The Planning Inspectorate

Appeal Decision

Site visit made on 15 October 2024

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 October 2024

Appeal Ref: APP/A2280/X/24/3338822
89 Bryant Road, Strood, Rochester, Medway ME2 3ES

- 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 S Khaira against the decision of Medway Council.
- The application Ref MC/23/2144, dated 25 September 2023, was refused by notice dated 15 January 2024.
- The application was made under section 191(1)(a**)** of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is described as *'C3 – Dwellinghouse - No 89b has been in use since the 1970s approx.'*

Decision

1. The appeal is dismissed.

Background

2. In an appeal under s195 of the Act against the refusal of a LDC the burden of proof is upon the appellant. The test of the evidence would need to show that the self-contained flat or residential unit of accommodation had been used on an uninterrupted basis since at least 25 September 2019 – otherwise known as the 'material date' - being four years prior to the date of the application made.

3. The onus of proof is on the appellant to demonstrate, on the balance of probability, that the outbuilding has been used for such, thereby confirming that the planning position is as claimed. Accordingly, the key is that the evidence should be precise and unambiguous to this end.

4. Where LDCs are involved the planning merits of the development applied for do not fall to be considered. Instead, the decision will be based strictly on the evidential facts, planning legislation and relevant case law.

5. Here, no 89B is a single-storey, detached, outbuilding to the rear of no 89, a two-storey building used as a fish and chips shop with accommodation above.

Main Issue

6. The main issue in this appeal is whether, on the balance of probability, the use was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990.

Reasons

7. S191(2) says that uses and operations are lawful at any time if (a) no enforcement action may then be taken in respect of them because the time for enforcement action has expired, and they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

8. A 'self-contained flat' is defined within s254 of the Housing Act 2004 as a separate set of premises which forms part of a building, either the whole or a material part of the building and in which all three basic amenities – defined as a toilet, personal washing facilities and also cooking facilities - are available for the exclusive use of its occupants.

9. The judgement in *Gravesham BC v SSE & O'Brien* [1982] sets out the distinctive characteristic of a dwellinghouse, being its ability to afford to those who use it the facilities required for day to day private domestic existence.

10. Self-contained units are usually characterised by having exclusive use of all facilities within their own physical envelope. In this particular instance, from my site inspection, I can indeed confirm that no 89b is a small, but fully self-contained residential unit.

11. The owner of the premises, Mrs Jagdeep Khaira, has produced a letter which indicates that she purchased the site in 1991. The outbuilding was already in situ and it is understood that she and her husband used it for taking breaks from working in the fish and chips shop. Mrs Khaira also mentions that the outbuilding had a shower fitted. By 2018, she mentions that she *"began to live in that part of the building."* She also says that at this time she requested that the Council value the unit for Council Tax purposes. Subsequent to this no 89B, which by then had its own gas meter and boiler, was rented out for independent use.

12. An outbuilding or annexe is liable for Council Tax if it has been fitted out to function as independent living space, with its own sleeping, cooking and sanitation facilities.; in other words being capable of use as separate and self-contained living accommodation.

13. Mrs Khaira does not indicate in her letter, specifically, when she ceased using the outbuilding facility, merely stating that she *"…eventually had it rented out"*, although the appellant's Statement says that she used the flat from 2018 until 2022.

14. A Domestic Electrical Installation Certificate, dated 7 February 2022, has been submitted which indicates, at that time that no 89B (described in the certificate as a ground floor flat) was unoccupied. The Certificate describes the fittings and works carried out, namely:

    'Installed Hob circuit, kitchen ring sockets, Oven Circuit, Boiler Radial, lounge and kitchen lights, heat detector, outside light, bedroom and bath/shower room, and covered circuits.'

15. The above suggests that the building, at that time, underwent, a significant refit and this corresponds with Hope Edith Carr, shortly afterwards, taking up occupation on 19 February 2022. Ms Carr vacated the premises in August

2022, following which Lee Hatchett took occupation. He has remained there since.

16. A letter from a letting sales manager of Wards Lettings has been provided which indicates that she recalls visiting the property in August 2018 and recommended a marketing figure of around £775 per calendar month. However, this has little relevance if Mrs Khaira continued to use the building until early 2022.

17. It seems to me from the above evidence that, in 2018, Mrs Khaira was considering renting the outbuilding for independent residential use, and had the unit separately registered for Council tax. However, this was not put into effect until after the internal works were carried out and completed on 8 February 2022.

18. I have had regard to all the evidence submitted, but there is nothing compelling before me to suggest that no 89B was used continuously for self-contained residential purposes, and as a main residence, until Ms Carr's tenancy commenced in February 2022. In contrast, it would appear that Mrs Khaira only used the facility, which clearly needed upgrading before it was rented out, on a casual basis. Indeed, she says in her letter that she and her husband *'lived in that part of the building on and off…"*

19. I acknowledge the 'Gabbitas' principle whereby it was held that if a local planning authority has no evidence itself to contradict the applicant's version of events then there is no good reason to refuse the application. Nonetheless, the evidence adduced has to be precise and unambiguous to support the claim. In this particular instance I find the evidence put forward to confirm residential use rights since at least 25 September 2019, and effective immunity from planning control, to be incomplete. The intervening period up to 19 February 2022 is not convincingly accounted for.

20. Having, therefore, interpreted and weighed up all the evidence available I must conclude that the appellant has not discharged the burden of proof.

21. Accordingly, for the reasons given above I conclude, on the evidence available, that the use was not lawful on 25 September 2023, within the meaning of section 191(2) of the Town and Country Planning Act 1990.

22. I will, therefore, exercise my powers under section 195(3) of the Act.

Timothy C King

INSPECTOR