



Appeal Decision

Hearing Held on 26 January 2021

Site visit made on 27 January 2021

by M Madge DipTP, MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd March 2021

Appeal Ref: APP/M2325/X/19/3242331

25A North Clifton Street, Lytham St Annes FY8 5HW

- 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 L Simkin of Freezewell Ltd against the decision of Fylde Borough Council.
 - The application Ref 18/0223, dated 18 March 2018, was refused by notice dated 22 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 residential use of the maisonette and ancillary first floor roof terrace.
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Application for costs

1. At the Hearing an application for costs was made by Mrs L Simkin of Freezewell Ltd against Fylde Borough Council. This application is the subject of a separate Decision.

Decision

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

Preliminary matters

3. The appellant claims that the residential use of the maisonette and use of the ancillary roof terrace commenced on 31 December 2003. While someone may have 'lived over the shop' at some point prior to that date, there is no evidence to demonstrate that any residential use of the first and second floors consisted of a single dwellinghouse before 31 December 2003.
4. Planning legislation contains no definition of a dwellinghouse and *Gravesham*¹ states that whether a building was or was not a 'dwellinghouse' is a question of fact. It goes on to confirm that 'a 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', which the maisonette does.
5. A garden or other outside residential amenity space is not a facility required for day-to-day private domestic existence. The ancillary first floor roof terrace is not therefore a necessary facility for the maisonette to be a dwellinghouse.

¹ *Gravesham BC v Secretary of State for the Environment* (1982) 47 P & CR 142

Background

6. The building containing the maisonette is occupied by 2 retail units on the ground floor, 51 and 51A Clifton Street. The first and second floors are occupied by the maisonette, 25A North Clifton Street. Both shop units have single storey rear extensions.
7. Planning permission 92/0431 ("the 1992 PP") proposed the erection of a flat roofed extension to No 51, which incorporated an external staircase and walkway across its roof to provide access to what would become No 25A. On the approved plans for the 1992 PP, No 51A is shown to have an existing pitched roof single storey rear extension. The 1992 PP was not implemented.
8. Planning permission 02/0754 ("the 2002 PP") again proposed the erection of a flat roofed extension to No 51, incorporating an external staircase and walkway across its roof to provide access to what would become No 25A. The approved plan, dated 12 September 2002, shows that the pitched roof on No 51A's single storey rear extension had been replaced with a flat roof.
9. The 2002 PP was implemented in 2003. As per the approved plans, the flat roofed extension was physically attached to the rear projections that existed at No 51A and incorporated the external staircase and walkway across its roof. The walkway is shown having balustrades to both sides. Photographs of the balustrades show that the ones installed were of a simple metal post and horizontal rail design, rather than the vertical spindle design shown on the approved plan.

Reasons

10. S191 of the 1990 Act enables any person to apply to the Local Planning Authority for a Certificate to the effect that, relevant to this appeal, any existing use of buildings or other land is lawful. S191(2)(a) sets out that uses and operations are lawful at any time if no enforcement action may be taken. The enforcement expiry time for a material change of use to a single dwellinghouse, as with operational development, is 4 years, but for any other material change of use it would be 10 years. Whichever period is relevant, it would need to have expired at least by the date that the application for the LDC was made, which in this case was 18 March 2018 (hereinafter referred to as "the material date").
11. The burden of proof rests with the appellant and the evidence must be sufficiently precise and unambiguous to justify the grant of an LDC. While the appellant's own evidence does not have to be corroborated by independent evidence, there should be no evidence that contradicts the appellant's version of events.
12. The **main issue** is whether the Council's refusal to issue an LDC is well founded. This turns on whether the appellant can show, on the balance of probability, that the residential use of the maisonette and ancillary first floor roof terrace has become immune from enforcement action.
13. The Council confirmed at the Hearing that the evidence shows, on the balance of probability, that the maisonette has been occupied as a single dwellinghouse for more than 4 years and that the use as a single dwellinghouse has been substantially uninterrupted. There is therefore no dispute that the use of the maisonette as a single dwellinghouse is lawful.

14. The matter in dispute is the use of the ground floor extensions' roofs as an ancillary first floor roof terrace, hereinafter referred to as the 'roof area'.
15. The appellant claims that the roof area has been used by residents as a garden and not just as a means of access. The primary use of the roof area, according to the appellant, forms part of the maisonette's planning unit. As the use of the roof area has always been integral to the residential occupation of the maisonette, a single dwellinghouse, the appellant contends that the relevant immunity period of 4 years lapsed on 18 March 2014.
16. The Council claim however that the primary use of the roof area has always been as the roof to the single storey rear extensions at No 51 and No 51A. While access to the maisonette had been provided by the staircase and walkway, the Council claim that the balustrades prevented any use of the remaining roof area for ancillary residential purposes. The Council claims that the removal of the balustrades in 2013 facilitated the regular use of the roof area for ancillary residential purposes, which represented a material change of use. The Council contend that the relevant period for immunity from enforcement action is 10 years, and as, in their opinion, the material change of use occurred in 2013 at the earliest, immunity from enforcement had not been achieved at the material date.
17. The appellant has provided a sworn declaration, which sets out their recollection of the history of the site and activities at the property since Freezewell Ltd purchased it in 1983. This confirms that, while not living at the property until early 2013, she visited regularly to check on tenants and saw the roof area being used for purposes incidental to the residential occupation of the maisonette. Her evidence also confirms her ancillary residential use of the roof area throughout her occupation of the maisonette and provides details of the refurbishment of the roof area in 2015. Plans, photographs, and aerial images are provided within the document to corroborate assertions in the appellant's evidence.
18. The appellant has also provided a considerable number of witness statements, produced by former tenants of the maisonette, neighbouring residents and retail workers, as well as people that have carried out work at the maisonette and visitors. These statements also include plans, photographs, and aerial images. Mr Billington also gave evidence at the Hearing. While the individual statements may only cover parts of the relevant period, collectively they cover the whole period, and these corroborate the appellant's version of events.
19. The Council's evidence consists of the plans approved by the 2002 PP, an assumption that the balustrades prevented any regular use of the roof area for ancillary residential use purposes and the lack of formal enclosure of the roof area would make its residential use un-safe. In their opinion, the primary purpose of the roof is to enclose the single storey rear extensions. The Council accept that the roof area may have been used intermittently by residents and visitors to the maisonette. In their opinion, the level of activity set out in the witness statements, is insufficient to demonstrate that a material change of use of the roof area occurred before the appellant removed the balustrades in 2013 and carried out the refurbishment in 2015.
20. Evidence provided by the occupiers of 25 North Clifton Street confirms that, since moving into their home in early 2014, they have seen the appellant use the roof area for sitting out, growing plants, etc. They contend however that

the refurbishment of the roof area in 2015 has adversely affected their living conditions due to loss of daylight and privacy. As their concerns amount to planning merits, they are not relevant to the determination of this appeal.

Assessment of the evidence

21. The period of immunity starts from the date the development occurred and it must have lapsed by the material date. The development for which this LDC is sought is claimed to have commenced on 31 December 2003 and the period of immunity must have lapsed by 18 March 2018.
22. Normally the roof area of a building, or part thereof, would be said to have the same use as the building below it. The flat roof area associated with No 51A is shown to exist on the 2002 PP approved plan. This part of the roof area therefore existed before the 2002 PP was implemented. Regardless of its subsequent physical connection to the single storey rear extension to No 51, any use of No 51A's roof area as an ancillary first floor roof terrace would represent a material change of use, for which the relevant period of immunity would be 10 years.
23. In respect of the 2002 PP, the evidence confirms that this approved development provides the only means of access to the undisputed dwellinghouse. As such, this part of the roof area was intended to and has always served 2 purposes: the roof of the single storey rear extension and the means of access to the maisonette. Neither purpose is less significant than the other and I find that this development was therefore for a mixed-use, which occurred from completion of the works in 2003. The design of the approved balustrades would not have readily facilitated access to the wider roof area and as such, I find the ancillary residential use only applied to the walkway and not the whole roof approved under the 2002 PP.
24. The evidence provided in the various statements refers to the roof area being used for ancillary residential purposes following occupation of the maisonette. Council Tax records provided in the appellant's sworn declaration² confirm that the maisonette was not occupied until 1 April 2005. It is therefore reasonable to conclude that the wider use of the roof area did not occur until or after the occupation of the maisonette commenced, some considerable time after the 2002 PP development had been completed. The residential use of the whole roof area above the single storey rear extension at No 51 would therefore represent an expansion of the residential purposes envisaged under the 2002 PP. As the 2002 PP included ancillary residential use of part of the extension's roof, and conditions were not imposed to prevent the residential use of the roof area or to require the permanent retention of the balustrades, I do not find the expansion of the ancillary residential use approved under the 2002 PP to be a material change of use.
25. While balustrades were provided to both sides of the walkway, these had an open form and would have allowed people to access the whole roof area without any significant difficulty. Specific reference is made to the roof area above No 51A being a 'sun trap'. Witness statements and photographs confirm that the wider roof area was used by residents of the maisonette for a variety of ancillary residential purposes, including sitting out, storage of domestic paraphernalia and hanging out washing. This evidence demonstrates that the

² Sworn Declaration of Lesley Simkin dated 20 February 2018 Exhibit 21

roof area was used for purposes akin to a 'garden' and was therefore more than just the means of access to the maisonette. I find the statements of Mr Ben Cuffe, Mr Jamie Milnes and Mrs Ellie Milnes, former occupiers of the maisonette, to be particularly relevant. These recollections of former residents are corroborated by neighbouring residents and employees of the ground floor retail units. I give this evidence and that of the appellant substantial weight.

26. The Council claims that several aerial images show the wider roof area to be clear of people and domestic paraphernalia and therefore serving no purpose other than to provide the roof to the single storey rear extensions. If the roof area was being used similarly to a residential garden, I find it unlikely that events such as washing being hung out to dry or social gatherings would occur all the time. The lack of evidence of such activity in these images, which portray a snapshot in time, does not confirm that they never took place. I find that these images do not outweigh the version of events set out in the appellant's sworn declaration or the other witness statements. I give this evidence limited weight.
27. The roof area is enclosed on 3 sides by the maisonette and built development at the adjoining properties to either side. The end of the roof area adjacent to No 25 has not been provided with any permanent means of enclosure. This lack of enclosure does not however prove that the roof area cannot be used for ancillary residential purposes. I give this evidence limited weight.
28. While the roof area may not have been used every day by residents or others for ancillary residential purposes, this would be no different from the use of any other domestic garden. Given that the only 'outside' space available to residents and visitors is the roof area, I find that its use, in the manner identified in the evidence, to be more than probable.
29. The removal of the balustrade in 2013 did not materially change the use of the roof area, as the evidence confirms that the ancillary residential use was already occurring. Furthermore, the refurbishment of the roof area in 2015, may have changed the visual appearance of the ancillary first floor roof terrace, but that of itself does not amount to a material change of use.
30. The evidence fails to show that the use of the ancillary roof terrace commenced on 31 December 2003. However, I find that the appellant's evidence precisely and unambiguously shows that, on the balance of probability, the use of the ancillary first floor roof terrace commenced concurrently with the occupation of the maisonette on 1 April 2005. That use has continued without substantial interruption up to and beyond the material date. The use of the ancillary first floor roof terrace is therefore immune from enforcement action.

Conclusion

31. For the reasons given above I conclude, on the evidence available, that the Council's refusal to grant a certificate of lawful use or development in respect of the residential use of the maisonette and ancillary first floor roof terrace was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

M Madge

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 18 March 2018 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black 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:

No enforcement action may be taken as the date for immunity has passed.

Signed

M Madge

Inspector

Date: 3rd March 2021

Reference: APP/M2325/X/19/3242331

First Schedule

The residential use of the maisonette and ancillary first floor terrace

Second Schedule

Land at 25A North Clifton Street, Lytham St Anne's FY8 5HW

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 use 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 of the 1990 Act, on that date.

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

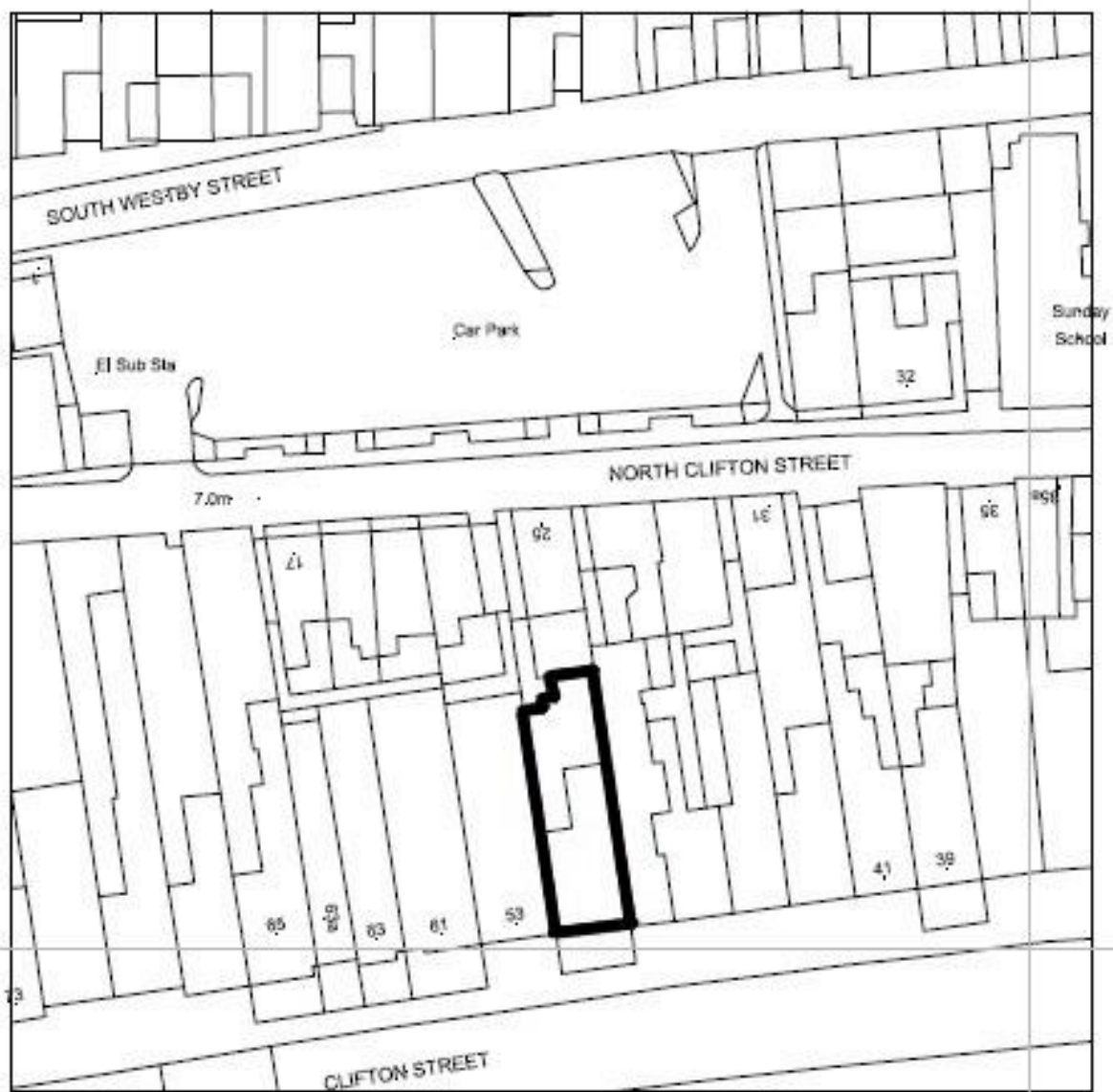
This is the plan referred to in the Lawful Development Certificate dated:

by M Madge MA DipTP MRTPI

Land at: 25A North Clifton Street, Lytham St Anne's FY8 5HW

Reference: APP/M2325/X/19/3242331

Not to Scale



APPEARANCES

FOR THE APPELLANT:

Miss Jane Fox	Fox Planning Consultancy
Mrs Lesley Simkin	Freezewell Ltd
Mr Ted Billington	

FOR THE LOCAL PLANNING AUTHORITY:

Mr Andrew Stell	Development Manager, Fylde Borough Council
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INTERESTED PERSONS:

Miss Elaine Davis

Mr John Johnston