



Appeal Decision

by S A Hanson BA (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 June 2021

Appeal Ref: APP/G3110/X/20/3259326

234 Headington Road, Headington, Oxford OX3 7PS

- 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 Dr M S Parvizi against the decision of Oxford City Council.
 - The application Ref 19/03390/CEU, dated 27 December 2019 was refused by notice dated 18 March 2020.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act)
 - The use for which a certificate of lawful use or development is sought is to certify that the existing annex as self-contained accommodation is lawful.
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Decision

1. The appeal is dismissed.

Preliminary matters

2. The appeal concerns the lawfulness or otherwise of the use of the former garage building as a self-contained unit of accommodation. It was agreed by the parties that because of the characteristics of this case, it would be possible for me to reach my decision on the basis of the representations made, without the need to visit the site.
3. Section 191(2) of the 1990 Act provides that a use of land is lawful if no enforcement action may be taken in respect of it, whether because it did not involve development or require planning permission or for any other reason. The change of use of a building from a domestic garage to use as a single dwelling house is development. Section 171B(2) of the 1990 Act provides that where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. It is this provision that the appellant relies upon.
4. For the avoidance of doubt, in an appeal under s195 of the 1990 Act against the refusal of an LDC, the planning merits of the matter applied for do not fall to be considered. The decision will be based strictly on factual evidence, the history and planning status of the site in question and the application of relevant law or judicial authority to the circumstances of the case. Rights under the Human Rights Act 1998 are not engaged in the context of an LDC appeal, except in relation to the fairness of the proceedings. The grant of an LDC is declaratory of lawful use or development rights and a refusal to grant one is simply a refusal to grant the declaration sought.

5. Where an LDC is sought, the onus of proof is on the applicant (now the appellant) and the standard is the balance of probabilities. If there is no evidence to contradict or make the appellant's version of events less than probable and their evidence is sufficiently precise and unambiguous, an LDC should be granted.

Main Issue

6. This is whether the Council's decision to refuse to issue an LDC was well-founded. The time limit relevant for taking enforcement action under s171B(2) of the 1990 Act regarding the use of the building as a single dwellinghouse is the end of four years beginning with the date of the breach. The appellant therefore needs to show on the balance of probability, that by the date of the application for the LDC, the use of the site for independent residential accommodation had existed on a substantially uninterrupted basis for at least four years, and had not subsequently been abandoned or supplanted by another use. The burden of proof rests with the appellant.

Reasons

7. The appeal concerns a former domestic garage situated within the curtilage of 234 Headington Road. The appellant's case is that the annexe building has been occupied continuously as an independent dwelling since December 2010. To support his case, various documents have been submitted which aim to show that the building has been used as a separate dwelling for the requisite period. These documents include tenancy agreements, copies of bank statements detailing rent payments made, electricity bills, an email and letter from the tenant, a letter from the Valuation Office Agency dated September 2018¹, energy performance certificate and a statement of case.
8. From the evidence submitted, it seems that the annexe had been rented to one tenant, Ms Oezmen. The appellant has provided copies of electricity bills from 15 February 2013 to 15 June 2013 which are addressed to the tenant but relate to another property. Electricity bills for the appeal property cover a period from 9 October 2015 to 10 February 2017 and then from 9 April 2018 to 3 October 2018, which is around the time when I am informed that the tenant vacated the property. These bills are addressed to Ms Oezmen, but without a breakdown of usage of electricity, they provide limited information to indicate that the annex has been used as claimed.
9. Evidence in the form of short term tenancy agreements show that a formal rental agreement was in place between 16 November 2010 and 15 November 2011; 16 November 2011 and 15 November 2012; 16 June 2013 and 15 June 2014; 26 September 2015 and 25 December 2015; and 8 February 2016 and 7 August 2016. Copies of bank statements show monthly payments made between January 2012 and December 2012; June 2013 and December 2013; January 2014 and December 2014; January 2015 and April 2015; March 2016 and December 2016; January 2017 and December 2017; January 2018 and September 2018. Reference is made to "a rolling tenancy agreement afterwards" however, there is no information as to how this operates and there appears to be no reference to such an option within the agreements themselves.

¹ Lists the annexe as a Band A property from 7 June 2018

10. From the evidence provided, I have identified breaks in the tenancy agreements of several months, and periods where no rent was received. There appears to be a period between December 2012 and May 2013 when neither rent was received or a tenancy agreement was in place. Furthermore, there is a significantly greater gap between May 2015 and February 2016 where no rent is shown as having been received, and between July 2014 and September 2015 where there is no tenancy agreement.
11. The appellant has referred to any "gaps in evidence" being explained by the submissions and he refers to appendices MSP/6 and MSP/7 provided by the tenant which state that she has been in "actual occupation"² of the annexe continuously. In these submissions, the tenant says that rent had been paid for the whole period (13 December 2010 until 4 October 2018) with the exception of 1 June 2015 until 25 September 2015 when "rent payment has been waved (sic) by landlord due to renovation in the annexe, painting, kitchenette instalation (sic), bathroom repair, etc." and "25 December 2015 until 7 Febraury (sic) 2016 - rent payment has been waved (sic) by landlord due to repairs in the annexe water pipe damage in the Annexe".
12. This may have been the case, but I have not been provided with any evidence to substantiate these claims. It would seem reasonable to me that renovations and repair of a water damaged property would have incurred expenses and copies of invoices/bills for works and/or materials would be available.
13. Regardless of the above, the appellant's statement provides that during the period of maintenance to the loft and bathroom, the tenant's niece occupied the annexe when the tenant was away on field research. He further refers to the fact that the "head tenant" (Ms Oezmen) "may have" sub-let the annexe at other times when she was away. The appellant claims that the property has remained occupied even at times of absence by Ms Oezmen.
14. However, final comments³ received from the appellant state that "the annex has been used for more than four continuous years by my tenant Miss Muejgan Oezmen who has been doing her PhD studies at Oxford Brookes University and paying minimum rent. As regards the 'gap' that the local Council mentions in paragraph 4.4.2, I had clearly explained that on one occasion when there was a few months gap, the tenant travelled for her field research in Africa and I had agreed to keep the annex vacant for her for this duration and not charge her any rent. Her personal effects remained at the annex till she returned."
15. Information from Ms Oezmen⁴ states that "since 13th December 2010 until today (email dated 14 June 19) all my personal belongings and my furniture remained in the Annexe". However, the Council provides that when they visited the appeal property in November 2018 and March 2019⁵, they were told that the property was not occupied and they state there was no evidence of personal belongings or food to indicate that someone was living there.

² Actual occupation is referred to by the appellant as including "visiting the property regularly to supervise renovation work as established by the principle of *Lloyds Bank v Rosset* case, relevant when the head-tenant was on field research and the property was refurbished". I have not been provided with a copy of the judgement and therefore I am unable to assess its relevance to the appeal case.

³ Dated 1 February 2021

⁴ MSP/6

⁵ Prior to the submission of the LDC application on 27 December 2019

16. It was held in the established case of *Swale*⁶ that there is a difference between an established dwellinghouse, when an occupier does not have to be continuously or even regularly present in order for the building to remain in use as a dwellinghouse, and where there is no established use. To be immune from enforcement action under s171B(2), the use of a building as a dwellinghouse must be 'affirmatively established' not merely at the start but over the whole period.
17. I am mindful that planning practice guidance states "In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability."
18. Nevertheless, the onus rests with an appellant to demonstrate his case in relation to an LDC. I am not persuaded that the appellant's evidence is sufficiently precise and unambiguous to show that the use of the annexe has gained immunity through the passage of time. The information before me does not present a picture of continuous independent residential occupation over a four year period, which is required to gain immunity from enforcement action. Furthermore, at the time of the application for the LDC the annexe was not occupied by a tenant.
19. Given the lack of clarity, the evidence does not demonstrate, on the balance of probability, that the annexe had been used as a separate dwelling for a continuous period of four years at the time the application was made.

Conclusion

20. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of the change of use of the building to use as a single dwellinghouse (Use Class C3) 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.

S A Hanson

INSPECTOR

⁶ *Swale BC v FSS & Lee* [2005] EWCA Civ 1568