidence. I have not been provided with sworn affidavits from any occupiers, shorthold tenancy agreements, rental records, invoices, receipts or copies of utility bills to show that the single-storey extension to the property has been used as a 1-bedroom flat continuously for a period of four years (or, for that matter, at all).
10. Against that, the Council advises that Council Tax records show that the property was not occupied until 30 October 2020. It was then occupied on shorthold tenancies between 30 October 2020 and 7 October 2021, before becoming vacant again for a period of some four months. The Council Tax records then show the 1-bedroom flat being occupied continuously from 14 February 2022 right through to the date on which the application was made (24 November 2022).
11. Council Tax records are not always a reliable source of evidence, given that occupiers do not always submit information for Council Tax purposes. Nevertheless, this evidence has not been challenged by the appellant who, having owned the property since 2014, would have been well aware of who was occupying it on those dates. As uncontested evidence, I am inclined to attach significant weight to it.
12. I note that Council Tax records show the property to be vacant from 8 October 2021 until being continuously occupied from 14 February 2022. That is a significant period of non-occupation which, in the absence of any explanation from the appellant, is too long to be judged as being de-minimis. The local planning authority could not have initiated enforcement action during that four-month period, because the flat was not actually occupied at that time.
13. On that basis, the four-year 'clock' would be reset to start again when the property was next occupied on 14 February 2022. Given that the application subject to this appeal was submitted only some nine months later (on 24 November 2022), the use as a 1-bedroom flat could not possibly have taken place continuously for a period of four years necessary to achieve immunity from enforcement action.
14. In an appeal of this type, the burden of proof is on the appellant to show that, on the balance of probability, the development would have been lawful on the date on which the application was made. The evidence provided by the appellant, or rather the lack of evidence, falls a long way short of demonstrating that to be the case. Accordingly, I conclude that the Council's decision to refuse to grant a LDC was well founded.

Paul Freer
INSPECTOR