



Appeal Decision

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 14 May 2020

Appeal Ref: APP/H0520/X/19/3228591

Brick Barn Cottages, Church Road, Grafham PE28 0BE

- 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 Mrs Valerie Williams against the decision of Huntingdonshire District Council.
 - The application Ref 18/02396/CLED, dated 26 October 2018, was refused by notice dated 26 February 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 1 and 2 Brickbarn Cottages as single dwelling houses in breach of condition 2 of 01/02145/FUL which requires the properties to have been used for holiday accommodation only.
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Decision

1. The appeal is dismissed.

Background and Preliminary Matters

2. As the determination of this appeal turns on matters of law, it was unnecessary for me to conduct a site visit.
3. Planning permission was granted on 25 January 2002 pursuant to Council ref: 01/02145/FUL for the change of use and alterations of a barn to form two holiday let cottages at Hill Farm. Condition no.2 attached to that permission provided that: "The accommodation hereby approved shall only be used as holiday accommodation and not as a permanent residence."
4. It is undisputed that alterations to the existing building were undertaken which was subsequently used as two holiday lets known as Brick Barn Cottages. The appellant says that one cottage became a private let for residential accommodation after she acquired the property during 2007 while the other remained a holiday let.
5. It is the appellant's case that from October 2009 both units became in use as single dwelling houses let out as assured shorthold tenancies. Evidence in support is brought from this time onwards which is the date from which the appellant states that a breach of condition 2 took place.
6. Section 191(2) of the 1990 Act states that uses and operations are lawful at any time if (a) no enforcement action may then be taken in respect of them;

- and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force. There is no suggestion that an enforcement notice is in force and so (b) is satisfied. Pursuant to section 171B.(2) of the Act where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of 4 years beginning with the date of the breach. In the case of any other breach of planning control, the immunity period is 10 years (section 171B.(3)).
7. Section 171A(1) defines a breach of planning control as including a failure to comply with any condition subject to which planning permission has been granted.
 8. It is evident from the Council officer's report and decision that a 4 year period was considered as set out in section 171B.(2). The appellant recognises that this might not be correct and discusses relevant case law.
 9. This includes the Court of Appeal decision in *FSS v Arun DC & Brown*¹ which established that where a breach of condition results in a property being used as a single dwellinghouse then it is the 4 year rule that applies under section 171B.(2). This is now settled law. It is important to note that this applies only where there has been a change of use to a single dwellinghouse.
 10. Here, both uses fall within Class C3 of the Town and Country Planning (Use Classes) Order 1987, as amended even if they have different planning impacts. The use of buildings for any other purpose within the same class does not involve the development of land by virtue of section 55(2)(f). Nevertheless, *Arun* confirms that it does not need to be a '*material* change of use' falling within the definition of 'development' to trigger section 171B.(2) as long as there is a 'change of use'.
 11. There is no definition of "dwellinghouse" in the Act, but case law establishes that the distinctive characteristic of a dwellinghouse is its ability to afford to those who used it the facilities required for day-to-day private domestic existence. It did not lose that characteristic if occupation was restricted by condition to some months in the year.
 12. In this instance, it appears from the nature of the building described that the two holiday lets had all the attributes of separate single dwellinghouses. There is no evidence to indicate to the contrary. Indeed, I note the units are described as a pair of two storey semi-detached dwellings with their own access. Their subsequent residential use as separate dwellings would not have involved a change of use because they already constituted single dwellinghouses. This differs from the scenario in *Arun* where the property concerned was an extension to the main house which was not already a separate single dwelling. In that case, two separate dwellings had been created in breach of condition where there was previously only one. In this case and in contrast to *Arun*, there were and remained two separate dwellings when the condition was breached. As the units were already single dwellinghouses there was no change in use to a single dwellinghouse for the rule in *Arun* to apply.
 13. Accordingly, the unauthorised development does not fall within the scope of section 171B.(2) for the 4 year rule to apply. It is section 171B.(3) which is engaged and a 10 year time limit is applicable for breach of the specific condition restricting the use to holiday accommodation and not as a permanent

¹ [2006] EWCA Civ 1172

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residence. This corresponds with the judgment in *Bloomfield v SSETR and Another*² where the permanent residential occupation of a building subject to a planning condition prohibiting its use at any time for permanent residential accommodation and limiting its use to a holiday let, was held not to involve a change of use to a single dwellinghouse. Therefore, the 10-year period applied.

Reasons

14. In order for a LDC to be granted under section 191 of the 1990 Act, the burden of proving relevant facts in this appeal rests on the appellant, and the test of the evidence is the balance of probabilities.
15. The main issue is whether the Council's refusal to issue a certificate of lawfulness was well-founded. That turns on whether the appellant can demonstrate, on the balance of probabilities, that at the time of the application each unit had been occupied as a single dwellinghouse in breach of condition no. 2 for at least 10 continuous years so as to be immune from enforcement action.
16. Paragraph 006 of the *Lawful Development Certificates* section of the national Planning Practice Guidance advises in the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.
17. The onus is therefore on the applicant to provide sufficiently clear and precise evidence in the first instance.
18. The application was made on 26 October 2018. There is no evidence that the building was used as two holiday lets until 2009. The appellant acknowledges that she cannot demonstrate 10 years continuous use of the units as separate residential dwellings in breach of the holiday occupancy condition. That in itself is enough for the appeal to fail.
19. In any event I note that copies of assured shorthold tenancy agreements have only been supplied from 2009 up to April and May 2016. Condition 2 is framed as a continuing requirement condition i.e. it is an ongoing condition. The particular non-compliance which is the subject of the application must be in existence at the date the application is made as per *Nicholson v SSE & Maldon DC*³. This case makes clear that even if a lawful right has been acquired through the breach of a condition that imposes a continuing requirement it can be lost by subsequent compliance.
20. The position between 2016 up to the time of the application is unclear. Both units may have been rated for Council Tax since 1 April 2017, but that does little to evidence continuous occupation in breach of condition.
21. Furthermore, I note that there were gaps between the tenancy agreements. The Council cites case law to the effect that only *de minimis* periods of non-occupation in breach of condition will not interrupt continuity.
22. In *Nicholson* it was held that where a breach of a 'continuing requirement' condition ceases because of discontinuance of the offending activity, that

² [1999] 2 P.L.R. 79

³ [1998] JPL 553

breach is at an end. The clock starts again and future non-compliance amounts to a new, separate breach subject to enforcement action for ten years. *North Devon DC v SSE & Rottenbury 1998* indicates that there would not normally have been a breach of condition when the property was vacant.

23. The appellant submits that the kind of people who have occupied each unit includes students, doctors and researchers who work at local hospitals whose normal place of work or residence is elsewhere within the UK. In addition, the units have also provided staff accommodation for businesses engaged temporarily in the area. Whilst noting the judgments in *Nicholson* and *Rottenbury* the appellant argues that having gaps in time is a naturally occurring phenomenon in the industry beyond the control of the appellant and subject to the circumstances of the market.
24. That may be so, but it is similarly the case that there will be times when holiday accommodation is vacant, if not more so. The question to be asked during any period of non-occupation is whether enforcement action could have been taken against a breach of the condition. It is only when there is a continuing actionable breach of condition throughout the requisite period that immunity from enforcement action can arise.
25. Even if a 4-year period were to be applied ending in April/May 2016 as per the evidence supplied, there were periods of 2-3 months or so when each unit was unoccupied. As a matter of fact and degree those periods of inactivity were significant and more than *de minimis*. The breach of condition discontinued when the units were vacant and not occupied by anybody during those periods. As such the Council could not have taken enforcement action at those times when discontinuance of the offending activity had ceased bringing to an end that particular breach. The clock will have started afresh with each subsequent breach meaning that there was not even 4 years continuous use.
26. On the evidence before me the appellant has not demonstrated on the balance of probabilities that at the time of the application there had been a continuous breach of the occupancy condition for the use applied for to be immune from enforcement action for the use to be regarded as lawful.

Conclusion

27. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use of 1 and 2 Brickbarn Cottages as single dwelling houses in breach of condition 2 of 01/02145/FUL 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.

KR Saward

INSPECTOR