



Appeal Decision

by R Hitchcock BSc DipCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 July 2024

Appeal Ref: APP/A1910/X/23/3326177

The Lodge, 37A Cavendish Road, Markyate, ST. ALBANS, AL3 8PT

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant a certificate of lawful use (LDC).
 - The appeal is made by Mr Raymond Beer against the decision of Dacorum Borough Council.
 - The application ref 22/01865/LDE, received by the Council on 13 June 2022, was refused by notice dated 18 January 2023.
 - 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 a residential use for more than 4 years, using side gate and rear gate access.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use describing the existing use which is found to be lawful.

Procedural Matters

2. Under s191(2)(a) of the 1990 Act, uses are lawful at any time if no enforcement action may then be taken in respect of them because the time for enforcement action has expired. The burden of proof in satisfying the requirement of s191(1)(a) in demonstrating any existing use of land or buildings is lawful falls to the appellant. The appropriate standard for testing the evidence is made on the balance of probabilities, that is to say whether something is more likely than not.
3. The Planning Practice Guidance reflects prior Court judgments. It sets out that an appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided the appellant's evidence alone is sufficiently precise and unambiguous. In a s191 case such as this, the determination is based on the evidence submitted. It was not therefore deemed necessary to carry out a site visit in the circumstances.
4. Between the appellant's responses to Planning Contravention Notices (PCN) served by the Council in 2016 and 2018, and the application form for the LDC, there are various claims as to when the building to the rear of 37 Cavendish Road was first used for residential purposes. Section 9 of the LDC application form indicates that the use began more than 10 years before the date of the application. However, Section 10 confirms the claim that full-time living in the building was from 2015 for the purposes of the LDC application. It followed an earlier application for an LDC¹ for the same use of the building in 2019.

¹ Ref. 4/02257/LDE

5. Although there is some disparity between the main parties as to when the building was constructed, the planning and enforcement record provided by the Council show that the site was visited on a number of occasions dating back to 2006. This included visits in respect of the subject building and various use allegations. Although the evidence before me in relation to those matters is limited, it seems that the building granted planning permission was present and being used for its specified purpose (summerhouse and garage) in 2006. An investigation at that time (ref. E/06/00428) is marked as 'no breach NFA' for an investigation alleging that the building was too big and possibly being used as separate accommodation.
6. Having regard to that and the provisions in s171B, it seems that any claimed independent residential use of the building would have resulted from a change of use. Accordingly, the time limit is 4-years prior to the date of the application, as set out in s171B(2). This is not disputed by the Council.
7. The application form submitted to the Council was undated. However, the Council's Decision Notice references the date on which the application was received as 13 June 2022. I have relied on this as the 'relevant date' on or before which the use of the outbuilding to the rear of 37 Cavendish Road as a separate dwelling is claimed to have accrued.
8. Since the Council's decision, the appellant has submitted further information in support of the application for an LDC. I have had regard to the additional evidence in coming to my decision.

Main Issue

9. The main issue is whether or not the Council's decision to refuse the LDC was well founded.

Reasons

10. As above, the LDC application form indicates that the use started in 2015. However, despite requests from the Council, the specific date of commencement has not been provided by the appellant. A declaration subsequently made by him under the Statutory Declarations Act 1835 states that The Lodge, 37A Cavendish Road, AL3 8PT has been used continuously without interruption as a separate independent self-contained unit for more than 4 years prior to 11 July 2023. However, it still fails to define the relevant period when that took place. If immediately before 11 July 2023, a period of 4 years before the date of the application would not have accrued.
11. In the 4-year period in the run up to the relevant date, the Council's evidence highlights that the appellant was abroad for some length of time in the latter part of 2019, for numerous months in 2020, and possibly extending into March 2021. This is not disputed by the appellant and seems to be reflected in the appellant's record of Council Tax payments for that period. Rather, it is the appellant's position that periods of holidays, absence due to ill health, or for reasons beyond his control do not alter the status of the dwelling.
12. However, the case of *Swale BC v FSS & Lee* [2005] EWCA Civ 1568; [2006] JPL 886, established that any change of use to a dwellinghouse must be 'affirmatively established' over a [here] four-year period before an occupier does not have to be continuously or regularly present in order for it to remain in such use. The correct approach is to ask whether there was any period

during the four years when the LPA could not have taken enforcement action against the use, because the building was not physically occupied, even though available. As a matter of judgement, it is necessary to make a finding as to whether any periods of non-occupation were *de-minimis*.

13. In the absence of clarifying evidence from the appellant, it appears that his stay in Asia was extensive. The appellant indicates that this was due to Covid-19 travel restrictions. Although it is possible this time away may have been intermittent, the Council estimate one period to be at least 8 months supported by dated communications between the main parties. It could have been considerably longer.
14. In the typical timeframe of expedient planning enforcement investigation, in my view, site investigation over such a period is unlikely to be able to legitimately conclude that a breach of planning control existed. Of the 4-year period immediately prior to the relevant date, the degree of absence would constitute a large proportion of the time limit for enforcement. It could not, in my view, be considered *de-minimis*. I cannot therefore conclude that the residential use was affirmatively established during that period.
15. Notwithstanding, it is equally valid to consider any other 4-year period prior to the relevant date. If consistent residential use was established over an earlier 4-year period then, following *Panton & Farmer*², any subsequent period of absence should be considered a dormant or inactive lawful use unless otherwise shown to be lost by abandonment, the formation of a new planning unit, or a different intervening use.
16. Correspondence with the Council indicates that the extended period abroad occurred some time prior to 29 November 2019. It is notable that the regular payments of Council Tax in 2019 extended up until 1 October 2019, after which regular payments stopped. A 4-year period prior to that would be a corresponding date some time in 2015.
17. Evidence provided by the appellant shows registered Council Tax liabilities from 1 May 2015. Whilst I agree with the Council that the evidence of Council tax payments does not directly translate to evidence of actual occupation, they add weight to the appellant's claim. Unlike the identified period of absence in 2019/20/21, payments appear more consistent.
18. Separate metering of utility supplies to the specific site address alludes to its independent use. The registration of a bank account and other financial institution correspondence to the address also adds weight in support of the appellant's claim.
19. Within that earlier period, the site record shows that an enforcement investigation, Ref. E/16/00344, was carried out by the Council. The evidence indicates that a PCN was served in 2016 followed by letters to the appellant on 24 January 2017 and 25 May 2017. The appellant's response advised of the building's separate residential use since July 2010 and of its permanent inhabitation. The Council's assessment advises that a further PCN response in December 2018 confirmed the appellant was living in the building at that time. As any response to a PCN is subject to the sanctions set out in s171D of the Act, they are entitled to significant weight.

² *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461

20. In concluding that investigation, an email from the Council, dated 14 February 2019, states that it was satisfied that the site has been occupied for at least four years. Although little of the content of that investigation has been provided in evidence by either party, the Council's finding in early 2019 is consistent with the appellant's claim.
21. The Council's subsequent record entry as 'No longer a breach' (as opposed to earlier 'no breach' findings on the site) is indicative of the s171B threshold having been met. It is distinct from merely NFA (no further action) that might result from a finding on expediency. Although the email stops short of describing the use of the site as 'lawful', if the Council's conclusion was that no enforcement action could be taken on the basis of consistent residential occupation, then a distinct parallel can be drawn to the LDC claim.
22. The enforcement assessment to qualify the reasoning behind that decision is absent. However, the wording and postscript (in bold) indicates that this was more than merely a question of expediency. As a building constructed in the early 2000s, it could only be its use (occupation) in question.
23. The Council do not dispute that the building is laid out in a manner that would facilitate day-to-day living. Furthermore, they have not presented any contrary evidence across those earlier years of the claim.
24. Taking all of the above together, I find that for the earlier part of that period, there is little to contradict the appellant's claim that the building has been used continuously for residential purposes. The responses to the PCNs, supporting evidence of use of the address as a registered dwelling for the purposes of the appellants personal administration, Council Tax and other bills, leads me to the conclusion that, on the balance of probabilities, the land identified on the location plan has been consistently used for residential purposes for a period of 4 years or more.

Other Matters

25. I acknowledge the references to the lawfulness, or otherwise, of any means of access used to gain entry to the site. However, this is not a relevant consideration in establishing the lawful use of the land. A representation from Markyate Parish Council highlights concern over associated parking provision. However, this is also outside the scope of my considerations in the appeal.

Conclusion

26. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant an LDC in respect of the independent residential use of the land was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act (as amended).

R Hitchcock INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 13 June 2022 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The Council has not provided any evidence to counter either its own finding on 14 February 2019 in relation to enforcement investigation Ref. E/16/00344, or the claim of the appellant regarding the consistent residential use of the site before October 2019. Therefore, on the balance of probabilities, I find that the claimed use has more likely than not persisted for a period of 4 years or more prior to the date of application ref.22/01865/LDE, received by the Council on 13 June 2022.

Signed

R Hitchcock

Inspector

Date: 15 July 2024

Reference: APP/A1910/X/23/3326177

First Schedule

Residential use

Second Schedule

Land at The Lodge, 37A Cavendish Road, Markyate, ST. ALBANS, AL3 8PT

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 15 July 2024

by R Hitchcock BSc DipCD MRTPI

Land at: The Lodge, 37A Cavendish Road, Markyate, ST. ALBANS, AL3 8PT

Reference: APP/A1910/X/23/3326177

Scale: Not to Scale

