



Appeal Decision

Inquiry held on 28 November 2019

Site Visit made on 28 November 2019

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3 February 2020

Appeal Ref: APP/J2373/X/18/3211199

8 Yates Street, Blackpool FY1 2DB

- 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 Mr John Town against the decision of Blackpool Borough Council.
 - The application Ref 18/0256, dated 19 April 2018, was refused by notice dated 14 June 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 use of ground floor as two self-contained flats used as permanent residential for over 4 years.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. All evidence at the Inquiry was taken under oath.

Main Issue

3. No issues of planning merit are relevant to any LDC appeal. The planning merits of what has been applied for cannot be taken into account. The main issue is therefore solely concerned with whether the Council's decision to refuse the certificate of lawfulness was well-founded.

Reasons

Background

4. Section 191(2)(a) of the 1990 Act sets out that uses are lawful at any time if no enforcement action may be taken in respect of them because either: they did not involve development or require planning permission; or, the time period for enforcement action has expired and they do not constitute a contravention of any enforcement notice then in force.
 5. The focus for this appeal is whether the development was lawful at the date the LDC application was made because the relevant time period for enforcement action had expired.
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6. Section 171B of the 1990 Act sets out the relevant time period for taking enforcement action. Section 171B(2) makes clear that, in the case of a breach involving a material change of use to a dwellinghouse, the time period is four years. Section 171B(3) sets out that, in the case of any other breach of planning control, including a breach of condition on a planning permission, it is 10 years.
7. The appeal property comprises a three storey, end terraced building. The purchase of the premises was completed by Mr Mahdavi in 2007, the purchase process having commenced, it is said, in 2006. At the Inquiry, Mr Mahdavi indicated that, at the time he purchased it, the property was a hotel containing 14 bedrooms on the first and second floor. The whole of the ground floor was laid out as a manager's flat.
8. Planning permission was granted on 21 September 2007 for the use of the premises as six, self-contained holiday flats and external alterations comprising replacement windows (the 2007 permission)¹. That permission contained five conditions. Condition 1 required the development to be begun within three years i.e. on or before 21 September 2010. Condition 2 stated that no flat shall be occupied until all alterations shown on the approved plans have been carried out and the layout of the accommodation and such arrangement shall thereafter be retained. Condition 3 expressly limited the occupancy of the flats to holiday lets. It stated that the premises shall be used as holiday flats and for no other purpose. Conditions 4 and 5 required details of car parking and refuse storage arrangements to be agreed prior to first occupation.
9. Mr Mahdavi indicated at the Inquiry that he then commenced work to convert the building in 2007, with work being completed at some point in 2008. The premises was sold to the appellant in 2015.
10. The Council's principal reason for refusal for the LDC application was that the use of the ground floor of the building as two flats for permanent residential occupation involves a breach of condition 3 of the 2007 permission and that the breach began less than ten years before the date of the LDC application. It is said by the Council that the relevant time period is 10 years under section 171B(3) of the 1990 Act.
11. On the other hand, the appellant argues that what has occurred is the material change of use of the ground floor to two self-contained flats and thus the relevant time period is four years under section 171B(2).
12. The first matter to establish is whether the 2007 use was lawfully commenced. Condition 2 of the 2007 permission required the layout of the building to be carried out in accordance with the approved plans. Mr Mahdavi indicated at the Inquiry that the conversion of the building from its former use as a hotel to holiday flats was carried out in accordance with the 2007 permission. In particular, he noted that the layout of the ground floor was the same as those shown on the approved plans. The Council's enforcement investigation in 2007 confirmed that, on 26 November 2007, the flats on the ground, first and second floor were all laid out in accordance with the approved plans in accordance with condition 2 and within the timescale of condition 1. As part of

¹ LPA Ref: 07/0626

those conversion works, the ground floor was changed from one single manager's flat to two separate flats. In addition, Mr Mahdavi indicated at the Inquiry that the upper floors were brought into use as holiday lets. I note that the property has been registered for business rates as a self-catering holiday unit and premises since 1 April 2010.

13. Conditions 4 and 5 of the 2007 permission required the submission of details of car parking and refuse storage to be submitted and agreed prior to commencement. The Council has no record of such details having ever been submitted or agreed. To that end, there has been no compliance with conditions 4 or 5. Nevertheless, case law has established that failure to discharge conditions does not necessarily invalidate a planning permission. Rather the test is whether the breached conditions are a true condition precedent and if so, whether they go to the heart of the permission.
14. The Council does not dispute that the conditions are true conditions precedent. Given that they require something to be done before the residential holiday lets can be brought into use, I see no reason to disagree. However, in respect of condition 4 there is only one area within the appeal site where off-street parking could be accommodated. Despite the failure to submit details, it is apparent that any car parking associated with the use has taken place on that forecourt area. As a consequence, I am satisfied that condition 4 did not go to the heart of the permission.
15. Likewise, with refuse storage, there is no other location within the appeal site beyond the forecourt area where refuse could be stored. That appears to have been the case. As such, I am satisfied condition 5 is not of such significance that it goes to the heart of the permission.
16. The appellant suggests that the two ground floor units were never brought into holiday use. However, they were laid out in accordance with the 2007 permission and there is no dispute that upper floors of the building were brought into use as holiday lets. Since the permission related to the use of the property as a whole, I am satisfied therefore, for the reasons set out above, that the 2007 permission was lawfully commenced,
17. Since the 2007 permission authorised the residential use of the building with occupancy restricted to holiday lets, what has said to have occurred would not amount to the the material change of use to two dwellinghouses. Rather, it would amount to a breach of the occupancy restriction imposed by condition 3 of the 2007 permission.
18. It was held in *FSS & Brown v Arun DC [2006] EWCA Civ 1172* that the four-year rule applies where a condition which prevents the use of a building as a single dwellinghouse has been breached. However, it does not apply in cases where a continuing requirement condition relating to the occupancy of a residential use has been breached.
19. Therefore, having had regard to the submissions of the parties, both those made in writing and at the Inquiry, I find the relevant time period for immunity from enforcement action in this case is ten years. It is necessary, therefore, for the appellant to demonstrate, on the balance of probabilities, that the failure to comply with condition 3 of the 2007 permission through the use of

the ground floor as two unrestricted self-contained flats had become lawful through the passage of time because it commenced on or before 19 April 2008 and continued throughout the ten-year period thereafter without ceasing.

Flat 1

20. The Council indicated in closing that the evidence points to somebody living in what is widely referred to as Flat 1 for the period 2008 to 2018. This was said to be first Mr Roadhouse followed by Mr Shuker. I heard at the Inquiry that Mr Shuker moved into the property on 9 December 2012. Whilst this conflicts with the date of November 2012 given in Mr Shuker's statutory declaration of July 2017, he indicated that this was a typographical error. I have no reason to believe that is not the case. Likewise, Mr Shuker indicated that he has occupied Flat 1 as his main, permanent residence continuously ever since. Again, the Council do not dispute that nor is there any evidence that leads me to believe otherwise. Indeed, the Council's own evidence indicated that at site visits on 10 June 2015 and 22 February 2017, Mr Shuker occupied Flat 1.
21. However, Mr Roadhouse began receiving housing benefit for his occupancy which is said by their records to have commenced on 6 May 2008. In addition, the Council's enforcement investigation records indicate that on the 3 April 2009, the Council officer noted that Mr Roadhouse occupied Flat 1 and had done since May 2008. In addition, enforcement records from February 2010 only indicate that Mr Roadhouse had lived there for 'approximately' 2 years.
22. Whilst Mr Shuker indicated at the Inquiry that Mr Roadhouse had lived at the property for "6 or 7" years prior to his own occupation in 2012, that would mean Mr Roadhouse had occupied the property in 2005/2006, some time prior to Mr Mahdavi's purchase and at a time when the use of the property was unknown, since Mr Mahdavi indicated that property was a hotel prior to his purchase.
23. As a consequence, it seems to me that there is insufficient evidence to show, on the balance of probabilities, that Mr Roadhouse's occupation commenced on or before 19 April 2008 and that there was a single continuous breach of the occupancy condition for ten years thereafter.
24. The Council's main argument on this matter is that Mr Roadhouse and thereafter Mr Shuker's occupation of Flat 1 was not continuous occupancy of the flat as unrestricted, permanent residential accommodation but rather accommodation associated with the holiday let use of the wider premises. However, whilst I heard from Mr Shuker that he has throughout his occupation of Flat 1 kept the communal areas on the ground floor of the building clean and tidy, there is nothing before me to suggest that Mr Shuker is or ever has been paid for undertaking those activities. Nor is there any evidence of any formal agreement between Mr Shuker and the appellant, or the previous owner Mr Mahdavi.
25. Indeed, I note Mr Shuker indicated at the Inquiry that he has a full-time job elsewhere working shifts. Moreover, Mr Shuker does not keep keys to the other flats, and I note he did not describe himself as a caretaker of the premises. The range of tasks he undertakes are limited to those that could be described as housework and those that could be described as neighbourly, as

opposed to those of a caretaker or manager. It seems to me that the activities he carried out, along with the frequency and informality of them, points towards Mr Shuker assisting the appellant, and before him Mr Mahdavi, to be helpful for both their benefit and his own benefit, rather than in any formalised arrangement as a caretaker or manager.

26. Nevertheless, since there is no demonstrable, continuous occupancy in breach of the condition from ten years prior to the date of the LDC application, I conclude that, on the balance of probabilities, the use of Flat 1 as a self-contained flat for residential use with unrestricted occupancy, in breach of condition 3 of the 2007 permission, did not occur on or before 19 April 2008 and take place throughout the ten-year period on a continuous basis. The use of Flat 1 is not therefore immune from enforcement action and is not lawful under Section 191(2)(a) of the 1990 Act.

Flat 2

27. It was put to me at the Inquiry that Mr Karimi has occupied that part of the premises known as Flat 2 as his main, permanent residence since 2008. However, the previous owner of the premises, Mr Mahdavi, indicated in cross examination that Mr Karimi moved into the property in 2010 to live with his brother who had lived there since 2008. Thereafter it was said Mr Karimi's brother vacated the property in 2010 to live overseas and Mr Karimi occupied it alone from then on until the present day.
28. However, there was no indication at the Inquiry on what date Mr Karimi or his brother before him moved into the flat nor any evidence which shows that Mr Karimi's brother commenced occupancy on or before 19 April 2008. Moreover, the evidence does not suggest that occupancy of Flat 2 was unrestricted, self-contained residential use or that it was continuous throughout the ten-year period.
29. This is because there was no indication at the Inquiry, nor in written submissions, that Council tax has ever been paid for the occupancy of Flat 2. Whilst that is not necessarily fatal to the appellant's arguments, no evidence that the property has ever been liable for Council tax is before me. The Council's records show no registration of Flat 2 for Council tax at any point. In addition, whilst not in itself determinative, the Council's housing benefit records show that no claim for housing benefit was ever received from Mr Karimi for occupation of the flat.
30. Furthermore, a tenancy agreement had been produced between the former owner Mr Mahdavi and Mr Karimi indicating his occupation commenced in August 2010. However, the tenancy agreement does not contain any agreed length of term or rent payment. Mr Mahdavi indicated that this was done to facilitate a process relating to asylum, rather than necessarily to formalise any tenancy arrangements of the flat. He indicated that Mr Karimi paid no rent because he was a family friend and was helping him out in his business interests.
31. At the Inquiry, Mr Shuker indicated that he had been aware Mr Karimi occupied Flat 2 prior to his own occupation of Flat 1 in in 2012 as he was an occasional visitor to its previous occupant Mr Roadhouse. He also indicated that Mr Karimi

had occupied Flat 2 from then until the present day. However, under cross-examination, Mr Shuker explained that he had never physically been into Flat 2 prior to December 2012. In addition, Mr Shuker indicated that he has been into Flat 2 no more than ten times since he started living in Flat 1. It was said that was to reset the electricity connection for Flat 1 as the fuse box was in Flat 2. He said at the Inquiry that on those occasions, there were times Mr Karimi was not present at the property. Indeed, he described Mr Karimi as being "in and out" of the property on a regular basis. As such, I take the view that Mr Shuker would have little basis on which to say with any degree of probability that Mr Karimi occupied Flat 2 as his permanent residence on a continuous basis throughout the relevant period.

32. Moreover, the Council's evidence shows that, on a visit on 10 June 2015 to inspect the premises, Mr Karimi advised the Council officer that he was a permanent resident in Flat 2 and had been for 2/3 months. I note that Mr Karimi indicated that this was likely meant to be 2/3 months since he moved back. However, I heard evidence at the Inquiry that Mr Karimi's occupation of the flat was intermittent, as he occasionally travelled to Manchester to stay with friends for several weeks at a time. In addition, he occasionally stayed with Mr Mahdavi and his family for two or three weeks at a time.
33. What is more, no documented dates of Mr Karimi's occupation have been provided to me. It is clear therefore that Mr Karimi's occupation of the flat was intermittent, as he spent considerable periods living elsewhere. As a result, I am not satisfied that the evidence of Mr Karimi's occupation of Flat 2 would be sufficient to amount to continuous occupation of the flat as a self-contained residential property throughout the relevant ten-year period.
34. That need not necessarily be fatal to the appellant's case, if it can be shown that the flat was occupied by other persons as a permanent dwelling on a continuous basis during Mr Karimi's periods of absence. However, as was pointed out at the Inquiry, there is no continuous record of habitation of Flat 2 from April 2008-April 2018.
35. Council records indicate that, at a visit on 6 May 2009, according to Mr Roadhouse nobody was living in Flat 2 at the time. The Council's housing benefit records go back to no earlier than 1 April 2009. They show that the flat (described as owner's accommodation in the records rather than Flat 2) was occupied by housing benefit recipients who were not Mr Karimi at times during the relevant ten-year period. However, they only cover part of the period. One person received housing benefit for the flat between 20 January 2013 and 20 January 2014, whilst another received housing benefit for the flat between 20 May 2014 and 11 August 2014, leaving on 7 August 2014. Thereafter a different person received housing benefit for the flat from 5 January 2015 to 16 February 2015.
36. Moreover, the Council's enforcement records indicate that on 3 April 2009, a Polish tenant had been occupying Flat 2 who would be leaving on 19 April 2009 and had been there for 10 days. Mr Roadhouse also indicated during a Council visit on 6 May 2009, that Flat 2 had been unoccupied for a while. Likewise, on the Council's visit of 3 February 2010, the flat was unoccupied.

37. This evidence suggests that occupation throughout the period was short-term and sporadic. As it is, housing benefit could be paid to persons for temporary, holiday accommodation and is not demonstrative of permanent residential occupation. The absence of any compelling evidence of Mr Karimi's dates of occupation, along with the sporadic evidence of anyone else living at the property and gaps in its occupation, point towards a failure to demonstrate a continuous period of occupation in breach of the occupancy condition for ten years preceding the date of the LDC application.
38. I conclude, therefore, that it has not been demonstrated, on the balance of probabilities, that the use of Flat 2 as a self-contained flat for residential use with unrestricted occupancy, in breach of condition 3 of the 2007 permission, occurred on or before 19 April 2008 and continued through the ten-year period on a continuous basis. The use of Flat 2 as such is not immune from enforcement action and is not lawful under Section 191(2)(a) of the 1990 Act.

Conclusion

39. I conclude on the evidence now available, that the Council's decision not to grant a certificate of lawful use or development in respect of the change of use of the ground floor to two self-contained flats was well-founded in relation to 8 Yates Street and the appeal should accordingly fail. I will exercise the powers transferred to me under section 195(2) of the 1990 Act in that regard.

J Whitfield

INSPECTOR

