
Appeal Decision

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

an Inspector appointed by the Secretary of State

Decision date: 26 February 2021

Appeal Ref: APP/T3725/X/20/3259320

Pool Peace Bungalow, Five Ways Road, Shrewley, Warwick CV35 7HZ

- 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 Samir Audhali against the decision of Warwick District Council.
 - The application Ref W/20/0285, dated 19 February 2020, was refused by notice dated 15 May 2020.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
 - The development for which a certificate of lawful use or development is sought is continued occupation in excess of 10 years in breach of occupancy condition no:2 of planning permission no: W870247.
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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 matter constituting a failure to comply with a condition which is considered to be lawful.

Procedural Matters

2. The planning merits of retaining the condition are not relevant to this appeal which relates to an application for an LDC. My decision rests on the facts of the case, on relevant planning law and judicial authority. The burden of proof is with the appellant and the appropriate test of the evidence is the balance of probabilities. The appellant's evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided his evidence alone is sufficiently precise and unambiguous.
3. As this appeal concerns a case which is decided purely on the basis of technical and/or legal interpretation of the facts, and as no-one would be prejudiced, I did not visit the site prior to making my decision.

Main Issue

4. The main issue is whether the Council's decision to refuse to grant an LDC was well-founded.

Reasons

5. The evidence shows that Pool Peace Bungalow is a detached dwellinghouse that is adjacent to Shafa Farm Ltd, a meat processing plant and abattoir. Planning permission¹ was granted for the erection of the bungalow on 28 May 1987 and condition 2 of that permission states *"The occupancy of the dwelling shall be limited to persons solely or mainly employed or last employed locally in agriculture, as defined in section 290 (1) of the Town and Country Planning Act 1971, or in forestry, or the dependant of such persons residing with him, (but including the widow or widower of such persons)."*
6. The effect of section 191(3) of the 1990 Act is that a breach of this condition would be lawful if no enforcement action could be taken in respect of it because the time for taking enforcement action had expired. Having regard to section 171B (3) of the 1990 Act, the time limit for taking enforcement action in respect of a breach of condition 2 is 10 years from the date on which the breach began.
7. The Council's main concern is whether any potential breach of condition 2 through physical occupancy has been continuous. However, it was held in the North Devon judgement² that *'clearly, continuous physical occupation is not required for there to be occupation in breach. Beyond those few comments it would not be appropriate to indicate any guidelines. This question is quintessentially a question of fact of degree to be considered in the light of all surrounding circumstances including the length and physical occupation and any other indications or evidence of continuing occupation despite the physical absence of the occupiers.'*
8. Moreover, in the Basingstoke and Deane judgement³ it was held that *'it is not a question of continuous occupation contrary to a condition; it is a question whether, over the relevant 10-year period, there has been a continuing breach of the condition. The correct approach is to ask the question whether enforcement action could have been taken at all material times, successfully, in relation to what was happening in the premises, or to the premises, at any material time.'*
9. Consequently, it is necessary to consider whether enforcement action could have been successfully taken at all material times during a 10-year period prior to the date of the LDC application (19 February 2010 to 19 February 2020).
10. I have little evidence as to who occupied the bungalow prior to 2005. There is no dispute that the appellant bought the bungalow in 2005 and that since that time he has been employed within his family's meat processing and abattoir business, Shafa Farm Ltd (formerly A.S. Audhali Farm Gate Fresh Poultry Ltd). There is also no dispute that the appellant's wife has also worked for that business since living in the bungalow. Therefore, there is no dispute that neither the appellant nor his wife, who currently occupy the dwelling, meet the employment restrictions cited in condition 2. There is also no dispute that since June 2011 that the dwelling has been occupied continuously by the appellant and his family. The appellant has stated that between 2005 and 2009 he was living at the property for a proportion of the time while he renovated it.

¹ Ref No W870247

² North Devon DC v SSE & Rottenbury [1998] EGCS 72

³ Basingstoke and Deane BC v SSCLG & Stockdale [2009] EWHC 1012 (Admin); [2009] JPL 1585

11. The appellant has provided 2 affidavits that are dated 27 November 2019 (Nov 2019) and 27 October 2020 and an undated Statement of Truth. There is some ambiguity within the appellant's submitted evidence as the Nov 2019 affidavit states that the appellant and his wife have lived continuously in the bungalow from December 2009. Whereas, the later affidavit and the Statement of Truth state that in 2010 the property was being extended and the appellant was only living at the property for a proportion of the time due to the ongoing building works.
12. The Council have stated that evidence provided by its Council Tax department indicates that between December 2009 and June 2011 a number of phone calls confirmed that the bungalow was furnished, unoccupied and used as a second home. As a result a second home discount was applied to the Council Tax invoked on the property. A signed form and letter from the appellant in relation to the Council Tax was submitted to the Council in December 2010. I acknowledge that the sections of the form which relate to the property being unoccupied and occupied are both completed. However, it is more likely than not that both sections were completed by mistake. Furthermore, the form/letter states that the bungalow is furnished and used as a second home by the appellant and his wife when relatives are visiting. It also states that they plan to move in full time to the bungalow when the building work/renovation is completed.
13. In February 2010 the appellant submitted an LDC application for a proposed extension and garage and that application was approved in April 2010. The plans submitted with that LDC application indicate that the extension would include an additional 4 bedrooms. There is no dispute that an extension and garage have been constructed. It is reasonable to consider that on the balance of probabilities that the construction work associated with that extension and garage was undertaken in 2010/2011.
14. Bills relating to the provision of Sky TV services have been provided for November 2006 through to March 2017 at the property. The bills are within the appellant's name and indicate that Sky TV has been available at the property within that time but on its own this does not indicate that the appellant was occupying the property in 2010. Furthermore, the spreadsheet submitted in relation to Calor Gas services at the bungalow is inconclusive as it is not clear what the differing amounts and notations refer to. Nevertheless, it is clear, from the submitted police report, that in June 2009 the appellant was occupying the property when an armed burglary took place there.
15. In addition, the appellant submitted a prior approval application for a proposed agricultural machinery store within the grounds of the bungalow in September 2009. The Council refused that application in October 2009 and within the reason for refusal it states '*...it has not been demonstrated that the building is reasonably necessary for the purposes of agriculture....all the land at Oldfield Farm was put up for auction in September 2009 with at least part apparently having been sold prior to that auction*'.
16. It is apparent from the evidence before me that there was not continuous physical occupation of the bungalow by the appellant prior to June 2011. Even though, the appellant and his wife were only occupying the bungalow on a second home basis prior to June 2011 they had declared to the Council that they were occupying the bungalow. Additionally, the prior approval for a

substantial extension and garage was submitted in 2010 and the appellant stated, within his letter in relation to Council Tax, that once those works were complete, he and his family would live there '*full-time*'. Therefore, it is reasonable to consider that those works were carried out in order to further the breach of the condition.

17. The appellant's connection to the A.S. Audhali Farm Gate Fresh Poultry Ltd would have been apparent through his name and the submission of the prior notification for the agricultural machinery store. Based on that the Council may have considered that the appellant could have been/be employed in agriculture but there is no evidence before me to indicate that this is/was the case. Nevertheless, the refusal notice associated with the agricultural machinery store makes it clear the Council was aware that a farm which appears to have been associated with the bungalow had been put up for auction/sold in 2009.
18. Consequently, taking into account all of the above, I consider that the evidence before me is sufficiently precise and unambiguous to indicate, on the balance of probabilities, that over the whole 10-year period, February 2010 to February 2020, enforcement action could have been taken successfully in relation to the breach of condition 2 of planning permission W870247. It is too late to take enforcement action against that specific breach, and it follows that the Council's decision to refuse to grant the LDC in the terms applied for was not well-founded. The appeal therefore succeeds.
19. However, an LDC can only certify that a matter is lawful on a particular date. Therefore, the effect of granting the LDC is not to discharge the condition, which remains in force, but merely to provide immunity against enforcement action for as long as that breach endures. The LDC does not provide immunity against a fresh breach of the condition should the current breach come to an end and the condition be complied with in future. Accordingly, I have worded the LDC to reflect this situation.

Conclusion

20. For the reasons given above I conclude, on the evidence now available, that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

D. Boffin

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 19 February 2020 the matter described in the First Schedule hereto, constituting a failure to comply with a condition or limitation subject to which planning permission has been granted, in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(3) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The evidence is sufficiently precise and unambiguous to indicate, on the balance of probabilities, that over the whole 10-year period, February 2010 to February 2020, enforcement action could have been taken successfully in relation to the breach of condition 2 of planning permission W870247. Therefore, no enforcement action in respect of that specific breach may be taken because the time for enforcement action in accordance with section 171B of the 1990 Act has expired.

Signed

D. Boffin

INSPECTOR

Date: 26 February 2021

Reference: APP/T3725/X/20/3259320

First Schedule

Continued occupation in excess of 10 years of Pool Peace Bungalow in breach of condition 2 of planning permission application number W870247.

Second Schedule

Land at Pool Peace Bungalow, Five Ways Road, Shrewley, Warwick CV35 7HZ

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the matter, constituting a failure to comply with any condition or limitation subject to which planning permission has been granted, described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 or 187A of the 1990 Act, on that date.

This certificate applies only to the extent of the matter described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any matter 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 referred to in the Lawful Development Certificate dated: 26 February 2021

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

Land at: Pool Peace Bungalow, Five Ways Road, Shrewley, Warwick CV35 7HZ

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Scale: Not to Scale

