The Planning Inspectorate

Appeal Decision

Inquiry Held on 24 January 2023
Site visit made on 24 January 2023

by Chris Preston BA(Hons) BPl MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 April 2023

Appeal Ref: APP/H2265/X/3273837
2 Keepers Cottage, Hurst Wood, Platt, Sevenoaks, Kent TN15 8TA

- 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 development (LDC).
- The appeal is made by Mr Ian Williams against the decision of Tonbridge & Malling Borough Council.
- The application Ref TM/20/01398/LDE, dated 03 June 2020, was refused by notice dated 30 October 2020.
- The application was made under section 191(1)(b) 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 on the application form as: The erection of the building subject of EN1 issued on 16 June 2009.

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful development describing the existing operation which is considered to be lawful.

Application for costs

2. At the Inquiry an application for costs was made by Mr Ian Williams against Tonbridge & Malling Borough Council. This application is the subject of a separate Decision.

Preliminary Matter and Main Issue

3. The application relates to a building within the garden of 2 Keepers Cottage which was the subject of an enforcement notice (EN1), issued by the Council in June 2009. The breach of planning control was described on the notice as "*Without planning permission, the erection and use of a building for the purposes of a single family dwellinghouse shown by the hatched area on the attached plan*".

4. A subsequent appeal against EN1 was dismissed and the notice was upheld subject to variations to the requirements. Those varied requirements were to cease the use of the building as a single family dwellinghouse and remove the kitchen and all associated fixtures and fittings and any beds or other furniture designed for sleeping.

5. The notice did not require the building itself to be demolished. Under the terms of section 173(11) of the Town and Country Planning Act 1990 (the Act) where

an enforcement notice could have required a building to be demolished but did not do so planning permission is treated as having been granted for the erection of the building by virtue of section 73A of the Act. That is subject to the proviso that all the requirements have been complied with, as set out under s173(11)(b). Whether the appellant did, in fact, comply with the terms of the notice is the nub of this appeal.

6. The building in question has been altered and extended since that time, including the filling in of the bays in the former car port. A second enforcement notice (EN2) was served in relation to those works. However, the LDC sought in this appeal does not relate to any of the works that took place after EN1 was served. For clarity, my decision makes no reference to the lawfulness, or otherwise of those subsequent works which have no bearing on this appeal.

7. Helpfully, a plan has been provided which depicts the building as it stood at the time EN1 was served[1]. Within the Statement of Common Ground both parties accept that the plan accurately shows the building as it stood at that point in time.

8. Following on from the above, the main issue in the appeal is whether the Council's decision to refuse to grant an LDC for the building as depicted on that plan was well-founded.

Reasons

9. As set out above the key question is whether, on the balance of probabilities, EN1 was complied with, such that planning permission has been granted for the building by virtue of s173(11) of the Act. More specifically, the issue in dispute is whether compliance occurred within the timeframe set out within the notice. In effect, that period was six months from the date the notice was upheld at appeal on 04 January 2010.

10. As set out within the Government's Planning Practice Guidance an applicant is responsible for providing sufficient information to support an application. 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.

11. There is no doubt that there were subsequent breaches of EN1 and the appellant was prosecuted and fined in December 2017 after pleading guilty to non-compliance over a period running from February 2016 to April 2017. However, if the notice was complied with in the first instance, as the appellant contends, then planning permission would have been granted for the building at that point in time. There is no suggestion that any subsequent lapse would have the effect of removing a planning permission granted by virtue of s173(11). That does not form part of the Council's case and I have not been directed to any legislation within the Act or any caselaw to the contrary.

12. The Local Planning Authority has provided very little contemporaneous evidence of its own to shed light on the events following the notice being upheld at appeal. No officers who were employed and visited the property during that period were called to give evidence, even though at least one is still

[1] 014-1042-21A

employed by the Council. Mr Thompson was engaged to act for the Council in July 2021 and had no personal knowledge of the site from before that time, other than information provided to him. He confirmed under cross examination that did not include any photographs of the building dating from 2010 but only those relating to the Court proceedings in 2017. From the information before me the appellant has made repeated attempts to seek any information that the Council holds in relation to the case but no information was provided in response to those requests.

13. Thus, it is fair to summarise the Council's case as being founded on what it perceives to be inconsistency or a lack of evidence on the part of the appellant as opposed to providing direct contemporaneous evidence of its own.

14. The appellant's case is similarly lacking in terms of any direct photographic or documentary evidence dating from the 2010 compliance period. However, in his statutory declaration Mr Williams provides a clear account of what happened at the time in terms of removing the kitchen cooker, worktops, washing machine, pots and pans and table, along with the beds. A local builder who was familiar to the appellant was employed to undertake some of the work, particularly removing the worktops. He contends that at the time the notice was upheld his son was living in the annex with his wife and young family and that they had ceased to occupy the building by June 2010, having moved into a caravan in the garden of 2 Keepers Cottage for sleeping purposes, taking meals in the main dwelling.

15. Then, according to his statutory declaration, the family moved out of the caravan and into 2 Keepers Cottage during the winter of late 2010/ early 2011 due to the cold. When giving evidence at the Inquiry under oath Mr Williams' evidence was consistent with that given in his statutory declaration. Under cross examination his memory of the precise timings of certain events wasn't clear. For example, having maintained that the washing machine, dishwasher and cooker were stored in the shed after compliance with the notice, Mr Williams was vague on precisely when and why they were subsequently sold for scrap. He also could not explain adequately why the dishwasher would have been sold for scrap given his earlier statement that it was a new machine when installed at the property.

16. Mr Williams couldn't pinpoint a precise day of compliance, other than to state that he was certain that he had complied by the 01 June 2010. Given that the events are now some 13 years ago it is not unsurprising that he cannot remember to the exact day. Overall, I found his evidence under oath to be plausible and he maintained that he had complied with the notice with sufficient precision on timescales, being consistent that the family had moved out "within a month" and that the physical works were completed around the same time.

17. He did not take or provide photographs of the work but stressed that Council officers had themselves visited and taken photographs on numerous occasions and that was the reason for his request to the Council to provide any evidence it had of events at the time. As noted, the Council did not respond to those requests, other than to seek clarification as to what information was being requested. Having read the chain of correspondence between Mr Baker (the appellant's agent) and the Council, it seems quite clear what information was being requested and no obvious reason for the lack of response is evident.

Only at the event itself did the Council indicate that it hadn't responded because it did not hold any information pertinent to the relevant period.

18. That may be the case if records have been deleted under a data retention policy but it would have been helpful for the Council to clarify that earlier in proceedings, if that is in fact the case. Whatever the situation in terms of Council records, no direct evidence has been presented that leads me to doubt Mr Williams' version of events.

19. Moreover, there is corroboratory evidence of compliance in the form of subsequent council reports and appeal decisions. The Planning Committee report of 13 April 2011 contains an item relating to a planning application that had been submitted to use part of the ground floor and the first floor of the outbuilding as an annex[2]. The report notes that Mr Williams had been interviewed under caution and had stated that all cooking and eating of meals was taking place in the main dwelling, the cooker had been removed, all beds and furniture designed for sleeping had been removed and that no-one was sleeping in the building overnight.

20. A typed copy of the interview under caution is provided by the Council as part of the background bundle of evidence relating to the 2017 Court proceedings[3]. The version of events given at that time by Mr Williams was consistent with his evidence under cross examination at the Inquiry. Thus, his case isn't founded solely on his recollection of events 13 years previous but his responses from the relevant period, at a time much closer to the event, are before me.

21. The committee report goes on to state; "*at the time of a pre-arranged site visit, it was observed that there were no beds or other furniture designed for sleeping at the first floor of the building and the cooker had been removed from the internal ground floor of the building. From the evidence available, it appears that the applicant has and is continuing to comply with the requirements of the Enforcement Notice: however, all visits when access has been available have been pre-arranged and indeed have to be so*".

22. To my mind that is a clear acknowledgement, in a formal committee report close to the relevant period, that the appellant had complied with the terms of EN1. The Council has provided no satisfactory explanation as to why it reached that conclusion in 2011 but has subsequently altered its position. The Council's Statement of Case and Mr Thompson's proof of evidence in the current appeal made no mention of the committee report. Mr Thompson acknowledged that he hadn't referred to the report because it hadn't been provided to him by the Council. He only became aware of it when it was submitted by the appellant in his proof. It is not clear why the Council failed to refer to it or provide it to him given the significance of the report to the case.

23. Further evidence of compliance is found in the Inspector's decision letter in relation to the appeal which followed the refusal of that 2011 planning application[4]. The appeal site visit took place on 05 August 2011. At the beginning of paragraph 7 the Inspector states; "*In order to continue to comply with the enforcement notice it is not proposed that the annex would have cooking facilities*". The phrase "continue to comply" is an indication that there

[2] LPA reference: TM/10/03036/FL
[3] Appendix 5a to Mr Thompson's proof of evidence
[4] APP/H2265/A/11/2152477

was compliance at the time of the visit, as is the comment that "it is not proposed that the annex *would have* (my emphasis) cooking facilities" – if such facilities were already present to include them would not be a proposal in the future tense.

24. At paragraph 11, the Inspector also noted the cramped nature of the sleeping arrangements for four adults and two children "within 2 Keepers Cottage" which would indicate that the young family had moved out of the annex. Mr Thompson fairly accepted when giving evidence that paragraph was referring to the main house and not the outbuilding, as he had previously suggested in the Council's Statement of Case.

25. Consequently, there is compelling evidence, on the balance of probability, that Mr Williams did comply with the terms of the enforcement notice within a 6 month period following 04 January 2010. His case is unambiguous, has been consistent throughout, and is supported by other evidence.

26. At the Inquiry the Council introduced a new line of argument, not previously set out within its written evidence. In short, even if the appellant had physically undertaken the works required by the notice and ceased living in the building at the time of pre-arranged visits, the Council indicated that the use hadn't fully ceased on the basis that items were only stored elsewhere temporarily and there was always an intention to move back into the building and occupy it as a dwelling.

27. That is not a compelling argument for a number of reasons. Firstly, there is no evidence that is what was in the mind of the appellant at the time. I am satisfied that the use had ceased and the works had been completed within the six month period for the reasons set out. There is no indication that the use had re-commenced by 2011 when the Council visited and interviewed the appellant under caution or by the time the Inspector visited later that year, some time later.

28. Thus, at the point of compliance there is no reason to suppose that there was any intention to resume the use. The notice was complied with and planning permission was granted by virtue of s173(11) of the Act at that point in time. It seems likely that the change in circumstances in 2011 and beyond which led to the re-occupation of the building was largely related to the unfortunate illness of the appellant's wife which no doubt created difficulties in terms of the appellant, his wife, his son and his family all living under one roof in cramped conditions, as described by the previous Inspector.

29. In any event, trying to ascertain whether an enforcement notice has been complied with having regard to a person's potential future intentions would be fraught with difficulty. In this case, the Council is seeking to use the benefit of hindsight and the fact that the appellant was subsequently prosecuted for non-compliance a number of years later. However, in most enforcement cases that is not possible. Council officers will need to inspect a premises and assess whether a notice has been complied with on the basis of what is occurring at a given time. If the physical works have been completed and/or the use has ceased, as may be required in a given case, then there will be compliance at that point in time.

30. Once they have stopped using the building for the said purpose and carried out the required physical works then planning permission will be granted for the

building not attacked by the notice by virtue of s73A/ s173(11) of the Act. I am not aware of any legal concept, and the Council did not direct me to any caselaw, whereby compliance has to continue for a given period before the benefit of planning permission kicks in. There is nothing in the Act to that effect and it seems to me that permission is granted at the point of compliance.

31. The concept raised by the Council would be practically unworkable in situations where a short timeframe is given within an enforcement notice for a use to cease and associated fixtures and fittings to be removed. It is not uncommon for the compliance period to be no greater than a month some situations. It would be practically impossible for those responsible for complying to undertake the required steps but also demonstrate continued period of compliance to demonstrate that they genuinely mean to comply as is suggested by the Council.

32. Compliance does not discharge the notice. It remains in force but any ongoing threat of prosecution in cases of a subsequent breach relates to the use of the building, rather than the physical works involved in its construction. That seems perfectly logical in such cases because the Council has presumably determined that the building itself is not harmful.

33. In this case, the Council inspected the property in late 2010 and early 2011 and was satisfied that the appellant had complied. The April 2011 committee report confirmed as much. Whilst that wasn't a formal confirmation with the same standing as an LDC, it was a very clear public indication from officers who had inspected the premises at the time. Upon reading that report the appellant had every reason to believe he had done what was required and I am satisfied that he had for the reasons given.

34. The Council raised a further nuanced point at the Inquiry that was not covered in its prior evidence. In its view, even if the kitchen was removed and the beds were removed, the building was still functioning as a dwellinghouse on the basis that it still contained storage, facilities to make drinks, occasional meals were taken inside, the living area contained a television, showers were taken and laundry was done. However, it seems clear to me that the Inspector in the 2011 appeal deliberately varied the terms of the enforcement notice to ensure that key facilities for day to day living were removed, specifically the kitchen and furniture to enable sleeping. In the absence of those, and having regard to relevant caselaw in *Gravesham*[5], the building no longer contained all of the facilities required for day to day living and was not an independent dwellinghouse at the point of compliance with the notice. Its use was a domestic building functioning as ancillary accommodation to the principal dwellinghouse at 2 Keepers Cottage.

35. Finally, I note that the Inspector in the 2017 appeals[6] made comment that planning permission had not been granted by virtue of section 173(11) on the basis that she observed that the kitchen "was still in place" and that the upper floors contained beds and furniture designed for sleeping. It is important to note that the Inspector in that case was determining appeals relating to EN2 in respect of works to fill in the bays of the car port and not specifically the lawfulness of the building subject to the 2009 enforcement notice. Precisely what evidence was presented to the Inspector is unclear. For example, it is

[5] Gravesham BC v SSE & O'Brien [1983] JPL 306
[6] APP/H2265/C/16/ 3154625 (Appeal A) &APP/H2265/C/16/3154626 (Appeal B)

unclear if the April 2011 committee report was before her, or any statutory declaration from the appellant as to his version of events. The case was determined by the written procedure such that there was no opportunity to examine the evidence under oath, as in the present case.

36. The evidence before me is clear that the notice was complied with in 2010 and then subsequently breached again in later years. Thus, the fact that the Inspector observed a kitchen and bedroom furniture in 2017 does not alter my conclusion that the notice had previously been complied with. Rather, those observations are entirely in line with the timeline of events presented by the appellant and it is likely that the Inspector was observing a new kitchen and re-housed bedroom furniture.

37. For all of those reasons, I am satisfied that, on the balance of probabilities, the requirements of the enforcement notice had been complied with within the 6 month period following 04 January 2010. Therefore, the part of the building, as it stood at the time the notice was served, does benefit from planning permission granted by virtue of s173(11) of the Act and is lawful having regard to the terms of section 191(2) of the Act. It follows that the Council's refusal to grant a certificate of lawful development was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Chris Preston

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Mr John Fitzsimons	Of Counsel
He called:	
Mr Neal Thompson BSc (Hons) MSc MRTPI	RE Planning Chartered Town Planning Consultants

FOR THE APPELLANT:

Mr Stephen Whale	Of Counsel
He called:	
Mr Ian Williams	Appellant

Inquiry Documents:

Statement of Common Ground, signed by Keith Baker on behalf of the appellant on 19 January 2023 and Neal Thompson on behalf of the Council on 17 January 2023

The Planning Inspectorate

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 03 June 2020 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The requirements of the enforcement notice, dated 16 June 2009, as varied and upheld on appeal, had been complied with within the 6 month period following the issue of the relevant appeal decision 04 January 2010. Therefore, the part of the building, as it stood at the time the notice was served, as shown on drawing number 014-1042-21A, benefits from planning permission granted by virtue of s173(11) of the Act.

Signed

Chris Preston

Inspector

Date 26 April 2023

Reference: APP/H2265/X/21/3273837

First Schedule

The erection of the building subject of EN1 issued on 16 June 2009, as shown on drawing number 014-1042-21A

Second Schedule

Land at 2 Keepers Cottage, Hurst Wood, Platt, Sevenoaks, Kent TN15 8TA

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 operations described in the First Schedule taking place on the land specified in the Second Schedule were lawful, on the certified date and, thus, were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any operation 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.

The Planning Inspectorate

Plan

This is the plan referred to in the Lawful Development Certificate dated: 26 April 2023

by Chris Preston BA(Hons) BPl MRTPI

Land at: Land at 2 Keepers Cottage, Hurst Wood, Platt, Sevenoaks, Kent TN15 8TA

Reference: APP/H2265/X/21/3273837

Scale: Not to scale