



Appeal Decision

Site visit made on 26 April 2022

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 09 May 2022

Appeal Ref: APP/G4240/X/22/3291806
85 King Street, Dukinfield SK16 4NQ

- 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 Kwok Fun Lam against the decision of Tameside Metropolitan Borough Council.
 - The application Ref 21/01290/CLUD, dated 2 November 2021, was refused by notice dated 12 January 2022.
 - 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 fish and chips and hot food takeaway shop on the ground floor and associated living accommodation on the top floor.
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Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development was well-founded. In this case that turns on whether the appellant has proved on the balance of probability that the use of the property changed to use as fish and chips and hot food takeaway shop on the ground floor and associated living accommodation on the top floor on or before 2 November 2011 and that the use then continued without significant interruption for ten years after the date of the change.

Reasons

3. When dealing with an appeal such as this, the burden of proof is on the appellant and the standard of proof is the balance of probabilities. Following the judgement of *Gabbitas*¹ the evidence of an appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, the appeal should be allowed.
4. S171(B) of the Act sets time limits for establishing lawful use. Where there has been a breach consisting of a building, engineering mining or other operational development, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were

¹ *Gabbitas v SSE & Newham LBC* [1985] JPL 630

substantially completed. Where there has been a breach of planning control consisting of a change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the period of four years beginning with the date of the breach. There is no restriction with respect to demolition and in the case of any other breach of planning control, no enforcement action may be taken after the end of the period ending ten years beginning with the date of the breach.

5. The application is for a mixed use and the appellant has stated that the property is of mixed uses being a hot food takeaway on the ground floor and a dwellinghouse on the top floor. He argues that each floor has a different use and should be treated separately with a different time limit for each of them. He submits that the ten year rule should apply to the ground floor and four years to the first floor. However, irrespective of whether or not the local planning authority is satisfied that the hot food take away has been proved lawful through the passage of time, the application is for a mixed use of the whole property and, consequently, the period of ten years is the required timeframe.
6. Furthermore, at my site visit I noted that the uses are intertwined, with the ground floor being used for a hot food takeaway with associated food preparation and storage space along with a shower room and living accommodation. At first floor level there are two bedrooms and no further domestic facilities such as a kitchen, bathroom or living room. Therefore, the living accommodation is spread across the two floors.
7. The appellant has stated that 85 and 87 King Street were historically in a single ownership and used as two shops with two flats above but the flats were linked through an opening until 2016 when it was blocked up to facilitate separate lettings. It is further stated that there were no changes to the layout and therefore the use of the flat at No 85 has never changed.
8. The appellant's evidence is that the appeal property has been used as set out in the description in the application form since 12 February 2008. He has also stated that the use of the property as a "single flat" commenced or re-commenced from 2016 to which the local planning authority made no objection and therefore the four year period has already passed. This brings into some doubt the relationship between Nos 85 and 87 King Street and whether or not the first floors were a single flat or two separate flats. I understand that the sub-division of the first floor accommodation involved only minor works, but that does not mean that development has not occurred through the material change of use of the building. It seems to me that the appellant does not consider these points to be relevant, but in my judgement, they are material to the determination of the current appeal.
9. S55(3)(a) of the Act provides that the use as two or more separate dwelling houses of any building previously used as a single dwellinghouse involves a material change of use of building as a whole and each part of it which is so used. In other words, the provision of self-contained flats within what was a single dwellinghouse represents a material change of use of the whole building and each individual flat within. There has been a material change of use of the whole building the subject of the appeal and the "planning clock would restart" in 2016 when the alterations to the first floor accommodation took place.

10. I have taken account of the appellant's comments with regard to the approach taken by the local planning authority and whether or not a certificate could have been issued for the ground floor, but in this case, the application was for both floors of the property for mixed use purposes. Given the evidence presented to them, the approach taken by the Council was sound.
11. Therefore, although there is some evidence of the mixed use of the building during the material period it is generally imprecise and insufficient for me to conclude that on the balance of probabilities the property changed to mixed use for fish and chips and hot food takeaway shop on the ground floor and associated living accommodation on the top floor on or before 2 November 2011 and that the use then continued without significant interruption for ten years after the date of the change. It should be noted that this decision does not preclude the submission of an application for a lawful development certificate in the future.

Conclusion

12. For the reasons given above I conclude, on the evidence now available that the appeal should not succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

A A Phillips

INSPECTOR