MAW
TOWN PLANNING LTD

Description: Certificate of existing lawful use for five flats (Use Class C3)

Address: First (part of) and Second floor, 303-307 The Crescent, Barnsley Road, Cudworth

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Date: February 2023

Introduction

This is a certificate of lawful use application for five flats (Use Class C3) on the first (part of) and second floors of 303-307 The Crescent, Barnsley Road, Cudworth. The flats subject of this certificate are marked out and outlined in red on the existing floor plan 01 and annotated as units 1,2,5,6 and 7.

The certificate excludes part of the first floor as this may be the subject of a separate CLEUD for two letting rooms and a shared bathroom.

The application is made under Section 191 of the Town and Country Planning Act 1990 as amended by Section 10 of the Planning and Compensation Act 1991 in relation to a certificate of lawfulness of existing use.

Background

According to Council Tax records and prior to 2007, 303-307 The Crescent was five flats, 1 bedsit and retail. In 2007, the owner refurbished the building to six flats, 1 bedsit and retail.

Between 2009 and 2015 a local lettings agent (2let2U) was managing the building. Their evidence establishes that the ground floor was one retail unit with a flat at ground floor. On the upper floors, the use was five flats and two letting rooms.

The building is presently vacant. According to Council Tax records and following 2let2u ending their lettings service with the owner, the date each flat became vacant is not precisely known, but it appears that occupation began winding down from 2016 onwards.

The applicant bought the property at auction on 23rd October 2019. In August 2020, the owner instructed his project manager to clear the building ready for refurbishment. Between October 2019 and the time of this application, the building has not been occupied and is currently stripped out.

Submitted Evidence

The evidence submitted with the application is:

Council Tax E-Mail

According to Council Tax records, the five flats have been subject to Council Tax since 2007. According to Council Tax records, the flats are now all vacant but over four years of use had been accrued by the time they became vacant (2007 to vacant date):

Flat 1: Council Tax became payable from 2007. Vacant since 28/04/2016 (9 years)

Flat 2: Council Tax became payable from 2007. Vacant since 05/12/2018 (11 years)

Flat 5: Council Tax became payable from 2007. Vacant since 11/09/2015 (8 years)

Flat 6: Council Tax became payable from 2007. Vacant since 08/10/2014 (7 years)

Flat 7: Council Tax became payable from 2007. Vacant since 17/07/18 (11 years)

Council Tax Bills

Since the owner bought the property, he has been billed for Council Tax for five flats and two letting rooms. A copy of the bills is included in the submission.

Street Name and Numbering E-Mail

According to street name and numbering records, the ground floor is commercial, and the upper floors are a mix of 2 bedsits and 6 self-contained residential flats.

The street name and numbering team haven't had any recent interactions with the premises and were created on their LLPG (Local Land and Premises Gazetteer) in the early 2000's when the database was formed.

Letter From 2let2U

A letter from 2let2U states that they managed the property between 2009 and 2015. During their time of managing the lettings, there was five flats on the upper floors. Each flat was self-contained as they had no shared amenity, each containing a kitchen and bathroom. A copy of the layout whilst they managed the property is included in the letter.

Tenants occupied the flats with an Assured Shorthold Tenancy agreement. The letter states that there was a regular turnover of tenants and rooms were rarely vacant. There were no intervening uses between 2009 and 2015.

Associated Documents From 2let2u

The lettings company have provided additional information, and this is summarised below:

FLAT 1

Summary of tenancies between June 2009 and March 2015 (6 years)

1 undated photo (but presumably taken during the time of managing and letting the property (2009 and 2015))

FLAT 2

Summary of tenancies between July 2010 and September 2015 (5 years)

3 undated photos showing the internal accommodation and includes a kitchen, oven and bathroom (presumably taken during the time of managing and letting the property (2009 and 2015))

FLAT 5

Summary of tenancies between July 2009 and September 2015 (6 years)

2 undated photos showing the internal accommodation and includes a kitchen, oven and bathroom (presumably taken during the time of managing and letting the property (2009 and 2015))

FLAT 6

Summary of tenancies between November 2009 and September 2015 (6 years)

3 undated photos showing the internal accommodation and includes a bed, furniture and kitchen.

FLAT 7

Summary of tenancies between November 2009 and June 2015 (5.5 years)

Electrical Installation Certificates from 2let2u

Three electrical installation certificates are included with the submission. These relate to flats 1,5 and 6. Unfortunately, 2let2u did not have certificates on their records for flats 2, and 7.

The electrical installation certificates are dated 2007 and they show that there was a shower, heating, lights and an oven in each of the three flats.

Applicant Letter

This confirms that the applicant is a property developer with multiple units. He asked his project management team to strip out the building but there has been no intention to abandon the use of

flats and letting rooms. The letter also states that the intention is to refurbish the property back to the lawful use, if the CLEUD is granted.

Site Visit Photos 06.12.2022

Included with the submission are photographs taken on a site visit on 06.12.2022 by Elizabeth Maw MRTPI. This is understood to be how the property is at the time of submission. The upper floors had been stripped out but there was evidence that the property had been last used for residential purposes with decoration on the walls, evidence of plumbing, electrical connections and pipework.

Photos of the Property in February 2020

Photos included with the submission.

Auction Pack

For information purposes only.

Other Evidence

The LPA has been asked to share any evidence they have. This includes information documented in the delegated report of application 2022/0170 and detailed as follows:

- A letter dated 11th December 2015 from BMBC Senior Private Sector Housing Officer of a notice to grant mandatory HMO licences.
- An HMO inspection screenshot from 25/02/2009 for 305 Barnsley Road

The LPA did not respond.

Relevant Planning History

- **2022/0904:** Change of use of first and second floor to 8-bedroom house in multiple occupation (HMO) and installation of dormer to front

  Submitted: 01.09.2022. Refused: 11.11.2022

- **2022/0170:** Lawful development certificate for existing use of first and second floor of building as 8no. bed HMO

  Submitted: 17.02.2022. Refused: 30.06.2022

NOTE: It is not considered that this submission has any bearing on the lawfulness being applied for. The CLEUD was submitted with vague and minimal evidence and the applicant was not represented by a Planning Consultant. The submitted evidence is not available online.

- **2020/1345:** Change of use of ground floor retail units with HMO above to 6no.apartments including external alterations

  Submitted: 24.11.2020. Refused:19.01.2021

NOTE: The submission described the upper floor as an HMO although there was no evidence to demonstrate that the existing use was an HMO. The described existing use appeared to be an assumption only.

Legal Position and Relevant Immunity Period

Section 191

Section 191B of the TCPA 1990 states

(1)If any person wishes to ascertain whether—

(a)any existing use of buildings or other land is lawful;

(b)any operations which have been carried out in, on, over or under land are lawful; or

(c)any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a)no enforcement action may then 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)they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

Section 171

Section 171B of the TCPA states:

(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or

under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(2)Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(2A)There is no restriction on when enforcement action may be taken in relation to a breach of planning control in respect of relevant demolition (within the meaning of section 196D).**]**

(3)In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

ODPM Circular 10/97

Withdrawn Circular 10/97 provides assistance on establishing whether the four or ten year rule applies to this case. Paragraph 2.81 of Annex 2 of the withdrawn Circular 10/97 states:

2.81 It is important to distinguish the term "use as a single dwellinghouse", in section 171 B(2), from what might normally be regarded as being a single dwellinghouse. Experience has suggested that, on occasion, people may adapt, or use, unlikely or unusual buildings or structures as their home or dwellinghouse. However, the Courts have held that, although there is no definition of what is a dwellinghouse, it is possible for the reasonable person to identify one when he sees it. If no reasonable person would look at a particular structure used as a dwellinghouse and identify it as such, it is justifiable to conclude, as a matter of fact, that it is not a dwellinghouse. In those circumstances, while its use as a dwellinghouse might be immune from enforcement action, it is not a dwellinghouse as such and, accordingly, would never enjoy the benefits of "permitted development" rights under Article -3 of, and Part 1 of Schedule 2 to, the GPDO. The Department considers that a flat may be used as a single dwellinghouse in certain circumstances, but not acquire GPDO "permitted development" rights as such, because Article 1(1) of the GPDO specifically excludes them from the definition of a "dwellinghouse" for GPDO purposes. For the purposes of the 1990 Act, where section 336(1) defines "building" as including any part of a building, the view is taken that a flat can be used as a single dwellinghouse, whether or not it would otherwise be regarded as being a single dwellinghouse as such, (see Doncaster MBC v. SSE and Dunhill [1993] JPL 565).

In conclusion, it is considered that the four year rule applies for immunity. The ODPM Circular 10/97 states that a flat may be a dwellinghouse by the TCPA 1990 and a change of use of a building can include part of a building.

Use as a 'Dwellinghouse' and Definition

The Use Classes Order advises C3(a) dwellinghouses include use by a single person or a family (a couple whether married or not).

An extract from Paragraph 2.81 of withdrawn ODPM Circular 10/97 is also of assistance. This states:

> …It is considered that the criteria for determining use as a single dwellinghouse include both the physical condition of the premises and the manner of the use. Where a single, self-contained set of premises comprises a unit of occupation, which can be regarded as a separate "planning unit" from any other part of a building containing them; are designed or adapted for residential purposes, containing the normal facilities for cooking, eating and sleeping associated with use as a dwellinghouse; and are used as a dwelling, whether permanently or temporarily, by a single person or more than one person living together as, or like, a single family, those premises can properly be regarded as being in use as a single dwellinghouse for the purposes of the Act. This interpretation would exclude such uses as bed-sitting room accommodation, where the occupants share some communal facilities within a building, such as a bathroom or lavatory, and the "planning unit" is likely to be the whole building, in use for the purposes of multiple residential occupation, rather than each individual unit of accommodation.

Case Law has also established that a dwelling should have the ability to afford those who used it the facilities required for day-to-day private domestic existence (Gravesham).

According to the evidence provided and the floor plans, each flat was capable of being occupied by a single person or couple. Each flat was self-contained with its own door and had a kitchen and bathroom. Occupiers had their own tenancy agreement and separate street number.

There is evidence of washing machines being installed in the some of the flats. However, some flats are likely to have shared a washing machine in the corridor (marked as W on the existing plan). Whilst occupiers of the flats may have shared a washing machine, this could not be defined as a 'shared amenity' and the lack of a washing machine in a flat would not regard it to be

unsuitable as providing a unit of self-contained accommodation. For instance, not all dwelling houses have washing machines and occupiers may prefer to use a laundrette.

Immunity

Council Tax has been paid for the five flats since 2007 which would imply the flats have been present since at least 2007. The evidence from 2let2u covers a period of 5 years. They have confirmed by tenancy information and a letter, that each flat was occupied for more than 5 years. Therefore, established use had occurred for each flat by 2015.

Another consideration is continuous occupation. The principle of continuous occupation is to ensure that the LPA are not denied the right to take enforcement action within the requisite period. For instance, if a flat was created, occupied for 6 months then stripped out and not re-occupied for two years, it would have denied the LPA the opportunity to serve an enforcement notice during the gap in occupation. However, whether any period during a dwelling is not occupied breaks that continuity will be a question of fact and degree. Furthermore, the Welwyn v SS case stated:

"*Section 171B (2) of the 1990 Act allows respite from enforcement action four years after the time when a breach of planning control consisting in the change of use of a structure to a single dwellinghouse occurred. This provision must be based on the general idea that the change of use has been there for all to see for four years. If in that period the breach has not come to the notice of the council or the council has not seen fit to take enforcement action, then the better policy is to allow the change of use to stand and, so, to exclude enforcement action*"

In this case, there are gaps in the tenancy information between 2009 and 2015 but this would not be unusual for one bed rental flats, which are associated with a regular turnover of tenants. Additionally, if the LPA had visited the site to consider enforcement action at any time between 2009 and 2015, it may have been noted that the odd flat was unoccupied, but it would have been plainly obvious that the upper floors were split into multiple residential units and an opportunity to take enforcement action would have existed. In support of this, this was the view taken in APP/K5600/X/14/2217970 (https://planningjungle.com/wp-content/uploads/2217970-Appeal-Decision-Notice.pdf). Secondly, in the appeal case APP/R3325/X/11/2167089 (https://planningjungle.com/wp-content/uploads/2167089-Appeal-Decision-Notice.pdf) the inspector concluded that active occupancy was not always required, and it would not be unusual to see gaps for rental properties due to a regular turnover of tenants.

Current Use/ Abandonment

Following a use being established, the decision making must consider whether the use as five flats remains lawful on the date of application. If there has been any other intervening use or a change of use following the building up of immunity, the lawful use would be lost. Cessation of the use by abandonment is also a consideration. This is commensurate with the case of Panton and Farmer v Secretary of State for the Environment which concluded that a use may become “dormant” without losing its use rights, unless it is abandoned, replaced by a different use, or extinguished following the formation of a new planning unit.

From the evidence available, the flats became unoccupied from 2016-2018.

After the flats becoming unoccupied between 2016 and 2018, and according to online research, it was brought to auction in 2019 by the LPA receivers (repossession).

The current owner bought the property on 23rd October 2019. Following the purchase, the owner instructed a project manager to strip out the building. The building began to be stripped out sometime after August 2020 and it remains stripped out and vacant up to the date of application. According to photos from the owner’s project manager dated February 2020, the current owner purchased the property as vacant. However, kitchens, bathrooms, bedrooms and furnishings were still in situ.

Given that the property has been through a repossession and when considering the photos supplied by the project manager dated February 2020, the floorspace subject of this certificate is unlikely to, on the balance of probability, changed use or had any intervening use since occupation ceased. The photos supplied by the project manager shows that in February 2020, the flats still contained furniture, furnishings kitchens and bathrooms. There is no evidence of alternative uses nor have Council Tax highlighted any other uses. Furthermore, the existing floor plans submitted with previous planning applications in 2020 and 2022 match the floor layout contained in the letter by 2let2u.

With regards to abandonment, Planning Practice Guidance (para 028) states:

The courts have held that, in deciding whether a use has been abandoned, account should be taken of all relevant circumstances, such as:

- the condition of the property
- the period of non-use
- whether there is an intervening use; and

- any evidence regarding the owner's intention

Condition of the Property

The property is currently stripped out. The upper floors are floorboarded and only contain electrical wiring, pipework and plumbing outlets. The internal layout of the property has not changed since it was purchased. The internal divisions and doorways remain in the same place.

The owner is able to refurbish the property back to five flats swiftly by a standard refurbishment which would include re-wiring, plumbing, installing new kitchens and bathrooms and cosmetic works.

Period of Non-Use

The property has been vacant for approximately 5-7 years and stripped out for the last 3 years. This timeframe is not a considerable length of time in abandonment terms. Additionally, it would not be unusual for historic residential properties to be vacant for 5-7 years where a property has been subject to a re-sale, numerous planning applications and a need for refurbishment.

Whether There is an Intervening Use

No evidence of intervening use (as already discussed).

Owners Intention

To understand the owner's intentions, it is necessary to explain a timeline of events since the owner bought the property in 2019.

Following purchase at auction on 23rd October 2019, the owner concluded that he did not want to carry out a refurbishment to the property without a certificate or retrospective planning permission. Without a planning permission, the value of the property is likely to reduce and any re-sale/ re-mortgage would be difficult. Therefore, the owner and on behalf of a planning consultant, applied to the LPA on 24th November 2020 for six flats on the upper floors. This application was refused on 19th January 2021.

After the refusal of planning permission for six flats, a CLEUD was submitted for an HMO. As the owner could not obtain planning permission for six flats, the intention was to revert back to what he thought was the lawful use as a HMO. The CLEUD lacked evidence and was subsequently refused on 20.06.2022.

In September 2022, a planning application for an 8 bed house in multiple occupation was submitted. The application for the 8 bed HMO was refused on 11.11.2022.

Given that the applicant has exhausted all options with the LPA for receiving planning permission for multiple residential units, the owner concluded to try and gather further information to help establish the past use and with a hope that enough information is available for a certificate. Should the LPA consider the submitted information to be sufficient and a CLEUD can be issued, the owner has confirmed by a signed letter that he will refurbish the property back to its lawful use.

It is acknowledged that the owner has by the submission of previous planning applications applied to use the upper floors for alternative residential uses of either a HMO or six flats. However, should a lawful use certificate be issued, the applicant will be continuing with the existing lawful. Any other uses would have been future uses. Only if the applicant would have received planning permission for an alternative residential use then commenced the works would it prevent the existing use from resuming and show intention to abandon the lawful use, which is not the case here.

Summary of Evidence

According to the evidence provided:

The five flats have a lawful use and gained immunity from enforcement action by at least 2015. According to the evidence available, each flat is self-contained and had their own kitchen and bathroom and passes the tests of being a dwellinghouse falling within C3(a) of the Use Classes Order.

The upper floors have been vacant since at least 2018 and the fixtures and fitting associated with the use as five flats were removed around August 2020. There is no evidence of any other intervening use or change of use since the properties became vacant. Furthermore, the test of abandonment has not been met given the short period of time that has passed, the applicants ability to be able to easily refurbish the property and his intentions.

Paragraph 006 of Planning Practice Guidance states that "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".

On the basis of the information submitted, it is considered that the evidence is unambiguous and on the balance of probability, five flats is lawful and passes the relevant legislative tests.

Should the LPA have any questions, please do not hesitate to contact me.

Yours sincerely

Elizabeth Maw BA(Hons) DipTP MRTPI

Maw Town Planning Ltd