



Appeal Decision

Site visit made on 13 June 2023

by R Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 June 2023

Appeal Ref: APP/A5270/X/22/3301216

241 Oldfield Lane North, Ealing, Greenford UB6 8PP

- 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 Sanjay Kumar against the decision of the Council of the London Borough of Ealing.
 - The application Ref 221254CPE, dated 20 March 2022, was refused by notice dated 15 June 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 "garage ancillary to the Class E commercial unit".
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr Sanjay Kumar against London Borough of Ealing. This application is the subject of a separate Decision.

Reasons

3. The appeal site is part of a two storey terraced building. The site is undisputed to contain a commercial unit at ground floor level, with a separate residential flat above. There is a rear yard, within which is situated the detached garage that is the subject of the current application.
4. Uses and operations are lawful at any time if no enforcement action may be taken in respect of them, whether because they did not involve development, require planning permission or because the time for enforcement action has expired (s191(2)).
5. There is a further proviso that the development must not contravene the requirements of any enforcement notice then in force. I have not been told that there was any extant enforcement notice relating to the property at the time of this application.
6. In this case the appellant is relying on the argument that the use of the garage would be immune from enforcement action due to the passage of time. In order to succeed on this ground, in accordance with Section 171B(3) of the Act, it would normally be necessary to demonstrate, on the balance of probability,

the use of the whole planning unit, including the alleged ancillary garage and the primary use which it is said to relate to, has continued as a single planning unit within Use Class E¹, for a period of ten years or more prior to the date of the application; therefore since at least 20 March 2012. Failing that, it would at least be necessary to demonstrate, on the balance of probability, the continuity of that ten-year period of use in relation to the land in question had not been interrupted by a material change of use, involving the garage, to or from Use Class E. The onus rests with the appellant to demonstrate their case on the balance of probability.

7. Use Class E of The Town and Country Planning (Use Classes) Order 1987 is defined as commercial, business and service uses. It would include shops, cafes and certain types of office and light industrial use. The Council does not dispute that the ground floor unit itself falls within Use Class E and I have no reason to take a contrary view.
8. The appellant states that they are seeking to demonstrate that the garage, the subject of this application, is ancillary to, rather than within, Use Class E. However, for the avoidance of doubt, where a building is used for purposes incidental or ancillary to a single primary use of the land, the incidental or ancillary use would nevertheless fall within the overall primary use classification for the purposes of determining lawfulness. The need to demonstrate ten year's continuous use, as set out above, remains relevant.
9. The appellant argues that the building has been "established or in existence" for more than 10 years, and accordingly is immune from enforcement action on this basis. S171B(1) of the Act provides that no enforcement action may be taken in respect of any unauthorised operational development after the end of the period of four years beginning with the date on which the operations were 'substantially completed'.
10. The Council does not dispute that the building itself appears to have been in place for in excess of four years, and from the evidence before me I have no reason to take a contrary view. However, this would only establish that the building itself would be immune from enforcement action. It does not follow that the lawful existence of the building means that its lawful use falls within Use Class E. The question of the lawful use of the building, which is the matter the appellant is seeking to resolve through this application², would need to be demonstrated independently of when the structure was actually built.
11. The garage appears to have been developed on land that is within the same ownership and title as No 241, and also is situated very close to the rear elevation of that building. However, there is simply no evidence presented to demonstrate the past use of the garage, including evidence that it has been functionally related to the ground floor unit at No 241, such as for car parking, having been used for purposes ancillary to that commercial unit for a continuous period of ten years.
12. The lawfulness of the garage use cannot be assumed by its proximity to, and common ownership with, the commercial unit, nor reasonably inferred by its design attributes (including presence of the roller shutter door). Neither is it

¹ or its equivalent predecessor.

² This must be the case as the application description refers to ancillary (i.e. use) to the Class E commercial unit. Furthermore the appellant's Costs application refers to 'continued use' of the outbuilding.

sufficient to assert that the building is ancillary by applying 'common sense'. Nor does the inclusion of the garage within a recent sales brochure³, relating to the adjacent commercial premises at No 241, overcome the aforementioned tests of functional linkage together with continuous use and determine lawfulness. On the basis of this reasoning, the garage may just as easily have been used for a purpose entirely independent of, and materially different to, the commercial premises at No 241. As such the balance of probability test is not satisfied.

13. I am mindful that planning practice guidance states *"In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability."* Given the appellant's lack of evidence concerning the actual use and continuity of use of the garage, on the balance of probability, the appellant's case falls significantly short of being able to meet the requisite test for lawfulness. For the avoidance of doubt the Council's representations regarding vehicular access to the garage being blocked at times have not influenced my decision.
14. Therefore, for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of "garage ancillary to the Class E commercial unit" 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.

R Merrett

INSPECTOR

³ Undisputed to date from March 2022.