



Appeal Decision

Site visit made on 4 February 2025

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 February 2025

Appeal Ref: APP/T5150/X/24/3342619

The Manor Health Club, 307 Arena Place, Cricklewood Broadway, Brent, London NW2 6PG

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Demos Philiastides against the Council of the London Borough of Brent.
 - The application ref 24/0180 is dated 23 January 2024.
 - 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 the residential use of the fourth floor flat.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Preliminary Matters

2. There is no doubt that the matter that is the subject of the LDC is a use as a self-contained residential flat, which is a use falling within Class C3, of Part C, Schedule 1 of The Town and Country Planning (Use Classes) Order 1987 as amended. The description in the header above, taken from the LDC application form, together with the documents that accompanied the LDC application and appeal, refer to the use of the fourth floor of the property at 307 Arena Place, Cricklewood Broadway. The plan submitted with the LDC application, showing the existing layout of the fourth floor of the property (drawing number 1582.P.04), indicates the location of the areas on the fourth floor identified as bedrooms, a living/dining room, a kitchen, etc. This plan also shows two stairwells, what appears to be lift shafts and a plant room on the fourth floor. My observations of the layout of the fourth floor are consistent with this plan.
3. Having noted the plant room, lift shafts, etc. present on the fourth floor, I sought clarification from the appellant with regard to the parts of the fourth floor that were intended to be the subject of the LDC application. A revised version of drawing number 1582.P.04 was subsequently submitted on which a red line boundary was drawn identifying the parts of the fourth floor for which the LDC is sought, this excluded the stairwells, lift shafts and plant room.
4. I have determined the appeal having regard to this annotated plan. In doing so I am satisfied that no injustice would be caused, particularly as the Council has not

approached its case on the basis that the omitted parts of the fourth floor were intended to be the subject of the LDC application.

Main Issue

5. Section 191(4) of The Town and Country Planning Act 1990 as amended (the 1990 Act) indicates that if, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application was lawful at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application. The Council did not determine the application subject of this appeal. Accordingly, the main issue in this case is, had the Council refused the LDC application, whether or not the refusal would have been well founded.
6. Having regard to the case made by both parties, there appears to be three main considerations in this appeal. These are, namely:
 - i. Whether or not there has been a material change of use of the fourth floor of the building to a use as a self-contained flat, separate from the use of the remainder of the building; and if so
 - ii. Whether or not, on the date the LDC application was made, the use of the fourth floor for this purpose had been continuous for a period of four years or more beginning with the date of the breach¹; and
 - iii. If found to be lawful, whether the lawful residential use of the fourth floor was extant or had been lost by the time the LDC application had been made.
7. The test of the evidence is the on balance of probability and the burden of proof is on the appellant. Paragraph 006 of the Planning Practice Guidance document on Lawful development certificates advises that, 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.

Reasons

8. The appellant's evidence in support of this case is primarily in the form of statutory declarations from the appellant and three other witnesses. These are the appellant's accountant, Pratap Tann; the appellant's architect, Mr Andrew Scott; and the appellant's solicitor, Michael Christos Votsis. The Council are satisfied that these have been 'suitably declared in accordance with the Statutory Declarations Act 1835'. Accordingly, I have determined this appeal, mindful of the significant weight that is carried by evidence provided in such statutory declarations, in view of the sanctions that could be imposed should these contain false or misleading evidence.

Has a material change of use occurred?

9. In their statutory declaration, the appellant says that they acquired the appeal building in March 1999. They say that the building was designed as offices, but does not indicate how the building was used prior to their purchase of it, save for

¹ In accordance with the time limits set out in section 171B(2) of the 1990 Act.

mention of a retail use at ground floor. Other than the ground floor retailer, the evidence indicates that, since as early as 2001, the appellant has been the occupier of the building.

10. The appellant says that the refurbishment of the building commenced in 2001, which included the provision of residential accommodation on the fourth floor. They say that their use of the fourth floor for residential purposes commenced at some time in 2001. There is corroboratory evidence of this from the appellant's accountant, Pratap Tann, who says in their statutory declaration that their 'first visit to the flat was in or about 2002'. They go on to say that at that time the appellant 'was living in the flat with his young daughter as their main residence'.
11. As for the nature of this accommodation, the appellant refers to a kitchen/dining area, a bathroom, a w.c. and a separate shower room. They also refer to 'rudimentary divisions for separate living and bedroom accommodation' to give them and their daughter privacy. I have not been provided with any photographs or a more detailed description of the accommodation at this time. However, the appellant's architect, Mr Andrew Scott, has provided a plan attached to his statutory declaration indicating the layout of the fourth floor at the time of his first visit in 2011. They say that this shows the location of some internal divisions within the accommodation, which is consistent with the rudimentary divisions referred to by the appellant. This is prior to the refurbishment of the fourth floor in 2019, which both the appellant and Mr Scott suggest resulted in the present layout.
12. Having regard to the evidence before me, it is more likely than not that the fourth floor accommodation had the distinctive characteristics of a dwellinghouse when the residential use commenced in 2001, in that it was able to afford to those who used it the facilities required for day-to-day private domestic existence. This is not disputed by the Council. Indeed, the Council does not suggest that the fourth floor of the premises has been used for anything other than to provide residential accommodation since 2001.
13. The indication is that from 2001 the fourth floor was used as the only home for the appellant and their daughter. The evidence also indicates that, at this time, the retailer was the occupier of the ground floor and that the remainder of the property was vacant, but subject to the renovation works.
14. There is no suggestion that there was ever any connection between the ground floor retail use and the fourth floor residential use. Accordingly, it is more likely than not that in 2001 there were two primary uses of the building that were physically and functionally separate from each other, each occupying a planning unit of their own. The first being the retail use at ground floor and the second being the use of most of the fourth floor as a residential flat.
15. There is no reference to previous residential accommodation within the building. Accordingly, whilst the retail unit may well have been an existing use at this time, the evidence indicates that, on the balance of probability, the introduction of the flat resulted in a material change of use of most of the fourth floor of the building.
16. The appellant says that the use of parts of the remainder of the building as a gym commenced in 2003, following the completion of the refurbishment works. The Council does not dispute the appellant's evidence that, prior to this, the residential use of the fourth floor had commenced and that, after this time, the residential use of the fourth floor continued. Nevertheless, and despite acknowledging that the

gym use commenced a year or more after the residential use of the fourth floor², the Council suggest that the residential use is ancillary to the gym use. Having regard to the chronology set out above, I have some difficulty with this suggestion. An ancillary or incidental use is one that is not part and parcel of the primary use, but is otherwise functionally related to it. The functional relationship should also be one that is normally found and not based on the personal choice of the user, as set out in the case referred to by the Council³.

17. Even if I were to agree with the Council, that a residential use is ordinarily ancillary to a gym, to my mind the primary use (i.e. the gym use) must exist for the residential use to be regarded as ancillary to it. An indication that there is a functional link between the two uses is that the ancillary use only exists because of the primary use. There is nothing in the Council's case to persuade me otherwise.
18. Accordingly, as the evidence indicates that the residential use had been established and ongoing for at least a year before the gym use within the building commenced, I cannot regard it as being an ancillary use in its early years, on the balance of probability.
19. Notwithstanding the above, the situation may have changed on the commencement of the gym use in 2003. If it were the case that at this time the residential use became a use that was ancillary to the gym use, there would need to have been a definable change in the character of the use of the property. To my mind it is not sufficient to say that this change occurred simply with the commencement of the gym use. There would also need to be a definable change in how the residential accommodation was used to indicate that it changed from being a primary use of the building, taking place in a planning unit of its own, to an ancillary use that is functionally linked to a new primary use of the building, taking place within the same planning unit as the new use.
20. In this regard, there is no suggestion that the areas occupied by the residential use changed at this time, or that there was a change to the physical separation between the residential accommodation and the remainder of the building, parts of which had begun to be used as a gym. The Council point to the shared access to the fourth floor flat via the gym prior to 2007⁴. The indication is that this was via the side entrance to the building, off Temple Street, which the Council describe as an entrance lobby.
21. At the site visit I was able to enter the building via this side entrance. Although I understand that this is only used at present to gain access to the fourth floor and the vacant parts of the building (i.e. those areas not actively used as a gym at present), there was a disused reception desk in the entrance lobby that might have been used as the gym's reception before the entrance to the gym was changed in 2007. Other than this, the entrance lobby, stairwell and lifts only appear to serve the purpose of providing access to each floor of the building. I acknowledge that anyone accessing the fourth floor flat could gain easy access to the other parts of the building from this central stairwell. Notwithstanding this, I noted the locked door at the entrance to the flat, which physically separates the part of the fourth floor

² This would be the minimum period, given that the date for the commencement of the residential use is some time in 2001 and the date for the commencement of the gym use is some time in 2003.

³ *Harrods v SSETR* [2002] JPL 1258, it

⁴ The evidence, which is not disputed by the Council, indicates that access to the gym moved in 2007 to the corner of the building (the Temple Street and Cricklewood Broadway corner) when the gym commenced occupation of the ground floor following its vacation by the retailer.

occupied by the flat, and the activities within it, from the remainder of the property. There is nothing to suggest that this physical separation between the flat and the remainder of the property has not been in place since the use of the flat commenced in 2001.

22. As for any functional connection between the residential use and the gym use, the Council refer to the CCTV monitoring equipment on the fourth floor, which it says monitors various parts of the building, including the gym. The evidence does not, however, indicate whether this monitoring equipment was in place in the early years following the commencement of the gym use. Nevertheless, I am not persuaded that the presence of monitoring equipment within the flat demonstrates a functional connection between the residential use and the gym use. Indeed, such monitoring equipment can be of use, regardless of whether it is within a business premises or remote from it.
23. The appellant refers to the early starts and late evenings working in the gym, which they say has resulted in their continued use of the residential accommodation, despite their purchase of a family home elsewhere in 2006. Having regard to the appellant's pattern of work, I have no doubt that their full time occupation of the fourth floor accommodation up until 2006 was entirely convenient for them, following the commencement of the gym use in 2003. However, there is nothing to indicate that, for example, the appellant's presence on site 24 hours a day was necessary for the gym use to operate day to day, or that the residential accommodation in some way supported the gym use from 2003 onwards. The proximity of the residential accommodation to the gym demonstrates the convenience of this arrangement. It is not, in my judgement, sufficient to demonstrate a functional connection between the two. Indeed, there is nothing before me to support the Council's suggestion that the fourth floor accommodation was 'required' to manage the gym.
24. Ordinarily, an ancillary use is subsidiary or secondary to the primary use. The evidence indicates that the residential use in this case started as a self-contained unit of accommodation, occupying a planning unit of its own. There is no suggestion of any physical change to this accommodation following the commencement of the gym use. Furthermore, I am not persuaded that the commencement of the gym use in this case resulted in a functional link between the two uses, such that I could conclude that, as a matter of fact and degree, there would have been a definable change to the character of the whole of the property.
25. Notwithstanding all the above, having regard to the particular circumstances of this case, including the evidence of the fluctuating scale of the gym use since its commencement in 2003 and the unchanging nature of the residential accommodation since 2001, I am not persuaded by the Council's suggestion that the residential use in this case would have been ordinarily ancillary to the gym use.
26. Having regard to all of the above, I find it more likely than not that the use of the fourth floor as a separate unit of accommodation taking place within its own planning unit continued after 2003, despite the commencement of the gym use in other parts of the building at this time.

Continuity of the Use

27. In order to establish whether or not the residential use became lawful, I now turn to the continuity of the use. The appellant states that their occupation of the fourth floor accommodation with their daughter, as their only home, took place between 2001 and 2006. There is a degree of ambiguity in the appellant's statement as more precise dates within 2001 and 2006 are not given for the commencement of the residential use on the fourth floor or the acquisition and move to a family home elsewhere. However, even if the precise dates were at the end of 2001 and the beginning of 2006, there would be a period of at least 4 years between the two. Furthermore, I note that the appellant's claims are supported in the statutory declaration of Pratap Tann and Michael Christos Votsis, who say that they visited the flat in 2002 and 2005 respectively. Although their visits were not frequent, their evidence does nothing but corroborate the appellant's claims.
28. I acknowledge that the fourth floor accommodation from 2001 was only recorded with the Council's revenues department in October 2023. The absence of such records for the accommodation prior to this date is not, however, sufficient to make the appellant's version of events less than probable.
29. Whilst I note that there is a lack of other corroboratory evidence one might expect, such as utility bills for the flat, the appellant's evidence is corroborated by the evidence of three other individuals. I find all of the evidence together sufficient to discharge the burden of proof in this case. Taken as a whole, the appellant's evidence is sufficiently precise and unambiguous in demonstrating that, on the balance of probability, the use of the fourth floor as a residential flat continued substantially uninterrupted for a period of four years or more starting with the date of the breach in 2001. I conclude as such, mindful of the weight that should be attributed to the evidence, having regard to how it has been given. I have had regard to the contradictory evidence, but I am not satisfied that this makes the appellant's version of events less than probable.
30. My conclusion above means that the residential use of the fourth floor became lawful within the meaning of section 171B(2)⁵ of the 1990 Act on the date four years after the breach commenced, which would have been some time in 2005, prior to the appellant acquiring a family home elsewhere.

Is the lawful use extant or has it been lost?

31. The Council point to the case of *Swale BC v FSS & Lee* [2005] EWCA Civ 1568, where it was held that there is a difference between an established dwellinghouse, when an occupier does not have to be continuously or even regularly present in order for the building to remain in use as a dwellinghouse, and where there is no established use. Once established, there are circumstances where a lawful use of land or a building might be lost. These include, for example, where a material change of use of the land to some other use has occurred. It might also be extinguished by the creation of a new planning unit.
32. I note the appellant does not rely on the period between 2001 and 2005 to demonstrate that the existing use of the fourth floor was lawful at the time the LDC application was made. Indeed, where there has been a material change of use of a

⁵ Section 171B(2) of the 1990 Act, together with section 5 of The Planning Act 2008 (Commencement No. 8) and Levelling-up and Regeneration Act 2023 (Commencement No. 4 and Transitional Provisions) Regulations 2024.

building to a single dwellinghouse, any four year period after the date of the breach can be relied upon in order to demonstrate the continuity and, therefore, the lawfulness of the use. However, I have reached my conclusion on the lawfulness of the use, having regard to the four year period following the date of the breach. Accordingly, I find it necessary to consider the implications of the appellant's change of circumstances in 2006.

33. As I note above, the appellant refers to their continued use of the fourth floor residential accommodation after 2006, despite their purchase of a family home elsewhere at this time. They say that this has continued at least a few times a week. The appellant refers to the convenience of this, not only for the proximity of the accommodation to the gym, but also to its proximity to the appellant's other property interests in London. The appellant also refers to the use of the flat with him by family members.
34. The visits to the fourth floor by Pratap Tann, Mr Scott, and Michael Christos Votsis at various times between 2005 and 2023 corroborate this. Indeed, they each refer to obvious evidence of the occupation of the flat during their visits.
35. Whilst the use of the flat since 2006 may not have been as regular as its use prior to this time, there is nothing to suggest that the change in the appellant's circumstances from 2006 onwards resulted in there having been a material change of use of the flat. Indeed, the evidence is sufficient to demonstrate that the residential use continued after the change to the appellant's circumstances in 2006, although not on a permanent bases, but nevertheless frequently.
36. In view of this, I have no reason to conclude that the lawful use of the flat on the fourth floor has been lost since it was established in 2005. Accordingly, I find it more likely than not that the residential use of the parts of the fourth floor identified on the annotated layout plan as a self-contained flat was lawful at the time the LDC application was made.

Conclusion

37. For the reasons given above I conclude that, had the Council refused to grant a certificate of lawful use or development in respect of the residential use of the fourth floor flat, that refusal would not have been well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act.

J Moss

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 23 January 2024 the use described in the First Schedule hereto in respect of the building specified in the Second Schedule hereto and edged in red on the plan attached to this certificate and labelled 'Plan 1', was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The appellant's evidence is sufficiently precise and unambiguous to demonstrate that, on the balance of probability, the use of part of the fourth floor as a self-contained residential flat continued substantially uninterrupted for a period of four years or more starting with the date of the breach in 2001. Once established, it is more likely than not that the lawful use continued and has not been lost. The use was, therefore, lawful at the time the LDC application was made.

Signed

J Moss

Inspector

Date: 21 February 2025

Reference: APP/T5150/X/24/3342619

First Schedule

A use as a self-contained residential flat, which is a use falling within Class C3, of Part C, Schedule 1 of The Town and Country Planning (Use Classes) Order 1987.

Second Schedule

Part of the fourth floor edged red on the plan attached to this certificate and labelled 'Plan 1' of the building at The Manor Health Club, 307 Arena Place, Cricklewood Broadway, Brent, London NW2 6PG edged red on the plan attached to this certificate and labelled 'Plan 2'.

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plans

These are the plans referred to in the Lawful Development Certificate dated: 21 February 2025

by J Moss

Land at: The Manor Gym, London, NW2 6PG

Reference: APP/T5150/X/24/3342619

Scale: Not to Scale

Plan 1



EXISTING
FOURTH FLOOR PLAN

Plan 2

