The Planning Inspectorate

Appeal Decision

by J Whitfield BA (Hons) DipTP MRTPI

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

Decision date: 28 July 2022

Appeal Ref: APP/E2205/X/21/3288463
The Paddock, Magpie Hall Road, Kingsnorth TN26 1HF

- 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 Edward Yorke against the decision of Ashford Borough Council (the LPA).
- The application Ref 21/01219/AS, dated 1 July 2021, was refused by notice dated 26 August 2021.
- 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 use of barn as residential dwelling.

Decision

1. The appeal is dismissed. **3288463**

Main Issue

2. The main issue is whether the LPA's decision to refuse the LDC application was well-founded.

Reasons

3. Section 191(2) of the 1990 Act states that uses are lawful at any time if: (a) no enforcement action may be taken in respect of them, including if the time for enforcement action has expired; and, (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

4. Section 171B of the 1990 Act sets out the relevant time limits for enforcement action. Section 171B(1) sets out the time limit for operational development as four years. Section 171B(2) sets out that, where there has been a change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after a period of four years beginning with the date of the breach. Section 171B(3) states that in the case of any other breach of planning control, no enforcement action may be taken after the end of a period of ten years beginning with the date of the breach.

5. The Paddock is a detached property with an extensive rear garden. Within the rear garden is a building described as The Barn. Planning permission was granted by the LPA in March 2011 for "retrospective planning permission for rebuilding single storey barn/shed on the same footprint"[1]. Condition 1 of that

[1] LPA Ref: 11/00134/AS

permission stated that, "the building hereby permitted shall not be occupied at any time for residential purposes, it shall only be used for agricultural storage and workshop in association with the property known as The Paddocks, Magpie Hall Road."

6. The use of the barn as a residential dwelling would therefore be a breach of planning control under Section171B of the 1990 Act both as development without planning permission (a material change of use from barn to residential dwelling) and as a failure to comply with a condition attached to a planning permission.

7. The LDC application seeks to confirm the use of the barn as a residential dwelling is lawful on the basis that the time for taking enforcement action has expired.

8. Whilst ordinarily a breach of planning control comprising a failure to comply with a condition on a permission would fall within the ten-year time period set out in Section 171B(3), it was held in *FSS v Arun DC & Brown* [2006] EWCA Civ 1172 that the four-year limit in Section 171B(2) applies where a building is being used as dwellinghouse in breach of a condition which serves to prevent that use. As a result, regardless of whether the breach amounts to a material change of use without planning permission or a breach of condition on a planning permission, the four year time limit under Section 171B(2) applies here. Consequently, it is necessary for the appellant to demonstrate, on the balance of probabilities, that the material change of use of the building to a residential dwelling took place on or before 1 July 2017.

9. Internally, the building is said to comprise a lounge, kitchen, two bedrooms and a bathroom. The appellant states in a sworn affidavit that he first occupied the building as a residential dwelling on 30 March 2014 and has lived at the property continuously ever since, using the building independently from The Paddock. This version of events is supported in the affidavit of the appellant's mother.

10. However, the affidavits contain limited detail, noting little beyond the date of first occupation and that it was occupied continuously and independently. No evidence to support that occupation is offered by way of utility bills, bank statements or invoices of any of the work done to facilitate the use. Nor are there any photographs provided from any point of the occupation or prior to it.

11. In addition, the LPA indicates that its records state the appellant's mother advised a Council Tax Officer from Ashford Borough Council that the appellant had occupied the barn since 1 October 2018. It weas only from that point that Council Tax had been registered to be paid on the barn as an independent dwelling. Nevertheless, I note the LPA has provided limited detail of those records in its evidence also.

12. In LDC cases, the onus of proof lies with the appellant. An appellant's evidence should not be rejected simply because it is uncorroborated. Whilst case law has held that if there is no evidence to contradict the appellant's version of events or make it less than probable it should be accepted, it has held that it should only be accepted where that evidence is sufficiently precise and unambiguous.

13. As such, whilst I afford moderate weight to the sworn affidavits, those affidavits and the limited detail therein has not been tested by questioning. Moreover, I find the detail of the affidavits sparse to the extent that corroborating evidence is required to discharge the onus of proof. Furthermore, I am not satisfied the appellant's evidence is sufficiently precise and unambiguous given the LPA's evidence contradictory evidence. Ultimately, I conclude that the appellant has not demonstrated, on the balance of probabilities, that at the date the application was made, the material change of use of the building to a residential dwelling took place four or more years prior to the date of the application.

14. Accordingly, it has not been demonstrated that the use of the barn as a residential dwelling was lawful under section 191(2)(a) of the 1990 Act because no enforcement action may have been taken at the time the application was made.

Conclusion

15. 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 of barn as residential dwelling 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.

J Whitfield

INSPECTOR