



Appeal Decision

Site visit made on 13 February 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 14 May 2020

Appeal Ref: APP/B0230/X/19/3238225

31A Stratford Road, Luton LU4 8NG

- 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 lawful use or development.
 - The appeal is made by Mr Kamran Bashir against the decision of Luton Borough Council.
 - The application Ref 19/00911/LAWE is dated 1 July 2019.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is described as '*existing use of the detached single storey building as a self-contained flat at 31A Stratford Road, Luton, Bedfordshire LU4 8NG*'.
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Decision

1. The appeal is dismissed.

Background

2. The development involves the use of a detached single-storey building, known as No 31A Stratford Road, located within No 31's curtilage as a self-contained flat, or unit of residential accommodation, separate from the living accommodation at No 31.
3. The said building was granted planning permission in March 2009, as a detached single storey 'annexe', subject to a condition prohibiting it from being used as a separate self-contained unit.
4. The Council indicates that, in 2015, it responded to a complaint that the annexe was being used as a separate dwelling. Subsequently, an application to allow the building to be used as a residential bungalow was refused planning permission by the Council and, in March 2018, that decision was upheld on appeal.
5. In such instances S171B (2) of the 1990 Act says that where there has been a breach of planning control involving the change of use of any building to use as a single dwellinghouse, such as is the case here, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. Here, given that the application for the certificate of lawful use (LDC) was made on 1 July 2019, the Appellant must successfully demonstrate, on the balance of probability, that the breach of control commenced four years before, ie prior to 1 July 2015 (hereinafter referred to as "*the material date*") and has continued since.

6. In an appeal under s195 of the 1990 Act against the refusal of a LDC the burden of proof is upon the appellant. The test of the evidence is one of balance of probability. As such, the planning merits of that applied for do not fall to be considered. The decision will be based strictly on the evidential facts and on relevant planning law.

Main Issue

7. The main issue in this appeal is whether, on the balance of probability, the use was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990.

Reasons

8. The appellant has provided evidence comprising a series of successive tenancy agreements which, on the face of it, suggest that, from 15 April 2015 until this appeal was lodged on 30 September 2019, there have been five separate tenancies and continuous residential occupation throughout. These are not, though, legal documents and, although they provide an indication of previous occupancy, they are not definitive records. Indeed, as I discuss later, I am not fully convinced as to their accuracy.
9. Evidence is also provided in the form of confirmation from statutory undertakers as to electricity, gas and water works, relating to No 31A, having been carried out. It appears that an electricity service cable was provided by 'UK Power Network', with the date of energisation indicated as 10 April 2014, and an independent sewer connection carried out on 17 July 2015. A Building Regulations Compliance Gas Safety Certificate dated 20 September 2015 from the 'Gas Safe Register' is unspecific, though, as to what particular works it relates to.
10. In an attempt to consolidate the evidence the appellant has also produced a statutory declaration which says that the self-contained flat has been fully occupied on a continuous basis since 15 April 2015.
11. The Council, in its representations, comments that during a telephone conversation with a representative of UK Power Network, following receipt of the LDC application, it was conveyed that there was no record of any application for a separate connection being made on the application site. The Council goes on to say that the representative mentioned that it is possible to have more than one connection for an existing property. In this regard I note that the appellant's evidence indicates only that an electricity service cable was provided.
12. The Council also mentions that records show that a waste and recycling bin for No 31A was not ordered until 29 July 2016, registration of the building as that separate from No 31 was not until 6 April 2016, whilst I also note the independent sewer connection was similarly installed after the 'material date'. I also understand that the Council's enforcement records – although none have been supplied to substantiate the claim – indicate that occupation of the building as a separate unit did not commence until 15 January 2016.
13. In the case of *Swale BC v FSS & Lee* [2005] EW.CA Civ 1568, [2006] JPL 886, the issue of continuous residential use for the four year period was discussed. It was held there is a difference between an established dwellinghouse when an occupier does not have to be continuously or even regularly present in order

for it to remain in use as a dwellinghouse and, where there is no established use, the use has to be "affirmatively established" over the four year period. Accordingly, it is necessary to examine whether there were any periods of non-occupation and, if so, whether these were de minimis or insignificant, or not.

14. As in the *Swale* case it is necessary to consider whether there was any period during the four relevant years of the breach when the flat was not physically occupied or shown to have been occupied, even though perhaps available for occupation, when the Council could not have taken enforcement action against the use. The case of *Thurrock BC v SSETR and Holding (CA) [2002] JPL 1278* is the authority for that test. The test is not to consider the building's availability or suitability for residential use, but whether it was actually put to such use.
15. The court explained in both *Thurrock* and *Swale*, the rationale of the immunity provision was that the planning authority had a four year window in which to take enforcement action after which it would lose the right to object to the development. In this particular instance the Council's evidence suggests that, although the building was first inspected in December 2015, separate and presumably independent occupation did not commence until January 2016. There is no evidence, though, before me to suggest that the Council sought formal enforcement action against the use.
16. I have paid due regard to the appellant's statutory declaration but, even so, it seems to me that matters in the accompanying evidence are less than clear. Daniel Scrutton's twelve month tenancy agreement was signed on 15 April 2015, and, although this would have expired in April 2016, it is said that Mr Scrutton continued living there until 18 August 2016 when Lukasz Malinowski took occupation.
17. Whilst I note that Mr Scrutton's Agreement, unlike all subsequent ones, says that the tenancy would continue on a month by month basis until the tenant gives notice that he wishes to end the Agreement, there is no direct, documented evidence to confirm the said time extension. In such circumstances, and without definitive proof, there is a four month period unaccounted for, and it has not been proved that Mr Scrutton, or for that matter anyone, was living at the property at the material date. Such a break is not insignificant.
18. In light of the above, I must consider whether there was any period during the four relevant years of the breach when the Council could not have taken enforcement action against the use. If so, the breach would not be considered continuous. In my assessment I find that the evidence is not so compelling as to confirm that the Council was not debarred from any such action.
19. On another point, Lucian Buraga's six month tenancy agreement indicates that he took occupation on 20 February 2017, with the agreement saying that this would expire on 19 August 2017. However, the subsequent tenancy agreement, taken up by Pramod Patil, was signed and commenced on 20 July 2017. There is, therefore, an overlap of some four weeks, with no explanation as to, or even any mention of, Mr Buraga's departure.
20. All the tenancy agreements stipulate that the tenant shall be responsible for gas, electricity and water charges. Accordingly, copies of the bills from the various statutory undertakers would have been useful here for clarification,

particularly those relating to Mr Scrutton's tenancy, especially as it is claimed that he resided at the property for some 16 months.

21. On the basis of the appellant's evidence before me I am not convinced that its extent is sufficiently precise and unambiguous to show that the use as claimed commenced before the material date or that it was continuous. Although I consider that, in rebuttal, the Council should have ideally provided details of the case's enforcement records and also the telephone conversation with the representative from UK Power Network referred to, the onus is, however, on the appellant to demonstrate, on the balance of probability, that, at the date of the application, the use had acquired lawfulness due to its immunity from planning enforcement action. In essence I find that the burden of proof has not been satisfactorily discharged in this instance.

Conclusion

22. The onus is on the appellant to prove his case and, having had regard to the substance of the case, I consider that insufficient precision and unambiguity has been shown to demonstrate, on the balance of probabilities, the claim that the use of the building as an independent dwelling had built up the necessary immunity since the material date.
23. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the detached single storey building as a self-contained flat 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.

Timothy C King

INSPECTOR