



Appeal Decision

Site visit made on 18 December 2019

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 January 2020

Appeal Ref: APP/D0840/X/18/3218051

127 Lily Way, St Merryn Holiday Village, Padstow, Cornwall PL28 8TG

- 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 Mr Simon Morland against the decision of Cornwall Council.
 - The application Ref PA18/08423, dated 25 June 2018, was refused by notice dated 23 November 2018.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described as "residential use".
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Cornwall Council against Mr Simon Morland. This application is the subject of a separate Decision.

Preliminary Matters

3. The Council in their decision changed the description of the use for which a LDC is sought but I have had no confirmation that this was agreed by the appellant. I have used the description as set out on the application form by the appellant which I am obliged to do. It is however clear that the appellant is seeking confirmation of whether permanent residential use of the property is lawful.
4. I carried out an accompanied site visit although it was not possible to gain access to the property. However, given the issues that have been raised, it was not necessary for me to do so.

Main Issue

5. This is an appeal that relates to the refusal of an application for a LDC and turns on matters of law rather than the planning merits of the use. The main issue is whether the Council's decision to refuse the LDC was well-founded.

Reasons

6. There is no dispute that the building contains the facilities required for day to day private domestic existence. As such it is a dwellinghouse even though it

was originally approved in 1986 (planning permission 6/86/1533/OOP MER49) subject to planning condition No 3 which states that "the development hereby permitted shall be used for holiday purposes only and shall not be used for permanent residential occupation". There would therefore be no material change in the use of the dwellinghouse if it were occupied on a permanent basis rather than for holiday purposes, however such occupation would be a breach of planning condition No 3.

7. I do not agree with the appellant's view that this condition is a "nullity" as he has termed it. The condition appears to be valid at face value. It is not for me in this appeal to consider the merits of its ongoing appropriateness with respect to planning merits or the tests for conditions as set out in the National Planning Policy Framework. A previous attempt to secure a prosecution with respect to non-compliance with an enforcement notice against a breach of the same planning condition was unsuccessful. However, the reasoning of the court appears to relate to the process rather than validity of the planning condition. The Council considers the previous enforcement notice was invalid for technical reasons rather than anything to do with the condition itself.
8. The Act at s191(2)(a) and (b) sets out that uses and operations are lawful at any time if:
 - i. No enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
 - ii. They do not constitute a contravention of any enforcement notice then in force.
9. With respect to 'ii', the current use is not in contravention of an enforcement notice. With respect to 'i', s171B sets out the time limits for taking enforcement action. It has been held that all breaches of conditions (except those preventing use as a single dwellinghouse - which does not apply here) are subject to the 10 year immunity period as set out in s171B(3). The appellant refers to the current occupiers using the property "residentially" which I take to mean that this is in breach of the planning condition. No evidence has been produced to demonstrate that if this is occupation in breach of the condition, that it has been continuous for 10 years.
10. The appellant relies instead upon his opinion that the Council cannot take further enforcement action due to the provisions of s171B(4)(b). That section provides for the taking of further enforcement action in respect of any breach of planning control if, during the period of 4 years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach. This section is often referred to as the 'second bite' provision. Therefore, if within the appropriate 4 or 10-year period the LPA have taken or "purported to take" enforcement action in respect of a particular breach of planning control they have a further 4 years in which to issue a subsequent notice, provided always that the first notice was not already out of time.
11. In this case, the Council issued an enforcement notice on 3 May 1988 in relation to this property although that was subsequently withdrawn. The Council could have issued another enforcement notice within 4 years if by then

the same breach of planning control had been continuous for 10 years.

12. The fact that the Council did not utilise the second bite provision and did not issue a further notice does not mean that the planning condition no longer has any effect. In the case of a continuing requirement condition as in this case, it has been held that discontinuance of the offending activity will bring an end to that particular breach and that can be so even where immunity has been attained. The clock then starts again with any subsequent breach.
13. The appellant has not demonstrated that any current breach of the planning condition, on the balance of probabilities, is a continuation of the breach that was occurring when the previous enforcement notice was issued or that a continuous breach has been taking place for a period of 10 years before the date of the application. As such the use in breach of the planning condition would not appear to be lawful.

Conclusion

14. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of residential use, 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 Harwood

INSPECTOR