
Appeal Decisions

Site visit made on 10 January 2023

by Diane Lewis BA(Hons) MCD MA LL M MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 March 2023

Land at Chapter Arms, New Town Street, Chartham Hatch CT4 7LT **Appeal 1 Ref: APP/J2210/X/22/3294079**

- 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 A Noel (Chapter Enterprises Ltd) against the decision of Canterbury City Council.
 - The application Ref CA/21/02696, dated 4 November 2021, was refused by notice dated 16 December 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 former public house as a dwelling house and residential curtilage.
 - An application for an award of costs was made by the appellant against the Council. This application is the subject of a separate decision.
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Appeal 2 Ref: APP/J2210/W/21/3289190

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr A Noel (Chapter Enterprises Ltd) against the decision of Canterbury City Council.
 - The application Ref CA/21/01084, dated 28 April 2021, was refused by notice dated 30 July 2021.
 - The development proposed is Change of use from a public house to a dwelling house.
 - An application for an award of costs made by the appellant against the Council is the subject of a separate decision.
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DECISIONS

Appeal Ref: APP/J2210/X/22/3294079

1. The appeal is dismissed.

Appeal Ref: APP/J2210/W/21/3289190

2. The appeal is dismissed.

THE SITE

3. The Chapter Arms is located on the edge of the village of Chartham Hatch and is accessed via a rural lane. The two storey building, which has been extended over the years, stands in a generous plot with a large hard surfaced car parking area to the front.

4. The probability is that the public house closed and ceased trading in June 2017. Prior to its closure, the ground floor accommodation comprised bar areas and a snug with a fairly large equipped kitchen, customer toilets and storage areas. On the first floor was living accommodation comprising a living room and bedrooms together with bathroom facilities and a kitchenette. The first floor accommodation was accessed internally through the pub.
5. On my site visit the basic internal layout and arrangements remained the same. The appearance was of a pub on the ground floor with residential accommodation above. In particular, the ground floor room layout, including the commercially fitted kitchen, storage areas and customer facilities, was characteristic of a pub, not a dwelling, even though the actual bars had been removed. Near the back of the building water ingress and damage to the building fabric had occurred. The property was unoccupied and vacant and inside the building was in a poor condition.

APPEAL 1

Reasons

6. Case law has established that a use can only become lawful if it continues throughout the relevant immunity period, such that a local planning authority could have taken enforcement action at any time. The use of a building as a dwellinghouse must be affirmatively established over the four year period. The issue is whether the use was continuous, not whether the building was continuously fitted out or intended for residential use.

The Appeal and the Existing LDC

7. Under section 191(4) the date for ascertaining whether an existing development is lawful is the date of the LDC application. In this case the relevant date is 4 November 2021, the date of application ref CA/21/02696. To succeed the appellant has to prove on the balance of probability that a material change of use of the public house and adjoining land to a dwelling house occurred before 4 November 2017 and that the use of the property as a dwelling continued substantially uninterrupted for a period of four years thereafter.
8. The appeal was made on 2 March 2022 against the Council's decision dated 16 December 2021 to refuse to issue a certificate of lawfulness. The appeal statement explained that following the refusal there was extensive correspondence with the Council. A new application was made for a LDC for 'use of former public house as a dwelling house and residential curtilage.'
9. On 15 February 2022 the Council issued an LDC to certify that on 25 January 2022 the existing use of the building as a public house with ancillary residential accommodation at first floor was lawful (ref CA/22/00178). No appeal was made against this decision under section 195(1)(a) of the 1990 Act. The current appeal is against the earlier refusal.
10. Section 191(6) of the 1990 Act states that the lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.
11. The two LDC applications were made within a short time period and cover a similar four year period. To grant a LDC under the appeal application would be

inconsistent with the LDC issued very shortly after and which the appellant has not contested. At the outset doubt is cast on the probability of the appellant's version of events.

12. Within this context I will focus on the main area of dispute between the Council and the appellant. The Council considered there was conflicting evidence regarding the use and condition of the property in the autumn of 2018, photographic evidence was imprecise and that it was unclear to what extent the surrounding land had been used residentially.

The Evidence

13. An inspection of the property was carried out on 28 September 2018 by a professional surveyor in order to inform a Commercial Viability Report dated 15 October 2018.
14. The report confirmed that on the day of the site inspection the public house had ceased trading and was under the supervision of a live-in caretaker. Access was possible to all public and service areas and living accommodation. The property was described as being in a neglected and poor state of repair internally and externally, clearly showing a lack of investment and maintenance over a number of years. The report continued that a number of issues, clearly visible upon inspection, indicated the property was not compliant with modern safety standards. The public house no longer traded and therefore all space was vacant.
15. The author of the report subsequently made a statutory declaration dated 12 January 2022. The document confirmed the photographs in the report were taken on the day of the site inspection. The entirety of the property was said to be occupied and used solely for residential use, as shown by the photographs. The author was in no doubt that the ground floor was being used as an integral part of the entire building as a single dwelling. The use of the word 'vacant' in the report was confirmed to be in the sense the premises was clear of an operating business.
16. The purpose of the report was to assess the viability of the property as a public house and the prospects of a public house re-opening there. The purpose of the visit and report was not to advise on the lawful planning use of the property. Nevertheless, the report could reasonably be expected to be factually correct and that the author was describing with accuracy his conclusions on the use and condition of the property at the time, based on what he observed. There is a marked difference in language and emphasis between the report and the statutory declaration. In the report the residential use was confined to a live-in caretaker for the public house, whereas the statutory declaration described the entire building as a single dwelling.
17. The photographs in the report (rooms not labelled) show a number of black bags of waste and rubbish in the bar/lounge areas, a collapsed ceiling in the customer toilets and possibly in a cloakroom, the equipped pub kitchen and a storage area. The accommodation looks to be unused apart from possibly a room with a sofa. I am not able to conclude from the photographs that on the balance of probability the whole property was in residential use.
18. The date of the inspection was about a month after the stated date of 30 August 2018 when a new tenant and lodger was said to have moved into the

property. The rubbish bags and unkempt state of the ground floor rooms could be as a result of a change in occupancy but the statutory declaration of the new tenant is not sufficiently precise in explaining the events, dates and use of the accommodation.

19. The additional evidence from the tenant, lodger and visitors related to the period of occupancy from the end of August 2018 lacked precision, particularly in terms of dates. The evidence also lacked consistency, notably in the use of the ground floor rooms.
20. In conclusion, and referring back to the case law principles, the building had all the facilities required for day-to-day private domestic existence and was capable of being used as a dwelling, despite features and facilities of the pub remaining in physical terms. After the public house had closed to trade in June 2017 there is evidence of at least part of the ground and the first floor being occupied as a dwelling. However, after occupation by members of the appellant's family ceased towards the end of August 2018, the necessary continuity in residential use of the whole property as a dwelling is not demonstrated. I am not satisfied the local planning authority could have taken enforcement action against the use of the property as a dwellinghouse throughout the four period. The appellant's evidence is not sufficiently precise and unambiguous to justify granting a certificate on the balance of probability.

Overall Conclusion

21. For the reasons given above I conclude on the evidence now available that the Council's refusal to grant a certificate of lawful use or development in respect of the use of former public house as a dwelling house and residential curtilage is 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.

APPEAL 2

Reasons

22. The main issues are the effect of the development on the Stodmarsh Special Area of Conservation (the SAC) and on village and community facilities.

Stodmarsh Special Area of Conservation

23. The Council based its reason for refusal on the advice and guidance from Natural England available at the time¹. For the purposes of this appeal the Council confirmed the guidance has been updated. The Council and the appellant were invited to update or amend their earlier representations. I have taken full account of the responses in addition to the appellant's initial statements and supporting ecological appraisal. There is no record of any formal consultation response from Natural England on the application.

The SAC

24. The SAC is a site of national and international importance for a range of water dependent habitats that support wintering and breeding birds and invertebrate species. The vegetation is exceptionally species rich with a rare plant assemblage. Increased levels of nitrogen and phosphorous entering the aquatic

¹ The documents included Natural England's Advice on Nutrient Neutrality for New Development in the Stour Catchment in relation to Stodmarsh Designated Sites for Local Planning Authorities, November 2020

environments via surface water and groundwater can severely threaten the sensitive habitats and species within the SAC. Eutrophication of designated lakes has occurred making it difficult for aquatic species to survive which in turn removes a food source from the food cycle. The SAC is in unfavourable condition due to high nutrient levels. An approach based on nutrient neutrality is an interim solution that has been adopted in the process of returning the habitat site to a favourable condition.

25. Natural England has advised that in relevant catchments the competent authority should undertake Habitats Regulations Assessments (HRA) of all development proposals which may give rise to additional nutrients entering their catchments, in line with the requirements of the Conservation of Habitats and Species Regulations 2017.

Habitats Regulations Assessment

26. In view of the advice from Natural England and adopting the precautionary approach it is not possible to conclude, on the basis of objective information, that the proposal in combination with other plans and projects would not have significant effects on the SAC. As it is not possible to rule out likely significant effects, the proposal must be subject to an appropriate assessment.
27. The expectation is that an appropriate assessment must contain complete, precise and definitive findings which are capable of removing all reasonable scientific doubt as to the absence of adverse effects on the integrity of the site. In accordance with regulation 63(2) the appellant must provide such information as the competent authority may reasonably require for the purposes of the assessment.

Effect on the integrity of the site

28. The development. The existing lawful use of the property is a public house with ancillary residential accommodation at first floor, as confirmed by the LDC issued by the Council on 25 January 2022. It follows that the building has a single primary use where the main activity is a public house. The proposal is described by the appellant as a change of use from a public house to a dwelling house. The appellant recognised the proposed change of use would create a new dwelling when referring to the delivery of a new home and its small contribution to the District's housing supply.
29. For the purposes of the assessment the proposed dwellinghouse would be a new home providing overnight accommodation.
30. Nutrient budget calculator. The first step requires information on occupancy of the new dwelling. The Natural England guidance emphasises the importance of ensuring that the figure is sufficiently robust and appropriate for the project being assessed and that occupancy is not inadvertently underestimated.
31. The appellant, in the statement of compliance², relied on the default setting based on the national occupancy rate of 2.4 people per dwelling. It does not appear that this occupancy rate was agreed with the local planning authority either as reflecting local conditions in the area or reflecting dwelling type. Elsewhere the appellant stated the local planning authority has adopted this approach and has not chosen to adopt any bespoke calculations tailored to the

² Appendix 11 to appeal statement

area of a scheme³. As part of the appropriate assessment, on the information provided, I am unable to be specific in the justification for choice of the occupancy rate used.

32. Step 2 requires a calculation of the annual nutrient load from existing pre-development land use on the development site. The appellant again uses the default occupancy rate of 2.4 people, referring back to three bedroom accommodation in the public house. There is nothing to suggest that this figure was agreed with the local planning authority or is appropriate, particularly taking into account the ancillary nature of the accommodation. The reason for refusal stated the proposal would lead to additional overnight accommodation. The first floor layout plan of the existing building does not identify the use of the rooms, albeit the viability report noted three bedrooms. The sales particulars in 2016 referred to two bedrooms and a bedroom/office. I am not satisfied that the input is appropriate.
33. By comparing the two chosen occupancy rates the appellant concluded that the proposal would not lead to a net increase in the number of new residents and did not continue further with the nutrient budget calculation. Therefore no account was taken of the type and area of the landcover present on the development site after the development has been completed, or the 20% buffer applied to ensure the final figure is robust and suitably precautionary.
34. My conclusion is that a precautionary approach has not been followed in working through the nutrient budget and uncertainty exists over the suitability of key inputs, especially occupancy rates.
35. Other considerations. The appellant argued use as a pub incorporating bars and restaurants generated a significant water load. Furthermore, the pub, being located towards the northern edge of the Stodmarsh catchment area, would attract people from outside the catchment area, adding to the nutrient load. However, it is also the appellant's evidence that the pub closed in June 2017 after more than two years of marketing and that for a long time the business struggled with diminishing trade. The viability report indicated the pub was underutilised on a regular basis and was no longer a viable business. Prior to closure it ran as a wet-led public house with very little trade to speak of. It was understood that the previous owner claimed not to have made a profit in a number of years, and the little trade the business experienced was from a handful of locals who visited only twice a week at best⁴.
36. Referring to Natural England's guidance on commercial premises, the approach is to assume anyone living in the catchment also works and uses facilities in the catchment. This removes the potential for double counting of human wastewater arising from different planning uses. Applying the advice in this case the pub should not be included in the assessment and the focus should be on wastewater generated from the residential use.

Conclusions

37. I am unable to be certain through the appropriate assessment, on the evidence provided, that the proposal will not have an adverse impact on the integrity of the protected site in combination with other plans and projects. Reasonable

³ Final comments

⁴ Viability report section 7 page 4

scientific doubt remains as to the absence of effects. No mitigation is explored or proposed.

38. There are no imperative reasons of overriding public interest to justify the proposal in light of the negative assessment. The proposal is contrary to Policy LB5 of the Canterbury District Local Plan 2017. There is also conflict with policy in the National Planning Policy Framework that protects and seeks to conserve and enhance biodiversity. In view of the highest level of protection afforded to the SAC and the statutory requirements it is not possible to grant planning permission. On that basis it is not necessary to consider the second main issue.
39. For the reasons given above the appeal shall be dismissed.

Diane Lewis

Inspector