

Appeal Decision

Site visit made on 10 August 2016

by Melissa Hall BA (Hons), BTP, MSc, MRTPI

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

Decision date: 14 November 2016

Appeal Ref: APP/R3325/C/16/3142655

Cross Cottage, North Street, Milborne Port, Dorset DT9 5ET

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Gillow Limited against an enforcement notice issued by South Somerset District Council.
 - The Council's reference is 11/200095/Opera.
 - The notice was issued on 11 December 2015.
 - The breach of planning control as alleged in the notice is '*Without planning permission the change of use of Cross Cottage from ground floor public library and first floor dental surgery (along with roof space) to ground floor public library and first and second floor residential in the approximate position marked with a cross on the attached plan*'.
 - The requirements of the notice are:
 - (i) *Permanently cease the residential use of the first and second floor of the building and*
 - (ii) *Restore the first and second floor of the building to its condition before the breach took place.*
 - The period for compliance with the requirements is 6 months from the date the Notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a),(c),(d),(f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The Enforcement Notice ("the EN") is corrected by:

- i) The deletion of the words '*....the change of use of Cross Cottage from ground floor public library and first floor dental surgery (along with the roofspace) to ground floor public library and first and second floor residential*' from the allegation at (3), and their replacement with the words '*....the change of use of the first floor of Cross Cottage from dental surgery to residential.*'

and varied by:

- ii) In requirements 5(i) and (ii) the removal of the words '*...and second*'.

Subject to these corrections and variations, I allow the appeal and direct that the Enforcement Notice be quashed.

Procedural Matters

- 2. The EN was served on the owners of the Milborne Port Social Club due to the flying freehold over the access to the upper floors of Cross Cottage and the potential for areas of common ownership. The Council has since informed me
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that the owners of the Social Club are neither owner nor occupier of the land to which the EN relates. Thus, even though served, the Council has subsequently confirmed that it is satisfied that these persons have no legal interest in the appeal property.

3. The appeal was initially made on grounds (a), (c) and (g). In subsequent correspondence, the appellant introduced grounds (d) and (f) with which the Council has taken issue on the basis of its late submission. As I have provided both parties with the opportunity to address the case advanced by the appellant in this regard, I do not consider that any party would be prejudiced by the inclusion of these grounds of appeal.
4. At my site visit, I observed that the first floor flat was in residential use. However, the roof space was undergoing works consisting of the erection of timber framing to form partition walls and fitting out; it was neither in a habitable condition nor in use as such. Thus, it is only the first floor that is currently in C3 use¹ as a self-contained flat.

Background

5. There is a detailed planning history associated with this site. A planning application was made in 2012 for the retention of two flats at first floor and within the roof space, but the Council states that it was withdrawn prior to determination due to concerns regarding noise from the adjoining occupiers, the lack of mitigation measures and the potential effect on the living conditions of future occupants.
6. A Certificate of Lawful Existing Use or Development (CLEUD) CLUD application followed in 2014. In coming to its decision, the Council states that the applicant failed to establish on the balance of probability that a mixed D1/C3 Use was lawful at the time the application was made.
7. The EN the subject of the appeal was subsequently served in December 2015. In its Enforcement Report, the Council stated that the continued residential occupation of the premises, without the agreement and installation of appropriate sound insulation measures would be unacceptable and detrimental to the residential amenities of the occupiers by reason of noise and disturbance from the adjoining public house and the sports and social club. It further considered that, given the history and length of the case and the unwillingness of the owner to resolve the outstanding issues, the LPA had no option but to take enforcement action to secure the cessation of the occupancy in the interests of residential amenity. Nevertheless, in its subsequent appeal correspondence, the Council states that a condition requiring details of noise mitigation measures would overcome its concern, but that it has no confidence such a condition would be complied with; it is of the view that the EN is therefore necessary to exert the appropriate degree of control.

The EN

8. The Council makes reference in the EN to the mixed use of the building and alleges a change of use of the upper floors to residential. I have a duty to correct an EN that is defective, provided it would not cause injustice to any party².

¹ The Town and Country Planning (Use Classes) Order 1987(as amended).

² Section 176(1)(a) of the Act.

9. In my opinion, the ground floor library and the first floor residential use function separately and completely independently of each other. There is no shared access or facilities and the nature of the uses are distinctly different. The appellant states that the building is comprised of two separate planning units. I agree. I shall therefore correct the EN by removing the reference to the ground floor public library.
10. In respect of the change of use of the first and second floors to residential, I observed that such a change is yet to occur in respect of the second floor. In this case, there is no doubt as to the breach that is being alleged but I shall correct the Notice to refer to the change of use of the first floor only and vary the requirements accordingly. I do not consider that any party would be prejudiced by my doing so.

The ground (c) appeal

11. The appeal on ground (c) is that there has not been a breach of planning control.
12. The appellant states that, historically, the property was in use as a single dwelling. Planning permission was subsequently granted in 1983 for the change of use to a library at ground floor and a dental surgery at first floor. That permission was subject to a condition to the effect that no part of the development shall be carried out until a car park has been provided to accommodate not less than 4 cars and surfaced in a material agreed in writing by the planning authority.
13. As I understand it, the condition was not complied with insofar as the parking spaces required to be laid out and made available for the dental practice were not provided. Thus, the appellant contends that the planning permission was never lawfully implemented owing to the breach of condition and that development must be undertaken strictly in accordance with any conditions attached to a planning permission³. The appellant adds that the lawful use must therefore revert to that prior to planning permission being granted which, in this case, was residential.
14. However it may be possible to implement a development in breach of a condition without the development being unlawful; thus this principle applies only to those conditions which go to the heart of the permission⁴.
15. In coming to its decision on the CLEUD application, the Council found that the planning permission for a library at ground floor and a dentist at first floor was authorised and implemented under planning permission Ref 26/87/1639. It was therefore of the view that the use of the surgery for some 20 years extinguished any fallback position and that there are no permitted development rights that allow for a change from D1 to C3. Additionally, the Council concluded that the disputed condition did not go to the heart of the matter with 2 of the 4 spaces being provided. As far as I am aware, the appellant did not appeal this decision.
16. The ground floor of the property continues to be in use as a library and the condition was complied with, in part, insofar as the two spaces associated with

³ The appellant cites *Sage v Secretary of State and Maidstone Borough Council 2003*.

⁴ *Hart Aggregates Limited v Hartlepool Borough Council 2005* and *Bedford Borough Council v Secretary of State and Murzyn 2008*.

this use were provided. Whilst the appellant states that the use of the first floor as a dental surgery ceased some 9 years ago, it seems to me that this use was not of a casual intermittent or insignificant nature.

17. Thus I agree with the Council that both uses were implemented. In this context, it is not the case that the lawful use would simply revert back to the former use before the intervening uses took place and, in the case of the library, continues to do so.
18. However, even if I am incorrect on this point, and the planning permission had not been implemented, the lawful use relates to a single planning unit which no longer exists.
19. Thus I conclude that, as a matter of fact and degree, there has been a breach of planning control. The appeal on ground (c) must therefore fail.

The ground (d) appeal

20. The appeal on ground (d) is that, at the time the EN was issued, it was too late to take enforcement action.
21. In its EN, the Council refers to a breach of control within the last 10 years, whereas the appellant contends that no enforcement action can be taken against the breach after the end of the period of 4 years beginning with the date of the breach.
22. Section 171B(2) of the Act states that where there has been a breach of planning control consisting of 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. Section 171B(3) clarifies that 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. The Council maintains that as the building is not in use as a single dwelling house, the 10 year rule applies.
23. As already stated, due to the physical separation between the ground and first floor and the material difference in the nature of the uses, I am of the opinion that two separate planning units exist. The 4 year period in s171B(2) applies to a material change of use of a building to use as a single dwellinghouse; "Building" is defined in s336 of the Act as including any part of a building, and flats are dwellinghouses for the purposes of the Act.
24. In this context, the 4 year period in section 171B(2) is of relevance as the development before me relates to the change of use of part of the building comprising a separate planning unit to a single dwellinghouse.
25. The EN was served on 11 December 2015. In deciding when the 4 year period will begin to run it is necessary to look at the physical works, that is, the date the premises were capable of providing viable facilities for living rather than the date when all the works were completed and when the use actually commenced. The Courts have established that if a building is equipped with the essential facilities required for day-to-day⁵ domestic existence, so that it can be genuinely described as a dwelling, and the building is used for no other

⁵ SSCLG and Beesley v Welwyn Hatfield BC [2011] UKSC 15 (J.1188)

- purpose, after a period of 4 years the use of the building as a dwelling would be lawful.
26. The appellant states in his Grounds of Appeal that the first floor was converted to residential use in 2014. However, in his subsequent appeal statement in which he advances ground (d), he states that '*there is no question that the residential conversion took place in 2011*' but that '*the first floor was not fully occupied until 2014*'.
27. To this end, I have been provided with a copy of an invoice dated May 2011 from a bathroom supplier showing the purchase of a bath, panel and screen together with the receipt for a quote from a DIY store dated January 2011 which the appellant states is in relation to a kitchen for the flat.
28. I have also been provided with the dates of the electrical, plumbing and painting work carried out between September and October 2011 and the names of the persons who carried out the work. The appellant tells me that the dates provided relate to that of the last invoices provided by the tradesmen.
29. The appellant therefore concludes that the first floor flat was capable of providing living facilities once the kitchen and bathrooms were installed and the electrics and plumbing connected. He adds that the project was undertaken over a relatively short period of time and October 2011 can therefore be taken as the date that it was ready for occupation.
30. The Council has not provided any substantive evidence to the contrary. Rather, it does not dispute the appellant's claim that these works were completed around October 2011. What is evident is that the Council was investigating the unauthorised use from April 2011 with the planning application to retain the works being made in July 2012 (albeit subsequently withdrawn) and the CLEUD application for what was described as '*...residential use (Use Class C3) at upper floors*' in September 2014.
31. Based on these facts, the appellant's intention to use the first floor for residential purpose from October 2011 was clear. It is likely to be the case that the physical condition of the flat was such that it had working services and amenities. As I have no evidence before me which contradicts the appellant's assertions, I must conclude that it was capable of being so used as of October 2011.
32. Consequently, it has been demonstrated on the balance of probability that the flat was substantially complete and capable of being occupied for a continuous period of 4 years from the date of the breach such that it has become immune from enforcement action. The appeal on ground (d) therefore succeeds.

Conclusions

33. For the reasons given above, I conclude that the appeal should succeed on ground (d). The appeal on grounds (a), (f) and (g) need not be considered.

Melissa Hall

Inspector