
Appeal Decision

Site visit made on 25 May 2021

by N Thomas MA MRTPI

An Inspector appointed by the Secretary of State

Decision date: 27 July 2021

Appeal Ref: APP/V2255/X/20/3261579

**Black Oast, Godfreys Grave, Hernhill, Forstall, near Faversham, Kent
ME13 9JG**

- 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 Ms Amanda Barnes against the decision of Swale Borough Council.
 - The application Ref 20/503063/LDCEX, dated 9 July 2020, was refused by notice dated 21 September 2020.
 - 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 general residential purposes as a permanent and full-time dwelling house.
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. I have taken the description of the existing use for which the LDC is sought from the application form, but I have removed superfluous wording.

Background

3. The appellant purchased the property in 2007 when the barn was dilapidated and without a roof, windows or doors. It was thought to have previously been used for residential purposes until the mid-1940s, and then for agricultural storage which had ceased in approximately 2000. It was not habitable when it was purchased.
4. Planning permission was granted under reference SW/09/1330 to convert the building to form 'dyslexic specialist unit, teaching suite and one accommodation'. The submitted proposed floor plan indicates that the 'one accommodation' was a one bedroom unit of accommodation, containing a kitchen, living room, dining area, bedroom with en-suite bathroom. Internal stairs are shown on the floor plan. The dyslexic suite consisted of a teaching room and a parents' room, with internal access from the one bedroom unit as well as its own external access. The design and access statement for the application indicates that only the ground floor of the original two storey building remained, with a rudimentary roof in horizontally laid corrugated iron sheeting. The permitted scheme included a new pitched roof, new openings for doors and windows, and a metal flue for a wood burning stove.

5. The permission was subject to 15 conditions, the following are of particular relevance:
 - Condition 2 states the holiday let hereby permitted shall be used solely for the purpose of holiday accommodation and shall not be let or occupied by any person or group of persons for a continuous period of more than 4 weeks in any calendar year.
 - Condition 6 states that detailed drawings of all new external joinery work and fittings together with sections through glazing bars, frames and mouldings shall be submitted to and approved in writing by the district planning authority before any development takes place.
 - Condition 7 of the permission requires that the development shall not be carried out otherwise than in complete accordance with the approved plans and specifications.
 - Condition 14 states that notwithstanding the approved details, the flue hereby permitted shall be located on the rear roof slope. Details of the exact design and siting of the flue shall be submitted to and approved in writing by the district planning authority prior to the commencement of works and the development shall proceed in accordance with the approved details.
6. In April 2010 the appellant made an application to discharge some of the conditions, supported by various plans. The 'discharge letter' refers to conditions 3, 4, 5, 6, 9 and 10, although I note that application for approval of details reserved by condition included conditions 11, 12, 13 and 14. Nonetheless, the approval refers only to conditions 3, 4, 5, 6, 9 and 10.
7. Works to the building commenced in November 2010. The building was converted and subsequently occupied by the appellant as a self-contained dwelling with the dyslexia teaching unit at one end of the building. The appellant and her husband 'camped' at the property and formally moved into it as their main residence in April 2011 and lived there until August 2018. In August 2018 the appellant moved out and the residential accommodation was mostly used as a holiday let, with some use by family members, until the appellant and her husband moved back into it in 2020. The appellant used the dyslexia unit for teaching until 2017, and her daughter started using it again for the same purpose in 2019.

Reasons

8. The application seeks to establish whether the use of the building as a permanent and full-time dwellinghouse was lawful on the date of the application. The onus is on the applicant to provide all the relevant information and evidence to support their case. On appeal, the Inspector's role is to decide whether, on the evidence, the Council's refusal to issue an LDC was well-founded or not. The case must be considered solely on the relevant legal tests, and its planning merits are of no relevance. The appellant must show, on the balance of probabilities, that the development was lawful at the date of the application.
9. Section 191(2) of the 1990 Act provides that existing uses are lawful at any time if no enforcement action may be taken in respect of them because the time for enforcement action has expired. S171B sets out the time limits for taking enforcement action. Where there has been a breach consisting in the

change of use of any building to use as a single dwellinghouse, s171B(2) provides that no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. It has been established by case law that this includes the situation where the breach arises from a breach of condition, if the condition being breached has the effect of preventing the change of use described s171(2). For all other breaches of planning control, the period for immunity is ten years.

10. The appellant argues that the building was not converted in accordance with the approved details, and therefore the planning permission was not implemented. As a result, condition 2 cannot have application and the operational development to convert the building, as well as its use as a single dwellinghouse for permanent occupation are lawful, as they have existed for a period in excess of four years. If this argument succeeds, it would need to be demonstrated, on the balance of probabilities, that the change of use to a dwellinghouse occurred at least four years prior to the date the application was made, that is on or before 9 July 2016, and was sustained for a full four year period.
11. In support of this argument, the case of *Handoll*¹ is cited. It was found that a bungalow built on land away from that in respect of which the planning permission was to operate, was not affected by an occupancy restriction because it had no relevance to a building put up without planning permission. It confirmed previous judgements to the effect that if a development does not comply in a material respect, or to a material extent, with the planning permission, a condition attached to the permission cannot have application. It was found that an earlier judgement in *Kerrier*² was wrongly decided and cannot be relied upon. Whether a permission has been implemented is a matter of fact and degree, and it needs to be considered whether the development that has been carried out differs in a material respect or to a material extent with the planning permission.
12. The appellant also puts forward an alternative argument. If it is found that the permission has been implemented and that therefore the restriction on the occupancy of the accommodation through condition 2 is engaged, the period for immunity is only 4 years as a result of s171B(2). In support of this argument, the appellant refers to the case of *Arun*³, where the Court of Appeal found that the provisions of s171B(2) applied to the breach of a condition relating to a change of use of a granny annex extension to use as a single dwellinghouse. If this argument succeeds, the appellant needs to demonstrate that the use of the dwellinghouse carried on for the required four years, and that there had been no subsequent compliance with condition 2.
13. The building was converted, with an internal layout that roughly corresponds with the approved drawings, and was used as a residential unit and the dyslexia unit. The variation to the internal layout does not have any material effect on the character of the development.
14. It has been established by case law that the distinctive characteristic of a dwellinghouse is its ability to afford to those who used it the facilities required for day-to-day private domestic existence. It does not necessarily lose that

¹ *Handoll & Suddick v Warner & Goodman & Street & East Lindsay DC* [1995] JPL 930

² *Kerrier District Council v SSE* (1981) 41 P&CR 284

³ *First Secretary of State v Arun District Council & Brown* [2006] EWCA Civ 1172

characteristic if it is occupied for only part of the year, or at infrequent intervals, or by a series of different persons. The building provides all the facilities for day to day private domestic existence, whether it is in use as holiday accommodation or is occupied on a permanent basis as a main residence and it is a dwellinghouse. The fact that it was not occupied as holiday accommodation when it was first converted does not therefore indicate that the permission was not implemented, only that condition 2 was breached. It follows that it did not lose the characteristic of a dwellinghouse when it was occupied for holiday accommodation.

15. The approved conversion works were extensive, involving a new roof as well as new openings for windows and doors. There are a number of instances where the development has diverged from what was approved. Most of these relate to minor variations in the dimensions and design of the windows and doors, as well as other minor discrepancies. A degree of variation is not out of the ordinary in the translation from drawings to building works.
16. Some of the variations are more noticeable when comparing the building as converted with the approved drawings. Window opening WG02 involved reopening an existing window opening. It has been formed with an arch which was not shown on the original conversion drawing but appears to follow the window detail shown on drawing number 07478-AL (04) 08 and in any event matches the other windows on the elevation and is not material.
17. The brick buttress on the north east elevation is not shown on the approved drawings, but is discernible on the drawing of the original building (drawing number 07478 AL 01). The chimney breast on the north west elevation is also shown on this drawing. It appears from the approved drawing number 07478-AL(04) 06 Rev A that the chimney breast was to be built upwards on the outside of the gable wall with the same width as the original chimney breast. However, what has been built tapers so that the upper part is narrower. This is a variation from the approved drawing but it has a very limited effect on the appearance of the elevation and is not material.
18. Door DG04 and window WF01 have been constructed differently to how they were shown on the approved drawing 07478-AL(04) 06 Rev A and the details 07478-AL(04) 10. The door was intended to have a brick archway over it to match the other windows. Instead, the door with the window above fill the opening, with no brickwork between them, only a strip of white boarding. This is a minor variation that has little impact on the appearance of the building and does not differ to a material extent from the planning permission.
19. Instead of a new window opening, window WG01 was designed to fit in an existing arched space. As this reuses an existing opening it has little impact on the appearance of the building. There are three doors in this elevation, which have all been built slightly taller than those approved. This has only a very limited impact on the appearance of the building, as the arches above the openings still fill the space between the top of the opening and the eaves.
20. In terms of the timber shutter door for WG07 on the south east elevation, instead of the full width door on one side of the opening, a single width door has been installed to the other side. It is not readily apparent that when closed the doors would not cover the entire window, although I note that it is identified as a bifold door on drawing no. 7. It is not clear from the approved drawings whether the upper floor opening DF01 was to be glazed behind the

timber door. The timber door is not present, and it is instead a glazed opening. However, these minor variations have little impact on the appearance of the building and are not material.

21. The flue on the original drawings was shown to be on the end gable of the building, but condition 14 required it to be on the rear roof slope, with details to be agreed. The drawing submitted with the discharge of conditions indicated it to be on the rear roof slope, but what has been installed is taller above the ridge and placed higher in the roof slope, and as a result is more prominent than that shown on the approved drawings. However, this is a minor element of the conversion of the building, and in the context of the extensive works approved by the permission, it cannot be said that it indicates that a different development was carried out to the one approved.
22. A residential use and the use of the dyslexia unit have been carried out, and in the context of the extensive works to the building, that have for the most part been carried out in accordance with the approved details, I do not agree that the variations, even when taken together, have resulted in a development that differs materially from that which was approved. I therefore conclude that the permission has been implemented and the conditions are engaged.
23. The appellant states that the conditions were deliberately strictly worded, with the reasons for the conditions specifying that it is essential that the details used do not detract from the special character of the building, and that therefore the variations from the approved details are material. However, while not in accordance with the approved details, and therefore potentially in breach of the relevant conditions, the variations do not necessarily indicate that a different development has been carried out. I am satisfied that the development that was permitted by the 2010 permission was carried out and I do not agree therefore that the building was unauthorised when it was constructed. Therefore condition 2 of the permission applies.
24. I have already found that the use of the building, whether as a main and permanent residence or holiday accommodation, has been as a dwellinghouse. It is not therefore the case that the holiday accommodation condition prevents the use of the building as a single dwellinghouse, and therefore the period of immunity that would need to be demonstrated is 10 years. The case differs from *Arun* where a new planning unit was created through the occupation of the extension as a separate unit of accommodation in conflict with the planning condition, and from *Moore*⁴ where the particular circumstances of the case indicated that the holiday accommodation was not occupied as a single dwelling house.
25. There is no dispute that its use as a permanent dwelling from 2011 until 2018, and from 2020 until the date of the application is in breach of condition 2. No firm evidence has been submitted to indicate that the period when it was being used as a holiday let was other than in compliance with condition 2. Therefore, the breach of condition 2 was not continuous for the required period and has not acquired immunity from enforcement action. The appellant's evidence therefore falls short of discharging the burden of proof.

⁴ Moore v SSCLG & Suffolk Coastal DC [2012]EWCA Civ 2101

Conclusion

26. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use for residential purposes as a permanent and full-time dwelling house 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 and dismiss the appeal.

N Thomas

INSPECTOR