



Appeal Decision

Inquiry Held on 19 March 2019

Site visit made on 19 March 2019

by A A Phillips BA(Hons) DipTP MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 July 2019

Appeal Ref: APP/A2335/X/18/3207142

Woodland House, 95 Balmoral Road, Morecambe LA4 4ER

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Grange View Ltd LLC against the decision of Lancaster City Council.
 - The application Ref 17/01257, dated 28 September 2017, was refused by notice dated 12 February 2018.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is a single dwellinghouse.
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Decision

1. The appeal is dismissed.

Application for costs

2. At the Inquiry an application for costs was made by Lancaster City Council against Grange View Ltd LLC. This application is the subject of a separate decision.

Procedural Matters

3. I have taken the description of development from the Council's decision letter rather than the application form because it more accurately describes the use for which the certificate of lawful use is sought.
4. I noted that there are some errors in the notification letters sent out by the Council on 28 November 2018 and 26 February 2019. Firstly, both refer to 'The appeal is against a refusal of planning permission'. Clearly, this is incorrect as it should refer to the appeal being against the refusal of a certificate of lawful use or development (LDC). In addition, it appears that the address provided on the notification letters is incorrect as both refer to 'The Woodlands' rather than 'Woodland House' as specified on the application form. However, both main parties agreed that the reference to the refusal of planning permission on the notification letters would not cause injustice because no interested parties had commented on the application. In addition, it was agreed that the address of the appeal property on the notification letters also included '95 Balmoral Road' and therefore it is unlikely that the slight inaccuracy would cause injustice.

5. The original appeal documentation did not include a full and complete copy of the original application form. In particular, there was no signed and dated declaration. However, a full copy of the forms has been received which confirms that the date of the application was 28 September 2017. It was clarified by the appellant that the floor plan included as their Exhibit 14 to the Statement of Case was the floor plan submitted with the original application.
6. The Council drew attention to the fact that the occupants of 97 Balmoral Road had not been included on the Council's appeal notification list. However, it was confirmed that a site notice had been displayed immediately adjacent to the appeal site. It was agreed that their omission was unfortunate, but was not limiting given the process for dealing with such a legal determination as a LDC.
7. The appellant contended that he was not informed of the details of the Inquiry and had only found about it through the local press. He also stated that he had no legal representative present and it would therefore not be possible for the Inquiry to be a fair process.
8. Following a brief adjournment to check the case file I confirmed that the correct correspondence, including appeal notifications, copies of relevant documents including the Council's Statement of Case had been correctly addressed and sent to the appellant in a timely fashion. The appellant had also signed the Statement of Common Ground on 19 February 2019 which included the date of the Inquiry and some details of the appeal, including the appeal reference, site address and description of the development. In addition, the appellant submitted a completed Enforcement /LDC Timetable Form dated 7 March 2019 and he must have known that the Council would have legal representation by the details provided in the Council's Timetable Form which identifies Anthony Gill, Barrister as the Council's advocate. The fact that the appellant had no legal representation did not mean that the Inquiry should not proceed.
9. The appellant also claimed that due to language issues he would be unlikely to understand the process nor provide the oral evidence required. However, after some discussion on this point he agreed that the Inquiry could proceed.
10. Each witness gave evidence under oath.

Main Issue

11. The main issue is whether the Council's refusal to issue an LDC was well founded. As explained later in this decision, whether or not the building has since been used as separate flats, a planning permission granted in 1983 for a change of use from a private dwelling to a home for the elderly appears to have been implemented. There has been no subsequent grant of planning permission for a change of use back to a single dwellinghouse. The question of whether the refusal of an LDC was well founded will therefore turn on whether the appellant has proved on the balance of probability that the use of the property changed to use as a single dwellinghouse on or before 28 September 2013 and that the use then continued without significant interruption for 4 years after the date of the change.

Reasons

12. In an appeal relating to a lawful development certificate the onus of proving the relevant facts rests with the appellant, and the standard of evidence is the

balance of probabilities. The appellant's own evidence does not need to be corroborated with independent evidence, and if there is no evidence to contradict or otherwise make the appellant's version of events less than probable, the appellant's evidence alone may be sufficient to justify the grant of a certificate provided that it is sufficiently precise and unambiguous.

13. It is my understanding that the original application included the application form, a floor plan and a site plan. No additional supporting documentation was submitted with respect to the use of the property. With the appeal form the appellant has submitted a range of documentation, which includes the following:
- Supporting letter dated 14 July 2018;
 - Statement of Case;
 - Council's decision letter;
 - Property sales particulars;
 - Location Plan;
 - Valuation Report;
 - Various correspondence with Lancaster City Council;
 - Property Inspection report dated 21 August 2018 by Duxbury's;
 - Planning permission reference 1/83/978;
 - Planning permission reference 01/90/0483; and
 - Extract from First Tier Property Chamber Decision dated 3 April 2017.
14. The Council has provided correspondence from the Council Tax Manager which indicates that the appeal site has been used as two flats since 2008, but the ground floor has been unoccupied. The Council's records show that there have been several tenants in the first floor flat. The appellant contends that the information held by the Council in this regard is incorrect. Consequently, he argues that he cannot be expected to prove that the second flat exists when, in fact, it does not. The Council Tax evidence indicates that the second floor may have been occupied as a separate residential unit even if the ground floor was not. I understand that it is not for the appellant to prove something that does not exist, but rather in this case it is for the appellant to provide sufficient evidence to prove on the balance of probabilities that the property has been used continuously as a single dwelling for the period of four years up to the date of the application.
15. The appellant has also argued that his company has not been notified of any material change of use of the property to two dwellings and the Council must have unlawfully made that change. He questioned whether the Council Tax Department has the authority to make such a change of use of a property without the consent of the owner. However, such claims and contentions are distractions from the key point that it is not for the Council to prove the existence of two flats rather than a single dwelling, but it is for the appellant to provide sufficient evidence to support the use which he claims to be lawful.

16. The appellant has also submitted evidence in the form of correspondence with the local authority's Council Tax Department. In this correspondence the appellant challenges the Council's records with respect to the use of the property as two flats. The records show that the first floor flat has been occupied by tenants independently of the rest of the building. The appellant has stated that the Council has provided no evidence or explanation with reference to the Council Tax records which show the use of the property as two flats. However, as previously set out in this decision, the burden of proof in a case such as this is on the appellant.
17. The appellant also argues that his company Grange View Ltd LCC bought the property as one dwellinghouse in 2007. The original marketing information submitted by the appellant describes the property as a detached house. Furthermore, it appears that the marketing information submitted is only the front cover of a more extensive sales leaflet and there are no details to show the rest of the document, including caveats that may have been included with respect to the assumptions on previous uses and the established use of the property. In any case the evidence submitted merely states that the property is a detached house without any additional details.
18. It is also my understanding from the appellant's oral evidence that at the time his Company purchased the property it was in a very poor condition, having been fire-damaged. The marketing information states "No internal viewings" as a consequence of the unsafe condition of the building. This may also help to explain why it is described on the cover as being a detached house.
19. The appellant contends that the property was bought with one kitchen, one electricity meter and one gas meter and since the purchase it has only been used as a single dwellinghouse. It may be the case that during the required four year period it has been used as one property, but there is insufficient evidence before me that the appellant has properly grasped that the Council considers it has been used a single property at first floor with the ground floor being used for storage purposes rather than as another self-contained residential property. In this regard I consider that marketing information holds only limited weight in the appellant's case.
20. The appellant indicated that the Council has provided no evidence of the lawful status of the property since 2007 and also disputed whether the care home which was granted planning permission by the Council in November 1983 was ever implemented. In making this argument it seems to me that the appellant has misinterpreted the Statement of Common Ground which actually refers to the fact that a subsequent planning application approved in June 1990 for the change of use of 97 Balmoral Road from a dwelling to an extension to No 95 was not implemented. However, the June 1990 planning permission indicates that the use of the premises shall be restricted to a rest home for the elderly only, and therefore it can be reasonably assumed that the care home at No 95 had in fact been implemented. In addition, the extract of the Valuation Report by Harrison Willis & Moore Chartered Surveyors describes the property as a substantial detached property which appears to have been used as a care facility in the past.
21. Although the detailed planning history of the site may be a little unclear in terms of when the care home permission was implemented and when the property ceased to be used as a care home for the elderly, this is insufficient

evidence to prove on the balance of probabilities that the property has been used as a single dwellinghouse for the prescribed four year period. I appreciate the appellant's frustration that the planning use of the appeal property remains unclear given the lack of documented history, but in a case such as this the burden of proof is on the appellant to prove on the balance of probabilities that the property has been used as a single dwellinghouse for the period of four years up to the date of the application. It is not for the Council to prove that something existed other than the use for which the LDC is being sought.

22. The appellant has also referred to an inspection of the property which was made with respect to an appeal to the First Tribunal under the Housing Act. It is my understanding that in October 2015 the Council served an Improvement Notice under Sections 11 and 12 of the Housing Act 2004 regarding the first floor flat at 95 Balmoral Road. This required certain works to be carried out in order to deal with hazards that had been identified by the Council; those hazards being related to excess cold, damp and mould growth, fire and falling between levels. The Notice was appealed by the appellant and subsequently, a site visit was undertaken by the Tribunal. The result of the appeal was that the Improvement Notice was confirmed on 16 March 2016, subject to the removal of the requirement for insulation to the attic bedroom.
23. Following a decision by the First Tier Tribunal, either party has the right to appeal to the Upper Tribunal. The appellant's letter dated 1 July 2018 states that the Council representative (Mr Mark Charlesworth) and the First Tier Tribunal's decisions have both been criticised by the Upper Tribunal. Furthermore, the appellant contends that the original decision of the First Tier Tribunal was set aside, a new First Tier Tribunal was appointed and the new First Tier Tribunal concluded that the original decision was reversed.
24. It is my understanding that the decision of the Upper Tribunal was reported by Judge Huskinson, but a copy of that judgement has not been provided as evidence by the appellant. However, evidence provided by the Council shows that on 12 August 2016 the Upper Tribunal (Lands Chamber) refused permission for the appellant to appeal to the Lands Chamber as there was no realistic prospect of a successful appeal. Furthermore, the decision of the Upper Tribunal goes on to state that none of the other grounds give rise to any arguable case that the first tier tribunal was in error when it confirmed the improvement notice. It was entitled to reach adverse conclusions on the reliability of the appellant's evidence and to prefer the evidence of the local authority's witness. In that case it is my understanding that the local authority's witness in question was Mr Charleston. However, rather than undermining the judgement of Mr Charleston, this evidence suggests that his evidence was preferred to that of the appellant, Mr Zohar, against whom adverse conclusions were made with respect to the reliability of his evidence. Indeed, the First Tier Tribunal states that *"the evidence and information provided by Mr Charlesworth is more reliable than that provided by, or on behalf of, Mr Zohar and it is in the light of this that the Tribunal draws the conclusion that it was appropriate for the Authority to issue an improvement notice with respect to 95 Balmoral Road"*.
25. The appellant has drawn attention to the appeals under the Housing Act 2004 as a means of undermining the credibility of the Council's Housing Officer Mr Charlesworth with particular reference to his findings which led to the Council

issuing the Improvement Notice on 12 October 2015. However, on examination of the detailed evidence provided by both parties, it is the appellant's credibility that has been brought into question.

26. In addition and with particular relevance to this planning appeal, Mr Charleston uses the address of the First Floor Flat, 95 Balmoral Road, Morecambe, rather than referring to the relevant property as a single dwellinghouse 95 Balmoral Road, indicating that the ground floor was in separate occupation, or was indeed not being used for residential purposes at all. He also identifies that there was inadequate separation between the ground and first floor flat and that there was high fire loading due to a large amount of flammable material stored on the ground floor and basement. This suggests that the ground floor was being used for some kind of storage uses rather than residential purposes at the time of his site visit in August 2015. The report of the First Tribunal dated 16 March 2016 sets out their findings of the site inspection which took place on the morning of 16 March 2016 and confirms that the ground floor and cellar was occupied by the appellant for storage of the many and varied items required for the running of his portfolio of rented properties. The report goes on to say that there is very little circulation space between the stored items. Rather than being a general assumption with respect to the use of the ground floor, this is a strong indication to me that at that time the property was being used for storage purposes rather than appearing to be in the process of being improved, as claimed by the appellant.
27. In his evidence the appellant has quoted from the First Tier Tribunal's decision by Judge Going dated 3 April 2017 which suggests a mis-judgement by Mr Charlesworth in determining whether an insecure front door at ground floor level was properly classed as a Category 1 Hazard. However, only a small extract has been provided of that judgement rather than the whole document. Furthermore, and more significantly, the Going Judgement relates to a different property, 46 Westminster Road, Morecambe and it also appears that the type of application to which the judgement relates is under Section 45 of the Housing Act 2004. As such, this piece of evidence does not criticise Mr Charlesworth's judgement with reference to the Housing Improvement Notice for 95 Balmoral Road under Sections 11 and 12 of the Housing Act 2004. Therefore, I do not consider it reasonable to use this piece of evidence as it is not at all a direct comparison with matters pertaining to No 95 and I give it little weight in reaching my decision.
28. The appellant also relies as evidence on the report of David Thomas, a Chartered Surveyor who was commissioned by the appellant to inspect the appeal property on 23 August 2016. The purpose of the inspection was to advise the appellant in respect of various notices served by Lancaster City Council in respect of defects at the property. I have looked this report in detail and have noted the following comments which I consider to be particularly relevant to the appeal case. Firstly, the report clearly relates to the "*First Floor Flat, 95 Balmoral Road*" rather than the whole property. The first page of the report identifies that the notices are served in respect of the first floor flat being part of a large detached two storey residence. Furthermore, page 3 of the report describes the property as a "*Large flat in a Victorian Building*" and on page 5 there is reference to "*The flat has not yet been decorated...*". The final page of the report refers to "*the tenant of the flat*". These references to the property being a flat are a clear indication that even the appellant's own appointed surveyor considered the first floor to be a separate flat rather than

- part of a single two storey house. Elsewhere in the report I see insufficient evidence that the surveyor, Mr Thomas, contends that 95 Balmoral Road is a single dwellinghouse.
29. I can understand that there are comments in his report which disagree with those of Mr Charleston, but it appears to me to support the case of the Council that the appeal property is not a single dwellinghouse. Instead, it seems to me to be clear from the Duxbury's report that the first floor has been occupied independently from the remainder of the building. The appellant contends that this report was used as evidence that was taken into account by the Upper Tribunal when they made their decision dated 12 August 2016. However, this cannot be the case since the date of the report is 21 August 2018 which post-dates the Upper Tribunal decision. In any case the Upper Tribunal found in favour of the Council.
30. The appellant has commented that the written annotation of the floor plans for the appeal site are not his original plans. I accept that this is the case because I have a copy of the original plans and, in addition, it was clarified at the inquiry that the annotated plans are those of the Council's Housing Standards Officer following site visits on 24 August 2015 and 9 September 2015.
31. With reference to the property being used as a single dwellinghouse the appellant has also pointed to recent correspondence from Eleanor Fawcett dated 6 February 2019 which states that the property was previously a single dwelling. However, it is clear to me that this refers to the use prior to it being used as a care home. As such, this does not give support to the appellant's case.
32. The Statement of Common Ground which has been signed by the appellant and the Local Planning Authority also refers to the fact that "the first floor of the property has been let for residential purposes".
33. The appellant is not satisfied with the manner in which the Council has dealt with his case. The Council's decision was not made within the prescribed eight week period, but there is evidence, including correspondence dated 27 November 2017 and 15 January 2018, that during the course of dealing with the application the Council sought to engage with the appellant. The signed refusal notice dated 12 February 2018 clearly states the reasons for the refusal of the certificate of lawfulness and is correctly addressed to the appellant.
34. He has also expressed concerns that during the course of determining the LDC no site visit was undertaken by a Council officer. Given the nature of such applications and the requirement to determine a LDC based on the evidence provided by the appellant at the time of making the application rather than on any planning merits I can understand why the Council may have not deemed it necessary to visit the site.
35. I can understand the appellant's frustration that the application was delayed and subsequently refused, but the delay in dealing with the application is justified and, in any case, I will determine this appeal on the basis of the evidence presented and the merits of the case rather than the timeliness of the Council's work.
36. The appellant has criticised the Council for failing to produce evidence but the burden of proof lies with him. The evidence submitted by the appellant is

imprecise, inconsistent and ambiguous. He has not shown, on the balance of probability, that the property has been continuously occupied as a single dwellinghouse for a period of 4 years or more up to the date of the issue of the application for a certificate of lawful use which was 28 September 2017.

Conclusion

37. The appellant indicates that the Council's decision to refuse this application was based on the Council Tax and Mr Charlesworth. Whilst these matters are material, the key reason for the refusal as set out in the decision letter of 12 February 2018 seems to me to be the lack of corroborative evidence in support of the application submitted by the appellant.
38. In this case I find that the appellant has not shown, on the balance of probabilities, that the use of the property changed to use as a single dwellinghouse on or before 28 September 2013 and that the use continued without significant interruption for 4 years after the date of the change. His own evidence seeks to reverse the burden of proof rather than seeking to discharge the burden of proof and pass the threshold of evidence required in this case. His case is largely a critique of the Council's approach, case and evidence rather than a case which seeks to prove on the balance of probabilities that the property has been in use as a single dwellinghouse for the required four year period.
39. As well as providing insufficient evidence to discharge the burden of proof there is a significant body of contrary evidence which has been provided by the Council and the appellant, himself.
40. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a single dwellinghouse was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

A A Phillips

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Eli Zohar
Naomi Zohar

Grange View Ltd LLC

FOR THE LOCAL PLANNING AUTHORITY:

Anthony Gill of Counsel

He called

Eleanor Fawcett

DOCUMENTS SUBMITTED AT THE INQUIRY

1. Copy of E mail from Eleanor Fawcett to Mr Zohar dated 6 February 2019.