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# Appeal Decision

**by J Whitfield BA (Hons) DipTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 26 October 2022**

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**Appeal Ref: APP/H2265/X/22/3297164**

**Oakcroft, Labour in Vain Road, Wrotham, Sevenoaks TN15 7NY**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the Act) 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 David and Heidi Wellar against the decision of Tonbridge & Malling Borough Council (the LPA).
  - The application Ref TM/21/00464/LDE, dated 17 February 2021, was refused by notice dated 21 October 2021.
  - The application was made under section 191(1)(a) the Town and Country Planning Act 1990 as amended.
  - The use for which a certificate of lawful use or development is sought is existing use of a building as an independent dwelling.
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## Decision

1. The appeal is dismissed.

## Main Issue

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

## Reasons

3. The appeal site comprises a detached building to the rear of the dwellinghouse known as Oakcroft. The appellants seek to confirm that the use of the building as an independent dwellinghouse was lawful at the date the LDC application was made.
4. S191(2) of the Act states that uses are lawful at any time if (a) no enforcement action may then be taken in respect of them (for reasons including because 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.
5. S171B(2) of the Act sets out that where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
6. Thus, to be lawful under s191(2) of the Act, it is necessary for the appellant to demonstrate, on the balance of probabilities, that the material change of use of the building to a dwelling took place on or before 17 February 2017 and continued without interruption for four years thereafter.

7. The key test in assessing whether the use of the building as a dwellinghouse took place substantially uninterrupted for four years is whether the LPA could have taken enforcement action against the use at any time in the four year period.
8. The appellants state that the building, known as 'The Clockhouse', was constructed in the 1980s as a workshop. Thereafter, they state the building was converted to ancillary living accommodation and used by family and friends. It is not clear, however, when that was done.
9. The statutory declaration of Mr Wallar states that the change of use from ancillary accommodation to an independent dwellinghouse took place in 2008 when a Mr H moved into the building and occupied it as a dwelling independently from the occupation of Oakcroft. Whilst I afford significant weight to the statutory declaration given its sworn status, it nevertheless does not indicate when in 2008 the change of use is said to have occurred. Moreover, there is little corroborating evidence to support the appellants' case in the form of photographs, utility bills, bank statements, tenancy agreements, invoices or other forms of written evidence. Importantly, Mr Wellar's statutory declaration only states that Mr H occupied the building between 2008 and 2012. It does not state that he did so continuously throughout that period.
10. The appellants' case is that Mr H left in 2012 when thereafter they rented the building to Mr W. There is no evidence of the length of time that elapsed between the two occupations. In any event, it is said that it was decided to make the renting arrangement more formal upon Mr W's occupation and a tenancy agreement was produced. A copy of the tenancy agreement has been provided. It is accompanied by a covering letter dated 7 October 2012 from Mrs Wellar which suggests that the attached agreement is the draft version sent to Mr W for signing. Thus, the tenancy agreement provided to me is not dated nor is it signed by the appellants as landlords.
11. Moreover, whilst it is signed by Mr W, the tenant details do not contain the tenant's full name. In addition, the tenant's signature has not been witnessed as the agreement sets out it should do so. Furthermore, there is nothing within the tenancy agreement which states that it is for the letting of the building known as 'The Clockhouse'. Both the landlord and tenant give their address as Oakcroft.
12. The appellants also state that the rent paid by Mr W was inclusive of water, sewage, electricity, gas and oil. However, the tenancy agreement makes clear that the tenant will be responsible for utility bills with landlord responsibility only for water charges and Council tax. The tenancy agreement does not say whether it is a weekly, monthly or yearly tenancy and whilst it includes a rent set at £500 it does not make clear whether that is per week or per month.
13. Mr Wellar's statutory declaration states that Mr W paid the rent to him every month by standing order. Bank statements have been provided which show payments from Mr W in 2016. However, the bank statements which have been provided are solely in the name of 'Mrs H Weller'. As it is, the statements only cover the periods 16 May 2016 to 13 June 2016 and 5 July 2016 to 4 August 2016. Moreover, whilst the statement show payments of £600 from Mr W by standing order on 3 June and 3 August 2016, there is no reference which indicates what the payments are for. Ultimately, the statements cover a very short period and do not evidence continuous occupation over four years.

14. LPA notes from a site visit on 9 February 2016 state that the building contained all the facilities necessary for independent occupation. The LPA did not note, however, that there was any evidence that it was being used as such. This is emphasised by the LPA's invitation of an LDC application, "if there was evidence that it had been used as an independent dwelling", not because there was evidence to that effect.
15. The fact that it was able to be used as a dwellinghouse at that time does not necessarily mean that it was actually in use. The principles laid out in *Swale*<sup>1</sup>, *Thurrock*<sup>2</sup> and *Islington*<sup>3</sup> are clear that it is not enough for the property to have been available or suitable for residential use, it must have been actually used as such.
16. In this instance, there are large gaps in the evidence demonstrating occupation of the building as a dwelling throughout the four year period. Indeed, there is little documentary evidence of the use of the building at any point from 2016 onwards.
17. I conclude, therefore, that it has not been demonstrated on the balance of probabilities, that no enforcement action may be taken in respect of the use of the building as an independent dwelling, because the time for enforcement action has expired. Thus, the use would not have been lawful at the date the LDC application was made.

### **Conclusions**

18. 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 a building as an independent 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**

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<sup>1</sup> *Swale BC v FSS & Lee* [2005] EWCA Civ 1568

<sup>2</sup> *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226

<sup>3</sup> *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin)