

Appeal Decision

Inquiry held on 8 November 2016

Site visit made on 7 November 2016

by Thomas Shields MA DipURP MRTPI

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

Decision date: 6 January 2017

Appeal Ref: APP/D0840/C/16/3144887

Govail, Higher Drift, Buryas Bridge, Penzance, TR19 6AE

- 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 Ms Li Yu against an enforcement notice issued by Cornwall Council.
 - The enforcement notice was issued on 25 January 2016
 - The breach of planning control as alleged in the notice is without planning permission, the sub-division of the dwellinghouse shown hatched black on the attached plan 2 resulting in a material change of use of the property to form 2 separate units of residential accommodation, and the operational development to construct a timber fence on top of the existing boundary wall and timber gates exceeding 1 metre in height adjacent to a highway used by vehicular traffic in the approximate position shown in green on the attached plan 2.
 - The requirements of the notice are:
 - (1) Cease the use of the dwellinghouse shown hatched black on the attached plan 2 as 2 separate units of residential accommodation.
 - (2) Dismantle and remove from the dwellinghouse the kitchen area which facilitates the additional residential unit, to include the kitchen cabinets, sink and cooking facilities, from the first floor open plan kitchen living area shown edged in blue on the attached plan
 - (3) Dismantle and remove from the land the timber fence in the approximate position shown in orange on the attached plan 2.
 - (4) Dismantle and remove from the land the timber fence and timber gates in the approximate position shown in green on the attached plan 2.
 - (5) Permanently remove from the land all materials and debris resulting from compliance with (2) - (4) above.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (d) of the Town and Country Planning Act 1990 as amended (the Act).
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Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Application for Costs

2. Cross-applications for costs were made by Cornwall Council and Ms Yu. These applications are the subject of separate Decisions.

Preliminary Matters

3. The appellant clarified that the appeal was in respect of the alleged sub-division of the dwelling into two residential units, and not to the alleged operational development. I have therefore determined the appeal on that basis.
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4. All oral evidence from witnesses at the Inquiry was given on oath or by affirmation.

Property description and background to appellant's case

5. Govail is an extended part single, part two-storey residential property. The parties agreed that the rooms and internal layout are generally as shown on the plans appended to the enforcement notice.
6. A lockable internal door on the ground floor links one half of the property to the other. The appellant states that she occupies one half of property and lets the other half to holiday makers. Each half of the property has its own external access door with rooms providing cooking, eating and sleeping facilities.

The appeal on ground (d)

7. I start by setting out that Section 55(3)(a) of the Act confirms that the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used. It is important to note that this refers to the *use* of the building.
8. A 'dwellinghouse' is not defined in law, but long established case law¹ sets out that in order for a building (or part of a building) to be a dwellinghouse it must be able to afford to those who use it the basic facilities required for day to day private domestic existence. Hence, both the physical condition of the building together with its manner of use must be considered. In this regard I have no doubt that the internal arrangement of rooms and doors I have previously described allow for the separate use of each half of the property.
9. No appeal has been made on ground (b); that the sub-division into two units of residential accommodation from a single dwellinghouse has not occurred, or on ground (c); that it did not constitute a breach of planning control. The appeal is made on ground (d), that at the date the enforcement notice was issued it was too late to take enforcement action against the breach of planning control due to the passage of time. In this regard 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.
10. The relevant date for the purposes of assessing immunity of the alleged breach of planning control is four years prior to the date of issue of the enforcement notice which is 25 January 2012 (hereafter referred to as the "material date"). The appellant must therefore demonstrate, on the balance of probability, that the change of use had actually taken place by or before the material date and that it was continuous, without material interruption, for at least a four year period after the date of change.
11. In pursuing an appeal on ground (d) the burden of proof is on the appellant, and the test of the evidence is on the balance of probability. The judgment in *Gabbitts v SSE and Newham LBC* [1985] JPL 630 makes it clear that the evidence of an appellant should not be rejected simply because it is not corroborated. If there is no evidence from the Council or others to contradict or

¹ *Gravesham BC v SSE & O'Brien* [1982] 47 P&CR 142; [1983] JPL 307

otherwise make the appellant's version of events less than probable, the appeal should be allowed provided that the appellant's evidence alone is sufficiently precise and unambiguous.

Summary of appellant's case

12. In oral evidence the appellant stated that she and her then partner bought the property on 31 May 2006 and occupied it together. Sometime after that they began to lead separate lives, each of them permanently and individually occupying one half each of the property, separated by the lockable internal door. Following her former partner's departure from the property she took over the whole property in 2009, remaining in one half of it herself and letting the other half since that time.

Assessment

13. The appellant's evidence was given on sworn affirmation. Giving sworn evidence carries with it the risk of imprisonment and/or a significant fine if a person knowingly makes a false statement, hence it is unlikely to be undertaken lightly and, as a consequence, it carries considerable weight. It provides strong support for the appellant's case, and regard must be had to its statutory status. However, all the evidence must be considered as a whole and any potential ambiguities or lack of necessary detail examined.
14. Having regard to the findings of the Court in *Uttlesford DC v SSE & White* [1992] JPL 171, I do not consider that the changed manner of shared but divided occupation of the property by the appellant and her partner to 2009 to constitute use of each half of the property as a single dwellinghouse. However, if following the departure of her partner, from 2009 onwards, half of the property was continuously let as a separate dwellinghouse, as claimed, then the change of use to two separate dwellinghouses would have become immune from enforcement action in 2013.
15. In furtherance of the appellant's case she referred to a letter from letting agents Southwest Holiday Cottages² (SHC) as evidence of the use. The letter is dated 22 September 2009. However, it is not addressed to the appellant by name or postal address and appears to be a standard information letter advertising SHC's services and rates to cottage owners who might be interested in letting. The last line states "*..and if you feel you may be interested in our letting your cottage or wish for further information please phone*". It does not therefore provide evidence that the property was in use as two separate dwellings at that time.
16. A copy of an undated SHC brochure listing and separate provisional booking notification slip³ dated 11 February 2010 was submitted to the Inquiry. There is no evidence of the date the booking was for, or that the booking was actually confirmed and taken up. By itself this does not provide conclusive evidence of separate and continuous use of the two halves of the property as two dwellinghouses, although it is not inconsistent with the appellant's oral evidence of the use of the property in 2010.

² Document 4.1

³ Document 4.4: "Penzance 24"

17. An electricity bill⁴ dated 23 May 2011 was also submitted. It is addressed to the appellant at "*The Annex*". Again, while not inconsistent with the appellant's sworn testimony, it does not by itself provide additional evidence of continuous use of the two halves of the property as two separate dwellinghouses.
18. The Council's evidence included copies of pages taken from internet websites⁵ accessed in July 2015. One of those was an entry for Rightmove dated 17 February 2011 which advertised half of the property as available for rental. While it indicates an intention to rent it does not provide evidence of when or if it was so rented.
19. Other pages (Tripadvisor, Holidaylettings.co.uk) describe and host photographs of the accommodation available and include reviews from people who rented and stayed at the property. Tripadvisor first listed the property in October 2013 and the earliest published reviews from people who stayed there refer to stays in June 2014 (Holidaylettings.co.uk). In my view, these documents provide substantial evidence of the use in 2013 to 2014 onwards, but that is after the material date (25 January 2012).
20. All of the submitted documents I have referred to thus far do not provide any additional evidence of when the change of use commenced. The appellant on oath asserts it occurred before 2010, but I have found that not to be the case for the reasons I have already set out above. Furthermore, in conflict with his own and the appellant's oral evidence that it occurred before 2010, in his written evidence⁶ in support of the appeal Mr Cosslette identifies that the change of use did not occur until 2010.
21. In November 2010 the property was visited by Council officers⁷. At that time it was noted by Mrs Brown that part of the building was being altered from a lounge and bedroom on the ground floor to a study and en-suite bedroom, together with the conversion of the loft space above to a lounge, kitchen and bathroom. Her notes of the visit record that the appellant was advised that planning permission would be required if it were to be used as a '*separate residential unit*'. That was unequivocally confirmed in her subsequent letter⁸ to the appellant which stated: "*However, if you decide to **use** this section of the dwellinghouse as a separate unit of residential accommodation, so that it is not **used** as part of the main dwellinghouse, then planning permission will be required for the sub-division of the property*" (my emphasis).
22. In her evidence the appellant argued that her level of understanding of the English language led her to be confused in respect of the Council's advice such that she believed that the critical issue was whether the dividing door between the two parts of the property remained locked or not. However, even accepting that may have been her understanding of the situation prior to 2010, I am satisfied that the Council's advice referred to above was absolutely clear in respect of the **use** of the property.
23. Following on, in August 2011 the appellant submitted a planning application to the Council⁹. Part of the development for which planning permission was

⁴ Document 4.2

⁵ Proof of Evidence of Mrs Brown – Appendix 13

⁶ Statement of Case: 'Planning Summary' and Proof of Evidence, para.1

⁷ Mrs Brown and Mr Read

⁸ Proof of Evidence of Mrs Brown – Appendix 1

⁹ Document 5

sought was described as: “*Conversion of a **detached house** to a semi-detached house with a self-contained annex*” (my emphasis). The relevant part of the application form was ticked to confirm that the change of use had not at that time commenced. That conflicts with the appellant’s assertion that the change of use occurred previously. In oral evidence on this matter she confirmed that she had received advice from the Council (Mr Brooks) that planning permission would not be required if the internal link to the main house was retained and the property remained in use by family members. In January 2013 Mrs Brown inspected the property with the appellant. She (Mrs Brown) recorded that the property had not been sub-divided at that time.

24. In December 2014 the Council issued a Planning Contravention Notice (PCN) with an accompanying letter¹⁰. The letter clearly explained that the PCN required confirmation of how the property was being used. In the PCN responses (question 4) the appellant confirmed that the use of the property was as a **single residential dwelling with two let rooms**. That description of use directly conflicts with her assertion in this appeal that the use as two separate dwellings commenced some years beforehand. In oral evidence on this point the appellant strongly asserted that her PCN response reflected her view at that time of the use of the property as one dwelling comprised of two living units.
25. However, I find the appellant’s explanation of her misinterpreting the meaning of sub-division and use as two separate dwellings difficult to reconcile with the clear verbal and written Council’s advice to her in previous years regarding the use of the property as a single dwelling. Moreover, she employed a chartered and professional planning consultant (not Mr Cosslette) to help her complete the PCN questionnaire; it clearly states the use as being a single residential dwelling with two let rooms, not two living units. I consider the PCN response to be contemporaneous and weighty evidence as to the use of the property.

Conclusion

26. I make no finding that the appellant has been dishonest, and the Council does not argue that she has been so. However, having regard to the judgment in *Gabitas* I consider that the appellant’s oral and written evidence, taken together, is very far from being precise and unambiguous. The evidence of her consultant Mr Cosslette in this regard is equally so, but that is understandable given that he had no detailed personal knowledge of the use of the property himself, and was acting and giving evidence on instruction from the appellant. The appellant’s evidence is also directly conflicted by the Council’s evidence which I have previously outlined.
27. Taking account of all of the evidence before me I am unable to conclude, on the balance of probability, that the change of use to two single dwellinghouses commenced by or before the material date and was continuous for a four year period. Consequently, I conclude overall that the use is not immune from enforcement action and the appeal therefore fails.

Thomas Shields

INSPECTOR

¹⁰ Proof of Evidence of Mrs Brown – Appendix 6

APPEARANCES

FOR THE APPELLANT:

Mr Graham Cosslette
BA BA/DipTP MRTPI MInstLM

Planning Consultant, AAP Development Services

He called

Ms Yu, the Appellant
and himself

FOR THE LOCAL PLANNING AUTHORITY:

Mr Ben Curnow

Legal Officer, Cornwall Council

He called

Mr Peter Blackshaw BA (Hons) MRTPI
Principal Development Officer, Cornwall Council

Mrs Sally Ann Brown, Development Officer
(Enforcement), Cornwall Council

DOCUMENTS SUBMITTED AT THE INQUIRY

- 1 Letter of notification of the Inquiry dated 11 October 2016
- 2 Council's opening statement
- 3 Copy of appellant's letter dated 17 May 2016
- 4 Bundle of 4 copies of letting documents and utilities bills
- 5 Copy of planning application and plans ref. PA11/06910
- 6 Council's closing submissions