



Appeal Decision

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 December 2020

Appeal Ref: APP/X1118/X/20/3255935

The White Hart, Bratton Fleming EX31 4SA

- 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 Philip Milton against the decision of North Devon District Council.
 - The application Ref 71491, dated 30 April 2020, was refused by notice dated 13 July 2020.
 - 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 is sought is described as: The planning unit has been used for residential accommodation only since the pub closed in 2012 by the previous owners and then by our tenants.
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Summary of Decision

1. The appeal is dismissed.

Procedural Matter

2. The appeal concerns the lawfulness or otherwise of the use of the first floor of the appeal building as two residential units of accommodation. The parties are content that the appeal can proceed by the written representation procedure and without the need for a site visit, given the evidential onus rests with the appellant. I have no reason to disagree and so will proceed to determine the appeal on the basis of the written evidence before me.

Main Issue

3. The main issue is whether the use of the first floor of the appeal building as two residential units of accommodation is lawful, having particular regard to both limbs of s191(2) of the Act.

Reasons

Background

4. In cases such as this the onus is on the appellant to demonstrate, on the balance of probabilities, that the use is lawful. Section 191(2) provides that uses and operations are lawful at any time if – (a) no enforcement action may be taken in respect of them; and (b) they do not constitute a contravention of any requirements of any enforcement notice then in force. Both limbs must be satisfied to achieve lawfulness.

5. The evidence concerns the lawful use of the first floor of a public house building known as The White Hart, as two residential units of accommodation. These are then referred to as the Flat and the Apartment.
6. On 10 October 2019 an enforcement notice was issued at the site, directed at an unauthorised material change of use consisting of the residential use of the public house. A subsequent appeal¹ proceeded on ground (d) and considered the lawfulness of the two residential units. That appeal was determined on 30 October 2020 wherein the enforcement notice was upheld subject to a correction and variation.

Section 191(2) of the Act

7. The reason for the Council's refusal of the appeal application centres upon the issuing of the 2019 notice and that it was then "in force" when the appeal application was made in April 2020. That being so, the two residential units would constitute a clear contravention of the requirement of the notice and so the appeal application could not be found lawful.
8. It is however occasionally argued, as it is here, that since s191(2)(b) includes in the definition of lawfulness the requirement that the use, operation or breach of condition should not be in contravention of an enforcement notice then in force, that a certificate can be granted while an appeal against an enforcement notice is continuing but not yet determined – because the notice has not come into effect due to the provisions of s175(4) and so is not in force. In the absence of any definition within the Act, the terms "in effect" and "in force" should be given their ordinary meaning and, as a matter of simple language, there is no distinction to be made.
9. The effect of the notice is therefore suspended during an appeal against it. As confirmed in the Government's Planning Practice Guidance², an '*...enforcement notice is not in force where an enforcement appeal is outstanding...*'.
10. Section 191(2)(b) is therefore satisfied although it remains the case that the Council had purported to take enforcement action against the unauthorised residential use by virtue of this notice. The notice and appeal application therefore relate to the same subject matter.
11. Turning then to s191(2)(a), it is necessary to consider if the Council could still take enforcement at the date of the application.
12. The Council's remedy, to ensure that the recipient of a notice issued within the relevant period in s171B is not able to avoid its outcome by continuing to appeal it until an application under s191 could succeed, is the second bite provision available under s171B(4)(b). Although I have found that the 2019 notice was not in force at the date of the application seeking a certificate of lawfulness, the powers under s171B(4)(b) still remained available to the Council at this time, since less than four years had passed from the date the Council purported to take action. Accordingly, the Council could still take enforcement action and the first limb of s191(2) – s191(2)(a), is not satisfied.
13. On this basis, I am unable to find the residential use lawful.

¹ APP/X1118/C/19/3240256 & APP/X1118/C/19/3240257

² Paragraph: 003 Reference ID: 17c-003-20140306

Conclusion

14. For the reasons given above I conclude that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Formal Decision

15. The appeal is dismissed.

Paul T Hocking

INSPECTOR