



Appeal Decision

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 12 October 2020

Appeal Ref: APP/D2510/X/20/3251963

Keepers Corner, Flintwood Farm, Main Road, Belchford LN9 5QN

- 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 Angela Bonnett against the decision of East Lindsey District Council.
 - The application Ref S/013/02328/19, dated 19 December 2019, was refused by notice dated 28/February 2020.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use development for which a certificate of lawful use is sought is:
'the existing use of Keepers Corner, Flintwood Farm as a dwellinghouse in Use Class C3 for a period in excess of 4 years'
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Decision

1. The appeal is dismissed. See formal decision below.

Matters of clarification

2. Further to the case officer's letters to the parties I consider that this appeal can be determined without the need for a physical site visit. This is because I have been able to reach a decision based on the initial submissions, supplemented by additional information and photographs being supplied. The appellant and the Council have agreed to the appeal proceeding without a site visit and I am satisfied that, in dealing with it in this manner, no injustice is caused.

Background information

3. The application site is located in the Lincolnshire Wolds, in a countryside location some 1200m north west of the settlement of Belchford. The appeal building, 'Keepers Corner' is a detached bungalow, located within its own small residential curtilage to the north-west of the main buildings at Flintwood Farm. It is set back 800m from the main Louth-Horncastle Road in an elevated position.
4. Planning permission (S/013/00329/1) was granted by the LPA for the '*Erection of one holiday bungalow and parking*', at Flintwood Farm, on 12 December 2011. The first part of Condition No 2 to the permission states: '*The accommodation hereby permitted shall be occupied for holiday purposes only and shall not be occupied as a person's sole or main place of residence*'.
5. The bungalow was constructed in accordance with the approved plans and there is no dispute that the permission was implemented. Although the bungalow was restricted for use as a 'holiday cottage', its lawful use as such was in Use Class 3, as a dwellinghouse. There are no full details of any occupations prior to September

2014, but it is stated that, from that time, the appellant and her husband moved into the bungalow and occupied it as their permanent home. It is acknowledged that this was done without complying with Condition 2 referred to above.

6. The Council indicates that there are no other relevant planning permissions relating to the property but it is stated that an application to change the use of the holiday cottage to a dwelling was withdrawn (S/013/1525/19). At the time the officer noted that *'The application was not determined, however, it is noted the description of development is incorrect and no change of use would be required'*. A breach of Condition notice was served on 23 March 2020.

7. In support of the LDC application the appellant submitted the following evidence to the LPA: a sworn Affidavit from Andrew Tuxworth, owner of Flintwood Farm; a sworn Affidavit from James Fraser (both confirming occupation since 2014); Halifax Bank Statements for Mrs. Bonnett dated from 1 September 2014 and October 2019; a Shotgun Certificate for Mr Bonnett dated 11/07/2014; a DWP letter to Mr Bonnett dated 23 September 2014; invoices from Mr Tuxworth from 4 January 2015 for electricity; Santander ISA statements to Mrs Bonnett from March 2014; Lloyds Bank statements to Mr Bonnett from October 2014; Currys Knowhow receipt for Mrs. Bonnett dated 28 October 2014 and a Feed receipt from Solway Feeders dated 2 October 2014.

8. The Council has not challenged any of the evidence and nor does it dispute that Mr and Mrs Bonnett have used the property *'Keepers Corner'* as their main residence for a period in excess of 4 years. I also accept that this is the case.

Reasons

Introduction

9. An appeal relating to a Certificate of Lawful Use or Development (LDC) is confined to the narrow remit of reviewing the Local Planning Authority's (LPA) reason for refusal and then deciding whether the reasons are well founded. The planning merits of the case do not fall to be considered. An LDC is not the equivalent in planning law as a planning permission.

10. Its purpose is to enable owners and others to ascertain whether specific uses, operations or other activities are lawful. Lawfulness is equated with immunity from enforcement action. The issue of any certificate depends entirely on the factual evidence about the history and status of the land or building in question and the interpretation of any relevant planning law or judicial authority.

11. National Planning Practice Guidance (PPG) indicates that an applicant is responsible for providing sufficient information to support a LDC application and that, without sufficient, precise and unambiguous information, a LPA may be justified in refusing to grant a certificate. However, PPG also indicates that if a LPA has no contrary evidence itself and there is none 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.

12. The Council refused the LDC application for the following reason: *'The breach of planning control is a failure to comply with condition 2 of planning permission S/013/00329/11. The relevant time period within which enforcement action for such a breach may be taken is 10 years. The evidence of the applicants indicates the breach began in September 2014 and a 10 year period has not elapsed since then. Consequently enforcement action may still be taken against the breach such that*

occupation without complying with condition 2 of S/013/00329/11 is not considered lawful in terms of Section 191 of The Town and Country Planning Act'.

The gist of the case for the appellant

13. It is indicated that the appellant have been living in the property as a dwelling house for more than four years and that whilst the LPA now contends that this does not constitute a change of use (from a holiday cottage to a dwelling house) as both uses are within Use Class C3, a change of use has occurred.

14. It is stressed that the test for such a use is summarised by Victor Moore's '*A Practical Approach to Planning Law 11th Edition 2010*' para 21.31 which states '*For the purposes of enforcement action, the Secretary of State has taken the view that in order to establish that a building has been used as a single dwelling house, it must be shown that for a four-year period ending with the taking of enforcement action, the building must comprise a self-contained independent unit of accommodation, containing all the facilities normally associated with a dwelling behind a single lockable door.*'

15. It is contended that as a holiday let the unit was independent and was not occupied by its owners but by holiday makers. The users of the property were subject to and restricted by conditions imposed by the owners as part of the rental agreement and were not be free to undertake any changes to the building. The building would have been rated on a different basis dependent on that use.

16. The case of '*Moore v Secretary of State* [1998] JPL 877 (CA)' is also relied upon whereby it was held that the distinctive characteristics of a dwelling house were to be its ability to afford to those who use it, the facilities required for day to day private domestic existence. It is contended that the use of the house meets the requirements of this test because, with the provision of services such as a permanent postal address and place of contact, the use has therefore changed from a holiday let to a dwelling house. It is argued that the house offers the facilities required for day to day private domestic existence that are not offered by a temporary holiday let.

17. It is contended that whilst there is no change of use between use classes, there is a change of use within the same use class just as would be the case for example between a D1 Nursery and D1 Place of Worship or any of a multitude of examples found within the Use Classes Gazetteer with different uses in the same Use Class.

18. In relation to the validity of the use condition prohibiting the change of use for ten years, it is indicated that this is succinctly summarised by Victor Moore in the same paragraph of his book that '*The provision has been replicated in s171 B(2) of the 1990 Act. It should be emphasised, however, that the immunity from enforcement action applies to a changes of use of any building to use as a single dwellinghouse and it matters not that the change of use may be a breach of condition intended to prevent such a change (appellants emphasis). Again no change was made in 1991 to that provision*'.

19. Reference is made to the Court of Appeal case '*First Secretary of State v Arun District Council and Brown* (2006)', whereby the court ruled that for the purposes of the four-year rule, a change of use to a single dwellinghouse need not be material. It held that any change of use, including one that does not involve development, is sufficient to trigger this immunity period. Although it is accepted that a single dwellinghouse occupied as a holiday let and a single dwellinghouse occupied on a permanent basis fall in the same use class, it is clear that they have different planning impacts. It is argued that while a change from one to the other might not

involve development and be material, in light of the Arun judgment it could be argued that the four-year time limit should bite.

20. It is stressed that the court was unanimous in its judgment that a breach of planning permission resulting from a failure to comply with a condition restricting change of use to use as a single dwellinghouse was governed by the four-year time limit in Sec. 171B(2) of the 1990 Act and not the ten-year period provided for by Sec. 171B(3). Planning Resource 12 Feb 2012.

21. The appellant contends that it has been demonstrated that the property has been in continuous and uninterrupted use as a single dwelling house for a period in excess of four years and that the condition preventing such use does not benefit from a 10 year lifespan, rather a four year one which has now been exceeded.

22. The LPA apparently contend, by virtue of an email exchange, rather than via a delegated report, that there has been no change of use given that Holiday Lets and Single dwelling houses fall within the same use class. However there is a clear difference in planning impacts between the uses, it is not envisaged that a planning application for the use of the same sized building in the same location would be granted planning permission as a dwelling house.

23. Whilst the LPA apparently states that there is no change of use and the use restriction condition applies, the Council Tax Department does consider there to have been a change of use and have issued a retrospective demand for residential council tax on the property.

24. The appellants have demonstrated that the property has been in use as a dwelling house and not a holiday let for a period in excess of four years and, as summarised by Moore, *'it matters not that the change of use may be a breach of condition intended to prevent such a change.'*

25. In view of the evidence provided it is contended that the appellants have demonstrated the continual and uninterrupted use of Keeper's Corner as a residential dwellinghouse within Use Class C3 since September 2014, a period in excess of four years and the use has now become lawful through the passage of time. The LPA have not challenged the veracity of any of this information or disputed the use has existed for a period in excess of four years, albeit they now appear to contend this is not a change of use.

The gist of the case for the Council

26. The Council stresses that both a use for holiday purposes and a use as a main place of residence fall within Class C3 of the Use Classes Order and as such a change between the two would not be a material change of use. It is indicated that the change is not a change of use that has resulted in the creation of a new planning unit. It is argued, therefore, that the unlawful development is not a change of use to create a dwelling.

27. Reference is made to the planning permission which was granted for the erection of a holiday let and that the appellant has indicated that construction began in February 2012. It is further noted that the appellant occupied the property as a main place of residence from September 2014 in breach of condition 2 of the permission. It has been confirmed that the works were otherwise carried out in accordance with the planning permission and that conditions 3, 4, 5, 10 and 11 were agreed on 26 June 2013.

28. Taking this into account, it is stressed that the planning permission has been implemented and the unlawful use is not operational development for the erection of

a dwelling. It is contended, therefore, that the breach of planning control is a failure to comply with a condition or limitation subject to which planning has been granted. Section 191 (3) states that this is lawful at any time if the time for taking enforcement action in respect of the failure has expired and it does not constitute a contravention of any of the requirements of an, enforcement notice or breach of condition notice then in force. The site is not the subject of any enforcement notice or breach of condition notice at the time the application was submitted.

29. It is indicated that the time limit for enforcement is set out in Section 171B and is a period of 10 years beginning with the date of the breach. The evidence provided in the statement of case indicates that the breach started in September 2014. A 10 year period since then has not expired and therefore enforcement action may still be taken in respect of the breach of planning control. Consequently it has not been shown that the development was lawful at the time of the LDC application.

My assessment

Introduction

30. The Court of Appeal judgment in *First Secretary of State v Arun DC & Brown [2006] EWCA Civ 1172* established that, in relation to a change of use to a dwelling house (my underlining), the 4 year rule applies. This applies whether the breach of planning control consists of development carried out without planning permission or a breach of a condition of a planning permission.

31. However, to benefit from the 4-year rule there must be a change to use as a single dwellinghouse (again my underlining). If the use of the building was as a single dwellinghouse in the first place, the 10-year rule and not the 4-year rule, applies. Authority on this point is provided by the judgments in *R v Tunbridge Wells BC ex parte Blue Boys Development [1989] 1 PLR 94* and *Moore v SSE and New Forest DC [1998] JPL 77; (1999) 77 P&CR 114*. 19. In *R v Tunbridge Wells BC*.

32. The main point to emerge was that a change of use from self-catering holiday units to permanent residential units did not constitute 'development', because both uses amounted to use as a dwellinghouse within Class 3 of the then Use Classes Order. In this case planning permission was granted for the erection of Keepers Corner as a holiday unit and it became a separate dwelling at that time, albeit subject to condition 2.

33. In *Moore v SOS for Communities and Local Government (September 2012)* the Court of Appeal held that the permitted use as a dwellinghouse includes not only occupation by an individual or family as a permanent home, but also the dwelling's use for holiday or temporary accommodation. The court also held that whether the use of a dwellinghouse for holiday lets amounts to a material change of use will be a question of fact and degree.

34. It was found that neither of the two extreme propositions – that using a dwellinghouse for holiday lets will always (my underlining) amount to a material change of use, or that the use of a dwellinghouse for holiday lets will never (my underlining) amount to a material change of use – is correct.

The Main Issue

35. The main issues in this appeal are firstly, whether or not the use of *Keepers Corner* as a permanent residence, in contravention of condition 2 of permission S/013/00329/11, amounted to a material change of use of the dwellinghouse and, as a consequence, whether or not the 4 year or the 10 year rule applies.

36. In determining whether or not a material change of use (MCU) has taken place, it is necessary to look at and compare the character of the current unlawful use (the use as a permanent dwellinghouse), with the previous lawful use, which was as a dwellinghouse for holiday let purposes. That is, subject to condition 2 of the 2012 planning permission.

37. Planning permission (S/013/00329/11) was granted for *'the erection of a holiday bungalow plus parking'* on 10 February 2012. The application plans indicated the plot location and the detailed layout of the bungalow, its access, parking area and garden. There is no dispute that the development allowed formed its own planning unit, separate from any other part of the former Flintwood Farm developments. There is also no dispute that it was carried out in accordance with the permission.

38. The accommodation shown on drawing No F2152-04 comprised a living/dining/kitchen area, two bedrooms, a bathroom and a utility room. Thus, from the date the bungalow was completed it provided all of the necessary facilities, for day to day living, as a dwellinghouse in Class C3. This is the case whether that be for temporary holiday accommodation or as a permanent residence. The submitted photographs indicate that the building is essentially the same now as when it was first occupied. The LPA accepts that the development was implemented fully in accordance with the planning permission.

39. The accommodation does not appear to have changed since the bungalow was first erected, although clearly minor alterations may have taken place over the years. Thus, what was erected as dwellinghouse for holiday purposes is essentially the same as that now used by the appellant as a permanent residence.

40. For a MCU to have occurred, as contended by the appellant, it needs to be shown, as a matter of fact and degree, that the character of usage of the bungalow has materially changed. This is confirmed by the case law references above. If a MCU has been considered to have occurred, then the unlawful use as a permanent dwellinghouse would mean that the LPA would have had to have taken enforcement action within 4 years of the LDC application. Otherwise the LPA would have had a period of 10 years during which they could have enforced against the unlawful use.

41. When completed as a *'holiday let'* dwellinghouse in Class C3, the bungalow could have been let for any period of time ranging from overnight; to a few days; a week or more, or even a few months. The accommodation provided would have limited the number of people who could have occupied it at any one time and that is still the case for the appellant's use of the dwellinghouse.

42. With regard to the appellant's contention that *'as a holiday let the unit was independent and was not occupied by its owners but by holiday makers'*, I do not consider that this goes to the heart of the character of usage. Furthermore, there is no difference, in my view, that the users of the property would have been subject to and restricted by conditions imposed by the owners as part of the rental agreement. Such conditions could apply to any rental agreement for any dwellinghouse, including those which would prevent alterations being made to the property.

43. I accept that the rateable situation might be different but this does not alter the situation regarding the character of the use. In my view, the character of use by those on holiday would not be significantly different to the use by the appellant. Even for very short term holiday lets there would be similar daily vehicle movements to and from the property as those movements by its use as a permanent dwellinghouse. Anyone living nearby or on any access road to the property would not notice any material change in how the bungalow was being used.

44. As referred to above the specific size of the property and the accommodation which it provides would not have resulted in any planning issues of any consequence for those occupying nearby properties. This is a completely different situation to the holiday units in the case of 'Moore'. In that case there were multiple holiday units. The planning consequences in terms of actual usage were significantly different to the situation in this case. There were distinctly noticeable material differences between use as a single dwellinghouse and the use as holiday units.

45. As a matter of fact and degree I do not consider that the character of usage, as a holiday let, 'Keepers Corner' would have been perceived by others to have been any different from its use as a permanent dwellinghouse. It made no difference in planning terms whether it was occupied by holidaymakers as a group, or by permanent residents. The bungalow provided the distinctive characteristics of a dwelling house whether being used by holidaymakers or by the appellant. I do not consider the provision of services such as a permanent postal address and place of contact, resulted in a change that was material to its use as a dwellinghouse.

46. In this case I do not consider, as a matter of fact and degree, that there was a change of use within the same Use Class C3. It follows that if this is the case there has been no change of use to a dwelling house. Thus the 10 year rule and not the 4 year rule must apply. I agree with the Council's conclusion and consider that their decision not to have issued a LDC to be sound. The appeal therefore is dismissed.

Other Matters

47. In reaching my conclusions I have taken into account all of the initial submissions including the planning history; the appeal statements; the photographic and drawn evidence and the matters set out in the cost application and the Council's response. However, none of these carry sufficient weight to alter my conclusion that the 10 year rule and not the 4 year rule must apply.

Formal Decision

48. The appeal is dismissed and a lawful development certificate is not issued.

Anthony J Wharton

Inspector