

Appeal Decision

by **Peter Willows BA MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 11 October 2024

Appeal Ref: APP/X1165/X/24/3340507

Flat 2, Oddicombe Hall, Babbacombe Downs Road, Torquay TQ1 3LF

- 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 or development (LDC).
 - The appeal is made by Mr and Mrs Gerald and Anne Wood against the decision of Torbay Council.
 - The application ref P/2023/1077/CE, dated 14 December 2023, was refused by notice dated 28 February 2024.
 - 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 described as 'use as a single dwellinghouse'.
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Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is whether the Council's decision was well-founded. This turns on whether it has been demonstrated, on the balance of probability, that use as a single dwellinghouse had, at the time of the application, become lawful due to the passage of time.

Procedural Matters

3. Given the nature of the dispute in this case, I did not consider a site visit to be necessary. I sought the views of the parties on this, and no contrary view was expressed. Accordingly, I have made my decision without visiting the property.
4. The application form is dated 13 December 2023 but both parties indicate that the application was made on 14 December, which I have taken to be the correct date.

Reasons

Background

5. The appeal property was formerly a restaurant in a hotel. The use for which a certificate is sought is as a single dwellinghouse, falling within Class C3 of *The Town and Country Planning (Use Classes) Order 1987* (as amended). The submitted floorplan shows a flat with 3 ensuite bedrooms, complete with a

sitting/dining/kitchen area and a WC. The site was laid out in accordance with the submitted plan when Council officers visited the site on 29 January 2024. There is no suggestion that it lacked any of the physical characteristics of a dwellinghouse at that time.

6. Class C3 is as follows:

Use as a dwellinghouse (whether or not as a sole or main residence) by—

- (a) a single person or by people to be regarded as forming a single household;*
- (b) not more than six residents living together as a single household where care is provided for residents; or*
- (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within class C4).*

7. Certain matters regarding the use of the property in recent years are set out in the appellants' evidence and are not in dispute. It appears that the appellants, who already owned and occupied the neighbouring Flat 1, bought the appeal property on 31 August 2017. A letter from a Mr Dowen states that he was living at the property (which he says was a 2 bedroomed flat at the time) between April and September 2017. Mr Woods' Statutory Declaration of 11 December 2023 indicates that, on acquiring the property, he decorated and renovated it in readiness for its first letting on 25th June 2018. It may be that the works to convert the property to its current 3 bedroomed layout were carried out at that time, but the details of the renovation works are not stated, so it is also possible that changes to the layout were carried out at a later date.
8. It seems clear that the property was let via an agent from 25 June 2018, as indicated in the letting agent's records. It appears that it was being let as holiday accommodation, and numerous lettings took place up to and beyond the date of the LDC application some five and a half years later. The Council do not query the veracity of the evidence on lettings, but point out some significant gaps in the lettings, for example a 5-month period between 13 November 2020 and 12 April 2021.
9. The appellants also advise that the property has been regularly used by family members. Again, this is not disputed, and it is supported by a letter from a family member, although there is no detail regarding dates and so forth.

The requirements to establish lawfulness

10. Advice relating to LDCs is provided by the Government's Planning Practice Guidance (PPG). This establishes that the applicant is responsible for providing sufficient information to support an application. 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. A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is lawful. Planning merits are not relevant.

11. Section 191(2) of the Act 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.

12. I have not been referred to any enforcement notice, so my decision hinges solely on s191(2)(a). The appellants argue that the time for taking enforcement action had expired by the time the application for an LDC was made. The time limits are set out in s171B of the Act. At the time of the application, in accordance with s171B(2), the relevant period for a change of use to use as a single dwellinghouse was 4 years¹. Thus, the appellants need to show, on the balance of probability that, prior to the LDC application, the building had been used as a single dwellinghouse for a continuous period of not less than 4 years, and that the use had not subsequently been abandoned or changed.

13. The Council argues that a 10-year time period applies. This is based on its view that the appeal property has not been used as a dwellinghouse. However, there is no doubt that the certificate the appellants seek is for use as a C3 dwellinghouse, and the relevant time period that applied to such a use when the application was made was 4 years. Whether the appellants have demonstrated that such use is lawful depends on:

- i) Whether the holiday accommodation use that has taken place is correctly characterised as a Class C3 dwellinghouse use; and
- ii) If it is, whether the appellants have demonstrated such use for a continuous 4-year period.

Whether the property has been in use as a Class C3 dwellinghouse

14. From the foregoing it is clear that the property has not been occupied as a sole or main residence, but rather let (or used by friends and family) as holiday accommodation. The question of whether such use is use as a dwellinghouse has been considered by the courts, and both parties refer me to relevant cases.

15. In *Moore v Secretary of State for the Environment & New Forest District Council* [1998] JPL 877, the Court of Appeal found that the Secretary of State erred in concluding that 10 units were not dwellinghouses on the basis that they were managed as an entity as holiday accommodation.

¹ The time limit was changed to 10 years by the Levelling-up and Regeneration Act 2023, but that does not apply retrospectively to the LDC application.

16. In the later (and unrelated) case of *Moore v SSCLG [2012] EWCA Civ 1202*, the Court of Appeal found that 'Neither of the two extreme propositions — that using a dwellinghouse for commercial holiday lettings will always amount to a material change of use, or that use of a dwellinghouse for commercial holiday lettings can never amount to a change of use — is correct'. In that case the Court supported a planning inspector's decision, based on a fact and degree assessment, to uphold an enforcement notice alleging a material change of use 'from a C3 dwelling to use as commercial leisure accommodation which does not fall within Class C3(a)-(c), and which therefore constitutes a sui generis use'.
17. Here, the Council argues that the property has not been used as a dwellinghouse, arguing that holiday lettings is a different use. However, the judgements highlighted above indicate that this is a fact-sensitive matter. Indeed, the judgement in the earlier *Moore* case suggests that the Secretary of State should have concluded that the particular holiday let units under consideration were dwellinghouses. Nothing in the later *Sheila Moore* case casts any doubt on the principle that such units may be capable of being dwellinghouses. It is also clear from the wording of Class C3 that a dwellinghouse does not have to be a sole or main residence to fall within it.
18. The property in this current case has been altered to form reasonably modest 3 bedroomed accommodation. It is not suited to large groups and is unlikely to appeal as a 'party house'. Thus, it is often likely to be used by couples, modest groups or families in a manner commensurate with use as a dwellinghouse. It is often used by members of the appellants' family. The letter submitted by a family member indicates that she has occupied it with her own family. Overall, it appears to me, on the balance of probability, that it has been used by people to be regarded as forming a single household or not more than six residents living together as a single household. Thus, the use the appellants describe is use as a single dwellinghouse falling within Class C3 of the Use Classes Order.

Whether the use has been carried out continuously for a relevant 4-year period.

19. The final question concerns the period during which the use has been carried out and whether it has been carried out continuously. The correct approach to this is considered in *Thurrock BC v SSETR & Holding [2002] EWCA Civ 226*, *Swale BC v FSS & Lee [2005] EWCA Civ 1568* and *Islington LBC v SSHCLG & Maxwell Estates [2019] EWHC 2691 (Admin)*.
20. In *Thurrock* the Court of Appeal held that a use can only become lawful if it continues throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time. In *Swale* the Court of Appeal held that there is a difference between an established dwellinghouse, when an occupier does not have to be continuously or even regularly present in order for the building to remain in use as a dwellinghouse, and where there is no established use. To be immune from enforcement action under s171B(2), the use of a building as a dwellinghouse must be 'affirmatively established' over the four year period. The approach set out in *Thurrock* and *Swale* was followed by the High Court in *Islington*.

21. With the above in mind, it is important to consider whether it has been shown that the local planning authority would have been able to take enforcement action at any time during a relevant 4-year period. If it could not, there has not been a relevant period of continuous use. The evidence relating to use as a dwellinghouse prior to June 2018 is very limited. Nevertheless, the period between 25th June 2018 (when commercial lettings began) and 14 December 2023 (when the LDC application was made) is well in excess of the requisite 4 years. The remaining question is whether such use during that period was continuous.
22. The letting agent's records show a significant degree of seasonal variation. The longest period without any recorded lettings was for 5 months between 13 November 2020 and 12 April 2021. There was also a 4-month gap between March and July 2020, a 3-month gap at the start of 2019 and a number of shorter periods as well. It may be that family members used the property for some of those periods, but the burden of proof falls on the appellants and there is no evidence to show that they did.
23. There is no evidence of any intention to put the property to any other use during the periods of non-letting. Moreover, the appellants have provided evidence to show that they were paying Council Tax for the property – identified as 'Flat 2' on the bills – as well as electricity, gas and water bills throughout the relevant period. I am also mindful that it is common for the occupation of holiday homes to vary with the seasons. A break in occupation does not necessarily mean that the use has ceased.
24. Even so, the period of 5 months with no evidence of occupation is a very significant period. The apparent intention to let the property again in the future does not mean that it was being used as a dwellinghouse when it was not occupied. It is clear from the judicial authorities highlighted above that the use would need to be 'affirmatively established' over the 4-year period. The judgement in *Swale* comments that 'The decision-maker is required to consider not the building's availability or suitability for residential use, but whether it was actually put to such use'. In this current instance, it has not been shown that it was actually put to such use on a continuous basis.
25. I am told that 'If an enforcement officer has visited at any point within the four-year enforcement window it would have been clear that Flat 2 was being used as a dwellinghouse (whether occupied or not) and that enforcement action could have been taken'. However, that claim is not established, on the balance of probability, by the evidence before me. Indeed, it is not entirely clear when the current 3 bedroomed layout was created. While the building was clearly in use as a dwellinghouse when it was occupied as such, there is no substantive evidence, in the statutory declarations or elsewhere, to show what an enforcement officer would have seen if visiting the property during one of the lengthy periods of apparent non-occupation.
26. I appreciate that the Council itself previously suggested items such as Council Tax records and utility bills be submitted as evidence of the use, and I do not regard them as irrelevant. Indeed, in *Hedges v SSHCLG & Cornwall Council* [2021] EWHC 2392 (Admin) the High Court acknowledged that factors other than 'use on a day to day basis' may be relevant. Nevertheless,

actual occupation is also an important consideration. The burden of proof falls on the appellants and, looking at the evidence in the round, it has not been shown, on the balance of probability, that the Council could have taken enforcement action against a C3 dwellinghouse use at any time during a relevant 4-year period. It follows from this that the lawfulness of the use has not been demonstrated.

Conclusion

27. For the reasons given above I conclude that the Council's refusal 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) and dismiss the appeal.

Peter Willows

INSPECTOR