



Appeal Decision

Site visit made on 30 July 2024

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 19 August 2024

Appeal Ref: APP/N4720/X/23/3332809

The Games Room, Land adjoining 180A Otley Road, Leeds LS16 5LH

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Barry Howgate against the decision of Leeds City Council.
 - The application Ref: 23/02063/CLE, dated 30 March 2023, was refused by notice dated 19 May 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, use of building as dwelling (C3).
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The site address in the heading above is taken from the appellant's application form. The description of the use for which a certificate of lawful use or development (LDC) is sought is taken from the Council's decision notice and the appellant's appeal form.
3. Relevant to this appeal, the time limit set out in section 171B(2)(a)¹ of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended) was amended on 25 April 2024. The period after which no enforcement action may be taken changed from four to ten years (beginning with the date of the breach). However, the transitional provisions for this means that the amendment does not apply where the breach occurred before the day on which that section came into force². As such, in my determination of the appeal, I have applied the time limit of four years beginning with the date of the breach, as set out in section 171B(2)(a) prior to the amendments.
4. As part of the appeal, at statement stage and final comments stage the appellant submitted additional documents/information which were not before the Council when it considered and determined the application³.

¹ Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse (England).

² The Planning Act 2008 (Commencement No. 8) and Levelling-up and Regeneration Act 2023 (Commencement No. 4 and Transitional Provisions) Regulations 2024.

³ Statement: Email re Council Tax (dated 16 June 2022); Statement from Virgin Money (dated 14 April 2018); Screen shot of Yorkshire Water Account (no date, but reference to 'Account opened 20 Sep 2019'); Bank Account Statement NatWest (dated 12 August 2019); Images (dated March 2017); and Correspondence with Solicitor dated 28 March 2018. Final Comments: Floorplan contained within Para 2.12 of Appellant's Final Comments.

5. The Encyclopaedia of Planning Law and Practice sets out that appeals under section 195 of the 1990 Act as amended 'are invariably treated as de novo appeals...the parties and interested persons may submit additional evidence to the Secretary of State which was not before the authority at the time of its decision'⁴. Moreover, the purpose of the LDC provisions are to enable the making of an objective decision based on the best facts and evidence available when the decision is taken. Therefore, I have had regard to the additional documents/information in my determination of the appeal.
6. The Council had the opportunity to comment on the documents/information submitted at statement stage as part of the appeal; and, in the interests of fairness, was given the opportunity to comment on the floorplan submitted at final comments stage, following which the appellant was given the final right of reply. I am therefore satisfied that neither parties' interests are prejudiced by my approach.
7. The building which is the subject of the appeal is referred to by the parties in a variety of ways including 'outbuilding', 'No 180B Otley Road' and 'the Games Room'. For the avoidance of doubt, hereafter, I have used the reference stated by the appellant in his application and appeal forms, namely, 'the Games Room'.
8. I note that the Council refers to there being an element of concealment in relation to the use of the Games Room, but I do not understand this to allege deliberate concealment that would disentitle the appellant to the provisions within section 171B(2)(a) of the 1990 Act as amended.
9. The Council contends that the site plan and red line boundary does not constitute an appropriate planning unit, reflecting land ownership rather than land use, and that the extent of the planning unit has not been consistent. In response the appellant highlights that, should I not consider all of the land within the red line boundary to be the same planning unit, a split decision could be issued. However, given my conclusion on the main issue, I have not pursued this matter further with the parties.

Background and Main Issue

10. Section 191(2) of the 1990 Act as amended, states that for the purposes of this Act uses and operations are lawful at any time if—(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
11. Under section 191(4), the relevant date for ascertaining whether the existing use is lawful, is the date of the LDC application. The date on the application form is 30 March 2023 and I have used this as the relevant date against which to determine the appeal.
12. Prior to the amendments dated 25 April 2024, section 171B(2) set 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

⁴ Encyclopaedia of Planning Law and Practice P195.03.

of the breach.’ As such, to be lawful, the use of the Games Room as a dwellinghouse must have begun on, or before, 30 March 2019 and continued without significant interruption for four years after the change.

13. In this appeal, the onus is on the appellant to make out their case to the standard of the balance of probabilities. As highlighted by the appellant, it is held in settled caselaw that evidence should not be rejected simply because it is uncorroborated. If there is no evidence to contradict the appellant’s version of events or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted⁵. It is necessary to consider whether, on the facts of the case and relevant planning law, the specific matter for which a certificate is sought would be lawful. Planning merits are not relevant at any stage in this particular appeal process.
14. Having regard to the above, the main issue is whether the Council’s refusal to grant the LDC was well-founded. This will turn on whether the appellant has demonstrated on the balance of probabilities that the use of the Games Room as a dwelling (C3) commenced on or before 30 March 2019 and then continued without significant interruption for four years after the change.

Reasons

15. The appellant submits that he has occupied and used the Games Room as an independent dwelling since 1 March 2018, and seeks to confirm its use as such for a continuous period of four years or more prior to 30 March 2023.
16. The Games Room is positioned to the rear of 180 Otley Road. It is a modest rectangular single-storey structure with a pitched roof, and is of stone and slate construction with uPVC doors/fenestration. It is accessed via a gated entrance just off Otley Road, where there is a separate post-box for the building.
17. Internally, it comprises a sitting/dining area; kitchen with sink, fridge, hotplates and microwaves; bedroom with sink; and bathroom with toilet and bath, all with associated utilities of electricity and water. Externally, immediately adjacent to the Games Room are a timber shed and metal storage container. The land within the appeal site is mostly grass with some mature trees and hedging, and is enclosed by a combination of tall close-boarded timber and metal wire mesh fencing.
18. There is no definition of the term ‘dwellinghouse’ in the 1990 Act as amended, but it is held in settled case-law⁶ that the distinctive characteristic of a dwellinghouse is its ability to afford to those who use it, the facilities required for day-to-day private domestic existence.
19. At the time of my site visit, as a matter of fact and degree, the Games Room possessed the facilities required for day-to-day private domestic existence and thus met the ‘Gravesham’ tests as a dwellinghouse. However, for the appeal to succeed, the appellant must demonstrate that, on the balance of probabilities, the change of use to a dwellinghouse began from, or prior to, 30 March 2019 and continued without significant interruption for a period of four years thereafter.

⁵ *Gabbittas v SSE & Newham BC* [1985] JPL 630.

⁶ *Gravesham BC v SSE & O’Brien* [1983] JPL 306.

20. The appellant's case that he has lived in the Games Room as a dwellinghouse since March 2018 is largely focused on the planning history of the site and the subsequent sale of 180 Otley Road (180) and what is now known as 180A Otley Road⁷ (180A). The appellant submits that historically, 180, 180A and the Games Room⁸ were all part of a single planning unit in residential use. In June 2013, 180 was sold⁹. The appellant states that he then resided at 180A between 2013 and 2018 whilst carrying out work to the Games Room to allow him to occupy it as a dwellinghouse. In March 2018, 180A was sold¹⁰. The appellant asserts that, since then, as he owns no other house, he has occupied the Games Room continuously as a dwellinghouse, highlighting that it seems 'inconceivable that the Games Room would be in separate ownership to 180 and 180A, but for it not to be occupied independently of them.'
21. I have had regard to the statements and evidence that the appellant has provided to support his case. The Land Registry record Title No YY19999 and the email from Horrocks Solicitors dated 28 March 2018 confirm the respective sales of 180 and 180A. Additionally, the singular statement extract from Virgin Money, is addressed to the appellant at the 'Games Room', and is dated 14 April 2018. These corroborate the appellant's assertions that after March 2018, the Games Room was no longer an annexe to either of the adjacent properties and that his post was delivered there.
22. Nevertheless, I note that the dates referenced on the Bank Account Statement from NatWest¹¹ and the screen shot of the Yorkshire Water Account¹² are within the four year period. Additionally, the email regarding Council Tax at the property does not confirm that the Council Tax Department 'required' Council Tax to be paid back to March 2018, and no evidence of any payment made by the appellant in 2022 or after has been provided.
23. Furthermore, whilst the submitted images appear to show some of the spaces within the Games Room in domestic use prior to 30 March 2019, including the presence of cooking facilities, crucially, none provide evidence of the presence of any toilet and personal washing facilities at those dates. In this regard, I note that the account with Yorkshire Water was only opened in September 2019 and the appellant's own admission that he 'had not been able to obtain an independent water supply immediately at the time of the independent occupancy of the building in 2018 and had to rely on his ex-wife until the independent supply could be established.'
24. In the above respects, I also note the Council's submission concerning the stationing of a caravan on the site for a 'significant period in the last few years', which could have been used as living accommodation instead of, or in conjunction with, the use of the Games Room¹³. Whilst I note the appellant's response on this matter and his assertion that a caravan was not stationed on the site during periods relevant to the appeal, namely, 2018, 2019, 2022 and 2023, no 'Google Earth images' have been provided to demonstrate this.

⁷ Granted full planning permission for change of use from a teenage annexe/studio to 5 bedroom detached house including first floor and new roof lights in 2009.

⁸ Granted full planning permission for detached annexe/art studio to garden of dwelling house in 2007.

⁹ Confirmed in submitted Land Registry record Title No YY19999 – although no plan is provided.

¹⁰ Confirmed in submitted email from Horrocks Solicitors dated 28 March 2018.

¹¹ Dated 12 August 2019.

¹² Not dated and states, 'Account opened 20 Sep 2019' and 'last payment received 30 Jan 2022'.

¹³ Aerial Photographs dated April 2020 and April 2021.

25. Consequently, I am not satisfied that, prior to 30 March 2019, the Games Room possessed all of the facilities required for day-to-day private domestic existence and, in that respect, that its occupation as a dwellinghouse had commenced. Moreover, even if I accepted that the use had commenced at that time, which I do not, there is no substantive evidence before me which demonstrates that it has been continuous thereafter.
26. Taken as a whole, the appellant's evidence is extremely limited in content and not continuous in its coverage. Whilst it makes a case for him having lived in the Games Room as a dwellinghouse for some time, the substantial deficiencies undermine his claims in terms of the length and continuity of the use.
27. I am mindful that the Council has not provided any substantive evidence of its own to directly contradict the appellant's version of events or make them less than probable. I am also aware of the appellant's submission that he is 'happy to set out his account in a different format'. Nonetheless, the onus remains squarely on the appellant to provide evidence in support of his case which is 'sufficiently precise and unambiguous.'
28. On this basis and mindful of the Gabbitts principle, whilst I do not reject the appellant's evidence, I consider that it is not sufficiently precise nor unambiguous. As such, the use of the Games Room as a dwellinghouse has not been 'affirmatively established' over a four year period.
29. Accordingly, I find that the appellant has not demonstrated on the balance of probabilities that the use of the Games Room as a dwellinghouse commenced on or before 30 March 2019 and then continued without significant interruption for four years after the change.

Other Matters

30. The appellant questions the validity of Condition 16 of Application Ref: 09/00830/FU and the subsequent Condition 9 of Application Ref: 22/04352/FU. Nevertheless, I find that this is another instance where the appellant has not discharged the burden of proof that is upon him.

Conclusion

31. 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 building as dwelling (C3)' 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.

F Cullen

INSPECTOR