



Appeal Decision

Site visit made on 22 October 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 2 December 2020

Appeal Ref: APP/L3625/X/19/3243912

The Cottage, rear of 5 Orchard Close, Banstead SM7 3QN

- 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 Karen Finikin against the decision of Reigate and Banstead Borough Council.
 - The application Ref 18/00477/CLE is dated 3 April 2018
 - 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 applied for is described as '*The certificate of lawfulness is being sought for the Cottage and garden which has been rented since July 1993 to date.*'
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is considered to be lawful.

Application for costs

2. An application for costs was made by Mrs Karen Finikin against Reigate and Banstead Borough Council. This application is the subject of a separate decision.

Background

3. S171B of the 1990 Act as amended 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 no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
4. It appears that the LDC application was actually submitted some time in February 2018; the application form is date-stamped 27 February 2018. However, neither the appellant nor the Council have provided me with the final sheet of the document containing the declaration date. Both parties are, instead, relying on the validation date, which is 3 April 2018. In the circumstances I will take the latter as the relevant date. Given the wider evidence, and my findings, neither party is prejudiced by the difference of a few short weeks, and my conclusions are not affected.
5. On this basis the appellant must successfully demonstrate, on the balance of probability, that the breach of control commenced four years before, ie prior to 3 April 2014 (hereinafter referred to as "*the material date*") and has continued since.

6. In an appeal under s195 of the 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 the matter 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 property in question, known as 'The Cottage' is a small single-storey building situated in the north-west corner of land belonging to No 5 Orchard Close. Set within a relatively narrow linear strip of land that also accommodates a small, garden area containing a summerhouse, the path outside the Cottage building's frontage is screened from No 5's rear garden by bushes on the boundary and ornamental fencing. The small, open amenity area beyond is, in turn, demarcated from No 5's garden by means of a picket fence and, further along, a brick wall. Importantly, this sectioned-off area described is accessed independently of No 5, being reached instead off a public bridleway to the property's rear, via a solid door within a high brick wall. At my site visit I noted that the door had a substantial lock.
9. The brick wall gives the impression that it has been in place considerably longer than April 2014, although I note that the tenancy schedule submitted, dated 20.10.17 under 'Agreed arrangements with the parties' states "*landlord to put double-bed in the property and fence off the lawn*". Maybe the fence amounted to a replacement, but there is no clear evidence to this effect. In this connection I have examined the photographs provided by the Council where the officer says there is *no* physical barrier or fence between the Cottage and the rest of the property, or a separate means of access to Orchard Close. First, I do not understand what the latter point means and, second – and most importantly – although it is claimed that these photographs were taken in April 2018, no proof of such, or anything particularly compelling, has been provided to this effect. Also, if this was the case, then I fail to understand why the application took until November 2019 to determine.
10. Both main parties are in agreement, from the evidence adduced, that the building has been occupied as a self-contained unit of residential occupation for a considerable number of years. The appellant has produced a series of tenancy agreements to support her case, and it appears that the Cottage has been occupied by a successive number of tenants, seemingly unrelated to the appellant who is the landlord and lives at No 5. No tenancy break so significant as to materially affect the continuity of the residential occupation has occurred during this time.
11. A short letter has also been submitted from a former tenant, Marcus Blunkett, whose agreement is dated January 2013, which says that during his tenancy of the Cottage he used the summerhouse for the storage of personal possessions. I also note that his agreement states within "*Post box to be fitted by gate*".

12. Also provided is a copy of a letter dated 21 November 2008 from Barry Williams (Planning Investigation Officer) of the Council, sent to the appellant stating:

"The Council has considered the situation with regard to the use of The Cottage as a separate residential unit and has taken the view, based on the answers given in the Planning Contravention Notice and other enquiries, that the Cottage may now be immune from enforcement control."
13. On the above basis the letter ended by saying that the Council did not intend to take any further action in this matter. In the circumstances I afford this letter considerable weight.
14. In planning terms a dwelling or dwellinghouse is defined as a self-contained building or part of a building used as residential accommodation, and usually housing a single household. In the case of *Gravesham BC v SSE & O'Brien* [1982] it was held that the distinctive characteristic of a dwellinghouse was its ability, to afford to those who used it, the facilities required for day to day private domestic existence.
15. At my site visit I observed that the Cottage has a living room area, a separate fitted kitchen, a shower-room/wc and a bedroom containing a double-bed. The building's aspect faces onto the pathway outside and the rooms are adequately lit. Accordingly, taken together I consider that the building, although small in size, contains convivial living accommodation and it constitutes an independent residential dwelling unit. The summerhouse and small garden complement this.
16. I do consider, though, that the description of the existing use on the application form is imprecise as to what exactly is being applied for, with no specific mention made of an independent residential use. However, when referring to the location plan which accompanied the submission it shows the Cottage and its associated external area as ringed red, with No 5 and its functional rear garden separately ringed blue to indicate land also within the owner's ownership/control.
17. I am also mindful that the Council had originally termed the proposal '*Use of Cottage and garden in use C3*' yet the case report, written some 18 months after the application was validated, says that the description of development has been changed to '*Use of the building known as The Cottage for residential purposes within the curtilage of 5 Orchard Close*'. On this point, I note from paragraph 4.14 of the appellant's Statement of Case that the description was changed without reference to the appellant.
18. In the circumstances the concept of the planning unit must here be explored. The leading case in which this was defined is *Burdle v SSE* [1972] 3 All E.R. 240. In this judgement it was suggested that there may be three possible situations which can be identified when considering the planning unit. First, there may be a single main purpose, to which any secondary activities are ancillary or incidental. Second, there may be a variety of activities which do not have a primary/ancillary relationship to each other but are composite within the whole planning unit. Finally, there may be sites where separate and distinct areas are occupied for unrelated purposes. In such instances these areas are actually separate planning units and each is to be considered by itself.
19. I find that the development at appeal reflects that of the third scenario, with a separate unit of occupation having been carved out of the original unit to create a new planning unit in both physical and functional terms. So far as physical

separation is concerned the judgement indicated that there need not necessarily be a wall or fence or other physical boundary feature between the separate uses, provided that it is possible to identify separate and distinct areas of occupation for unrelated purposes.

20. In this case the Cottage does, in fact, have its own defined and separate curtilage which, moreover, has been physically demarcated. I am also puzzled as to the Council's points in its representations dated 4 June 2020 whereby it is stated:

"... although the Cottage has a lawful residential use, it is not classed as a C3 dwellinghouse. Because of the siting of The Cottage within the curtilage of the planning unit, 5 Orchard Close, a separate dwellinghouse has not been created, as it does not have its own defined separate curtilage."

21. On the contrary, it seems to me patently obvious that a separate dwellinghouse has been created and this independent residential use, allowing full use of its associated curtilage, has become affirmatively established. I am therefore unclear as to why, given the Council's letter in 2008 saying that no further action was intended on the matter, the case was then reopened some years later. It is more than apparent that severance has occurred, and a new planning unit created. In relating the evidence to that of the *Burdle* judgement I do not understand the Council's reasoning.
22. Finally, and of particular importance, the reference to the unnumbered location plan in the decision notice, which shows the Cottage building and its curtilage separated from the dwelling at No 5 and its curtilage, is clearly inconsistent with the description on the LDC issued ie *'Use of the annex known as The Cottage for residential purposes within the curtilage of 5 Orchard Close, Banstead'*. The Cottage is not an annex, and neither does it lie within No 5's curtilage. There is no evidence of any interaction between No 5 and The Cottage. Accordingly, I am satisfied that the said location plan correctly depicts the reality of the situation.

Conclusion

23. Having interpreted and weighed up all the evidence available, including the various comments from interested parties, I must conclude that the appellant has discharged her burden of proof with sufficient precision and unambiguity demonstrating, on the balance of probabilities, that the use of the Cottage as an independent dwelling had built up immunity over a period considerably longer than the requisite four years from the material date.
24. For the reasons given above I conclude, on the evidence available, that the use was lawful on 3 April 2018, within the meaning of section 191(2) of the Town and Country Planning Act 1990.
25. Accordingly, I will exercise my powers under section 195(2) of the Act.

Timothy C King

INSPECTOR



Lawful Development Certificate

APPEAL REF. APP/L3625/X/19/3243912

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191

(as amended by section 10 of the Planning and Compensation Act 1991)

THE TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)

ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 3 April 2018 the development described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto and shown edged in red on the plan attached to this certificate was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 as amended, for the following reason:

The time period for enforcement had expired and the use did not contravene any of the requirements of any enforcement notice or breach of condition notice then in force.

Timothy C King

INSPECTOR

Date: 2 December 2020

First Schedule

Use of The Cottage as a self-contained unit of residential accommodation, and its associated curtilage for incidental purposes thereto.

Second Schedule

The Cottage, rear of 5 Orchard Close, Banstead, Surrey SM7 3QN

CERTIFICATE OF LAWFULNESS FOR PLANNING PURPOSES

NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 as amended.
2. It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful on the certified date and, thus, would not have been liable to enforcement action under section 172 of the 1990 Act as amended on that date.
3. This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Plan

This is the plan attached to the Lawful Development Certificate dated: 2 December 2020

by Timothy C King BA (Hons) MRTPI

**The Cottage, rear of 5 Orchard Close, Banstead,
Surrey SM7 3QN**

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Scale: Do not scale

