



Appeal Decision

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 21 October 2021

Appeal Ref: APP/Y3940/X/21/3279490

Whitepits Lodge, Whitepits, Kingston Deverill, BA12 7HD

- 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 Richard Munro against Wiltshire Council.
 - The application (Ref. PL/2021/03220) is dated 21 March 2021.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (1990 Act).
 - The use for which a certificate of lawful use or development is sought is described as 'Use of converted garage as accommodation for use by owners' family, subsequently let out to a lodger over ten years ago'.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. I have taken the description of the existing use in my banner heading above from the appeal form rather than from the application form, since this more appropriately describes the use in respect of which a LDC is sought.

Background and Main Issue

3. Planning permission was granted in 2003¹ for alterations and extensions to the dwelling at Whitepits Lodge, including conversion of an existing garage. Condition 3 of that permission stated that *'the property as a whole shall be occupied as one dwelling unit, with the accommodation hereby permitted occupied as part of, or an extension to, the main dwelling and it shall not [be] let or sold as separate accommodation'*.
4. It is the use of the converted garage which is at issue. This was apparently originally used by members of the appellant's extended family. Subsequently, the garage was let in breach of Condition 3. It is this use in respect of which the appellant seeks a LDC.
5. The main issue then is whether the Council's deemed refusal to grant a LDC was well founded. This will turn on whether the existing use stated above was lawful as at the date of the application by reason of there having been a continuous breach of Condition 3 over the relevant enforcement period detailed below.

¹ Ref: W/03/01193/FUL (2003 Permission)

Reasons

Legal context

6. Where a LDC is sought, the onus of proof is on the appellant to make their case on 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, a LDC should be granted.
7. Planning merits are not relevant; the question is one of lawfulness. The appellant's case is that use of the garage in breach of Condition 3 is lawful because the time for taking enforcement action has expired.
8. Section 171B of the 1990 Act sets out time limits for the taking of enforcement action. Section 171B(1) states a time limit of four years for operational development. Under s171B(2), where the breach consists of a change of use of a building to use as a single dwellinghouse, the time limit is four years starting with the date of breach. Section 171B(3) then states that in the case of any other breach of planning control, the time limit is ten years.
9. A breach of planning control consisting of a failure to comply with a condition falls to be considered under s171B(3) unless the condition prevents a change of use of a building/part of a building to use as a single dwelling². Thus, to be immune from enforcement action, the breach of Condition 3 would need to have occurred by no later than four years prior to the date of the LDC application, in accordance with s171B(2) and to have continued for four years thereafter.
10. Further, it should be noted that since Condition 3 imposes a continuing requirement, if it was shown to be probable that the condition was initially breached but then the offending activity ceased, and the condition was complied with again, the breach of planning control would be deemed to have ended. As such, the four year immunity 'clock' would only start running again if and when Condition 3 was breached again. This principle would though only apply if the interrupting compliance is significant and not de minimis.

Evidence/analysis

11. The appellant's submission is that Condition 3 was first breached in 2005. A tenancy agreement dated 25 February 2005 is submitted in support of this. Other tenancy agreements are also put forward in evidence dating from 2009, 2012, 2014, 2016, 2017 and 2021 in support of the appellant's position that the breach of condition was continuous thereafter.
12. Each of these agreements is for an assured shorthold tenancy (AST) for an initial term of 6 months. The appellant has now stated that these tenancies rolled forwards as is usual for ASTs and that the seven tenancies were continuous, with the exception of 'short periods' between them when new tenants were sought and references were being taken up.
13. The appellant submits that utilities have been shared with the main house and not separately metered. Thus, no evidence is available indicating the periods of letting of the garage in the form of utility bills. Council records indicate that the garage was only registered separately for Council tax from February 2021

² Per *FSS v Arun DC* [2006] EWCA Civ 1172

- and so Council tax bills are also not available to support four years' continuous use. No other documents are submitted in evidence, such as sworn statements from previous tenants or TV licencing or other bills or official correspondence.
14. I turn then to look at the evidence for the four year period from the first date of breach of Condition 3. Although the 2005 tenancy agreement was for an initial 6 month term, the document contains a handwritten note indicating that the tenant's deposit was returned on 25 October 2008 and an end date of that same date. The subsequent AST then commenced on 4 February 2009.
 15. Whilst it could be taken from the handwritten notes that the 2005 tenancy continued until 25 October 2008, I do not consider this of itself to represent sufficiently precise and unambiguous evidence of such continuity, bearing in mind the absence of any other supporting evidence. The same is true as regards the situation as between 26 October 2008 to 3 February 2009: the appellant states that the property was being marketed/references being taken up for 'short periods' between tenancies, but no detail is given of this, let alone any substantive evidence of these activities during this period.
 16. Looking next then at the tenancy agreements submitted for the periods thereafter, evidently these cover a far longer period overall than the four years required. However, again, these do not of themselves show continuous breach of Condition 3 as described over that period.
 17. This is because on the evidence available, there appear to be long periods of months and years where no detailed or substantive evidence is supplied as to what was occurring in respect of the garage at those times. The statement from the appellant that the ASTs were continuous save for short periods of marketing/reference checking is not supported by any substantive evidence and is not sufficiently precise and unambiguous to demonstrate a continuous breach on the balance of probability. Thus, the appellant has not shown that it was probable that the Council could have taken enforcement action over any four year period covered by the tenancy agreements submitted.
 18. Further, in view of the seemingly large gaps between ASTs after 2009, the appellant has not shown on the balance of probability that the breach did not cease at any point during these times, which would have restarted the 'clock'³.

Conclusion

19. I note that the appellant has felt frustrated with the LDC application process. However, I am required to determine the application on the basis of the legal position in view of the evidence before me. Concerns as regards the Council's handling of the application are not for me in determining this appeal.
20. For the reasons given above, I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of a use described as 'Use of converted garage as accommodation for use by owners' family, subsequently let out to a lodger over ten years ago' 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.

V Bond

INSPECTOR

³ As described in paragraph 10 above