
Appeal Decision

by Roy Curnow MA BSc(Hons) CMS MRTPI

An Inspector appointed by the Secretary of State

Decision date: 10 August 2022

Appeal Ref: APP/D0840/X/22/3295895

Trealwin, Station Road, Camelford PL32 9TX

- 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 Mrs Christine Sleep against the decision of Cornwall Council.
 - The application Ref PA21/10725, dated 26 October 2021, was refused by notice dated 14 January 2022.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is breach of Condition 2 (agricultural occupancy) of Application No. 21589/E (E/CM/21679).
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Decision

1. The appeal is dismissed.

Procedural Matters

2. It was agreed by the parties that, given the nature of the case, there was no need to visit the site. The appeal was, therefore, assessed on the basis of the written submissions.

Reasons

3. The main issue is whether the Council's decision to refuse to issue a certificate was well-founded.
4. Planning permission was granted for the erection of a dwelling on the site on 8 December 1969, subject to conditions. Of these, No 2 states
"The occupation of the dwelling shall be limited to a person employed or last employed in agriculture, as defined in Section 221 (1) of the Town and Country Planning Act 1962 or in forestry, or a dependant of such person residing with him (but including a widow or widower of such a person)".

The reason for the condition is

"The site is within a rural area in which it is intended to provide primarily for agriculture".

5. Amongst its terms, section 191 of the 1990 Act states *"If any person wishes to ascertain whether...(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been*

granted is lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter”.

6. Section 191 (3) states that *"a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—*
 - (a) the time for taking enforcement action in respect of the failure has then expired; and*
 - (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force”.*
7. Time limits for the taking of enforcement action are set out in s171.B of the 1990 Act and for a breach of a condition this is 10 years. the evidence before me shows that no enforcement notice has been issued in respect of the breach of condition.
8. It is, therefore, for the Appellant to show that the condition has been breached continuously for a period of at least 10 years at the date of the application (the ‘relevant period’) and, therefore, that this breach began on or before 26 October 2011 (the ‘relevant date’). It is for the Appellant to make her case on the balance of probability.
9. There is agreement between the parties that the condition has been breached for long periods. Their area of dispute relates to a period when the property was unoccupied. I have no reason to disagree with this premise.
10. The primary evidence is an affidavit made by the Appellant. In this she states that the breach of condition 2 commenced in August 2007 when ST and her husband SM moved in, (I use initials to protect the privacy of third parties). ST moved out in the summer of 2009, but SM continued to occupy the property until June 2013. Neither, she says, was employed in agriculture and, therefore, did not comply with condition 2.
11. SM left the property in what the affidavit describes as “very poor condition” and that all of the plumbing and heating had to be replaced and the property had to be repaired, renovated and cleaned prior to be re-let. This work lasted 9 months, from June 2013 to March 2014.
12. After this the property was let to AN, who stayed 4 years from March 2014 to late December 2017. After AN left, DS moved into the property in early January 2018 and lived there until the affidavit was signed on 7 October 2021. The affidavit states that neither AN or DS were employed in agriculture.
13. I give the affidavit substantial weight in my deliberations, and it is clear from submissions that the Council does not dispute its claims.
14. The area of dispute between the Council and the Appellant lies in the period of 9 months, between SM leaving the property and AN moving in. The Council’s position is that this represented a significant interruption of the breach. Thus, it says, the breach ceased and then recommenced after the 9 months. In this situation the 10-year period in which enforcement action could be taken started again.

15. The Appellant's position is that the break was *de minimis* and the breach was continuous.
16. Both parties cite court decisions¹ to support their positions. All relate to the question of continuity of a breach of planning control. *Thurrock* sets out that a use can only become lawful if it continues throughout the relevant immunity period, such that the LPA could have taken enforcement action at any time. A judgement has to be made on whether a break in the breach is *de minimis* or significant to the point where the breach ceases. A similar judgment was issued in *Nicholson* that, together with that in *Ellis*, set out that a claimed failure to comply with a condition must be in existence at the time that the application for a certificate is made.
17. The *North Devon* judgement contains the following passage "Clearly, continuous physical occupation is not required for there to be occupation in breach. Beyond those few comments, it would not be appropriate to indicate any guidelines. This question is quintessentially a question of fact [and] degree to be considered in the light of all surrounding circumstances, including the length of physical occupation and any other indications or evidence of continuing occupation, despite the physical absence of the occupiers."
18. The *Basingstoke* case related to a breach of an agricultural occupancy condition. The judgement identified that the correct question was whether there had been what could properly be regarded as a breach of the condition over the whole of the 10-year period, whether or not there was anyone in physical occupation during any particular part of it. There had been a clear breach for some time, namely use by persons that were not agricultural tenants. It was held that a gap during which refurbishment took place, in order to make the dwelling more attractive so that the breach could continue, was a period during which the breach actually continued. In that case, if enforcement action had been taken during the period of refurbishment, it would have succeeded. The judgement turned on the facts of the case, emphasising the importance of every case being fact sensitive.
19. The underlying lesson from all of these cases, as well as from the two appeal decisions² that have been referred to, is that determining whether a breach has been continuous is a matter of fact and degree.
20. The judge in the *Ocado* case undertook a thorough review of the law in this area. Amongst his findings were that if a condition has been breached continuously for any ten-year period, without significant interruption, the breach will be lawful thereafter, unless that lawful right has been lost through some event sufficient to terminate it. Also, in a position contrary to *Ellis* and *Nicholson*, he stated that the breach does not have to be continuing at the date of an LDC application to become lawful.
21. There are obvious parallels between *Basingstoke* and the case before me. The break in the physical occupation of the property in *Basingstoke* was 12 months. It appears that the court was given evidence to show that during this period the owner arranged for persons to do the work, the work was undertaken, and

¹ *Nicholson v SSE & Maldon DC* [1998] JPL 553; *North Devon DC v SSE & Rottenbury* [1998] EGCS 72; *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226; *Ellis v SSCLG* [2009] EWHC 634 (Admin); *Basingstoke and Deane BC v SSCLG & Stockdale* [2009] EWHC 1012 (Admin); *R (Ocado) v Islington LBC* [2021] EWHC 1509 (Admin)

² APP/H0520/X/08/2077438; APP/N6845/X/16/3147473

the property marketed. The court found that the purpose of the work was to further the breach of condition that had occurred prior to the break, which was the intention of the owner.

22. The break is shorter in the case before me, at 9 months, than that in *Basingstoke*. It is reported by the Appellant that this equates to just over 5% of the period between the start of the breach and the date of the application being made. This might well be the case. However, to my mind, this is not the relevant metric of assessing the break. The correct way is to assess the length of the duration in its own right, rather than as a percentage of the time that a breach has occurred.
23. The judgement in *Basingstoke* demonstrates that the Appellant needs to show why this break was required at Trealwin. That is to say, show what activities and work occurred during the 9 months, and that the Council was able to take enforcement action throughout the relevant period.
24. In this regard, the Appellant says in her affidavit that after SM left the property all of the plumbing and heating had to be replaced and the property had to be repaired, renovated and cleaned prior to being re-let. The Appellant does not give a detailed explanation as to what the extent of the work and activities was, save for stating in a letter to her Agent that it was a "formidable task of clearance, cleaning, painting etc."
25. The affidavit states that an oil burner was installed, but this is referred to as a wood burner in a letter³ from the Appellant to her agent. Given that the Appellant has referred to new heating being installed, I find this to be a minor inconsistency. However, I find differently in respect of Certificate of Compliance from HETAS. This, the Appellant states, related to the work at Trealwin; however, this does not appear to be the case. It is made out to Mrs Sleep but relates to a property at Boscastle. It does not, therefore, provide evidence of work at the appeal site.
26. In addition, 9 stubs from the Appellant's cheque book have been submitted. They date from the period 18 December 2013 to 21 February 2014, a period of some two months. It might be broadly surmised what work some of these relate to, for example, one refers to 'plumbing' and another 'electrician'. However, this is not readily apparent with others, for example two made out to 'Cornwall Council'.
27. I understand the argument that the Appellant, due to her age, dealt in cash and cheques. I similarly understand why she might not have kept the receipts after 8 years. However, the submissions do not provide precise evidence of work and marketing over the 9-month period. It might have clarified things had there been submissions from tradespeople and those involved in marketing the property. However, none provided evidence of the work that they carried out and how long this took.
28. I do not doubt that it was the Appellant's intention to continue to breach the condition. However, overall, I find that the evidence put forward in support of the Appellant's case is sparse and what has been provided lacks precision and is ambiguous. As a matter of fact and degree, based on the evidence before

³ Dated 24 August 2021

me, I find that there was a break in the breach of the condition and that this was greater than *de minimis*. As such, I find that the Council would not have been able to take enforcement action during this break. Therefore, on the balance of probability, condition 2 attached to planning permission 21589/E (E/CM/21679) has been continuously breached for ten years.

Conclusion

29. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of 'Breach of Condition 2 (agricultural occupancy) of Application No. 21589/E (E/CM/21679) as C3 Residential Use' 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.

Roy Curnow
Inspector