



Appeal Decision

Site visit made on 18 December 2024

by D Moore BSc (HONS), PGDip, MCD, MRTPI, IHBC

an Inspector appointed by the Secretary of State

Decision date: 26 March 2025

Appeal Ref: APP/N5090/X/24/3350200

Flat 4, The Spinney, 22 Hendon Wood Lane, London NW7 4HR

- The appeal is made under section 195 of the Town and Country Planning Act 1990, as amended, (the 1990 Act) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr GMP Fitzgerald against the decision of the Council of the London Borough of Barnet.
 - The application ref 24/1960/191, dated 17 May 2024, was refused by notice dated 14 June 2024.
 - The application was made under section 191(1)(a) of the 1990 Act.
 - The use for which a certificate of lawful use or development is sought is "Use of Building as single Class C3 dwellinghouse".
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs has been made by Mr GMP Fitzgerald against the decision of the Council of the London Borough of Barnet. This is the subject of a separate Decision.

Preliminary Matters

3. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous.
4. For the avoidance of doubt, the planning merits of the use are not relevant and there is no deemed planning application.
5. The application sought confirmation that the use of the building as a dwellinghouse within Class C3 of the Schedule to the Use Classes Order 1987 was lawful on the date of the application. It was argued that the material change of use had taken place four or more years prior to the date of the application and the use had gained immunity from enforcement action due to the passage of time. The Council refused the application on 14 June 2024 for the following reason – "This operation constitutes a contravention of the requirements of an enforcement notice currently in force and, as such, the use is considered to be unlawful by virtue of Section 191(2)(b)".

6. Subsequently, the Council reviewed the case and decided that, at the time of the registration of the application, the enforcement notice (ref ENF/1464/21) was not in force. However, the Council maintained that the development was not lawful as it had not been shown that no enforcement action may be taken. It issued a 'Statement of Clarification' to that effect. The appellant indicates that it is not acceptable for the Council to depart from its original reasoning and change its reason for refusal.
7. The Council had to decide whether the development was lawful or not on the date of the application. I accept that the reasoning evolved but, ultimately, the conclusion was that the use was not lawful. The Council's decision on that matter did not change.
8. S195(1) of the 1990 Act provides that an appeal may be made to the Secretary of State where an application under s191 or s192 is refused. S195(2) and (3) provide that, on appeal, the Secretary of State shall grant an LDC if the Local Planning Authority's refusal is not 'well-founded' and shall dismiss the appeal if the refusal is well-founded. Hence, appeals under s195 are treated as 'de novo' appeals and the parties may submit additional evidence to the Secretary of State.
9. This is because s195 refers to the refusal being well-founded, which is the decision, not the reasons for the decision. Moreover, the application being appealed is made to ascertain what is lawful. If the evidence taken as a whole suggests that the matter in question is not lawful, it would be wrong to grant an LDC, even if the Local Planning Authority had different (and misplaced) reasons for reaching the same conclusion. The purpose of the LDC provisions are to enable the making of an objective decision based on the best facts and evidence available when the decision is taken.
10. The appellant refers to caselaw in support of their arguments, however, many of the cases cited concern issues that are not in dispute. It is agreed that the relevant date for ascertaining whether the existing development is lawful is the date of the LDC application; that s175(4) applies and the notice had no effect at that date; an enforcement notice cannot invalidate a use that has become lawful through the passage of time; and that an Inspector's task on s195 appeals is to consider the evidence afresh.
11. It is also indicated that the Council is estopped from changing its reasoning in respect of the LDC refusal. This is not correct for the reasons given above.

Main Issue

12. The main issue is whether the Council's refusal to grant an LDC is well-founded.

Reasons

13. The enforcement notice referred to in the Council's decision notice alleged a material change of use of the land to a dwellinghouse. The notice was issued on 1 December 2022 and an appeal was made. That appeal was dismissed, and the notice was upheld on 11 June 2024.
14. The appellant submitted an LDC application for "use of building as single C3 dwellinghouse" on 17 May 2024, after the notice was issued but before the Inspector's decision. It is argued that the dwellinghouse has gained immunity due

to the passage of time and, at the date of the LDC application, there was no enforcement notice in force.

15. S191(2) of the 1990 Act provides that uses and operations are lawful at any time if (a) no enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason; and (b) it does not constitute a contravention of any of the requirements of an enforcement notice then in force.
16. The 'and' between s191(2)(a) and (b) is crucial. If it is found, for example, that a notice was issued but not in force on the relevant date and so s191(2)(b) is met, that is not enough for an LDC to be granted. The appellant will still need to show that no enforcement action may be taken in order to satisfy s191(2)(a)¹.
17. The time for taking enforcement action will expire as and when the Local Planning Authority fails to issue an enforcement notice within the relevant period under s171B(1),(2) or (3) and the authority will not be able to take further enforcement action if a notice is withdrawn or quashed and it does not issue a second notice within the prescribed time limit under s174B(4). A use or operation may become lawful under s191(2)(a) if a notice is issued and appealed, and proceedings are protracted and yet the authority fails to exercise its powers under s171B(4). In the latter scenario, an s191 appeal could succeed before an appeal against a notice is finally determined.
18. However, that is not the case with this appeal. At the date of the application, an appeal had been brought under s174 and consequently the notice had no effect pending the final determination of the appeal. Nonetheless under s171B(4), the 'second bite' provisions, the Council may take further action in respect of any breach of planning control if, during the period of four years ending with that action being taken, it had taken or purported to take enforcement action in respect of that breach. Hence, even though the four-year time limit specified in s171B(2) may have expired, the Council may nevertheless have been able to take enforcement action at the date of the application, because of the second bite provisions.
19. The appellant argues that the Council does not question the evidence which has been submitted to demonstrate the continuous use of the premises as a C3 dwelling. There is evidence and caselaw cited on the matter of immunity and the Inspector's decision is referred to. However, this consideration is not relevant since the second-bite provisions apply in any case.

Conclusion

20. For the reasons given above, I conclude that the Council's refusal to grant an LDC for the use of the building as a single Class C3 dwellinghouse is 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.

D Moore Inspector

¹ Reiterated in *LB Brent v SSHCLG, Ebele Muorah* [2022] EWHC 1875 (Admin).