



Appeal Decision

by **Jean Russell MA MRTPI**

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

Decision date: 23 July 2021

Appeal ref: APP/Q0505/X/21/3267012

59 Darwin Drive, Cambridge, CB4 3HQ

- The appeal is made by Mr A Powell under section 195 of the Town and Country Planning Act 1990 (TCPA90) against the decision of Cambridge City Council (the Council) to refuse an application to grant a certificate of lawful use or development (LDC).
 - The application (ref: 18/1969/CLUED) was made under section 191(1)(a) of the TCPA90, dated 12 December 2018 and refused by notice dated 15 September 2020.
 - The existing use for which an LDC is sought is described as 'separate one bed dwelling to rear of 59 Darwin Drive'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The appellant has applied for a full award of costs against the Council. That application is subject to a separate decision.
3. This appeal is determined on the papers and I have not visited the site.

The Appeal Site and Development

4. 59 Darwin Drive is a mid-terraced building, albeit that it is only linked to no. 61 at first floor level; there is a path through the building from the street to the rear garden at the property. No. 59 is used as two separate flats but has been licensed for use as a small house in multiple occupation (HMO).
5. The appeal site, as shown edged in red on the location plan submitted with the application, comprises an outbuilding within the rear garden at no. 59 plus the path to it from Darwin Drive. The plan shows that the main building at no. 59 is outside of the site – but the appellant's statement of case suggests otherwise. I take the statement as meaning that the outbuilding and no. 59 are in the same ownership.
6. There is no dispute that the outbuilding itself is immune from enforcement action under s171B(1) of the Town and Country Planning Act 1990 (TCPA90) because the operations undertaken to construct it were substantially completed more than four years before the LDC application was made. An LDC is sought to ascertain that the existing use of the outbuilding is lawful as described below.
7. The plans show that the outbuilding is laid out as a studio rather than one bedroom flat, but still contains the facilities required for private day-to-day living. It could be used as a single dwellinghouse and I take that as the appeal use.

Matters of Evidence

8. Where an LDC is sought, the onus is on the appellant to make their case on the balance of probabilities. Their evidence should be accepted if it is sufficiently

precise and unambiguous, and there is no evidence to contradict their version of events or make it less than probable.

9. I take the appellant's 'statutory declaration' dated 31 October 2019 as being sworn evidence because it was signed by a solicitor. However, I agree with the Council that the 'statutory declarations' made by the appellant on 31 December 2020, and by his managing agent and the previous owner of the site, were not so signed and cannot be described as sworn. That finding does not in itself lead me to question the contents of the evidence.

Main Issue

10. The main issue is whether the use of the outbuilding as a single dwellinghouse is lawful by reason of immunity from enforcement action.

Reasons for the Decision

11. S171B(2) provides that 'no enforcement action may be taken after the end of the period of four years beginning with any breach of planning control consisting in the change of use of any building to use as a single dwellinghouse'.
12. The appellant must show that the use of the outbuilding was changed to use as a dwellinghouse at least four years before the date of the LDC application – 12 December 2018 – and that the use continued without substantial interruption for four years, such that the Council could have taken enforcement action at any time in the period. The appellant has only owned the outbuilding since January 2017, and so he relies on evidence from the previous owner, PK.

Change of Use

13. In order for the four year rule set out under s171B(2) to apply, there must have been a 'change of use' of the building to use as a single dwellinghouse. Where a building is used unlawfully as a dwellinghouse from the date of construction, the use can only become immune from enforcement after ten years under s171B(3).
14. The Council states that the appeal outbuilding can be seen on aerial photographs dating from 2008 and on plans submitted with a planning application made in 2011¹. It appears from the latter that the outbuilding was then being used as a 'study/home office' – presumably incidental to the residential use of the main building at no. 59 – rather than as separate dwelling. This evidence assists the appellant because it shows that there probably was a change of use at some point.
15. PK said in a letter that the outbuilding was constructed before 2011 and 'has been in constant use since that date' – but not what the use was. In their declaration, PK said that 'following the construction of the building at the rear of 59 Darwin Drive in 2011, it was continuously occupied as a self-contained unit...during my ownership of the self-contained unit between 2011 and 2017 it was continuously let as a separate and self-contained unit of residential accommodation'.
16. Thus, PK gave contradictory accounts as to when the outbuilding was constructed but a clear impression that the structure has only been used as a dwellinghouse. I accept that a home office is residential in nature, and witnesses of fact cannot be expected to know the precise meaning of incidental use. However, PK ought to have been aware as to whether the outbuilding was being let out separately or not. Their evidence raises a prospect that the 2011 plans were inaccurate and the outbuilding has always been used as a dwellinghouse. If that is so, s171B(2) would

¹ The application (ref: 11/1002/FUL) for the use of the main building at no. 59 as two flats was approved.

be disappplied and the appellant would have to demonstrate that the outbuilding had been used as a dwellinghouse for ten years by 12 December 2018.

17. However, the submitted copies of assured shorthold tenancy (AST) agreements undermine PK's declaration because they do not date back as far as 2011. Given the clarity of the Council's evidence and the inconsistencies in that from PK, I am satisfied that the outbuilding was constructed in or before 2008, and it was used as a home office for some years by occupiers of the main building at no. 59 before its use was changed to that of a single dwellinghouse. The four year rule applies but there are questions about the reliability of PK's evidence.
18. The first AST agreement is dated 22 April 2013 and, as discussed below, I accept that it relates to the outbuilding. The appellant – although not then the owner – installed a replacement electrical consumer unit in the structure on the very same day. I find the coincidence of electrical works and a new letting unsurprising.
19. The appellant said in his second declaration that 'at the time of the installation...the property was occupied as a separate residential unit as illustrated on the floor plans'. It is curious that the appellant gave no details as to what he actually saw to tell him that the outbuilding was 'occupied'; there is a fair chance that the tenant was literally moving in on 22 April 2013. Even so, I find it probable that the change of use took place on or around that date. The question now is whether the use took place for a continuous four year period.

Continuity of Use

Assured Shorthold Tenancy Agreements

20. The appellant has submitted copies of the following AST agreements:

Tenant(s)	Accommodation at no. 59	AST Start Date	Landlord
JA	Annex	22 April 2013	PK
MA(M) and JB	Studio A	1 December 2016	PK
MLAS (or MLAD)	Annexe (sic)	2 January 2017	PK
LDW and BRU	59C	13 July 2018	Appellant
SZ and JH	59C	12 March 2020	Appellant

21. I accept all of the AST agreements as reliable – and note that they were all made with conventional six month terms that could (and often would) be rolled forward without any need for a new agreement. Accordingly, however, none of the agreements show when any tenant moved out. It is not the case, as PK claimed, that 'the tenancy agreement of [JA] dated 22 April 2013 confirms that [they] lived at the self-contained unit between 22 April 2013 and 01st December 2016'.
22. Moreover, it seems that that the AST agreement dated 1 December 2016 was submitted in error, with 'Studio A' probably being one of the flats in the main building at no. 59. PK described the outbuilding as the Annex or Annex C, and the appellant conceded that MA(M) 'was an occupant at the neighbouring property'². But if the AST agreement for Studio A is irrelevant, that begs the question as to

² The AST agreements also show that Studio A was let at a higher rent to the Annex.

why PK said 'when [JA] on 01st December 2016 ended her tenancy, I let the self-contained unit to [MLAS] who lived at the property between 01st December 2016 and 10th January 2018'.

23. MLAS actually rented the 'Annex' from 2 January 2017. When flats or houses are rented out, there is normally a gap between one tenant leaving and the next arriving. The length and number of gaps should be assessed on a fact and degree basis when deciding whether use as a dwelling continued for a four year period. A gap of one month may or may not be considered sufficient to break the continuity of the use, depending on what happened during that time.
24. There is nothing to show that the outbuilding was being marketed or refurbished to further the dwellinghouse use between 1 December 2016 and 2 January 2017. In any event, PK's evidence contains too many inconsistencies for me to accept it as likely that JA moved out on the former date which seems to have significance only in relation to 'Studio A'. There is nothing to show when JA stopped paying rent and I cannot find that the outbuilding was continuously used as a single dwellinghouse from 22 April 2013 to 2 January 2017 on the balance of probabilities.
25. I accept that MLAS was living in the outbuilding when the appellant bought the site, and that '59C' on the next two AST agreements was the outbuilding. There is nothing to contradict the claims by the appellant and his agent that the outbuilding was continuously let from January 2017, with no subsequent gap between tenants being longer than eight days. However, these findings do not show that the use of as a dwellinghouse had continued for four years by the date of the LDC application.

Other Evidence

26. The electrical reports submitted by the appellant add weight to my finding that the change of use of the outbuilding took place in April 2013, but do not show that the dwellinghouse use continued without substantial interruption, on the balance of probabilities, for any four year period.
27. The Council notes that an HMO licence for no. 59 dated 28 March 2017 makes no reference to the outbuilding and there are no Council Tax or electoral records relating to the structure. That evidence is unhelpful for the appellant, but it is not unusual for people who rent small properties for a few months or years to avoid Council Tax. I would not dismiss the appeal on the local authority records alone.
28. The appellant submitted other evidence to the Council pertaining to Studio A or '59A'. Again, it is likely to be irrelevant but I will consider the evidence – as described by the Council – for the avoidance of doubt. The email concerning a tenant who stayed for two years from March 2017 could not show continuity of use over a four year period prior to December 2018. The declaration by another tenant that they lived in Studio A for five years was not signed and did not specify the five year period, if indeed it was a single period.
29. The length of time that it took the Council to determine the LDC application is not relevant as to whether the appeal use is lawful.

Conclusion

30. On the basis of Council, tenancy and electrical records, I find it probable that the use of the outbuilding was changed to use as a single dwellinghouse in or around April 2013. That finding assists the appellant, since it means that the four year rule applies, but it also reveals that there are inconsistencies in the evidence of the previous owner of the site. For that reason and given the limits to what may be gleaned from the AST agreements, I find the appellant's evidence insufficiently

precise or unambiguous to show that the use had taken place for a continuous four year period by 12 December 2018 on the balance of probabilities.

31. I conclude that the appellant has failed to demonstrate that the use of the outbuilding as a single dwellinghouse is lawful by reason of immunity from enforcement action under s171B(2). The Council's refusal to grant an LDC was well-founded and the appeal must fail. I will exercise accordingly the powers transferred to me in s195(3) of the TCP90.

Jean Russell

INSPECTOR