
Appeal Decision

Site visit made on 16 August 2016

by Susan Wraith DipURP MRTPI

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

Decision date: 5 October 2016

Appeal ref: APP/J1915/X/16/3143830

Johnsons Thatch, East End, Furneux Pelham, Buntingford SG9 0JU

- The appeal is made under s195 of the Town and Country Planning Act 1990 [hereafter "the Act"] as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development [hereafter "LDC"].
 - The appeal is made by Mr S Shelsher against the decision of East Hertfordshire District Council.
 - The application ref: 3/15/1104/CLE, dated 25 May 2015 was refused by notice dated 17 December 2015.
 - The application was made under s191(1)(a) of the Act.
 - The development for which an LDC is sought is: Use of garage as self contained residential unit.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is considered to be lawful.

Preliminary matters

2. On the LDC application form the development was described as "conversion of garage to flat". In the decision notice the development was framed as "use of garage as a self contained residential unit" and the appeal is also made in those terms. I shall adopt that description for the purposes of the appeal.
 3. The building concerned comprises a garage, stables and a store together with first floor accommodation. From the drawings which accompanied the application, and from what I saw at my site visit, I understand that the flat occupies only a part of the building, that being the part above the garage and above one of the stables at first floor level. I shall deal with the appeal on that basis.
 4. The relevant date for the purposes of this determination of lawfulness is the date of the LDC application, i.e. 25 May 2015. There is nothing to suggest that, at the date of the application, the use would have been in contravention of any enforcement notice or breach of condition notice then in force. The matter to be decided upon, therefore, under subsection (a) of s191(2), is whether the use would have been lawful on the application date as no enforcement action could then have been taken in respect of it.
 5. S171B of the Act sets out the time limits within which enforcement action can be taken. In the case of a breach of planning control consisting in the change
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of use of any building¹ to use as a single dwellinghouse the relevant time period is four years (s171B(2)).

6. A condition of planning permission for the garage building (I am told) limited its use to purposes incidental to the occupation of the main dwellinghouse. Whilst the time period for enforcing a condition (generally) is ten years (s171B(3)), case law has held that where a breach of condition relates to a change of use to a single dwellinghouse the relevant time period is four years². Therefore, irrespective of whether the matter is considered as a change of use or a breach of condition, the relevant time period is four years.
7. In an appeal under s195 of the Act against the refusal of an LDC the burden of proof is upon the appellant. The test of the evidence is one of balance of probability. Additionally, the planning merits of the matter applied for do not fall to be considered. The decision will be based strictly on the evidential facts and on relevant planning law.

Main issue

8. The main issue in this appeal is whether the Council's decision to refuse the LDC was well founded.

Reasons

9. The flat, which is positioned within part of the first floor of the outbuilding, is accessed from within the garage via a staircase. It shares the driveway to the main dwelling and has parking spaces within a communal parking area. There is a small shared laundry to the corner of the garage. The flat itself is self contained having all the facilities necessary for day-to-day private domestic existence.
10. It is unclear as to when, precisely, the works to convert this part of the building to a flat were undertaken. However, there is evidence that the first tenancy commenced in May 2009. At that time the flat became a separate unit of occupation. It had the physical characteristics of a self contained dwelling and was being so used. This is the time when the unauthorised use commenced and the breach of planning control occurred. The parties are in agreement that the breach occurred in May 2009.
11. There is uncontested evidence that the use then continued between May 2009 until May 2012 at which point the flat became occupied by the appellant and his wife, for a period of some 18 months, whilst works were being carried out to their house (Johnsons Thatch) following a fire. By November 2013 the appellant had moved back into Johnsons Thatch and a new tenant had been found for the flat. Its use as a self contained residential unit was continuing at the date of the LDC application. The only issue between the parties is whether the period of occupation by the appellant and his wife broke the continuity of the use.
12. Once an unauthorised use has commenced it must continue substantially uninterrupted over the relevant time period (in this case four years) in order to gain lawful use rights. If an interruption is such that no enforcement action can

¹ In the interpretation given at s336 of the Act the term "building" includes (amongst other things) any part of a building.

² FSS v Arun DC and Brown (CoA 10/8//06, J.1158)

be taken against the use during that period, the breach will have come to an end. Any resumption of the use will constitute a fresh breach and the four year clock will restart from zero.

13. The appellant's case is that there has been no interruption of the use. It is contended that during the period he and his wife occupied the flat its use was as a self contained residential unit as it had been previously. The four year period (it is argued) continued to accrue.
14. The evidence indicates that, for the duration of the appellant's occupation, the main dwelling was uninhabitable. For example, a letter from the Insurance Adjusting Services [IAS] states that due to the extent of damage sustained it was necessary for the appellant to relocate to the annexe, thus incurring loss of rent, until the works were completed on 1 October 2013. A neighbour recalls that the property was "seriously fire-damaged" such that it was "re-built" and the appellant's legal advisor has stated that there was no second dwelling capable of occupation throughout the time that his client occupied the flat. The Council describes the works to Johnson's Thatch as "repair" rather than "re-building" but there is no evidence that any part of the main house was being used in common with the flat during the time that it was occupied by the appellant.
15. I find this evidence compelling. It supports the contention that the appellant was living in the flat throughout this period and that he and his wife would have needed to rely upon the facilities in the flat for day-to-day domestic living as the main property could not be used. There is no contradictory evidence.
16. The Council describes the appellant's use of the flat as "ancillary" occupation. However, there is no evidence that the flat had any functional relationship with the main dwelling during this period which would have been an essential feature for the use to be ancillary. On the contrary, the evidence indicates that, during this period, there was no active residential use of the main dwellinghouse and, thus, there was no main residential use which the flat could have had a functional relationship with.
17. Whilst the garage building was originally comprised within the wider dwellinghouse planning unit, the change of use in 2009 brought about the formation of a new planning unit within which the self contained residential unit subsisted. Even though one of the periods of occupation was by the appellant and his wife this, in itself, would not have brought about a material change in the nature of the use within that planning unit. The evidence is that the use as a self contained residential unit continued during the period that the appellant was in occupation in the same way that it had done before. It would, thus, have been possible to take enforcement action even though the occupiers at that time were the owners of the main property and the wider land comprised in the original planning unit. The time period would have continued to run during the appellant's occupation.
18. On the evidence, on balance of probability, I find that the use of this part of the garage building as a self contained residential unit had continued for a period of four years. There is no evidence to indicate other than that the use would have been lawful at the application date.

Conclusion

19. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant an LDC was not well founded and that the appeal should succeed. I will exercise accordingly the powers transferred to me under s195(2) of the Act.

Susan Wraith

INSPECTOR

Lawful Development Certificate

APPEAL REFERENCE APP/J1915/X/16/3143830
TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by section 10 of the Planning and Compensation Act 1991)

THE TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT
PROCEDURE) (ENGLAND) ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 25 May 2015 the development described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto and edged and hatched in red on the plan attached to this certificate, would have been lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended) for the following reason:

The time period for enforcement had expired and the use did not contravene any of the requirements of any enforcement notice or breach of condition notice then in force.

Susan Wraith

INSPECTOR

Date: **5 October 2016**

First Schedule

Use of garage as self contained residential unit (Use Class C3).

Second Schedule

Part of the first floor and internal staircase of the garage building at Johnsons Thatch, East End, Furneux Pelham, Buntingford SG9 0JU

IMPORTANT NOTES – SEE OVER

CERTIFICATE OF LAWFULNESS FOR PLANNING PURPOSES

NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 (as amended).
 2. It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful on the certified date and, thus, would not have been liable to enforcement action, under section 172 of the 1990 Act, on that date.
 3. This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.
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Plan

This is the plan referred to in the Lawful Development Certificate dated: **5 October 2016**

by Susan Wraith DipURP MRTPI

Johnsons Thatch, East End, Furneux Pelham, Buntingford SG9 0JU

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Scale: Not to scale

