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The Head of Planning
The London Borough of Haringey
Planning, Regeneration & Economy
Level 6
River Park House
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N22 8HQ

Sent by way of the Planning Portal

20 August 2023

Dear Sir,

Section 191 Town and Country Planning Act 1990
Application for a Certificate of Lawfulness for Existing Use or Development
Basement Flat, 3 Aubery Road, London N8 9HH

We hereby apply on behalf of our client, Mr Simon Fraser-Allen, for a Certificate of Lawfulness for Existing Use or Development ("CLEUD") in respect of the basement flat at his property, no. 3 Aubrey Road, London N8 9HH.

The application is described below together with submissions as to why it should be allowed. We would ask that you please take these matters in your determination:

Introduction

1. The application seeks a CLEUD certifying:

   The lawful use of the basement at no. 3 Aubrey Road, London N8 9HH is as a single self-contained residential flat (use class C3).

2. The application comprises the following:

   a. The application form;

   b. The site location plan;

   c. The statutory declaration of Mr Fraser-Allen dated 19 July 2023.

   d. The statutory declaration of Ms Francesca Lamacchi dated 19 July 2023;

   e. A fee of £462; and

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f. This covering letter

3. The application is made under section 191(1) Town and Country Planning Act 1990. The factual background is summarised below and this is followed by an overview of the relevant legal framework. An assessment is then made of the facts in regard to this legal framework.

The background

4. In terms of the background, Mr Fraser-Allen's declaration sets out how this property has been used since it was acquired by him and his wife on 29 July 2002.

5. In summary, soon after they acquired the property the Fraser-Allens carried out works to create a self-contained flat in the basement; see para. nos. 6 and 7 of his declaration.

6. The rest of the declaration details how this flat – which we will refer to here as "the Flat" – has been used since it was created in 2002.

7. Paragraph 8 states that the Flat has been used and occupied separately from the rest of the property since it was created. Paragraph 9 contains a table setting out the list of occupiers. These run from May 2003, when Ms Leigh Davy moved in to the Flat to Ms Francesca Lamacchi and Mr Alexander Cox who occupy the Flat at the current time.

8. The Flat was occupied on a full time basis from May 2003 through to April 2013 by four occupiers. Initially Ms Davy occupied the Flat. She was followed by Mr Tim Graham and after he moved out it was occupied by Mr Alan Andrews and Ms Katherine Gamble. A copy of the tenancy agreement with Mr Alan Andrews and Ms Katherine Gamble is annexed to the declaration; see para no. 11 and exhibit no. SRFA3.

9. The Flat was then used for short-term accommodation. This started in February 2014 and carried on through until June 2017. During this time, there were periods when the Flat could not be used as such because of flood damage and the subsequent renovation work. Details of the period when the Flat was being used for "temporary sleeping accommodation" can be found at para no. 15 and the exhibit numbered SRFA5.

10. The Flat was then used for permanent accommodation, starting with the tenancy agreed with Ms Gleeson and Mr Doherty in June 2017; see para. no. 16. They lived in the Flat for a year. They were followed by Mr Herbert who lived there for 90 nights. There was also some short periods of use as temporary accommodation. These amounted to 19 nights in 2018 and 89 nights in the first half of 2019.

11. For just over the past four years, the Flat has been used and occupied by Ms Francesca Lamacchi and Mr Alex Cox. A copy of their tenancy agreement can be found at exhibit no. SRFA7.

12. Mr Fraser-Allen explains at para. no. 19 that the Flat has all the facilities necessary for day-to-day private domestic existence. In para. no. 20 he explains the position with regard to utilities and so forth.

13. Ms Lamacchi's declaration sets out how she has used and occupied the Flat since moving there on 17 July 2019. She confirms, at para. no. 6, that she and her partner have always used it for self-contained accommodation. At para. nos. 7 to 9 she sets out how much rent she pays and the position with utilities.

The legal framework

14. Section 191 of the Town and Country Planning Act 1990 makes it clear that operations over land and uses of land are lawful if at any time if no enforcement action can be taken in respect of them; see Section 191(2)(a) Town and Country Planning Act 1990. In effect this means that if the statutory limitation period for taking enforcement action has expired then use or activity in question is lawful.

15. The limitation periods for taking enforcement action are found in section 171B of the Town and Country Planning Act 1990. In respect of breaches of planning control comprising the carrying out of operational development no enforcement action may be taken after four years after those works are substantially complete; see Section 171B(1) Town and Country Planning Act 1990.

16. Likewise, where there has been a change of use of any building (including a part of a building) to a single dwellinghouse, then no enforcement action may be taken after the end of the four year period beginning with the date of the breach; see Section 171B(2) Town and Country Planning Act 1990. The courts have held that the four-year period applies where two flats are created because the effect of the conversion is to change the use of each part of the building to use as a single dwellinghouse *Van Dyck v Secretary of State* [1993] JPL 565.

17. For all other breaches of planning control a ten year limit applies, starting with the date of the breach; see Section 171B(3) Town and Country Planning Act 1990.

18. An application under section 191 Town and Country Planning Act 1990 must be granted if the planning authority is provided with information satisfying them of the lawfulness of the use or operation; see section 191(4) Town and Country Planning Act 1990.

19. In determining applications under section 191 Town and Country Planning Act 1990, the courts hold that the burden of proof lies with the applicant. The evidential test to be applied is the standard civil law test, i.e., on the balance of probabilities; see the advice in the National Planning Practice Guidance. The courts hold that the applicant's own evidence does not need to be corroborated by independent evidence in order for it to be accepted; see *FW Gabbitas v Secretary of State* [1985] JPL 630.

20. There is no statutory definition of a dwellinghouse per se but the courts have held that a dwellinghouse has all the facilities for day-to-day private domestic existence; see *Gravesham v Secretary of State* (1984) 47 P&CR 142. Generally, dwellinghouses themselves fall within use class C3 of the Use Classes Order 1987 (as amended). This means that a change of use from one type of dwellinghouse, say, accommodating a family comprising two parents and two children to one, say, accommodating a small number of students who form a single household, is not a material change of use which requires planning permission. There are however two important statutory provisions which are relevant here.

21. First of all, when a dwellinghouse is divided into two or more separate dwellings, then Section 55(3)(a) Town and Country Planning Act 1990 holds that the subdivision of a single dwellinghouse into two or more separate dwellinghouses is "a material change of use of the building and each part of it which is so used".

22. Secondly, in London, the use of a dwellinghouse for short-lets is controlled by sections 25, 25A and 25B of the Greater London Council (General Powers) Act 1973. From 1984 until 25 May 2015 these rules meant that a (statutory) material change of use occurred when a permanent residence was used "as temporary sleeping accommodation" by the same person for less than 90 consecutive nights and which was provided with or without services for a consideration. These rules were modified by the Deregulation Act 2015 through the enactment of Sections 25A and 25B of the Greater London Council (General Powers) Act 1973. These amendments state that the use of premises in London as temporary sleeping does not involve a material change of use provided two conditions are met: first, that the number of nights in the same calendar year does not exceed 90; and second, that the person who provided the sleeping accommodation was liable for Council Tax in respect of the premises.

23. Finally, it should be noted that the law has changed in recent years to the effect that parties to a fraud cannot benefit from the provisions of sections 171B and 191 of the Town and Country Planning Act 1990; see *Welwyn Hatfield v SSCLG* [2011] UKSC 15. Also, changes to Section 171 of the Town and Country Planning Act 1990 allow planning authorities with the consent of magistrates to effectively extend the time period for taking enforcement action (and hence the establishment that a development is lawful) in cases where there has been deliberate concealment.

Assessment

24. For the purposes of this assessment we divide the planning history of the Flat into four periods as follows:

    a. Period 1 is the period between May 2003 and April 2013 after the Flat was created by the Fraser-Allens and when it was occupied independently by a series of tenants, first Mr Davy, then Mr Graham and last of all by Mr Andrews and Ms Gamble.

b. Period 2 is the period from February 2014 through to May 2017 when it was used as temporary sleeping accommodation.

c. Period 3 is the period from 22 June 2017 through to June 2017 when the Flat was used as permanent accommodation by Ms Gleeson and Mr Doherty and then by Mr Herbert as well as being used as temporary sleeping accommodation but within the prescribed limits.

d. Period 4 is the period from 17 July 2019 onwards when the Flat has been used as permanent accommodation, exclusively by Ms Lamacchi and Mr Cox.

25. In terms of Period 1, it is accepted that this was a breach of planning control. Section 55(3) Town and Country Planning Act 1990 holds that the sub-division of a dwellinghouse into two or more dwellings is a material change of use. Carrying out this material change of use without planning permission was therefore a breach of planning control. Enforcement action could have been taken against the whole of the building had it been taken in time, that is within four year of the Flat and indeed the rest of the building being occupied as two dwellings. Therefore, the use of the Flat as a separate dwellinghouse became lawful in May 2007, that is four years after it was occupied by Ms Davy.

26. In terms of Period 2, the Flat was used for temporary sleeping accommodation from February 2014 through to June 2017. This was a material change of use to a *sui generis* use notwithstanding the fact that the Flat continued to provide all the facilities for day-to-day private domestic existence. This use was not lawful and moreover was not carried out for the necessary length of time for it to become lawful.

27. In terms of Period 3, the Flat began to be used again as permanent accommodation again in June 2017. It is considered that this change – from temporary to permanent sleeping accommodation - wasn't "material". The Flat continued to be used as a dwellinghouse. All that changed was that it ceased to be used by a wide number of different occupiers on a short-term basis to a smaller number of permanent occupiers.

28. Ms Gleeson and Mr Doherty occupied it for a year. It was then occupied by Mr Herbert for 90 consecutive nights. His occupation did not amount to "temporary sleeping accommodation" as it was not *less* than 90 nights. After he vacated the Flat, the Fraser-Allens used the Flat as "temporary-sleeping accommodation" for a total of 19 nights in 2018 and 89 nights in 2019. It can be seen that both these periods did not exceed 90 nights in the same calendar year. Moreover, Council Tax was paid in respect of the premises. This use did not therefore involve a material change of use because it was within the applicable thresholds as set out at section 25A of the Greater London Council (General Powers) Act 1973 and referred to above.

29. Finally, there is Period 4. This is the most recent period, of just over 4 years, during which time the Flat has been used and occupied as a separate single dwellinghouse by Ms

Lamacchi and Mr Cox. This use was not a material change of use from the previous use as permanent accommodation and periods of authorised use as temporary sleeping accommodation. In any event, having been used as a single dwellinghouse for more than four years, the pre-existing uses are irrelevant. This period of use alone is sufficient to mean that the lawful use of the Flat is as a single-dwellinghouse within the C3 use class.

30. It appears that during each of these four periods there was no “deliberate concealment” or fraud in connection with the use of the Flat. There is therefore no basis to disapply the statutory scheme relating to the acquisition of immunity from planning enforcement control.

Summary

31. From the foregoing, the evidence submitted with this application demonstrates that the use of the Flat as a separate dwellinghouse began more than four years ago. This use cannot be enforced against because it is outside the time limitation period under Section 171B(2) Town and Country Planning Act 1990. It follows that the use is now lawful because, under Section 192(2)(a) Town and Country Planning Act 1990, no enforcement action may be taken against this use. This means that the certificate applied for by way of this application must be granted.

We trust that upon due consideration of this application you will agree with our assessment and duly grant the certificate of lawfulness. In the meantime, should you have any questions we ask that you address these to David Evans of this office, by email to: david.evans@keystonelaw.co.uk, in the first instance.

Yours faithfully,

David Evans
Consultant Solicitor
Keystone Law

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