

Delegated Application Report

Address: 24 Donnington Gardens

Application No: 191663/CLE

Proposal: Certificate of Lawfulness of existing use of the property as a 4 person, 4 bedroom HMO (C4 use) (amended description)

Case Officer: Connie Davis

Agreed Target Date: 29/04/21

Site Description

The application site is a two storey mid-terrace property located on the western side of Donnington Gardens; opposite the boundary of the Alexandra Road conservation area. Properties in the vicinity are of the same style and size, with some being in use as HMOs.

The property is located within an Article 4 direction preventing the change of use from C3 to C4. This was introduced in May 2013.

Description of Use or Development

A Certificate of lawfulness has been applied for to demonstrate the existing use of a property as a 4 person, 4 bedroom HMO.

In order for the certificate to be granted, it needs to be demonstrated that the property has been in continuous use for ten years prior to the application being submitted to the Local Planning Authority. As such, the relevant time period is 17th October 2009 - 17th October 2019. It is stated as part of the application that the HMO is used by students.

Throughout the course of the application, the number of occupiers was amended from 5 to 4 due to it being agreed that insufficient evidence had been provided to demonstrate that the property had been continuously occupied for the relevant period by 5 tenants.

Relevant Planning History

181741/FUL - Change of use from dwellinghouse (Class C3) to a house in multiple occupation (Class C4) - Application Withdrawn

Relevant Planning Policy and Guidance

Section 10 of the Planning and Compensation Act 1991 established a procedure that enables anyone who wishes to do so, to apply to the local planning authority to determine whether a proposed use or operation, or an existing operational development or an existing use of land, or any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted, is lawful, and if so, be granted a certificate to that effect.

A Lawful Development Certificate is a legal document stating the lawfulness of past, present or future development. If granted by the local planning authority, the certificate means that enforcement action cannot be carried out to the development referred to in the certificate. However, the certificate will not protect from enforcement action by the planning authority if the specified use or development is then changed 'materially' without a planning application for it.

The certificate is not a planning permission. The planning merits of the use, operation or activity in the application are not relevant. The issue of a certificate depends entirely on factual evidence about the history and planning status of the building or other land and the interpretation of any relevant planning law or judicial authority. The responsibility is on the applicant to provide evidence to support the application.

The NPPG states that “The applicant is responsible for providing sufficient information to support an application. In the case of applications for existing use (section 191 of the Town and Country Planning Act 1990), 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”.

Internal Consultation Responses

Council Tax

From a council tax point of view this property is not considered to be a HMO, this is because the tenants have always been named on the same tenancy agreement and therefore liable for the council tax charge.

I can advise that over the last ten years this property has continued to be let out to different tenants.

Planning Enforcement

The unauthorised development had been previously investigated by the Enforcement team but the following conclusion was reached:

Though the evidence that you have already provided is insufficient for an application for a Certificate of Lawfulness, I feel it is sufficient for me determine that, on the balance of probability, the HMO use was established prior to May 2013 and the introduction of the Article 4 Direction. Therefore I will close the planning enforcement investigation taking no further action.

Legal

Recommend refusal of the certificate due to the gap of almost one year (03/06/16 - 30/06/17) resulting in a break in continuous use.

External consultation:

Not required for applications of this type. However, two comments were received:

- 1) *I am less worried by the number of people in the house than the number of parking permits granted. 5 people in an HMO could feasibly mean the house require 3 or more permits. This makes parking for residents very difficult even though we are now paying for permits. There has also been increased litter and waste problems with the rise of HMOs.*
- 2) *As one of the few family houses on Donnington Gardens we feel the street has its fair share of student accommodation. We are concerned about:*
 1. *Parking: It seems every student has a car for him/herself hence:*
 - a. *lack of parking space, despite the Resident permit holder scheme*

b. poor parking (many new drivers) on an already narrow street impacting everything from bin-lorry to delivery vans to regular car drivers simply trying to get in /out of tight parking spaces. Broken wing mirrors are a frequent sight on the street

c. speeding

2. Noise: loud drunken shouting and singing; regular and frequent student parties with antisocial behaviour late in the night from returning students if not house parties.

3. Littering: due to drunken behaviour or careless disposal of rubbish with overflowing bins as a result of missed bin collections. Build up of rubbish in front gardens.

Officer Comment: This Certificate of Lawfulness application can only assess whether the applicant has provided enough evidence to prove that the unauthorised development has been in continuous use for a 10 year period (17/10/09 - 17/10/19). It is not planning permission, but the Certificate would result in no enforcement action being able to be taken against the development. This application has no control over matters detailed as part of the objections, the design or construction of the development. The Council's Transport team/ Parking Permit team could be contacted for matters relating to the highway. Environmental Protection team regarding noise, and Street Care team regarding littering.

Information Submitted

- Location & Block Plan
- Letter from Barrett & Co. reference NJH/EW/MAN084.001 dated 7th September 2016
- Tenancy Agreements covering the following periods (indicating if the agreement is signed and by how many occupiers are on the agreement):

11/12/09 - 11/12/10 - signed - 4 occupiers

11/12/10 - 11/12/11 - signed - 3 occupiers

14/12/11 - 14/12/12 - signed - 4 occupiers

01/02/12 - 01/02/13 - signed - 3 occupiers

08/09/13 - 08/09/14 - signed by 3 occupiers (within letter reference JML/MAN98/9 from the applicant, they are stating 4 occupiers. **4 are detailed in agreement but agreement is signed by 3**)

03/02/14 - 03/02/15 - signed by 2 occupiers (within letter reference JML/MAN98/9 from the applicant, they are stating 4 occupiers. **4 are detailed in agreement but agreement is signed by 2**)

27/09/14 - 27/09/15 - signed by 3 occupiers (within letter reference JML/MAN98/9 from the applicant, they are stating 4 occupiers. **4 are detailed in agreement but agreement is signed by 3**)

02/06/15 - 02/06/16 - signed - 4 occupiers

01/07/17 - 30/06/18 - signed 5 occupiers

01/07/18 - 30/06/19 - signed - 5 occupiers

Received 17th October 2019

- Invoice from Radex Building Services dated 05/06/17

Received 17th October 2019

- Letter reference JML/MAN98/9 dated 20th February 2020 from Herrington Carmichael Solicitors
- Letter dated 18/02/2020 from Radex Building Services

Received 20th February 2020

- Letter reference MJR/MAN98/9 dated 11th March 2021 from Herrington Carmichael Solicitors
- Legal Opinion prepared by Andrew Parkinson dated 10th March 2021

Received 11th March 2021

Further information was provided by the applicant on 27/04/21 however this has not been considered for the purposes of the application. This is because the LPA clearly stated no further evidence would be accepted after the above was provided.

APPRAISAL

The applicant has submitted a lawful development certificate to establish the use of property as a 4 person HMO (C4 use) for a continuous period of 10 years prior to the submission of the application. In the case of *Thurrock BC v SoS for ETR 2001*, it made clear that in order to establish immunity in any particular case it is necessary to identify the character and intensity of the use current at the date of the enforcement notice or application for a CLEUD as a starting point. Information outside of the relevant time period cannot be considered. The relevant time period for which evidence has to be provided for is 17th October 2009 - 17th October 2019.

The applicant has submitted signed tenancy agreements. However, the following gaps are noted:

- 17/10/09 - 10/12/09
- 02/02/13 - 07/09/13
- 03/06/16 - 30/06/17 - vacant due to the sale and renovation of the property
- 01/07/19 - 17/10/19

All tenancy agreements provided were signed, however on occasions not signed by all tenants. For example, the tenancy agreement from 03/02/14 - 03/02/15 was signed by two tenants but 4 tenants names were detailed in the agreement.

Number of occupiers

On some occasions, the property was let to less than 4 occupiers. Within the letter from Herrington Carmichael Solicitors it states that:

“The two periods when the Property was occupied by 3 occupiers was limited and only arose as the former tenants vacated the Property part way through the academic year. With any market aimed at students, the opportunity to secure tenants outside of the start of term time was limited. As such securing 3 persons

was better than the property remaining empty and this was a continuation of the use as a house of multiple occupancy.”

In order for the Certificate to be granted, it needs to be demonstrated that the property has been continuously occupied by specifically 4 people. Despite the above, it is still considered that this represents a break in the continuity of the property being let as a 4 person HMO.

The applicant also states *“that the determination of what is sufficient for continuous use is to be determined in the context of the use in question. This was confirmed in North Devon DC v Secretary of State for the Environment & Rottenbury [1998] EGCS 72 where the fact holiday lets only took place for part of the year did not interrupt the continuous use. Therefore, the fact the Property in question is let to students should be taken into account when considering the short periods the property was empty or let to a smaller number of occupiers”*. This argument is considered to explain the gaps identified (other than the renovation works).

The tenancy agreements range from 11 December 2009 to 30 June 2019. Some agreements show fewer signatures than the individuals named in the agreement. The agreements show fluctuations in the occupancy levels year to year in terms of number of occupants and breaks in occupation, whereby the property is vacant. As such, there is considered a lack of consistency and a level of ambiguity around the number of occupiers in some years. It has been advised by the Council's Planning Solicitor that fluctuations in numbers of occupiers needs to be assessed on a case by case basis. It will be a matter of fact and degree if fluctuation in the number of tenants occupying a property over a number of years is sufficiently material to warrant reflection in the number of HMO occupants that should be certified in any Certificate of Lawfulness for Existing Use application. In this case, it needs to be assessed as to whether the fluctuation between 3 and 5 occupiers is a material change. It has been established in case law that an accrued planning right can only be lost in certain ways, one of which is through a material change of use. Whilst the number has fluctuated between 3 - 5, these numbers are all still within the C4 use class and so the varying numbers of occupiers over the years is not considered to have resulted in a material change in this instance. In addition, the majority of the 10 years in question had 4 occupiers. As such, the fluctuation in occupiers is not considered a reason to refuse the certificate in this instance.

Property vacant between 03/06/16 - 30/06/17

The property was vacant between 16/06/16 - 30/06/17 which is stated to be due to the sale of the property and part due to renovation works. It is stated that contracts were exchanged in September 2016 when the applicant bought the property. A letter from Radex Building Services has been provided confirming renovation works began in December 2016 after being delayed (originally meant to begin October 2016). Works ceased in April 2017 but the property remained empty until July 2017 when new tenants were recruited for the new academic year.

The applicant has referred to Basingstoke and Deane Borough Council v Secretary of State for Communities and Local Government and Sir Thomas Stockdale [2009] EWHC 1012 (Admin) to justify that a gap of this nature would not present a break in the use: *“where a 12 month period for refurbishment and remarketing of the property*

was held to be de minimus interruption and so the application for a certificate was successful. The refurbishment works were carried out to improve the chances of the property continuing to be let and as such the works were considered to be an ongoing breach of use.”

Following on from consultation with the Council’s solicitor, it is considered relevant to assess if this break serves to reset the immunity clock to zero. There are two High Court judgements to consider. Firstly, *Swale Borough Council v The First Secretary of State* [2005] EWCA Civ 1568. Keene L J referred to the judgement of Newman J at first instance in *Thurrock*, subsequently approved by the Court of Appeal, and in particular to the following summary by Schiemann L J at paragraph 15 of the Court of Appeal judgement, as follows: *“The rationale of the immunity is that throughout the relevant period of unlawful use, the LPA, although having the opportunity to take enforcement action, has failed to take any action and consequently it would be unfair and/or could be regarded as unnecessary to permit enforcement. If at any time during the relevant period the LPA would not have been able to take enforcement proceedings in respect of a breach (for example, because no breach was taking place) then any such period cannot count towards the rolling period of years which give rise to the immunity. It was for the land owner to show that at any time during the relevant period enforcement action could have been taken”*

During this break, enforcement action could not be taken against use as a HMO as the property was vacant meaning it should not be considered as part of the 10 year immunity period.

The second and more recent case (more recent than that provided by the applicant) to consider is the recent High Court planning case, *Islington LBC v SSHCLG* [2019] EWHC 2691 (Admin). This case confirmed well established law that there is the need for the **continuous, uninterrupted** residential use as set out in the cases of *Thurrock* and *Swale*.

Furthermore, the applicant has noted that works began in December 2016 after being delayed (originally meant to begin October 2016). Works ceased in April 2017 but the property remained empty until July 2017. The LPA are not convinced that the delay for that length of time was entirely justified or needed. As such, the break of almost a year is considered to result in a break in continuity of the use over the last ten years.

Conclusion

As such, based on the evidence provided, it has not considered that it has been demonstrated there has been continuous occupation over the relevant 10 year period, due to the gap between 03/06/16 - 30/06/17.

The PPG makes the position clear on how the evidence submitted is to be considered. It says:-

“In the case of applications for existing use, 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”.

The law on applications for existing use certificates is clear and in relation to the submitted application it is incumbent on the applicant to prove, on the balance of probabilities, that the building had an existing lawful use as a 4 person, 4 bedroom HMO (C4 use) for the relevant time as noted above. The applicant’s evidence alone is not sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability and consequently the application will be refused for the reason set out below.

Recommendation - Refuse Certificate

Reason for refusal:

The applicant has not provided sufficient evidence or other information that satisfies the Local Planning Authority that the use of the property as a 4 person, 4 bedroom HMO (C4 use) has been ongoing continuously for at least ten years. It follows that there is no justification to grant the certificate of lawfulness applied for by the applicant.

Informatives

Information considered

Positive and Proactive - Refusal

1:1250 Location Plan (Not to scale)

