



Appeal Decision

Site visit made on 12 November 2020

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 December 2020

Appeal Ref: APP/D1590/X/19/3240726

100 Southchurch Avenue, Southend-on-Sea, Essex SS1 2RR

- 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 John Wilkinson against the decision of Southend-on-Sea Borough Council.
 - The application Ref 19/01589/CLE, dated 22 August 2019, was refused by notice dated 17 October 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 first and second floors as two self-contained flats (Lawful Development Certificate – Existing)".
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. I have taken the description of development from the Council's decision notice, which has not been disputed by the appellant. For the avoidance of doubt, it was apparent that at the time of my visit there were two separate self-contained flats in place, respectively occupying the first and second floors of the property.

Application for costs

3. An application for costs was made by Southend-on-Sea Borough Council against John Wilkinson. This application is the subject of a separate Decision.

Reasons

4. Uses are lawful at any time if no enforcement action may 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 (s191(2)(a)). In this case, the appellant seeks to rely on the passage of time.
5. Usually it would be necessary to consider whether the conversion of the property to provide two flats, occurred and has been continuous for a period of four years or more prior to the date of the application, that is from at least 22 August 2015, so as to be immune from enforcement. The onus is on the appellant to demonstrate that, on the balance of probability, the use has continued for the aforementioned four-year period.

6. However a key proviso to s191(2)(a) is that the use must not contravene the requirements of any enforcement notice then in force (s191(2)(b)).
7. As part of its evidence the Council has referred to a previous enforcement notice and subsequent appeal in relation to the same property. The alleged breach of planning control in that case was the change of use of the first and second floors of the building to use as two separate flats. The appeal was dismissed in January 1994, with the enforcement notice being upheld by the Inspector. The notice required, amongst other things, that the unauthorised use of the first and second floors of the building as two separate flats must cease¹. The enforcement notice therefore 'attacks' the same use that the appellant is now seeking to confirm would be lawful.
8. Because the date on which the enforcement notice appeal was decided was before the date of the current LDC application, subject to this appeal, the LDC sought in this case would be in contravention of the requirements of an enforcement notice 'then in force'. Accordingly, irrespective of whether it could be demonstrated that the flats have been in continuous use and for how long, there is conflict with s191(2)(b) of the Act. For this reason the use of the first and second floors of the property as two self-contained flats would not be lawful. There is no need for me to consider the matter any further.
9. The appellant has referred to an unsuccessful attempt by the Council to prosecute in relation to the unauthorised use of the property. A Council internal memorandum, dated 23 March 1995, referring to a defendant being found not guilty, has been provided. Although this document refers to the property address at 100 Southchurch Avenue, it is unclear from the information therein whether the matter being referred to concerned the aforementioned appeal. However, even if it did, an unsuccessful prosecution would not have the effect of discharging the previous enforcement notice. Furthermore I have not been provided with any information that would lead me to conclude, on the balance of probability, that for any reason the enforcement notice does not remain in force.
10. The appellant has also referred to the flats being in place since 1993; that they are served by separate utility meters, with independent kitchens, toilets and bedrooms, with all enjoying access to the front and rear of the property. The possibility of providing witness statements has also been indicated. These considerations however do not overcome the conclusion that I have reached above.
11. Therefore 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 first and second floors as two self-contained flats (Lawful Development Certificate – Existing)" at 100 Southchurch Avenue, Southend-on-Sea, Essex SS1 2RR 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.

Roy Merrett

INSPECTOR

¹ Appeal Ref T/APP/C/93/K1555/629389