



## Appeal Decision

Site visit made on 30 October 2018

**by Anthony J Wharton BArch RIBA RIAS MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 13 November 2018**

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**Appeal Ref: APP/H0738/X/18/3205376**

**Flats 1 to 11, 2 Mill Wynd (lands at and next to Number 2),  
Yarm, Stockton Borough TS15 9 AF**

- 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 William Gate against the decision of Stockton-on-Tees Borough Council.
  - The application Ref 18/0511, dated 21 May 2018, was refused by notice dated 8 June 2018
  - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
  - The use development for which a certificate of lawful use or development is sought is: use of existing four-level structures at 2 Mill Wynd (and behind) as 11 flats since at least 2007 (Approved as 8 flats SoTMBC 04/3317/FUL).
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**Applications for Costs:** There are two applications for awards of costs. One is by Mr William Gate against Stockton-on-Tees Borough Council. The other is a counter claim by Stockton-on-Tees Borough Council against Mr William Gates. These are the subjects of separate decisions.

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### Decision

1. The appeal is dismissed.

### Matters of clarification

2. The description of the proposed use is taken from the LDC application. What had been being sought was a Lawful Development Certificate (LDC) to indicate that, on 21 May 2018, all 11 flats at 2 Mill Wynd were lawful for planning purposes and that the LPA was precluded from taking enforcement action.
3. The application had been considered by the LPA and a 'split' decision was issued. The LPA granted a LDC in relation to Flats 1 to 10 on the basis the appellant had satisfactorily demonstrated that the 10 flats on plan No SBC 002, dated 9 March 2016, had been in use (as Class C3 residential units) for a continuous period of 4 years or more (prior to the date of the LDC application) without the LPA taking enforcement action.
4. The LPA refused to issue a LDC in respect of Flat 11 on the basis that the applicant/appellant had not demonstrated that No 11 on plan SBC 002, dated 9 March 2016, had been in use for a continuous period of 4 years or more (prior to the date of the LDC application).

5. This appeal is made against the LPA decision following the LDC application and the decision set out above. In theory the appeal is against the whole of the Council's split decision. However, from all of the submissions it is clear that the only dispute relates to whether or not Flat 11 was also lawful on the date of the LDC application. It is on this basis that I have dealt with the appeal and I am satisfied that this will not cause any injustice.

6. The Council has issued a LDC for flats 1 to 10 and thus it has been confirmed that these units are now lawful. I have no reason to dispute that. I now turn to whether or not, on the balance of probabilities, Flat 11 was also lawful on the LDC application date and immune from enforcement action.

### **Background information**

7. The appeal site comprises a flatted development with 'undercroft' car-parking and is located on the east side of Yarm High Street, within the Yarm Conservation Area (YCA). It is accessed from Mill Wynd which links the High Street to the riverside. Planning permission for development of the site for 8 flats was granted subject to conditions in February 2005 (04/3317/FUL), together with an associated bin store and the parking. This part of Yarm comprises residential and commercial uses typical of a market town centre.

8. Although the Council indicates that externally the building has been '*constructed largely in accordance with the approved plan*' it is clear that the works carried out did not comply with the permission granted. On behalf of the appellant it is stated that the current layout of 11 units has been that way from the original construction date. It is indicated that the 8 flat layout was reconfigured to provide 10 units and that an 11<sup>th</sup> unit was formed by using the space initially allocated for the bin store and meter cupboards. This is evident, since the kitchen to Flat 11 lies outside of the main structure and there is an external cavity wall and window between the kitchen and the rest of the flat. There is no dispute between the parties that the whole of the development had become unlawful due to the changes made.

### **Matters of clarification re LDC appeals**

9. An appeal relating to a LDC refusal is confined to the narrow remit of reviewing the LPA's reason for refusal. The planning merits of the case do not fall to be considered. As indicated above this LDC was applied for in order to establish whether the 11 flats were lawful for planning purposes under section 191(1)(a) of the Town and Country Planning Act 1990. To be deemed lawful (as Class C3 residential units) it had been necessary for the appellant to show, on the balance of probabilities, that all 11 flats had been in continuous Class C3 residential use for a four year period commencing on 21 May 2014 and ending on 21 May 2018.

10. National Planning Practice Guidance (PPG) indicates that an applicant for a LDC is responsible for providing sufficient information to support an application and that, without sufficient precise or unambiguous information, a LPA may be justified in refusing a certificate. However, PPG also indicates that a refusal is not necessarily conclusive that something is not lawful because insufficient evidence has been presented. On appeal it is regularly the case that additional information submitted at appeal stage, as opposed to application stage, is taken into account. In this case it would appear that the appellant refused to submit any further information at the application stage despite a request from the LPA.

11. However, following the Council's split decision, further information in the form of tenancy agreements (see below) have now been submitted. In some cases it is argued by a LPA that only the evidence which was submitted at the time of the

applications should be considered. However, section 195 of the Act refers only to the refusal being *'well-founded'* or *'not well-founded'*. This relates to the decision itself and not to the reasons for it. In the case of *'Cottrell v SSE and Tonbridge and Malling BC [1982] JPL 443'*, although it was held that the Secretary of State cannot be compelled to issue a certificate, where the opinion is that one should not be granted, conversely it was also held that for a LPA to argue that the only evidence to be considered was that placed before them as part of the application, denies the purpose of the LDC procedure.

12. The LDC procedure is aimed at the decision-maker arriving at an objective decision (on the balance of probability) based upon the best facts and evidence available. It is also the case that if subsequent information is available it is always open to an applicant to re-apply. In this case and in the light of the above case law, I consider it appropriate to take all of the original and the post-decision information into account. I am satisfied that in taking this course of action no injustice will be caused to either the Council or the appellant.

13. The information submitted in support of the application a floor plan; photos of the front doors of the flats; the decision notice for the original planning permission; an e-mail from SBC Council Tax (CT) department confirming payments for Nos 1 to 10 (note: the Council had been informed by the agent that information was not available for No 11) and a part photograph of a letter from SBC CT stating that CT arrears existed for an 11<sup>th</sup> flat. Details of the dates from which CT was payable for each flat was set out. These date from 5/4/2006 for Flat 4 (the earliest date) to 18/8/2008 for Flat 5 (the latest date). The submitted floor plan for the application appears to have been a *'marked-up'* version of an original drawing showing the kitchen being in the position of the initially proposed bin store.

14. Following the decision by the LPA the appellant's agent provided copies of tenancy agreements (TAs) dating the terms of occupancy from a Mr Kishan Ladva from 18 August 2015 to 28 February 2016 and from a Mr Nick Hunter from 29 January 2017 to 29 July 2017.

### **The gist of the case for the appellant**

15. It is contended that the LPA did not make a fair and reasonable decision on the balance of probabilities. It is stated that they did not take into account the submitted evidence and that there was *'absolutely nothing adduced submitted, or in front of them to rebut the applicants version of events for the case of 11 flats'*. It is considered, therefore, that a LDC should have been granted for all 11 flats.

16. With regard to the CT situation it is indicated that it is the tenant and not the landlord who is responsible for CT. It is argued, therefore, that the purported *'absence'* of a CT record for Flat 11 is not determinative with regard to whether the flat had been occupied continuously for over 4 years. The absence of such a record is considered to be *'nothing at all in the balance of probabilities for this LDC'*, since it has been submitted that the flat had been occupied since the structure and the conversion were completed. It is argued that the absence of a CT record does not *'in itself, rebut that at all'*.

17. It is contended that the LPA have *'got the wrong test and certainly the wrong balance'* with regard to the probability of Flat 11 being occupied. It is considered that the test has been met by the submissions and that a decision should have been made on the balance of probabilities. Case law (*H (Minors) [1996]AC 563 at 586*) is referred to whereby it was held that *'the balance of probabilities test'* was a flexible test.

18. The case is quoted and, amongst other things, reference is made to '*the balance of probability standard*' meaning that a court is satisfied an event occurred if it considers, on the evidence, that '*occurrence of the event was more likely than not*'. It is stressed that the signed and dated LDC application forms; the information submitted; the layout of the structure and the occupation of Flat 11 since the structure first opened '*is not an improbable event*'. It is then stated that the area of the site '*can have been nothing else*'.

19. Reference is also made to the case of *F W Gabbitas v SSE and Newham LBC [1985] JPL 630*, where it was held that an applicant's own evidence does not need to be corroborated by '*independent*' evidence in order to be accepted. It is stressed that if a LPA has no evidence of its own, or 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 is sufficiently precise and unambiguous to justify a certificate on the balance of probability. It is contended that there is no ambiguity in this case and that '*everything is plain and obvious*'.

20. Turning to the CT situation, again it is contended that the Council's Legal Unit and its Planning Unit have got their analyses and conclusions wrong and that, just because Flat 11 may or may not have only been registered for CT from 02/06/16 on the system, does not mean that the flat was not in existence. Thus the absence of registration for CT cannot be taken to provide evidence that Flat 11 had not been in existence for 4 years.

21. The submissions (plans, documents, photos and the application form) all indicate that Flat 11 was created when the structure was built and that the submissions are sufficiently precise and unambiguous. If that is not considered to be convincing then the question to be asked is why Flat 11 would not have been tenanted and let since the conversion was undertaken. There is, therefore, so much evidence (and none to dispute it) that the decision made on the balance of probabilities has to be in favour of the appellant's position

### **The gist of the case for the Council**

22. The Council indicates that the only evidence submitted at the time of the LDC application that carried any weight in relation to the occupation of the flats was the CT information. However, it is stressed that this only related to Flats 1 to 10, whereby it was clear that these flats had been subject to Council Tax for at least a 4 year period prior to the date of the LDC application.

23. The Council refers to an e-mail from the appellant which had only sought CT information for Flats 1 to 10 and that the e-mail indicated that, at that time, there were only 10 flats within the property at No 2 Mill Wynd. The Council then refers to a subsequent e-mail (to the appellant's agent) which appears to confirm that there was, at that time, no information relating to CT for Flat 11. The e-mail then indicates that the appellant wished to proceed with the LDC application without any information relating to Flat 11. The council confirms that no further evidence was provided for CT relating to Flat 11.

24. The Council then indicates that, '*following our own inquiries, at the insistence of the agent who declined to provide further evidence when requested, that Flat 11 had only been subject to CT since 02/06/16*', the necessary 4 year period had not been demonstrated. It is further stressed that the extract of the CT reminder submitted by the appellant did not show the date of the letter. It was not, therefore, considered to carry any weight to demonstrate that Flat 11 had been in continuous occupation for the required 4 year period.

25. Similarly it is contended that a *'photo of a door with a number 11, again undated with no proof that that it is a flat at No 2 The Wynd, carries no evidential weight as it does not prove that the flat had been in existence for 4 years'*. The Council therefore contends that sufficient precise and unambiguous evidence had not been provided to indicate occupation of Flat 11 for the required 4 year period. The fact that the Council held the CT evidence to the contrary supports their case.

26. It is further stressed that, whilst the photos of doors and doorbells for Flats 1 to 10 provides no evidential proof of all 11 flats being built and then occupied for the necessary 4 year period, the CT records, on the balance of probabilities, does suggest that flats 1 to 10 did exist and were in occupation for the relevant 4 year period. It is indicated that the only evidence initially submitted in relation to Flat 11 was a plan, a photograph of a door with number 11 on it (but without any date or identifying feature to confirm that it was indeed No 11 The Wynd) and the photograph (referred to above) regarding the CT letter. It is considered that none of this evidence showed that Flat 11 had been in continuous use as a dwelling for the required 4 year period.

27. In support of its case the LPA refers to the fact that, in relation to a LDC application, the onus of proof is firmly on an applicant to demonstrate that the use claimed to be lawful has been carried out continuously during the relevant period identified; in this case from 21 May 2014 until 21 May 2018. The Council acknowledges the fact that the High Court has held that the applicant's own evidence does not need to be corroborated by independent evidence. However it is also stressed that the evidence must be *'precise and unambiguous'*.

28. The Council cites the requirement of Section 191(4) of the Act, whereby it is required that, *'a local planning authority' are provided with information satisfying them that of the lawfulness at the time of the application of the use, operation or other matter described in the application*. The Council stresses that, at that time, it had not been provided with sufficient information to initially support the LDC application. This was despite a request (e-mail from LPA officer to the appellant's agent, with reply dated 15 May 2018) for further information.

29. The Council stresses that the burden of proof lies with an applicant for a LDC and not with a LPA. It is stressed that, at the time of the application, no tenancy agreements were submitted and there were no *'Statutory Declarations made in support of the application'*. The Council refers to PPG and contends that the evidence submitted was not sufficiently precise and unambiguous to determine, on the balance of probabilities that *'flat 11 had been built for 4 years'*. (This, however, is not the question see my assessment below).

30. The Council draws attention to the fact that the appellant states that there was no evidence in front of the decision-maker (the LPA) to rebut the case for lawfulness of all 11 flats. However, it is stressed that this ignores the fact that the appellant had failed to *'make a case which is what the LPA based their decision on'*. It is contended that the LPA followed the correct statutory provisions and guidance in determining the LDC application.

### **Assessment**

31. The courts have held that the onus of proof, in establishing on the balance of probabilities that a period of immunity has accrued, falls on the applicant or appellant and not on the LPA. It has been held that the burden of proof lies on the party seeking to establish that a breach of planning control has given rise to immunity from enforcement action. Government policy is that the burden of proof



lies firmly on an applicant or appellant whose evidence is to be sufficiently precise and unambiguous.

32. The evidence required in this instance needs to show, on the balance of probabilities, that Flat 11 had been in continuous residential Class C3 use between 21 May 2014 and the date of the LDC application, 21 May 2018.

33. It is evident in this case that it is the tenants of the flats and not the landlord who is responsible for the CT. Indeed records indicate that CT had been paid for well over the 4 year period by the tenants of Flats 1 to 10. The Council, from its own records, accepted that this was the case and reached a decision that these flats were lawful on the date of the LDC application. Because there was no such record for Flat 11 and on the basis of a lack of other precise and unambiguous evidence, the Council concluded that Flat 11 was not lawful on the application date.

34. I accept that the lack of a CT record cannot, in itself, be determinative that Flat 11 had not been occupied for the relevant period. However, I do not agree with the contention that the lack of such a record is '*nothing at all in the balance of probabilities for this LDC*'. It is a matter of fact that there is no CT record for the whole of the necessary 4 year period. This fact must be weighed in the overall balance of the evidence on which to reach a decision on the balance of probabilities.

35. I find the suggestion that the LPA have '*got the wrong test and certainly the wrong balance*' with regard to the probability of Flat 11 being occupied, difficult to understand. The initial evidence was, in my view, negligible and far from precise. Even the submitted plan was a 'marked-up' version of an original plan. In my view the LPA reached a decision, as they were entitled to do, on the basis of all of submitted information. I accept that the appellant's evidence does not need to be independently corroborated. However, it is required to be 'precise and unambiguous' (my underlining).

36. I do not consider that the submissions (plans, documents, photos, the application forms etc) conclusively indicate that Flat 11 was '*created*' when the structure was built. The 'infill' kitchen to Flat 11 could have been carried out at any time following the construction of the main external wall. The onus was upon the appellant to show precisely and unambiguously when the works for Flat 11 were completed. But, even if it was the case that the kitchen was constructed at the same time as the external wall, the onus is still upon the appellant to indicate that the Flat 11 was continuously occupied for the relevant 4 year period. In my view, the inference that the information (on the application form and the other submitted documents) was sufficient precise and unambiguous evidence to indicate a continuous 4 year occupation of Flat 11 stretches the imagination.

37. I accept that '*the balance of probabilities test*' is a flexible test. However, the '*balance of probability standard*' requires a court (or decision-maker) to be satisfied on the evidence, that '*occurrence of the event was more likely than not*'.

38. In this case it is my view that none of the submissions (including the application form) either individually or when considered together, show precisely or unambiguously that, on 21 May 2014, Flat 11 was occupied as a Class C3 residential unit. The later submitted tenancy agreements post-date the relevant date. The first of these is dated from 28 August 2015. That leaves an unexplained period of around 15 months.

39. There is no evidence whatsoever for this period. Normally one would expect earlier copies of tenancy agreements or at least some form of documentary evidence in the form of utility bills and/or bank statements. There are no

Statutory Declarations to support the appellant's case and even accepting that the photographic evidence related to Flat 11, there are no references to actual dates.

40. Overall, therefore, I find that the initial evidence fell well short of what would normally be expected to prove that Flat 11 had been in continuous occupation as a Class C3 residential unit for the relevant 4 year period. I do not consider, therefore, that the appellant has discharged the burden to indicate that the opposite is the case. The later evidence (tenancy agreements) also falls short of proving that Flat 11 was lawful for a continuous period from 21 May 2014 to the date of the LDC application.

### **Conclusion**

41. For the above reasons I consider that, on the balance of probabilities, the continuous occupation of Flat 11 for the relevant 4 year period has not been proven. It follows that I consider the Council's decision not to issue a LDC for Flat 11 to be well-founded. The appeal, therefore, fails and a LDC is not issued.

### **Other Matters**

42. In reaching my conclusion I have taken into account all other matters raised by and on behalf of the appellant and by the Council. These include the planning history; the initial statements; the additional information submitted and the Council's delegated report relating to the LDC application. However, none of these carries sufficient weight to alter my conclusion and nor is any other factor of such significance so as to change my decision that the appeal should fail.

43. The appellant is not precluded from applying for planning permission for the use of Flat 11 as a Class C3 residential unit. The Council is not precluded from taking enforcement action if it considers such action to be expedient.

*Anthony J Wharton*

Inspector