



Appeal Decision

Site visit made on 25 August 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 28 September 2020

Appeal Ref: APP/J1860/X/20/3251872

'Huntley's Lodge' at Huntley's Farm, Hancock's Lane, Little Malvern, Malvern, Worcestershire WR14 4JP

- 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 and Mrs David Nixon against the decision of Malvern Hills District Council.
 - The application Ref 19/01345/CLE, dated 30 August 2019, was refused by notice dated 22 November 2019.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
 - The use for which a certificate of lawful use or development is sought is described as *'The chalet/log cabin style building is of a permanent fixed structure, known as 'Huntley's Lodge' located at Huntley's Farm; it has been used without interruption as a residential dwelling house since April 2014'*.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr and Mrs David Nixon against Malvern Hills District Council. This application is the subject of a separate decision.

Procedural Matters and Background

3. I have taken the address, in the banner heading above, from the submitted application form. It is clear from the evidence before me and my observations at the site visit that 'Huntley's Lodge' is the log cabin cited in the Council's Decision Notice.
4. A previous LDC application¹ was refused by the Council in 2019 and it appears that the site of the building, Huntley's Lodge, and its adjoining 'garden' area were included within the red line that was considered in that application. Whereas, the application before me only includes the area occupied by the building. The evidence before me indicates that the appellants consider that both of the LDC applications were made under sections 191(1)(a) and 191(1)(b) of the 1990 Act. I have not been provided with a copy of the application form for the previous LDC application. However, section 4 of the application form associated with this case indicates that the appellants applied

¹ Ref No: 19/00912/CLE

for an LDC for an existing use. Within that section the appellants have also stated that they consider that the existing use falls within Class C3 (dwellinghouses) of The Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO). Therefore, the application was made under section 191(1)(a) of the 1990 Act. Notwithstanding the description of development referred to in the Council's Decision Notice the description of the existing use, in the banner heading above, is taken from section 5 of the LDC application form.

5. Taking into account all of the above, I consider that the existing use that the LDC is requesting to be certified as lawful is the residential use of the log cabin, 'Huntley's Lodge'. I have dealt with the appeal on this basis.
6. Planning merits are not relevant here. They are not an issue for consideration in an appeal under section 195 of the 1990 Act, relating to an application for an LDC. My decision rests on the facts of the case, relevant planning law and judicial authority. The burden of proof is with the appellants and the appropriate test of the evidence is the balance of probabilities.

Main Issue

7. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development (LDC) was well-founded. In reaching a conclusion on that issue, it is necessary to consider first, whether the 4 year or 10 year rule under section 171B of the 1990 Act is applicable in terms of assessing the relevant immunity period and, secondly, whether the development is immune from enforcement action and thereby lawful by virtue of section 191(2)(a) of the 1990 Act.

Reasons

8. The appellants have stated that the time limit that should apply in this case is contained within section 171B (1) of the 1990 Act. There is no dispute between the parties that at the time of the LDC application, the operational development comprised in the erection of the building that occupies the appeal site is lawful development by virtue of section 171B(1) of the 1990 Act as the operations were substantially completed at least 4 years beforehand. There is also no dispute between the parties that the building was used from the outset as a dwellinghouse so that section 171(B)(2) of the 1990 Act is not relevant to this case.
9. The appellants consider that the Council has accepted that the subject building is a dwelling and that consequently a dwelling that is established and is immune to enforcement action can be occupied as such. Nonetheless, it does not follow automatically that a residential use of such a building is lawful. Section 75(2) of the 1990 Act provides that *'Where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used.'* Section 75(3) of the 1990 Act states that *'If no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed.'*
10. Section 75 of the 1990 Act only applies where planning permission has been granted. In this case, there was no application for planning permission to construct a residential dwelling on the site and no planning permission has

been granted. An LDC application is not an application for planning permission and it does not grant planning permission. It is clear that the provisions of section 75 of the 1990 Act are not applicable in this case.

11. Furthermore, the Council considers that there has been a material change in the use of the land that the building has been erected on. As such, it considers that section 171B(3) of the 1990 Act is relevant as the material change of use should be treated as '*any other breach of planning control*' cited in that section. The Council draws support for this proposition from the case of *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15; [2011] JPL 1183 (*Welwyn Hatfield*).
12. The appellants seek to distinguish the facts of the *Welwyn Hatfield* case from their own situation. In *Welwyn Hatfield*, planning permission was granted for the erection of a hay barn, but a house had been built that looked like a barn. The first issue in that case related to section 171B (2) of the 1990 Act and whether it was relevant to it and the second was related to deception. I acknowledge that section 171B (2) is not relevant and there is no evidence of deception in this case.
13. Nevertheless, although the facts of this case differ from those of *Welwyn Hatfield*, I do not believe that those differences are such that they undermine the matters of principle which can be derived from the obiter comments set out in that judgment. Both cases relate to an LDC application submitted under section 191(1)(a) of the 1990 Act for the residential use of a building. Furthermore, in both cases there was/is no dispute that the building operations were/are lawful.
14. Lord Mance at paragraph 16 of the judgement states, amongst other things that '*The scheme of section 171B is on its face straightforward. Subsection (1) deals with unauthorised building operations. For reasons already given, subsection (1) applied to the present building. Subsection (2) deals with change of use of a building to use as a single dwelling house. Both subsections involve four year periods, from the date of substantial completion of the operations under subsection (1) and the date of the breach (meaning clearly the date when the change of use first occurred and the four year period began to run) under subsection (2). There is a basic distinction between the types of development dealt with under these two subsections, and it is buttressed by section 336(1) **where use in relation to land is defined as not including the use of land for the carrying out of any building or other operations on it.***' (my emphasis) It goes on to state '*Subsection (3), applying "in the case of any other breach of planning control", involves, in contrast, a ten year period from the date of breach.*'
15. Sections 336(1) of the 1990 Act defines a "*building*" as including "*any structure or erection and any part of a building, as so defined, but does not include plant or machinery comprised in a building*"; and "*land*" means "*any corporeal hereditament, including a building,*". It is clear that whilst the 1990 Act provides separate definitions for a "*building*" and "*land*", the latter is defined to include the former.
16. In addition, section 55(1) of the 1990 Act states that "*development*" means '*the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.*' Even though there is no definition within the 1990 Act

- as to what '*other operations*' are the Act makes a distinction between operational development and the making of a material change in use.
17. Moreover, Lord Mance, at paragraph 17 of the *Welwyn Hatfield* judgement, states '*Protection from enforcement of a building and its use are thus potentially very different matters.....The building attracts a four year period for enforcement under subsection (1), while its use attracts, at any rate in theory, a ten-year period for enforcement under subsection (3).*'
 18. Lord Mance also comments in paragraph 17 that '*...there is a potential answer to this apparent anomaly, one which would apply as much to a dwelling house as to any other building. It is that, once a planning authority has allowed the four year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless....*'
 19. Lord Brown comments at paragraph 68 of the judgement that '*Parliament appears to have contemplated that a dwelling house built by way of unpermitted operational development would be enforced against, if at all, within the requisite four-year period provided for by section 171B (1) – failing which the authority probably would not seek ordinarily to enforce against its continued use as a house. That no doubt explains why the protection of a four-year (as opposed to a ten year) limitation period for enforcement in respect of single dwelling-houses was not extended to use as such but only to a "change of use of any building [inferentially, some building other than a newly built house] as a single dwellinghouse". Either way, as Lord Mance demonstrates, section 171B (2) is simply not apt to encompass the use of a newly built house as a dwelling house and the nil use concept provides no coherent escape from this conclusion.*'
 20. Those comments reflect the expediency test that a local planning authority undertakes in deciding whether to take enforcement action. It may consider that it is not expedient to take action against a residential use if a building is no longer to be regarded as unlawful. That is a matter for its discretion in exercise of its powers under section 172 of the 1990 Act. It is not the same as the use being certified as lawful under section 191 of the 1990 Act.
 21. Taking into account all of the above, if there has been a material change of use of the land the 10-year rule through section 171B (3) of the 1990 Act is the relevant time limit to apply.
 22. Section 191(2) of the 1990 Act states that '*For the purposes of this Act uses and operations are lawful at any time if— (a) no enforcement action may then 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 (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.*'
 23. There is no evidence before me to indicate that there is an enforcement notice in force on the appeal site relating to the residential use of Huntley's Lodge. The appellants' assert that the land beneath the building forms part of the dwellinghouse and that the dwelling would not exist without the operational development. They also state that the impact in land use terms may be

- insignificant and that a change of use would not be material. The Council points to a material change of use having occurred.
24. The concept of the planning unit is a means of determining the most appropriate physical area against which to assess the materiality of a change of use. Even though, the red line area shown in relation to the LDC application only includes the site of the building I consider that this concept is useful in determining whether a material change in the use of the appeal land/building has occurred. As a general rule and starting point the planning unit is the area in the same occupation or ownership because that is normally the unit in which a set of functionally and physically interdependent activities are carried out.
25. The appellants appear to own the appeal site, adjacent agricultural land/buildings and the dwelling cited as Huntley's Farm. Nevertheless, it is apparent from the submitted evidence that Huntley's Lodge is occupied by the appellant's daughter, her husband and children. Whereas, the appellants live in Huntley's Farm. That dwelling is close to Hancock's Lane and it has a driveway off that lane. The grounds used for residential purposes associated with Huntley's Farm adjoin that dwelling and in the main are delineated by hedges and fencing. The photographic evidence submitted by the Council indicates that prior to the appeal building being erected the appeal site was, more likely than not, being used for an agricultural use. I note that there is reference to a mobile home being stationed on the appeal site before Huntley's Lodge was constructed. Nonetheless, there is no evidence before me in relation to the occupation and use of that mobile home or the length of time that it was on the appeal site.
26. Huntley's Lodge is served by a separate track off Hancock's Lane. The track is to the south of Huntley's Lodge and it goes past it into a yard area that has a number of buildings around it that appear to be associated with an agricultural use. I observed at the site visit that the appeal building is adjacent to the buildings that are around the yard area, but it has its own grounds that are fenced off from the track and the surrounding land. Huntley's Lodge is physically separate from Huntley's Farm and it appears to benefit from all of the facilities necessary for day to day living.
27. I acknowledge that the occupiers of Huntley's Lodge may help the appellants with farming activities. Nevertheless, the evidence before me indicates that the appellants' daughter is a teacher and there is no evidence to indicate whether her husband is in employment associated with their farm. Its function has been to provide permanent residential accommodation and it is capable of doing so as an independent unit. There is little evidence before me to indicate that the residential use of Huntleys Lodge has been ancillary to the agricultural use of the appellants land. In any event, an LDC is not sought for a residential use that is ancillary to another primary use.
28. I consider that as a matter of fact and degree that the appeal site, in combination with the delineated ground that is utilised as its garden area, is an area where physically and functionally interdependent activities take place even though the appellants own a wider area of land. As such, the residential use of the appeal site is a primary use in its own planning unit.
29. There is no statutory definition of what constitutes a '*material change in use*'. It is a question of fact and degree in each case. The appellants have stated that the residential use would not have occurred without the operational

development. The operational development involved in the construction of the building is immune from enforcement action. Nevertheless, no LDC is sought for the operational development.

30. However, as also stated above for the purposes of the 1990 Act operations and a material change in use are distinct and separate. Each is regarded as a separate basis for a need for planning permission. Even though, the building facilitates the residential use it is therefore not reasonable to consider that the use can be treated as being ancillary to the operational development. Moreover, I have found that section 75 of the 1990 Act is not relevant to this case.
31. For a material change of use to occur there must be a significant change in the character of the use from that which went on previously. There is a clear and fundamental difference in the previous use for agriculture and the existing use for residential purposes. In my judgement, there has undoubtedly been a material change in use under section 55 of the 1990 Act.
32. The residential use of Hunley's Lodge began in 2014 when the building operations were substantially completed. There may have been a mobile home stationed on the site prior to the current building being constructed and occupied. However, there is little evidence before me to indicate the length or manner of any residential occupation of that mobile home. Consequently, on the balance of probability it has not been shown that the residential use of the appeal site has been continuous without material interruption for 10 years, before the date of the LDC application, namely 22 November 2009. It has not been demonstrated that the material change in use of the land/building is immune from enforcement action.

Conclusion

33. 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 residential use of the log cabin, 'Huntley's Lodge' 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.

D. Boffin

INSPECTOR