



Appeal Decision

Inquiry held on 23 October 2024

Site visit made on 23 October 2024

by David Jones BSc (Hons) MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 December 2024

Appeal Ref: APP/P1615/X/24/3342313

Ishkara, Dragon Fires, Grange Court Road, Adsett, Westbury on Severn, Gloucestershire GL14 1PJ

- 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 Mark Hughes against the decision of Forest of Dean District Council.
 - The application ref P0203/24/LD1, dated 8 February 2024, was refused by notice dated 3 April 2024.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is 'the use and occupancy of a bungalow, originally granted permission for holiday accommodation, as a permanent dwelling'.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development (LDC) describing the matter constituting a failure to comply with a condition which is considered to be lawful.

Application for costs

2. An application for costs was made by Mr Mark Hughes against Forest of Dean District Council. This application is the subject of a separate decision.

Procedural Matters

3. A Case Management Conference (CMC) was held online on 23 September 2024 with the appellant and representatives of the Council. The CMC was held to discuss the arrangements for the Inquiry and not the merits of the appeal.
4. For the avoidance of doubt, the planning merits of the existing use are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act as amended. My decision rests on the facts of the case, and on relevant planning law and judicial authority.
5. All oral witness evidence to the Inquiry was given by sworn affirmation.

Main Issue

6. The main issue is whether the Council's decision to refuse to grant a lawful development certificate for the use and occupancy of the bungalow as a permanent dwelling was well-founded.

Reasons

Background

7. The appeal property "Ishkara" is a single storey detached building located a short distance to the south-east of the dwelling known as "Dragonfires", where the appellant currently resides. The appeal property was built following the grant of planning permission P.1384/01 on 29 May 2002 for the *"Change of use of part of existing buildings together with alterations and extension to create a holiday let"*.
8. Condition e) attached to that permission stated *"The proposed holiday accommodation shall be used for holiday purposes only and shall not be used as permanent habitation. It shall not be occupied for a period exceeding 4 weeks for any single letting, and there shall be no return within 4 weeks by the same household. A register of all occupiers, detailing dates, names and usual addresses shall be maintained by the owner and shall be kept up to date and available for inspection at all reasonable hours by officers of the Council"*.
9. On 8 February 2024, the LDC application subject of this appeal was submitted. The description of the existing use on the application form is given as *"Use and conversion of a bungalow, originally granted permission for holiday accommodation, as a permanent dwelling"*. Four different grounds were selected on the application form, including *"the use as a single dwellinghouse began more than four years before the date of this application"*, and that the certificate was being sought for *"a use, operation, or activity in breach of a condition or limitation"*.
10. Section 191(3) of the 1990 Act sets out that any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if: the time for taking enforcement action in respect of the failure has then expired; and it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force. The focus for this appeal is whether, at the date the LDC application was made, the time for taking enforcement action in respect of the failure to comply with condition e) had expired.
11. Section 171B of the 1990 Act sets out the relevant time period for taking enforcement action. Section 171B(2) makes clear that, in the case of a breach involving a material change of use to a dwellinghouse, the time period is four years. Section 171B(3) sets out that, in the case of any other breach of planning control, including a breach of condition on a planning permission, the time period is 10 years.
12. Notwithstanding the above, it was held in *Arun*¹ that the four year time period for taking enforcement action set out under section 171B(2) applies to both development without planning permission and a breach of condition relating to a change of use to a use as a single dwellinghouse.
13. Nevertheless, in this case the appeal property was permitted as a dwellinghouse (Use Class C3), albeit with a restrictive condition that limits the manner in which it is capable of being occupied. Given that there is no material change of use to a dwellinghouse involved, the LDC therefore falls to be considered under Section 171B(3) which indicates that no enforcement action

¹ FSS v Arun DC & Brown [2006] EWCA Civ 1172; [2007] JPL 237

may be taken after the end of the period of 10 years beginning with the date of the breach.

14. It is clear from the evidence before me that both parties also considered that the LDC was sought under section 191(1)(c) on the basis that the residential use was in breach of condition e), and that the relevant period was therefore 10 years. I shall determine the appeal accordingly.

The evidence

15. In this type of appeal, the onus of proof is firmly upon the appellant. In *Gabbitas*² the Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The 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.
16. The evidence submitted in support of the appellant's case includes a statutory declaration from the appellant himself dated 5 February 2024. This sets out the use of the building since its construction which is stated as being:
- The construction of "Ishkara" was completed on 18 October 2004. It was immediately occupied by the appellant Mr Hughes who resided there until 2014. The property was then occupied by a "*range of market rental tenants*" who were "*mainly introduced by Forest of Dean District Council and claiming housing benefit for more than 10 years and is ongoing*".
 - The subsequent tenants who occupied the property after Mr Hughes are named as being Aimee Boyce from December 2014 to 2015, Tom Morgan from September 2015 to 18 July 2021, and Helen Norville from 19 July 2021 to date.
17. A further witness statement was provided by the appellant dated 27 September 2024 which set out that:
- Mr Hughes became involved in the construction of "Ishkara" initially with his own finances and then by way of a commercial mortgage to fund the works.
 - When the building was partially completed in 2004 and finished in 2005 Mr Hughes occupied it as his own and sole residence
 - Mr Hughes remained in the bungalow until December 2014, before moving back into "Dragonfires".
 - A friend of the appellant, Mr Andrew Boyce, asked whether he could rent the bungalow for his daughter Aimee Boyce to live in. Aimee Boyce subsequently resided there without break from December 2014 until July 2021. The rent was paid by her father Andrew Boyce during this period.

² *Gabbitas v Secretary of State for the Environment* [1985] JPL 630

- After Aimee Boyce left the property in July 2021, the property was rented to Helen Norville who has lived there with her daughter until the present day as their sole and only residence.
 - When making Council Tax enquiries in relation to the occupancy of "Ishkara" by Helen Norville, the Council revealed to the appellant that when Aimee Boyce had been living at the property her partner, Tom Morgan, had also lived there from September 2015 until they left in July 2021.
 - Neither the appellant or his father had ever let the building for holiday accommodation or carried out any farm diversification.
18. The appellant also provided a copy of an Equity Release Loan Agreement that appears to be dated 6 July 2004, and a response by Forest of Dean District Council to a Freedom of Information Request (FOI response) made in November 2022.
19. Two written statements dated 14 June 2024 and 27 September 2024 were also provided by both Andrew Boyce and Helen Norville detailing their involvement and knowledge of the occupancy of "Ishkara". Both individuals attended the Inquiry and swore the contents of their statements to be true and gave oral evidence to further clarify the content.

Assessment of the evidence

20. The Council's reasons for refusing to grant a LDC included that there was no evidence to suggest that Council Tax had been paid at the property, or that the property was even listed for Council Tax purposes. It was confirmed at the Inquiry that this was indeed the case. However, the responsibility for paying Council Tax rests with the tenant(s) and thus little weight can be afforded to this part of the Council's argument. I find that this simply shows that the property was not recorded for Council Tax purposes and is not evidence which relates to exactly how the property was occupied during the required ten-year period.
21. The Council also point to the fact that no persons have been registered at the appeal property on the Electoral Register. These omissions though would be the failure of occupiers to enrol on the Electoral Register, and such omissions do not demonstrate that the property was vacant during this period. Similarly, whilst the appellant Mr Mark Hughes has been registered at "Dragonfires" on the Electoral Register from 2009, this does not refute his sworn evidence that he resided at "Ishkara" between 2004 and 2014.
22. Turning next to the Equity Loan Agreement, I concur with the Council that the document does not assist the appellant's case. There is no reference to the appeal property, or its use, and the loan agreement appears to have been secured against the existing residential property "Dragonfires". The handwritten date at the bottom of the agreement indicates that it dates from July 2004, which may corroborate the appellant's written statement of the 27 September 2024 which stated that a mortgage was taken out to help fund the construction of the appeal property. In any event, I find that it is an entirely neutral piece of evidence that does not assist in establishing the use or occupancy of "Ishkara" during the relevant period.

23. The FOI response provided by the appellant is also a neutral piece of evidence. It is clear from the document that the request, which was made by the appellant's agent Mr Kendrick, sought information on whether specified individuals had occupied and/or paid Council Tax at the appeal property.
24. The appellant contends that the Council has withheld information relating to the occupancy of the property. It is clear though from the FOI response that as the request related to personal information, under section 40(5) of the Freedom of Information Act 2000, the Council were not obliged to confirm or deny whether the information was held. The Council's Officer Mr Colegate stated during his evidence in chief that had the specified individuals requested the information themselves instead of the appellant's agent, then any information held would have been provided. In any event, the burden of proof is firmly on the appellant to provide sufficient evidence to demonstrate, on the balance of probabilities, that the use of the property is lawful.
25. In terms of the appellant's statutory declaration and the written statements provided by Andrew Boyce and Helen Norville, together these all indicate that the appeal property has been occupied as a residential dwelling in breach of condition e) since 2004. All three witnesses reiterated this to the Inquiry when giving their oral evidence.
26. In the Officers report in relation to the LDC application subject of this appeal, it was stated that the Local Planning Authority had no evidence to contradict the accounts made by the appellant within his statutory declaration. The Council's primary argument was that the evidence was not sufficiently precise and unambiguous.
27. In his sworn evidence to the Inquiry Mr Hughes confirmed that, as set out in his statutory declaration, he moved into the appeal property in October 2004 when it first became habitable. He further confirmed that the building was completed externally in 2005. Mr Hughes continued to reside in the property until December 2014 when he moved into "Dragonfires", which was by now vacant following the passing of his father in June 2014.
28. Other than the absence of Council Tax being paid, and persons being registered on the Electoral Register at the property, which are matters I have already dealt with above, the Council has provided no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events in relation to his own occupation of the appeal property less than probable. Any potential inconsistency concerning the date when he started living in the appeal property was addressed through his sworn oral testimony.
29. Having regard to the appellant's statutory declaration and sworn oral evidence, to which I attach substantial weight, I regard the evidence to demonstrate on the balance of probabilities that the appellant occupied the property between 18 October 2004 and December 2014. Consequently, the property was in residential use without compliance with condition e) for a period in excess of ten years.
30. The residential use of the appeal property without compliance with condition e) of planning permission P.1384/01 therefore became lawful on 18 October 2014. Once it had acquired that lawfulness, the Council would be unable to take

enforcement action so long as there has not been a supervening event, such as a material change of use or abandonment³.

31. It was clarified in *Ocado*⁴ that the same applied in a breach of condition case. The reasoning of Justice Holgate in *Ocado* deals specifically with that point.

32. Paragraphs 162 to 164 of *Ocado* read:

162. The correct legal position is that a lawful planning right which has accrued upon the expiry of a time limit in s.171B is not lost merely because subsequently that right is not exercised for a period of time. That conclusion applies just as much to a right legitimising a breach of condition which prohibited a use as to a use right derived from a material change of use. The law does not require that such a right be exercised on the date when an application for a CLEUD is made (or an enforcement notice is issued), or that it has been exercised throughout the intervening period from the time when it accrued. Instead, the law requires that the right remains in existence at the date when the lawfulness of what it authorises is in issue. So an accrued planning right must not have been lost in the meantime because of a supervening event, such as abandonment.

163. This case has had to focus on the breach of a negative condition restricting the use of land. But the range of conditions which may be imposed on a planning permission is very wide and varied and the nature of the breaches to which they can give rise may also vary considerably. For example, a condition may be mandatory in nature by requiring something positively to be done, e.g. a requirement to provide landscaping, noise attenuation or some other form of mitigation, parking spaces, or just obscure glazing to prevent overlooking through a window. Where such a condition is breached during the 10-year immunity period the accrued right will entitle the landowner not to comply with the condition thereafter. The continued existence of that right will not depend upon the landowner having to take any positive action to assert his right, let alone to continue taking that action. In my judgment there is no legal reason why the continued existence of a right which arises from breach of a negative condition should be any different in this respect.

164. The breach of a condition may be of a continuing nature, or it may be once and for all..... I do not presently see why, once that accrued legal right has been defined, its continued existence is affected by whether the past breach was of a once and for all or a continuing nature..... There is no suggestion that the legal basis for the continued existence of an accrued right relating to development without planning permission is different according to whether the former breach of planning control was once and for all or a continuing breach.

33. Caselaw has therefore held that where a breach of a planning condition became lawful after ten years by virtue of section 191(3) of the Act, the right which thereby accrued was not lost if it did not continue to be exercised. Something more would be required in order for the right to be lost. The law also did not require that such a right was being exercised when an application for a LDC was made.

³ *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461

⁴ *R (Ocado) v Islington BC* [2021] EWHC 1509 (Admin)

34. In this particular case though, I find that the right was being exercised at the time the LDC application was made. The sworn oral evidence given by Helen Norville to the Inquiry was sufficiently clear and precise, setting out that she moved into the appeal property in July 2021 with her daughter and has lived there continuously ever since. No evidence put forward by the Council casts any doubt on that claim.
35. Much of the Council's concerns regarding potential inconsistencies and evidence not being sufficiently precise and unambiguous relate to the period between December 2014 and July 2021, when the appeal property is said to have been occupied by Aimee Boyce and Tom Morgan. These concerns include:
- In his statutory declaration, Mr Hughes states that the property was "*immediately occupied by myself then by a range of market rental tenants introduced by the Forest of Dean District Council Housing Department and claiming housing benefit for more than 10 years and is ongoing*". The Council denied that tenants were introduced by the Council's Housing Department and Mr Hughes later appeared to play down this claim, instead stating that the tenants were introduced to him through friends. The Council's records also showed that housing benefit had only been claimed at the property between 1 May 2015 and 26 March 2017.
 - In his statutory declaration, Mr Hughes stated that Aimee Boyce resided at the property from December 2014 to 2015, with Tom Morgan occupying the property from September 2015 until 18 July 2021. This changed in his later written statement dated 27 September 2024 where Mr Hughes stated that Aimee Boyce resided at the property without break from 2014 until July 2021, with Tom Morgan also living there from September 2015.
36. Notwithstanding the inconsistencies in Mr Hughes evidence as set out above, the sworn oral evidence given to the Inquiry from Andrew Boyce, the father of Aimee, was that Aimee had lived at the property between the end of 2014 and July 2021 and that he had paid Mr Hughes the requisite monthly rent over this period. Helen Norville also stated in her evidence that she was aware of Aimee Boyce and Tom Morgan as they were still moving out as she was preparing to move into the property in July 2021.
37. The Council's evidence in respect of the housing benefit claim further supports the position that the appeal property was occupied in breach of condition e) for at least part of the period between December 2014 and July 2021. In an email dated 5 September 2024, Benefits Manager Mr Fisher confirmed that "*There was a housing benefit only claim from 01/05/2015 to 26/03/2017 at Ishkara for a Miss Aimee Boyce with the landlord stated as Mark Hughes of Dragon Fires.*"
38. Mr Fisher also confirmed during cross examination that Aimee Boyce had phoned to inform the benefits team that "her partner" was moving into the property, and that the housing benefit claim was subsequently ended when the person moved in. The Council's evidence was that the housing benefit claim ended on 26 March 2017 which would indicate that her partner, Tom Morgan, had moved into the appeal property by that date. There is no evidence before me that suggests that Aimee Boyce and/or Tom Morgan moved out of the property prior to the arrival of Helen Norville in July 2021.

39. I therefore find, on the balance of probabilities, that the appeal property was occupied by Aimee Boyce between at least 1 May 2015 and July 2021, with Tom Morgan also residing at the property from at least 26 March 2017 until July 2021. I accept that the gap between the date when Aimee Boyce was said to have moved into the property (December 2014) and the start of her housing benefit claim (May 2015) is unexplained. Nevertheless, even if the property was unoccupied during this period, as held in *Panton & Farmer* and *Ocado*, a lawful use is not lost just because it is dormant or inactive for a period. In order for an accrued right to be lost there would need to be a supervening event such as (i) abandonment, (ii) the formation of a new planning unit; or (iii) a material change of use.
40. In this case, there is no evidence before me to suggest that the property was occupied as a holiday let in accordance with condition e) at any stage, nor is there any evidence to suggest that any other material change of use occurred at the property. Equally, there is no suggestion that a new planning unit had been formed or that the use of the property had been abandoned at any stage. Any periods of inactivity at the property would not therefore result in the accrued lawful use being lost.
41. I note that other evidence, such as, tenancy agreements or bank statements showing the payment of rent over the requisite period would have supported the appellants claims more robustly. However, the fact that the missing information highlighted by the Council has not been provided does not contradict the appellants claims or make them less than probable. The Council has also not produced any evidence to show that enforcement action could not have been taken if they were to have investigated the breach during the requisite period of time.
42. I therefore find that the totality of the evidence is sufficient to conclude that, on the balance of probabilities, the appeal property was in continuous residential use without compliance with condition e) between 18 October 2004 and December 2014. Having been used for a requisite ten-year period in breach of condition e), there is no evidence that the use which had become lawful was subsequently lost through any means.
43. Consequently, no enforcement action in respect of the breach of condition e) of planning permission P.1384/01 may be taken because the time for enforcement action has expired. In accordance with section 191(3) of the 1990 Act, the residential use of "Ishkara" is lawful.

Other Matters

44. The Council also refer to deliberate concealment. The principles on deception and public policy derived from *Welwyn Hatfield*⁵ are: that positive deception is a matter integral to the planning process; that deception was directly intended to undermine the planning process; it did undermine that process: and, the wrong-doer would profit from the deception if the normal limitation period were to enable him to resist enforcement.
45. The Council's case in relation to any deliberate concealment is firstly that there is no record of any Council Tax being paid at the property, and secondly that

⁵ *Welwyn Hatfield v SSCLG v Beesley* [2011] UKSC 15

the appellant will have been familiar with the planning process and that the building was approved for use as holiday accommodation.

46. Whilst I find it likely that the appellant was aware that the property was approved as holiday accommodation and that its use for permanent residential accommodation required planning permission, and that (at least during the period he occupied the property) the necessary Council Tax was not being paid, this does not amount to positive deception. Instead, I consider it to be more accurately described as simply “keeping a low profile”. Therefore, on the basis of the evidence before me, I do not find that there was no deliberate concealment.

Conclusion

47. For the reasons given above I conclude, on the evidence now available, that the Council’s refusal to grant a certificate of lawful use or development in respect of the use of Ishkara, Dragon Fires, Grange Court Road, Adsett, Westbury on Severn, Gloucestershire GL14 1PJ for residential purposes in breach of condition e) (holiday accommodation) of P.1384/01, was not well-founded and that the appeal succeeds. I will exercise accordingly the powers transferred to me in section 195(2) of the 1990 Act as amended.

David Jones

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

John Kendrick	Agent
He called:	
Mark Hughes	Appellant
Andrew Boyce	Factual Witness
Helen Norville	Factual Witness

FOR THE LOCAL PLANNING AUTHORITY:

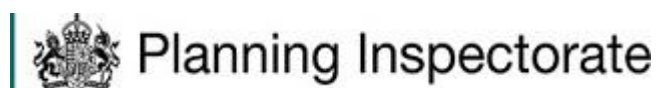
Peter Wadsley	Counsel instructed by Forest of Dean District Council
He called:	
Stephen Colegate	Principal Planning Officer, Forest of Dean District Council
Craig Fisher	Benefits Technical Lead for Publica Group Ltd

INTERESTED PARTIES:

Jeffrey Stephens	Neighbour
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DOCUMENTS SUBMITTED AT THE INQUIRY

1. Opening submissions on behalf of Forest of Dean District Council
2. Arun District Council v First Secretary of State and another [2006] EWCA Civ 1172
3. Costs rebuttal statement from Forest of Dean District Council



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 8 February 2024 the matter described in the First Schedule hereto, constituting a failure to comply with a condition or limitation subject to which planning permission has been granted, 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(3) of the Town and Country Planning Act 1990 (as amended), for the following reason:

No enforcement action in respect of the breach of condition e) of planning permission P.1384/01 may be taken because the time for enforcement action in accordance with section 171B of the 1990 Act has expired. In accordance with section 191(3) the residential use of the property known as "Ishkara" without compliance with condition e) of planning permission is lawful.

Signed

David Jones

Inspector

Date: 16 December 2024

Reference: APP/P1615/X/24/3342313

First Schedule

The residential use of the property without compliance with condition e) of planning permission P.1384/01

Second Schedule

Land at Ishkara, Dragon Fires, Grange Court Road, Adsett, Westbury on Severn, Gloucestershire GL14 1PJ

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 matter, constituting a failure to comply with any condition or limitation subject to which planning permission has been granted, 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 or 187A of the 1990 Act, on that date.

This certificate applies only to the extent of the matter described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any matter 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: 16 December 2024

by David Jones BSc (Hons) MPlan MRTPI

**Land at: Ishkara, Dragon Fires, Grange Court Road, Adsett, Westbury on Severn,
Gloucestershire GL14 1PJ**

Reference: APP/P1615/X/24/3342313

Scale: Not to Scale

