



Appeal Decision

Site visit made on 8 December 2021

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 December 2021

Appeal Ref: APP/E5330/X/19/3223439

Garage north side 71 Elmdene Road, London, Woolwich Arsenal SE18 6TZ

- 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 Mr Linas Gocentas against the decision of Royal Borough of Greenwich Council.
 - The application Ref 18/4339/CE, dated 12 December 2018, was refused by notice dated 5 February 2019.
 - 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 described as: A habitable basement dwelling below existing domestic garage.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The appellant originally requested that the appeal be decided by way of a Hearing. But in a letter dated 9 February 2021 the appellant subsequently requested the procedure be changed to written representations and I have had no reason not to agree to this request.
3. Section 4 of the application form confirms the application is for an existing use, rather than existing building works and I have assessed the application on this basis.
4. Statutory declarations have been submitted. The Council states that 2 of these have only been submitted under the current appeal and did not form part of the evidence base considered by the Council. It is the Council's view that therefore they should not be considered. However, I should consider any relevant fresh evidence advanced at the appeal, including where this evidence was not advanced at application stage. The purpose of the LDC provisions are to enable the making of an objective decision based on the best facts and evidence available when the decision is taken.
5. In any event, it would serve no public purpose for me to decide an LDC strictly on the basis of the evidence submitted with the application, because if I were to refuse the application, it would always be open to the applicant to make a further LDC application on the basis of evidence that came to light after the local planning authority's refusal.

Main Issue

6. The main issue is whether the Council's decision to refuse the certificate was well-founded or not.

Reasons

7. Under section 191(1) of the 1990 Act, if any person wishes to ascertain whether any existing use of buildings or other land is lawful, they may make an application for the purpose to the local planning authority specifying the land and describing the use.
8. Section 191(2) of the same Act states that for the purposes of this Act uses are lawful at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
9. Section 191(4) provides that if, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
10. The Planning Practice Guidance states that the applicant is responsible for providing sufficient information to support an application¹. In the case of applications for existing use, it states that 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.
11. Section 171B(2) of the 1990 Act states that where there has been a breach of planning control consisting in the change of use of any building² to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of 4 years beginning with the date of the breach.
12. It has been established in case law that a use can only become lawful if it continued throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time.
13. So based on the evidence provided, I must consider whether any part of the appeal building changed to use as a single dwellinghouse and was used as such continuously, apart from de minimis breaks, for at least 4 years after the date of the change and before the date of the application, ie 12 December 2018.
14. To determine the date of a change of use of a building to a dwellinghouse, regard should be had to (i) when the building provided viable facilities for living and (ii) when the use actually commenced. Neither of these factors is decisive.

¹ Lawful development certificates, Paragraph: 006 Reference ID: 17c-006-20140306

² Under section 336 of the 1990 Act "building" includes any part of a building

15. On the application form, the appellant declares the use began on 12 December 2012. Although, taking into account the above 2 factors, it is not clear what the above date is based on, bearing in mind it is only the appellant who is said to have occupied the dwelling and that it is on land that the application form indicates he owns.
16. The above date is contradicted by the Council's record of an inspection of the site on 6 October 2014, where enforcement officers investigating a change of use of the garage to a habitable room, found no breach of planning control. Whilst I appreciate the dwelling is below the garage, having inspected the site and its doors and staircase down to the dwelling from the garage above, I do not find it likely that enforcement officers would have missed the access down to the dwelling when they inspected the garage.
17. The appellant states that his bedroom, shower, W/C and kitchen were all present in 2014. Be that as it may, I must consider the evidence in the round including actual use, rather than just when the building may have provided viable facilities for living.
18. A total of 6 different statutory declarations have been provided. The 4 earliest of these³ all refer to "71 Elmdene Road, Woolwich SE18 6UA". As is clear from the application form and Land Registry plan provided and as I saw on my site visit, the above address is not the address of the appeal site but is a separate building on the opposite side of the public highway. I therefore consider the 4 earliest statutory declarations to be imprecise.
19. The Statutory Declaration of Fiyinfolu Popoola, dated 23 July 2020, states that the appellant's basement dwelling is still the same as first seen in February 2014. But this does not confirm 4 years' continuous use. This declaration also states that the Council's suggestion that the appellant was not living at the basement dwelling continuously since February 2014 is incorrect. But it is not precise about what is correct in this regard. This declaration also states that Fiyinfolu Popoola knows the content of the appellant's statement in response to the Council's statement to be true. But this is an ambiguous remark.
20. The Statutory Declaration of Nana-Yaw'For Ghunney, dated 23 July 2020, states that the Council's statement does not correctly reflect matters, without saying precisely what this means. It states the appellant's dwelling is still the same inside as it was originally in February 2014. But this does not confirm 4 years' continuous use. It goes on to say: "*I have explained when I first visited... and I confirm [the appellant] has lived there continuously ever since.*" But Nana-Yaw'For Ghunney has not stated precisely when they first visited the appeal site. A comment made about visiting between March and September 2018 is not long enough ago and it is ambiguous as to whether the above comment regarding February 2014 concerned an actual visit by Nana-Yaw'For Ghunney.
21. Bills have been provided for electricity consumed at "Garage Adjacent to 71 Elmdene Road" between January 2014 and October 2018, as well as a letter from the electricity company confirming the appellant has been a registered customer at this address since 13 December 2012. But there is nothing in this evidence to indicate the electricity consumed was for a dwelling and there is

³ Fiyinfolu Popoola dated 23 November 2018, Nana-Yaw'For Ghunney dated 27 November 2018, Arturas Salmanis dated 12 June 2020 and Juozas Matevicius dated 16 June 2020

- nothing provided to distinguish the level of consumption from the use of the site as a garage.
22. Water bills have been provided for the supply of water services to "The Garage, 71 Elmdene Road", rather than to an address which is recognisable as a dwelling. Similarly, a telephone bill provided is for "Garage North Side 71 Elmdene Road. This does not confirm 4 years' continuous use. Nor does an email from the telephone company detailing Broadband usage for the last 12 months and confirming that the appellant has been with the company since 2 September 2014, bearing in mind such services are supplied to properties which are not dwellings as well as those which are.
23. Based on Google Street View images, the Council states that the site was under construction in March 2018 and on 10 July 2018 when officers visited the site. As such, it is the Council's view that it was not being used as a habitable property during these times. But the appellant states this was repairs to the garage roof, mistakenly regarded as indicating the habitable space below was incomplete.
24. Having inspected the site and the photographs provided, I am of the view that it is not impossible that the space beneath the garage could have been occupied as a dwelling during building works to the garage at ground level. But it is not likely and continuous occupation of the dwelling beneath is contradicted by a period of zero water consumption between 23 September 2017 and 11 June 2018, reflected by water bills which have been provided. This time period overlaps with when the Council's evidence shows significant building works were taking place and, in my view, this is a substantial period of time and is not reflective of a de minimis break in occupancy.
25. The appellant's claim that zero water consumption readings were the result of a faulty metre has not been corroborated by the water company and above-zero water consumption is shown to have resumed in subsequent bills, using the same water metre that was said to be faulty. The appellant states that the water company will not admit the fault in writing. But there is no evidence of correspondence addressed to them showing they have been asked to.
26. In the Statutory Declaration dated 23 July 2020, Fiyinfole Popoola recalls the appellant complaining about the faulty water metre. But I am not satisfied this is sufficient evidence of a fault, in light of the above. I also am not satisfied that the level of water consumption is explained by the appellant showering at work or the gym and having work clothes washed at work. This is because in a continuously occupied dwelling at least some water would still be needed for flushing the toilet, handwashing, food-preparation and cleaning/washing-up.
27. The appellant states that the Council does not produce any evidence to suggest he was living anywhere else. Yet all of the water bills, with the exception of those dated September and November 2018, are addressed to the appellant at a different address⁴ to the appeal site. This contradicts other evidence which has been provided to support the appellant's case.
28. The appellant has indicated that the water metre was obviously broken because of the amount of water that would be needed for the cement for the works to the garage roof. But I am not satisfied this is sufficient evidence of a faulty

⁴ 49 Greenland Mews, London SE8 5JW

water metre as it is entirely possible that cement used on the site could have been prepared without water sourced from the appeal site itself.

29. A letter has been provided from a neighbour at No 64 Elmdene Road (undated) and a neighbour at No 76. But these are unsworn so no sanctions would apply if they were found to be untrue and, in any event, neither letter confirms 4 years' continuous use and neither letter precisely identifies the correct appeal site address. A petition has been provided which correctly identifies the appeal site address. It includes a prayer that the appellant has lived there from the end of 2012. But it is undated so it does not confirm 4 years' continuous use and, as with the letters, it is unsworn.
30. Similarly, the appellant's documents entitled 'hearing witness statement' and 'comment upon Council statement', whilst signed, are unsworn and do not take the form of a Statutory Declaration. So they carry no more weight than any other written statement.
31. Taking into account all of the above, I am not satisfied that the appellant's evidence is sufficiently precise and unambiguous to demonstrate on the balance of probability that any part of the appeal building changed to use as a single dwellinghouse and was used as such continuously, apart from de minimis breaks, for at least 4 years after the date of the change and before the date of the application.

Conclusion

32. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of 'a habitable basement dwelling below existing domestic garage' 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.

L Perkins

INSPECTOR