

Appeal Decision

Site visit made on 17 February 2025

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 25th February 2025

Appeal A - ref: APP/T3725/X/24/3339528

Glenthorne, Five Ways Road, Hatton, Shrewley, Warwick CV35 7HZ

- The appeal is made under section 195 of the Town and Country Planning Act 1990, (the Act), as amended by the Planning and Compensation Act 1991 against the refusal of Warwick District Council grant a certificate of lawful use or development.
- The appeal was made by Mr Richard O'Flynn.
- The application, reference W/23/1648, for a certificate of lawfulness, (LDC), dated 25 October 2023 was registered on 15 November 2023. It was refused on 15 February 2024.
- The application for a Certificate of Lawful Development was for the existing use of the building as a single private dwellinghouse, (Use Class C3) – described on the application form as: “Use as a dwellinghouse as per my red line plan”.

Summary of decision: The appeal is not allowed. A certificate of lawful use or development is not issued.

Appeal B - ref: APP/T3725/X/24/3343915

Glenthorne, Five Ways Road, Hatton, Shrewley, Warwick CV35 7HZ

- 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 the refusal of Warwick District Council grant a certificate of lawful use or development.
- The appeal was made by Mr Richard O'Flynn.
- The application, reference W/24/0219, for a certificate of lawfulness, dated 16 February 2024 was registered on 23 February 2024. It was refused on 19 April 2024.
- The application for a Certificate of Lawful Development was for the existing use of the building as a single private dwellinghouse, (Use Class C3) – described on the application form as: “Use as a dwellinghouse as per my red line plan”.

Summary of decision: The appeal is not allowed. A certificate of lawful use or development is not issued.

Costs application

1. The Appellant, Mr Richard O'Flynn, applied for an award of costs against Warwick District Council. That application is considered in a separate decision.

The 2 applications and appeals

2. The 2 applications and appeals deal with the same development. The cases made by the parties are essentially the same for both. In his second application and appeal, Mr O'Flynn submitted further arguments in support of his claim to lawfulness in respect of the use of the subject building as a single private dwellinghouse. I therefore deal with both appeals together, to include consideration of Mr O'Flynn's additional representations on the second application.

Appeal property

3. The appeal concerns the use of the single storey H-shaped plan brick building within the 1.4ha land attached to the dwelling Glenthorne, Five Ways Road, Hatton.

Brief history

4. By an appeals decision dated 5 October 2017, (refs: APP/T3725/X/15/3002141; APP/T3725/X/17/3172164), use of land at Glenthorne, including the current appeal land, for residential purposes incidental to the residential use of a single private dwellinghouse was determined to be lawful. It was a single planning unit, (para. 20, 5/10/17 decision).
5. The appeal building was constructed following the issue of a lawful development certificate by the Council, ref: W/17/2164, on 31 January 2018 for the proposed erection of 2 no. detached outbuildings, including the appeal building, siting of a caravan and formation of hardstanding at Glenthorne. The Council accepted that, whilst the buildings were reasonably large, their size was not disproportionate to that which would be required to accommodate the proposed uses, including a gym room, wood working tools and storage, snooker room, space for table tennis, model railway track, dance studio, darts and seating area. The Council had been satisfied that the all of the proposed uses were incidental to the residential use of the main dwellinghouse.
6. The appeal building was said to have been substantially completed on 27 September 2019. Mr O'Flynn said it had been occupied and used as a separate dwelling to Glenthorne by his wife, Mrs Carole O'Flynn, from 14 November 2019. It had then been continuously occupied by her for a period of more than 4 years. He said its use as a separate dwelling had become lawful by the passage of time.

Selected legal background

7. S.171B(2) of the Act says: "*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 of the breach.*". (the legislative change that from 25 April 2025 all breaches of planning control are to be subject to the "10 year rule" is not retrospective. It does not apply here).
8. A "dwelling" means any building or part of a building occupied or intended to be occupied as a separate dwelling. A "flat" means a separate set of premises (a) which forms part of a building, and (b) which is constructed or adapted for use for the purposes of a dwelling - Leasehold Reform, Housing and Urban Development Act, s.101(1).
9. S.191(1) of the Act provides that if any person wishes to ascertain whether (a) any existing use of buildings or other land is lawful; they may make an application for the purpose to the Local Planning Authority. Where that application is refused and an appeal against that decision is made, the burden of proof to show that the decision was not well founded lies with the appellant.
10. S.193(4)(a) of the Act provides that an LDC may be issued under s.191 or s.192 for the whole or part of the land specified in the application.
11. S.195(1) provides that an appeal may be made to the Secretary of State where an application under s.191 or s.192 is refused. S.195(2) and (3) provide that, on appeal, the Secretary of State shall grant an LDC if refusal is not 'well-founded'.
12. S.174(2)(d) of the Act says that, at the date the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. The burden of proof is on an appellant in an enforcement appeal to make their case in respect of this legal ground. The case of *Nelsovil v SSE* [1962] 13 P&CR 151 is authority for that position.

13. The purpose of the LDC provisions is to enable the making of an objective decision based on the best facts and evidence available when the decision is taken. 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 accepted, (the case of *Gabbitts v SSE & Newham BC* [1985] JPL 630 is authority for the position, also see *Ravensdale Ltd v SSCLG*).

Considerations

14. Mr O'Flynn needed to show that an independent unlawful residential use of the 'H' shaped plan appeal building at Glenthorne started more than 4 years before the dates applicable to the LDC applications and that such use had continued uninterrupted up to the application dates.

Planning unit

15. Mr O'Flynn submitted that the issue of a W/17/2164 lawful development certificate on 31 January 2018 effectively divided the Glenthorne curtilage into 2 separate planning units. That was because of the substantial separation of the main house and garden from the appeal building and its surrounding land.
16. Appeal decision of 10 March 2021, our ref: APP/T3725/X/20/3257925, although criticised by Mr O'Flynn, but not challenged, at Paras. 14 to 23 dealt with the question of a possible division of the Glenthorne planning unit. The Inspector concluded, correctly in my view, that the effect of the W/17/2164 lawful development certificate was confirmation that the development proposed would be required for a purpose incidental to the enjoyment of the dwellinghouse at Glenthorne as such under the provisions of the General Permitted Development Order. It did not divide the Glenthorne land into 2 separate planning units.

Continuity of residential occupation of appeal building

17. Mr O'Flynn said the H shaped plan appeal building had been continuously occupied as a separate dwelling to the house at Glenthorne by his wife, Carole O'Flynn, for a period of more than 4 years from 14 November 2019. He had to show that change had occurred at that time and that it continued thereafter to the extent that the Council could have taken enforcement action at any time in that period. The case of *Thurrock BC v SSETR & Holding* (COA 27.2.02, J 1080) is authority for that position. That is unlike the situation, where, with an existing lawful residential use, a dwelling could be unoccupied for sometimes lengthy periods of time without losing that lawfulness, (*Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461). In the case of an unlawful use, if the use ceased during that period, the time up to that point would not count towards immunity. The "clock" would restart if and when the unlawful use recommenced.
18. The question is whether the use was continuous, not whether the dwelling was continuously fitted out or intended for residential use, (*Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin)). It can be a difficult test to pass by demonstration. That is especially so here, where the appeal building was said to be occupied by a member of the family of those living in the dwelling, Glenthorne. Nevertheless, Mr O'Flynn made several references the arrangement that he and his wife lived separate lives in the dwelling Glenthorne and in the appeal building respectively.
19. It was said that Mr and Mrs O'Flynn took separate holidays. If that was during the requisite 4 year period, it is reasonable to suppose that when Mrs O'Flynn was away on holiday, she was not in occupation of the appeal building. If so, during those holiday periods the Council could not have taken enforcement action against an unlawful residential use of the appeal building as it would not have been occupied as a single family dwelling. At those times, the "clock" would have restarted when the unlawful use recommenced. The times and dates of non-occupancy were not shown. Even a few days of the appeal building being unoccupied would have meant a 4 year uninterrupted period to gain immunity was not achieved. Mrs

O'Flynn's mother lived with her in the appeal building for some months. But that fell well short of covering the full 4 year period.

Mixed use of appeal building?

20. The planning appeal decision 10 March 2021, ref: APP/T3725/X/20/3257925, at para. 18 says: *"Although there is some ambiguity in how the building is used, the appellant confirms that since September 2018, he has regularly undertaken woodwork projects in two of the south facing rooms as part of his own DIY requirements and hobby activities and I have no reason to doubt the appellant's evidence in this regard. Whilst the appeal building appears to be physically separate from the main dwelling of Glenthorne, it appears that there remains a functional link between the use of the main dwelling and the appeal building."* If that was right, the then use of the current appeal land and building would have been an unlawful mixed use ancillary to the single dwelling Glenthorne and a new single residential dwelling use, separate from that at Glenthorne. An unauthorised additional planning unit would have been formed. It would not have been an unlawful new single residential use of the 'red line' as shown on the 2 appeal applications plans.

Planning Contravention Notice (PCN)

21. On 5 June 2020 the LPA issued Mr O'Flynn with a planning contravention notice alleging *"Without planning permission, the unauthorized use of the Land and buildings identified on the attached plan used as independent residential accommodation"*. A planning contravention notice may be issued under section 171C of the Town and Country Planning Act 1990 and can be used to allow the local planning authority to require any information they want for enforcement purposes about any operations being carried out; any use of; or any activities being carried out on the land.
22. Mr O'Flynn responded to the notice on 22 June 2020. He considered that no breach of planning control had occurred. Amongst other points made, Mr O'Flynn said his wife Carole O'Flynn had decided that parts of the 'H' shaped plan building were more suited to her own deteriorating physical and other needs than the accommodation provided by the dwellinghouse of Glenthorne. She moved into the building on 14 November 2019. In his response to the notice, Mr O'Flynn said 3 rooms within the notice building remained unoccupied and undecorated and available to be used for their originally intended incidental residential use purposes. Nothing had changed in that regard since the Council's last site visit in January 2020. Mr O'Flynn further said that since December 2018, he had regularly undertaken other woodwork projects in 2 of the south-facing rooms to assist his son with his home extension project and as part of his own DIY requirements and hobby activities.
23. The Council said they did not close their enforcement file, instead waiting until 9 December 2019 before conducting another site visit when they noted that parts of the notice building were then being lived in by Carole O'Flynn and that her elderly mother was staying with her. Further Council file notes show that on 4 May 2021 the view was that the then current use appeared to be as an annex to Glenthorne rather than having a full independent use. A later note of 22 March 2021 said an officer passed the site, forming the view that there was nothing to suggest that the building was independently occupied.
24. The final outcome noted on the file said the site had been monitored on multiple occasions with no breach being identified. The Council were content that they had enough evidence to prove there was no continual use and would close the case pending new information. The Council's Enforcement Manager had visited the property noting on 20 May 2022 that no change appeared to have occurred.
25. When Mrs Carol O'Flynn and later her mother moved into the appeal building, it may have appeared that the building was lawfully occupied as an annex to the dwelling Glenthorne. It would have been difficult for the Council to distinguish between such lawful use and an unlawful change of use of the building to use as a separate dwellinghouse, as is evidenced by their perceived need for to issue a planning contravention notice and their regular visits

to check on the usage of the appeal building. The Council were also dealing with denials by Mr O'Flynn of an ongoing unlawful use in response to the planning contravention notice. Nevertheless, in the appeals here before me the claim is that there had been an unlawful use for more than 4 years. That apparent contradiction much weakens the separate dwelling use case now claimed.

Council Tax

26. The Council's Enforcement Manager noted that a Council Tax check showed the appeal 'H' shaped building was not registered. Mr O'Flynn described that as a seemingly irrelevant fact. It is not. The failure to register could suggest an intent to conceal, where the Courts have found that in those circumstances the time limits in s.171B of the Act do not engage until the breach has been discovered, (*Welwyn Hatfield Council v SSCLG & Beesley* [2011] UKSC 15). In that case it was found that the aim of the conduct was to obtain a planning permission which would not have been granted had the application been made for a dwelling house.

Other matters

27. I have considered all the other matters raised, including those made by Mr O'Flynn dated 6 May 2024. Some put forward and criticisms made of the Council's actions are not relevant to my considerations, for example, the *Res Judicata* point. After all, appeals are required to be determined as if the application for permission had been made to the Secretary of State in the first instance - para. 006 Planning Practice Guidance – Planning Appeals General.

Conclusion

28. I consider that no persuasive case was made that the LDC application building and the 'red line' plan land had acquired a lawful use as a separate residential dwelling by the passage of time.

FORMAL DECISIONS

Appeal A - ref: APP/T3725/X/24/3339528

29. For the reasons given above, I conclude that the Council's refusal to grant a lawful development certificate for application dated 25 October 2023 for the existing use of the building as a single private dwellinghouse (Use Class C3) at Glenthorne, Five Ways Road, Hatton, Shrewley, Warwick CV35 7HZ was well founded and that the appeal should fail. I exercise accordingly the powers transferred to me by s.195(3) of the Act, (as amended).

Appeal B - ref: APP/T3725/X/24/3343915

30. For the reasons given above, I conclude that the Council's refusal to grant a lawful development certificate for application dated 16 February 2024 for the existing use of the building as a single private dwellinghouse (Use Class C3) at Glenthorne, Five Ways Road, Hatton, Shrewley, Warwick CV35 7HZ was well founded and that the appeal should fail. I exercise accordingly the powers transferred to me by s.195(3) of the Act, (as amended).

John Whalley

INSPECTOR