
Appeal Decision

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 May 2020

Appeal Ref: APP/B1415/X/19/3230439

Flat 9, Moreton Court, 40-41 Eversfield Place, St Leonards-on-Sea, East Sussex TN37 6DB

- 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 Karl Hopper-Young against the decision of Hastings Borough Council.
- The application Ref HS/EX/19/00002, dated 20 December 2018, was refused by notice dated 29 May 2019.
- 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 the area outside the window behind the parapet for sitting.

Summary Decision: The appeal is dismissed.

Reasons

1. This LDC application seeks to ascertain whether the use of the roof area outside the front window of Flat 9, Moreton Court, 40-41 Eversfield Place, St Leonards-on-Sea is lawful. Section 191 of the Act states that the use of buildings or other land is lawful if 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). Section 191 of the Act goes on to state that the relevant date for consideration of the lawfulness of the use is the time of the application.
2. As a result of this, an application under Section 191 of the Act can only consider whether or not the use is lawful on that date. In this case, there is some evidence that there have been significant repairs to the relevant roof area since the application was made. If that is the case, it is unlikely that a site visit would help me understand whether the use had occurred for the relevant period or was occurring at the time of application. I also understand that the latest occupiers have been told not to use the area for sitting out. Taking account of the evidence and consultation with the appellant and Council, I decided that a site visit was not necessary. I have based my decision on the written evidence provided by the appellant and Council.
3. The burden of proof is on the appellant, with the relevant test of the evidence being on the balance of probability. Case law indicates that evidence does not

need to be corroborated by independent evidence to be accepted, but does need to be precise and unambiguous, even if there is no evidence to contradict it.

4. I note that, on the appeal form, the appellant says that he has been closely involved in management of the building and that the most recent tenant was advised not to use the roof as a balcony. The Council refer to emails, that have not been submitted with this appeal, from the "managing owners of the flat" dated July and August 2018 that required the use of the roof as a balcony to cease. A neighbour suggests that the roof ceased use as a balcony eight months before their email dated March 2020, i.e. July 2019.
5. It is unclear on what date the previous tenant, who appears to have used the roof as a balcony, vacated the property and when the most recent tenant occupied it. The last tenancy agreement supplied ended on 28 February 2018 and an email from the appellant dated 25 February 2019 confirms that was the end of occupation by that particular tenant. No tenancy information has been supplied beyond that date. It is unclear who, if anyone, occupied the property on the date of application.
6. Taking all of this into account, the evidence is not precise and unambiguous that the use was taking place on the date of application.
7. The appellant suggests that the use had begun more than ten years before the date of the application and the roof had been used as a balcony since he acquired the property in July 2008. That would be more than ten years prior to submission of the application. The Council refer to a period of four years in their decision notice. It is not clear why they suggest four years would be the appropriate period.
8. Section 171B of the Act states that no enforcement action may be taken after the end of the period of four years beginning with the date of the breach only in the case of a single dwellinghouse. For all other uses, the period is ten years beginning with the date of the breach. The use of the roof as a balcony is suggested to provide outdoor sitting space for residents; it is not a single dwellinghouse in its own right. Nor has it been suggested that the use of the flat may be unlawful and should be considered as the area for which an application has been made.
9. Neighbours of the flat suggest that the responsibility for maintenance of the roof is the responsibility of the freeholders of the property, rather than the appellant as leaseholder. They provide a quotation for works to the "roof area outside flat 9/10 damaged due to being used as a balcony" addressed to the management company. Although it is unclear who was responsible for these works and the appellant has disputed whether it related to the roof subject of this appeal, this indicates that the roof may be outside the curtilage of the flat in planning terms. As the application is clear that it is solely for use of the roof as a balcony, I conclude that the ten year period is the appropriate period of lawfulness in this instance.
10. I have limited evidence to support the use of the roof as a sitting area over the 10 years prior to submission of the application. This comprises the assertions of the appellant within their supporting documents and messages from some previous tenants. A number of unsigned versions of tenancy agreements have been provided, some of which were for a fixed period of 6 months and some for

a period of 12 months that could continue beyond with 2 months notice, along with an email setting out names of tenants and years of occupation. As set out above, I have limited information on occupation after February 2018. The evidence is unclear whether tenancies were contiguous or whether there were gaps between them, nor whether all of the tenants used the roof for sitting out such that there would be a gap in its use. I note that the appellant lived in the property toward the beginning of his period of ownership and asserts that he used the roof for sitting out during his occupation.

11. As set out above, the onus is on the appellant to demonstrate that the development does not constitute a breach of planning control. However, I have concluded that the evidence is not precise and unambiguous as to whether the use was taking place on the date of application, as required by Section 191 of the Act. That is sufficient to conclude, on balance, that the use of the roof as a balcony was not lawful on the date of application. In addition, on the balance of probability it is not clear whether or not the roof has been used as a balcony for a continuous period of ten years ending with the date of application.
12. As such, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use of the area outside the window behind the parapet for seating of the flat at Flat 9, Moreton Court, 40-41 Eversfield Place, St Leonards-on-Sea was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the Act.

Formal Decision

13. The appeal is dismissed.

AJ Steen

INSPECTOR