
Appeal Decision

by P N Jarratt BA DipTP MRTPI

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

Decision date: 26 April 2021

Appeal Ref: APP/V3310/X/20/3260607

Maple Cottage, Poplar Farm, Eastertown, Lympsham, Somerset, BS24 0HY

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Paul Brace against Sedgemoor District Council.
 - The application 24719/0027 is dated 11 September 2019.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use or development for which a certificate of lawful use or development is sought is an existing use of a building as a permanent dwellinghouse.
-

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.

Procedural Matters

2. An application for an award of costs has been made by the appellant against the Council. This application is the subject of a separate decision.
3. The appellant points out that in registering the application for the LDC the development was incorrectly described as "Certificate of lawfulness for existing occupation of a dwelling in breach of condition (occupancy condition) attached to planning permission 24/01/00003 (retention of building to be used as holiday accommodation)". The application form describes the application as for the use of a building as a permanent dwellinghouse and this is the description I have used above.
4. For the avoidance of doubt, I should explain that the planning merits of any use or operations are not relevant, and they are not therefore an issue for me to consider, in the context of an appeal under section 195 of the Town and Country Planning Act 1990 as amended, which relates to an application for a lawful development certificate. My decision rests on the facts of the case, and on relevant planning law and judicial authority.

Background

5. Maple Cottage is part of the larger site of Poplar Farm. It is a single storey dwelling granted permission for its retention in 2001 as holiday accommodation (Ref 24/01/00003). The development was the subject of a legal agreement under s106 dated 15 November 2001. The proposal is stated as being "Retention of building to be used as holiday accommodation" on the decision letter. No occupancy condition was attached to the permission but the occupation of the building is limited through the agreement as follows:
 - (1) the occupation of the conversion shall be solely under the supervision of the owner(s) of the main dwelling;
 - (2) the conversion shall remain vacant/unoccupied throughout the period of 10th January to 10th February inclusive in each year;
 - (3) the occupation of the conversion by any person(s) shall not exceed the period of three months in any calendar year.
6. A statutory declaration by the appellant dated 5 September 2019 indicates that the property has been rented out from January 2012 and occupied as a separate open market dwelling by several occupiers. This is supported by copies of tenancy agreements.
7. The parties agree that the current lawful use of the land to be for holiday accommodation. Holiday accommodation does not form a use class but represents a residential use restricted in this case by the description of development on the planning permission and the s106.

Main Issues

8. The appellant's case is that, notwithstanding the restrictions agreed within the section 106 agreement entered into with the grant of permission for the retention of the building as a holiday let and in the absence of a condition specifically restricting occupation, the on-going occupation of the building as an unrestricted dwelling for more than four years before the application means the dwelling is lawful within the terms of the decision letter. An LDC should therefore be issued. The appellant is of the view that the enforcement of the s106 falls outside the consideration the LDC application and is a separate matter that can only be dealt with by way of a further application to remove the restrictions imposed through the s106.
9. The appellant believes that the Council has misdirected itself in thinking that the appellant has applied by way of the LDC application to remove the s106, whereas the application is for a change of use of a building to residential use under s171B(2). Notwithstanding the appellant's comments, the Council's statement does not indicate to me that they have been misdirected but that they have considered the issues in the widest possible manner.
10. The main issues are, firstly, whether the application under s191 is a legitimate means of establishing the lawfulness of the claimed use or whether the s106 agreement is of relevance to the determination of the application; and secondly, whether the development sought concerns a material change of use and, if so, whether the use has become immune from enforcement action through the passage of time.

Reasons

11. No enforcement notice has been served so it is necessary to establish if a breach has occurred. The Council rely on *Gravesham*¹ in reaching the view that a change of use from holiday use to permanent residential use is not a change of use for which planning permission is required; and, consequently s171(B)(2) cannot apply. Similarly, as there is no condition restricting the use as holiday accommodation, the 10 year rule for breaches of condition under s191(B)(3) does not apply. On this basis, the Council concludes there is no breach but simply a breach of the s106 agreement. This approach fails to exclude the appellant's claim that there is a restriction on the consent by way of the description of the development.
12. In addressing the permission, the Council accepts that whilst the description of development is not a 'limitation' for the purposes of Part VII of the Act, it is not necessarily ineffective and the courts have held that this need not be done by condition as the wording of the grant of permission will suffice. I note that the appellant questions the source of the Council's statement.
13. S191(2)(a) and (b) indicate that a use or operations are lawful if no enforcement action may be taken in respect of them, whether because they did not involve development or require planning permission or the time for taking enforcement action has expired or for any other reason; and, they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
14. There are different types of enforcement action available to the local planning authority but s171A (2) describes what constitutes enforcement action for the purposes of the Act. These include the issue of an enforcement notice or a breach of condition notice. In this case, the use is in breach of an occupancy restriction set out in a s106 agreement which does not fall within the categories identified in s171A (2), albeit that enforcement of planning obligations and other special controls are conferred separately to Part VII Enforcement contained in the Act.
15. The Council considers that it is not possible to gain an LDC in respect to matters restricted under the terms of a s106 agreement simply because the enforcement of the agreement falls outside Part VII of the Act. Whilst I understand the logic of the Council's approach, it fails to acknowledge the straightforward reading of s191(2)(a) and (b) and of s171A(2), the wording of which I regard as unambiguous. I also note the appellant's reference to National Planning Practice Guidance (17c-004-20140306) which indicates that a grant of a certificate applies only to the lawfulness of development in accordance with planning legislation and that it does not remove the need to comply with other legal requirements of licensing and permitting schemes. Although the s106 agreement is part of the same Act that contains parts relating to enforcement and lawfulness, s191(2)(a) and (b) is clear that s106 matters are not tested under those provisions.
16. The parties have referred to various decisions. The Stratford decision (APP/J3720/X14/3002100) is interpreted by the Council as having a direct parallel with this appeal in that the occupation of the building in that case as a dwelling is unlawful when considered against the permission and the s106

¹ *Gravesham BC v SSE* (1992)

agreement when read as a whole. However I accept the appellant's interpretation that this case can be distinguished on its facts, in particular, that the appellant in that case claimed that a restriction in a s106 could be removed by way of a planning appeal, which is not what the appellant is seeking to do in this appeal.

17. In the Peel case² it was held that in the absence of a subsequent permission for an alternative use of the buildings the obligations within the original s106 agreement continue to 'bite' on the development and notwithstanding the subsequent permission it would not be 'lawful' to sell unrestricted goods. In the light of this case the Council considers therefore the s106 obligations at Maple Cottage continue to bite and any non-holiday occupation would be unlawful. Again the case to be distinguished on its facts as it is reliant on a different principle having no relevance to the current appeal and it is not, in any event, asserted by the appellant that the s106 agreement no longer applies.
18. Reference is made to Norfolk Homes³ in which it was held in paragraph 5 of the judgement that the provisions of s191 and s192 "do not enable the legal effect of non-compliance with a s106 obligation to be tested... Such an obligation is a freestanding legal instrument which does not form part of the grant of any planning permission and its conditions." This is unambiguous.
19. The Council draws attention to remarks elsewhere in paragraph 5 which refer to the LDC application made in the Norfolk Homes case being outside the limited terms of s192 and there would be no jurisdiction to determine the appeal. This led the Council to consider whether the current appeal could be a nullity. They consider that the application is misguided as neither s192, nor s193(5), enable the legal effect of non-compliance with a s106 agreement, which forms part of the decision, to be tested. However, it is clear from the unambiguous comments about non-compliance with s106 obligations, and without further detailed argument from the Council to indicate that the current appeal is a nullity, that I attach limited weight to this line of argument.
20. I find that in having regard to the established principles in the interpretation of a planning consent⁴ and to other caselaw referred to inclines me, on balance, towards the view that a development in breach of obligations in a s106 agreement is not relevant in this case as the s106 agreement is a wholly separate matter.
21. I therefore conclude on the first issue that the s191 application is a legitimate means of establishing the lawfulness of the claimed use and that the s106 agreement is a separate matter not of relevance to the application for an LDC.
22. Turning to the second issue, the appellant cites caselaw⁵ relating to whether a change of use has occurred is a matter of fact and degree and that it is necessary to understand whether a change in the character of the use has occurred which is sufficient to be material. The appellant points out that the Council restricted the use of the appeal property to holiday accommodation which was considered to be a use acceptable on the site whereas an unrestricted dwelling was not and refers to Sedgemoor Local Plan Policy at the time of the 2001 application. The appellant states that the Council made an

² Peel Land and Property Investments Ltd plc v Hyndburn BC [2013] EWCA Civ 1680

³ Norfolk Homes v North Norfolk Council [2020] EWHC 2265 (QB)

⁴ R v Ashford BC ex parte Shepway DC [1999] 2 PLR 12 QBD and Barnett v SSELG [2008] EWHC 1601 (Admin)

⁵ Moore v SSE [1998] 2 PLR 65; FSS v Arun DC and Brown [2006] EWCA Civ 1172

assessment of harm arising from a private dwelling that could only be overcome if the dwelling was restricted to holiday accommodation. On this basis, the appellant asserts that the Council considered the two uses within C3 to be distinguishable and I would agree, as a matter of fact and degree, that a change of use has occurred.

23. Although not argued by the appellant, the Council has addressed the point that the holiday use ceased less than 10 years prior to the application (in 2012) and had an occupancy condition been imposed on the decision, then the normal 10 year rule would have applied. (As no occupancy condition was imposed this is a somewhat academic point). The Council considers that as there is no period of immunity for non-compliance with a s106 agreement and as the agreement forms part of the permission, the Council does not agree that the occupation of an unrestricted dwelling is lawful.
24. Additionally, the Council considers that the submitted evidence regarding tenancies fails to show a continuous use of the land as a single dwelling for either 4 or 10 years. The statutory declaration indicate that Maple Cottage was occupied between 7 January 2012 to 28 August 2017 and from 4 September 2017 to the present. The Council consider that the gap of one week between the tenancies could be over 2 months as there is a lack of evidence such as utility or other bills to support continuity of use. I have no reason to disregard the appellant's version of events in respect of the tenancies and in any event a small gap of one week to be *de minimis*. Having regard to the appellant's statutory declaration, to which I attach substantial weight, I regard the evidence to demonstrate on the balance of probabilities that the property has been used as an unrestricted dwelling for a period of at least four years prior to the application for the LDC contrary to the description of the development in the planning permission.
25. The appellant considers that the Council's approach to control occupancy was incorrect and reference is made to a 2004 appeal decision⁶ in which the Inspector in allowing an appeal, concluded that the most suitable means of governing future occupation was by means of a conditional planning approval only and that an obligation was unsuitable in that particular set of circumstances. Whilst this may well have been the case in that decision, a s106 obligation exists in respect of Maple Cottage, notwithstanding that the current practice of the imposition of an occupancy condition would have been more appropriate.
26. I therefore conclude on the second issue that the development sought involves a material change of use and that, on the balance of probabilities, the use has become immune from enforcement action through the passage of time as it has been used as permanent dwelling for a period of at least four years prior to the date of the application for the LDC.

Conclusions

27. I can understand the logic behind the Council's approach to challenge the appellant's position that the s106 should be ignored and that the decision letter on the original 2001 permission should be read at face value, as the Council

⁶ APP/C1435/A/03/1133583

considers that this over-simplifies the concept of planning permission. It is the case that the 2001 application was made specifically for continued holiday use, the decision letter refers to holiday use and an obligation was entered into specifically to restrict the use to holiday occupancy. In reading the decision and the obligation together, the intent clearly was to restrict the use to holiday occupancy. Nevertheless, the relevant sections of the Act and the caselaw referred to by the parties provides for an LDC to be issued, irrespective the breach of the s106 agreement. The Council has separate powers to enforce that agreement should it choose to do so.

28. I note the appellant's intention, at the appropriate juncture, to make an application under s106A(3)(b) for the obligation to be formally discharged and that will be a matter for the parties at that time.
29. 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.

P N Jarratt

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 11 September 2019 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and cross-hatched 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:

The use is immune from enforcement action under the provisions of s171B(2).

Signed

P N Jarratt

Inspector

Date 26 April 2021

Reference: **APP/V3310/X/20/3260607**

First Schedule

The use of a building as a permanent dwellinghouse.

Second Schedule

Land at Maple Cottage, Poplar Farm, Eastertown, Lymsham, Somerset, BS24 0HY

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 /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were 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 /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation 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 my decision dated: 26 April 2021

by **P N Jarratt BA DipTP MRTPI**

**Land at: Maple Cottage, Poplar Farm, Eastertown, Lympsham, Somerset,
BS24 0HY**

Reference: APP/V3310/X/20/3260607

Scale: Do not scale

