
Appeal Decision

Inquiry held on 1 November 2016

Site visit made on 1 November 2016

by Sukie Tamplin DipTP Pg Dip Arch Cons IHBC MRTPI

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

Decision date: 1 December 2016

Appeal Ref: APP/T5150/X/15/3138588
9 Stonebridge Park, London NW10 8EJ

- 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 Wise Estates (UK) Ltd against the decision of the Council of the London Borough of Brent.
- The application Ref 15/4053, dated 18 September 2015, was refused by notice dated 13 November 2015.
- 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 C4 Small HMO with no more than six residents.

Summary of Decision: The appeal is dismissed.

Application for costs

1. At the Inquiry an application for costs was made by the London Borough of Brent against Wise Estates (UK) Ltd. This application is the subject of a separate Decision.

Background and procedural issues

2. All evidence at the Inquiry was taken on Affirmation.
3. The appeal site is a terraced 2-storey residential property on the east side of Stonebridge Park. It was acquired by the appellant on 4 July 2014 and it is common ground that at stage it was laid out as a single dwelling house.
4. Mr Mann on behalf of Wise Estates says that following acquisition works were undertaken to convert the property and this included the construction of a single storey extension. These works took about 3 months and the evidence shows that by October 2014 it was occupied by a number of tenants.
5. The Council issued an Enforcement Notice on 11 February 2015 alleging that there had been a breach of planning control so that No 9 was now in use as six flats. This Notice was not appealed and came into force on 23 March 2015 and the period for compliance with the steps outlined in the Notice was 6 months. In summary the steps required: 1. the cessation of the use of the premises as flats; 2. the removal of kitchen and bathroom facilities¹ and 3. the restoration

¹ Except one kitchen and 2 bathrooms

of the use as a single dwellinghouse. This Notice is not a matter over which I have any jurisdiction but it is a material consideration in the current appeal.

6. The application for the Lawful Development Certificate (LDC) for the proposed use was made approximately a week before the expiry of the period for compliance with the requirements of the Notice. An application for a LDC must be determined on the basis of fact and law and considered against the appropriate legislation in force at the time the application was made. Section 192(2) of the Act² says that if on an application the decision maker is satisfied "that the use...described in the application would be lawful if instituted or begun at the time of the application", the certificate shall be approved. The onus of proof lies firmly on an appellant and to succeed the evidence submitted must be sufficiently precise and unambiguous.
7. Two of the plans submitted as evidence to the Inquiry had the same reference number and the same date but showed a different layout of residential accommodation in No.9. It was agreed, for the purposes of the Inquiry and the decision, that the plans should be renumbered to avoid confusion. Consequently the plan titled 'Existing' and showing the property as a 4-bedroom single family house is known as Dwg No 01; the 'Proposed' plan showing 5 units of accommodation is known as Dwg 02. These plans are those that formed part of the application for the LDC. A third plan, included in the appellant's appendices, also titled 'Proposed', numbered 02 and showing 6 units is referred to in my decision as Dwg No 01a. All the drawings are dated 1 July 2014.
8. Class L of Part 3, Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) says that the following development consisting of a change of use of a building is development permitted by the Order:
 - a) a use falling within Class C4 (houses in multiple occupation) of the Schedule to the Use Classes Order (UCO), to a use falling within Class C3 (dwellinghouse) of that Schedule;
 - b) a use falling within Class C3 (dwellinghouses) of the schedule to the UCO, to a use falling within Class C4 (houses in multiple occupation) of that Schedule.
9. The parties agree that the layout of No 9 illustrated on Dwg 02 (5 units), would, if the tenants shared a kitchen, fall within the meaning of "house in multiple occupation" (HMO) as defined by Section 254 of the Housing Act 2004.

Main issue

10. The main issue in this appeal is whether or not the proposed use of the building as a small HMO would be lawful at the date of the application.

Reasons

11. This issue can be considered in the light of three possible scenarios or starting points.
12. Firstly, Mr Ormonde on behalf of Wise Estate's says that whether or not the building was in use at the date of the application as 6 self-contained flats is

² Town and Country Planning Act 1990 as amended

irrelevant because the lawful use of the building is as a single dwelling house. What is more, the steps of the Notice require the building to be returned to its former configuration and that is a single dwelling house. Thus the baseline for the LDC application, he says, is that the lawful use of No.9 at the time of the application was use as a single dwelling house (C3). In the alternative he said the property was already in C4 use at the date of the application.

13. Secondly, the Council say, in their preferred scenario, that the starting point must be the evidence that shows that since about October 2014 the property has been subdivided and occupied as 6 self-contained flats and in their view it was in this use at the relevant date.
14. Thirdly and in my view, it is necessary to address the wording of the deemed permission, conferred by Class L of the GPDO in the context of the wording of S192 of the Act. Hence in this scenario, the starting point must be that the onus is on the appellant to demonstrate, on the balance of probabilities that No.9 was in C3 or C4 use at the time of the application.

The use of No. 9 on 18 September 2015

C3 use

15. As I have noted above the LDC application was supported by 2 plans, Dwg 01 and Dwg 02. However at the Inquiry Mr Mann on behalf of Wise Estates appeared to distance himself from Dwg 01 and refers to the layout on the plan Dwg 01A³, as the current or existing layout of the property; this is despite the title 'Proposed Floor plan'. This plan shows 6 units and my site visit showed that this layout approximates to the current configuration of accommodation on site. When questioned, Mr Mann seemed unaware that the plan was different from the plan put in as part of the LDC. Although he said he had commissioned the drawing up of the plans he could not explain why all three plans bear the same date but show different internal arrangements. He suggested that this was simply a drafting error but also said that he was not particularly familiar with the property. He also suggested that, irrespective of the plans which were submitted to support the application, these can now be discounted as unnecessary.
16. Similarly Mr Ormonde, who appeared on behalf of the appellant, said that although he had submitted the application for the LDC, he had not visited the appeal site at No 9. Consequently he said that he did not know when No.9 was in use as a C3 dwelling and or how the property was laid out. Moreover because the application was for the proposed use of No 9, the historic or actual use was irrelevant.
17. Hence Wise Estates was neither able to explain why the plan submitted with the LDC application, (Dwg 01), showed the 'Existing' layout as a 4 bedroom single dwellinghouse nor provide any cogent evidence that the building was in C3 use at the time of the application.
18. In these circumstances, and the absence of evidence to demonstrate, on the balance of probabilities that No. 9 was in C3 use at the time of the application, I find that this part of the appellant's preferred scenario appears flawed.

³ Renumbered for the purposes of clarity as noted in paragraph 7 of this decision

C4 use

19. The evidence shows that the appeal property was registered as 6 flats, for Council Tax purposes with effect from 30 June 2014. However, as noted by the appellant, the Valuation Office applies different criteria to that used by the Housing and Planning Acts. In this case therefore the Council Tax classification is not, in itself, determinative of whether or not a building is used as an HMO or divided into self-contained flats.
20. The tenants of Flat 3 and Flat 6 completed applications for the payment of Housing Benefit on the 16 October 2014. Each of these said in their applications that they had exclusive use of a bedsit room, a kitchen, a bathroom and a toilet. As a consequence housing benefit appears to have been paid at a higher rate, (1-bed flat £260.64 per week), than would have been the case if the premises were part of a HMO, for which the payment would be £97.83 per week. The evidence shows that these tenants were still in residence in July 2016 and were paid at this higher rate for at least a 9 month period from about the beginning of 2016. There is no evidence before me about the payment made in September 2015, but because the flats were occupied by the same tenants both in October 2014 and in January 2015, on the balance of probabilities, I consider it likely that the higher self-contained flat rate would have been paid at the date of the application for the LDC.
21. Although Mr Mann suggested that the payment of the higher rate is not an indicator that the premises were self-contained, he could not explain why any tenant would suggest that the premises comprised self-contained flats and provided exclusive use of cooking facilities. Housing benefit is not paid to the tenant and thus there is no incentive for a tenant to give misleading answers. Consequently I give significant weight to the tenants' own testimony.
22. The Council also submitted an Assured Shorthold Tenancy agreement for the period 3 March 2015-3 September 2015. This was in favour of Flat 2, where this tenant remains in occupation. The tenancy is in respect of Flat 2 only and does not imply or infer use of any communal facilities. Mr Mann was unable to explain why the tenancy agreement was in this form and said because he had so many other properties to manage he could not be expected to know the form or content of the tenancies at No. 9; he also said he did not normally visit the properties he managed because this was done by the staff he employed.
23. The appellant conceded that the steps in the Enforcement Notice had not been complied with and that the only action taken to date was the addition of 'blanking plates' to prevent the use of the power points located above the kitchen worktop in each room. However no evidence was provided to the Inquiry about the timing of this alteration and in particular if it had taken place by 18 September 2015.
24. I also heard that verbal requests had been made to the tenants to remove all cooking facilities from their rooms. Despite these requests, which were not supported by any substantive evidence, the Council says that all six rooms at No 9 were visited in October 2015 and they all had a toilet, washing facilities and cooking facilities at that date. The officer visiting the premises at that stage has now left the Council and thus was unable to give a first hand account at the Inquiry. But later visits by Council officers to 2 separate flats found evidence that cooking facilities were still in use in at least 2 units in December 2015 and January 2016 and this is supported by photographic evidence.

25. Mr Mann says that regular checks are made to ensure that tenants do not have their own cooking facilities, but I give this limited weight because even at the pre-arranged appeal site visit, access was not available to all the units. I also saw that at least one flat continued to have facilities available for cooking.
26. The appellant's evidence was evasive at best and in contrast the Council provided a wide range of supporting evidence and information gained from visits to the property. One tenant at the site visit said that he had rented a 'studio flat' in good faith and was aggrieved that one of his power points had subsequently been taken out of use. Though this supports the appellant's claim that cooking facilities were removed I find, on the balance of probabilities, that No.9 was not in use as a C4 HMO at the date of the application. Hence this finding casts doubt on the second limb of the appellant's scenario and lends support to the Council's preferred approach.

Is the existing use relevant?

27. The premise underlying the appellant's case is that the existing use is irrelevant because the application was made under S192 of the Act and thus is concerned with future use, not current use. Moreover he says, that regardless of any Enforcement Notice, Section 57(4) of the Act is clear that planning permission is not required for the use for which the property could lawfully have been used if the unlawful development had not been carried out.
28. It is common ground that use of No 9 as a C3 dwelling would not require an express grant of planning permission, but as I have concluded above, it was not in this use on the relevant date. Neither was it in use as a C4 HMO. Hence in either case it cannot, as a matter of fact, benefit from the provisions of Class L. As noted in the extract from a publication by Martin Goodall, submitted as part of the appellant's evidence "there are no other permitted development rights that allow the change of use of a dwelling from Use Class C3 to any other use except C4, and none which allows any other change of use to or from Use Class C4".
29. In this case, I have found, on the balance of probabilities, that the existing use of No. 9 at the time of the LDC application was as self-contained flats. This was unlawful because the flats had no planning permission and the use was the subject of an enforcement notice which has come into force. The appellant suggests that an application for an S192 LDC must be determined in the light of the lawful use of the premises, particularly because it could revert, without any express permission to that use at any stage, but this is an approach which is not supported by the courts.
30. The Supreme Court held in the case of *SSETR v Waltham Forest London Borough Council* [2002] EWCA Civ 330 (*Waltham Forest*) that when, as in the circumstances before me:
1. no permission is needed to move from the existing use, to another use, in this case a C3 dwellinghouse; and
 2. no further permission is needed to move from that use, in this appeal (C3) to the use applied for (C4)
- it is a matter potentially relevant to whether planning permission should be granted.

31. However the Court also held that this 2 stage approach "is a complication not relevant to the exercise under Section 192". Thus whether or not the use was unlawful and could revert to C3 and thence to C4, does not help the appellant because it was not, at the relevant date in C3 or C4 use and thus could not benefit from Class L rights. In these circumstances and with reference to the wording of Section 192, the existing use is highly relevant because this determines whether or not the proposed use can benefit from the permitted development rights of Part L of the GPDO. Whilst the appellant says that this approach is not sensible it falls fairly and squarely in line with that taken by the Supreme Court, the wording of the GPDO and also S192 of the Act. Hence, I favour this third scenario which is supported by the Council's evidence of the use subsisting at the premises on 18 September 2015.

Other matters

32. A number of appeal decisions are relied upon by the appellant, and both parties rely on legal opinions which are concerned with the tests to be applied in assessing whether or not a property is in C4 use. But these appeal decisions, including that submitted by the Council, are all appeals made under Section 174 of the Act and thus are materially different from the LDC appeal before me. Similarly the legal opinions are primarily concerned with the assessment and interpretation of Use Class C4 and thus have limited application in this case. In any event, it is a long established premise that an appeal must turn on its own facts and thus I give these documents little weight.
33. The appellant suggested that the Council's evidence was misconceived and was based on the provisions of Section 191 of the Act. I agree that its evidence appeared muddled at times, and this was accepted by Mr Scott. However I found that its defence of the appeal was comprehensively underpinned by unambiguous and relevant data about the use of the premises at the time of the application. This is, as I have found above, highly relevant to the appeal before me. Whilst this muddled approach may, in other circumstances, have been damaging to the Council's case, I also found that the appellant's evidence was internally contradictory, vague and unspecific. The onus of proof lies firmly on the appellant and to succeed the evidence submitted must be sufficiently precise and unambiguous and I find that this test of the evidence has not been met.
34. Consequently, the proposed change of use of No 9 to a C4 Small HMO with no more than six residents by reason of the limitations of Schedule 2, Part 3, Class L of the GPDO, does not benefit from deemed consent granted by the Development Order.

Decision

35. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the proposed change of use of No 9 to a C4 Small HMO with no more than six residents, was well-founded and the appeal should fail. I therefore exercise the powers transferred to me in section 195(3) of the 1990 Act as amended and uphold that decision. Consequently the appeal is dismissed.

Sukie Tamplin

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Saira Kabir Sheik QC

She called

Alvin Ormonde

Pincus Mann

Proprietor, Planning and Management Services
Property Manager and company Director of
Manlow Development and Manlow Property
Management

FOR THE LOCAL PLANNING AUTHORITY:

Nigel Wicks MRTPI

He called

Scott Davies BA

Deputy Planning Enforcement Manager, London
Borough of Brent

DOCUMENTS submitted at the Inquiry

- 1 Statement of Common Ground
- 2 Opening submission on behalf of the appellant.
- 3 *SSETR v Waltham Forest London Borough Council* [2002] EWCA
Civ 330 submitted by the Council