
Appeal Decision

by A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 06 September 2017

Appeal Ref: APP/L2250/X/16/3164236

6 Jesson Close, St Mary's Bay, Kent TN29 OSH

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 ['the Act'] against a refusal to grant a certificate of lawful use or development ['LDC'].
 - The appeal is made by Mrs Sharon Byrne against the decision of Shepway District Council.
 - The application ref Y16/0324/SH, dated 6 April 2016¹, was refused by notice dated 1 June 2016.
 - The application was made under section 191(1)(a) of the Act².
 - The use for which a certificate of LDC is: *'This should be granted because "permitted development right" was removed – condition 3. The living area has been in use since 2005 (see photographic evidence without objection)'.*
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Procedural matter

1. It is apparent to me that the description of the existing use is imprecise. Planning permission for no. 6, being part of a residential development, was granted on 30 May 2000³ ['the 2000 permission' for convenient shorthand]. Mrs Byrne seeks a LDC declaring that the existing use of a garage for living accommodation in breach of condition 3) imposed on the 2000 permission is lawful. I will proceed on this basis.

Decision

2. The appeal is dismissed.

Inspector's reasons

3. The onus of proof is firmly upon Mrs Byrne. In *Gabbitas*⁴ the Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The applicant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the local planning authority ['LPA'] has no evidence of its own, or from others, to contradict or otherwise make Mrs Byrne's version of events less than probable, there is no good reason to dismiss the appeal, *provided her evidence alone is sufficiently precise and unambiguous* [my emphasis]. I must examine the submitted factual evidence, the history and planning status of the appeal site and garage in question and apply relevant law or judicial authority to the circumstances of this case.

¹ I have taken this date from the Council's decision notice and appeal papers submitted by the appellant. The application form declaration date is unclear.

² If any person wishes to ascertain whether any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful s/he may make an application for the purpose specifying the land and describing the other matter.

³ Council ref: Y00/0218/SH granted planning permission on 30 May 2000.

⁴ *Gabbitas v Secretary of State for the Environment* [1985] JPL 630 reviewed in *Ravensdale Limited v Secretary of State for Communities and Local Government* [2016] EWHC 2374 (Admin).

4. Mrs Byrne's claim is a simple one, namely, that condition 3) has been breached for more than four years⁵, because the garage has been used for living accommodation in breach of condition 3). The LPA maintain that insufficient information had been submitted to evince lawfulness.

The main issue to consider is whether the existing use was lawful on the date of the application.

5. The word 'development' includes the making of any material change in the use of any building or land. Express planning permission is required for the carrying out of any development of land⁶. Planning permission may be granted subject to conditions that regulate development, for example controlling the use of the permitted development. The carrying out of development without the required planning permission, or failing to comply with any condition or limitation subject to which planning permission has been granted, constitutes a breach of planning control. A use is lawful⁷ at any time if no enforcement action may be taken in respect of the use due to the passage of time. Where there has been a breach of control consisting in the change of use of any building to use as a single dwelling-house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. In the case of any other breach no enforcement action may be taken after the end of the period of 10-years beginning with the date of the breach⁸.
6. No. 6 is a detached dwelling with garage. As I have said elsewhere planning permission for the property is derived from the terms of the 2000 permission. The LDC site plan outlines in red the whole of the property. It is apparent to me that the property constitutes a single unit of occupation in residential use⁹. The garage does not form a self-contained residential planning unit, but it is occupied and used as a living room contrary to condition 3) imposed on the 2000 permission. The latter reads:

'The area shown on the approved plan as car parking or garage spaces shall be adequately surfaced before the premises are occupied and kept available for parking purposes in association with the premises'.

The reason given for imposing this stipulation states:

'It is necessary to make provision for adequate off street parking to prevent obstruction of the neighbouring highway and safeguard the amenities of adjoining areas'.

7. The condition seeks to ensure that the garage is made available for parking purposes in association with the use of no. 6 as a dwelling-house. Read straightforwardly and within the context of the 2000 permission, the natural and ordinary meaning of the words clearly suggest it prohibits the use of the garage for any other purpose except for the parking of vehicles. Its use for habitable accommodation is therefore a breach of condition 3). Further, my assessment of the condition's meaning is consistent with the reason given for imposing it. The LPA wanted to avoid potential impact on amenity caused by kerbside parking arising from the residential scheme.

⁵ Affidavit signed and dated 5 April 2016.

⁶ Sections 55(1) and 57(1) of the Act.

⁷ Section 191(1)(2) and 171B of the Act.

⁸ Section 171A and 171B(2) and (3) of the Act.

⁹ Applying the principles established in *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.

8. I therefore consider that the use of the garage is emphatically controlled by condition 3), which remains effective and in force¹⁰. This amounts to a breach of planning condition firmly falling within the scope of s 171B(3) - the 10-year time limit is applicable.
9. Mrs Byrne contends that the garage has been used for habitable accommodation since May 2005¹¹, which is before 6 April 2006 (the material date). She has referred to various photographs purporting to show the living accommodation in actual use. For instance, the images show individuals who have reached adulthood or aged over time while residing at no. 6. The assertion is a simple one, namely, that this proves that the garage has been used as a living room since 2005. However, I do not find this evidence persuasive. This is because, apart from lack of clarity as to when and where the photographs were taken from, the images fail to establish when the garage was first converted into living accommodation. There is no detailed explanation of how the garage had actually been adapted to facilitate an ancillary residential use. For example, there is no explanation of building operations, the scale of the works of conversion, or a timeline and sequence of past events. The evidence does not adequately show how the garage has been used. It is difficult to draw any firm conclusion as to when the garage was first used in breach of condition 3). Given the ambiguous nature of this evidence, I attach it little weight.
10. In addition to all of that, Mrs Bryne's own evidence is contradictory. The claim that the garage was first used for living accommodation in May 2005 is directly at odds with her sworn statement, which is dated 5 April 2016. She says that the garage was converted into a living room more than four years ago yet there is no specific date or timescale. She says that the family have used it since that time but the nature of the use is unclear. She says that the garage doors are still in place but no specific detail has been provided. Given the substantial inconsistency in the evidence presented, there is significant doubt over the veracity of the immunity claim.
11. For the sake of completeness, I will consider the implication of s 55(2)(d). As a matter of law the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such is excluded from the definition of 'development' for planning purposes. The term 'building' includes any part of a building. There may well be a claim that express planning permission would not be required for the garage's incidental residential use. However the 2000 permission expressly proscribes any other use of the garage except parking of vehicles. Therefore, s 55(2)(d) would not be engaged in this circumstance.
12. Having reviewed all of the evidence presented and on the balance of probabilities, Mrs Byrne whichever way one scrutinises the representations made I find that insufficient, incomplete and contradictory evidence has been provided to substantiate your case. It is ambiguous as it does not show, with sufficient clarity or precision, when and how the garage was converted into habitable accommodation and subsequently used for living purposes. It does not show that the use of the garage in breach of condition 3) subsisted for a period of at least 10 years before the current LDC application without significant interruption¹².

¹⁰ Applying the principles established in *Dunnett Investments Limited v the Secretary of State for Communities and Local Government and East Dorset District Council* [2017] EWCA Civ 192.

¹¹ Taken from 9 and 10 of the LDC application form.

¹² Applying the principles established in *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461.

Conclusion

13. On the material facts and circumstances of this case and the available evidence, I must reject Mrs Byrne's submissions as the onus of proof has not been discharged. This does not necessarily preclude the submission of a further application if better evidence is subsequently available. Thus far imprecise evidence has been presented that does not sufficiently discharge the burden of proof¹³.
14. I therefore find that, in part at least, the LPA's refusal to issue the LDC was well-founded.
15. For all of the reasons given above and having regard to all other matters, I conclude that the appeal should be dismissed in accordance with the powers transferred to me in section 195(3) of the Act.

A U Ghafoor

Inspector

¹³ The Department's Planning Practice Guidance, published online, advises on LDC applications from Paragraph: 001 Reference ID: 17c-001-20140306 onwards.