Appeal Decision
Inquiry held on 5 January 2011

by Felix Bourne  BA(Hons) LARTPI Solicitor
an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 8 February 2011

Appeal Ref: APP/P1560/X/10/2130140
9 Seawick Road, St. Osyth, Clacton on Sea, CO16 8JS

- 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 Helen and Michael Day against the decision of Tendring District Council.
- The application Ref 09/01073/LUEX, dated 14 October 2009, was refused by notice dated 14 December 2009.
- 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 or development is sought is not fully described in the application or in the appellant’s Appeal Form. In the Notification of Refusal of a Certificate it is referred to as a “Lawful Use Application for all year round occupancy”.

Summary of Decision: The appeal is dismissed.

Preliminary Matters

1. I conducted a Public Inquiry into the above appeal on 5 January 2011, undertaking a formal site inspection during an extended luncheon adjournment. All oral evidence was given following solemn affirmation. Notwithstanding the descriptions contained, or not contained (as the case may be) in the application, Notification of Refusal, and Appeal Form, it was agreed at the Inquiry that the application related to, and the appeal therefore seeks, a LDC for continued use of 9 Seawick Road, St Osyth, as a dwellinghouse, without complying with condition no. 1 attached to planning permission reference TEN/248/71 for one detached holiday bungalow. That condition stated that “the holiday bungalow shall not be used for human habitation between 31st October in any year and the 1st March in the following year”. For the sake of convenience I shall refer to the period when occupation is prohibited as the winter period.

Main Issue

2. This is whether the decision to refuse the grant of a LDC was well-founded.

Inspectors’ Reasoning

3. Annex 8 of Circular 10/97 is concerned with Lawfulness and the Lawful Development Certificate. Paragraph 8.15 advises that, in appeals to the Secretary of State which raise “legal issues” (for example, enforcement appeals on grounds (b) to (e) in section 174(2)), where the burden of proof is on the
appealant, the Courts have held that the relevant test of the evidence on such matters is “the balance of probability”. It goes on to explain that, accordingly, this test will be applied by the Secretary of State in any appeal against a local planning authority’s decision on a LDC application.

4. As the application is made under section 191(1) of the Act it is pertinent to set out part of the relevant section, thus:

191.-(1) If any person wishes to ascertain whether-
(a) any existing use of buildings or other land is lawful;
(b) any operations which have been carried out in, on, over or under land are lawful; or
(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

191.-(2) For the purposes of this Act uses and operations are lawful at any time if-
(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

5. There was some confusion as to the period relevant for proving a lawful use in this case. A letter from the Council to the appellants, dated 9 December 2008, indicated that “in order to obtain a certificate of lawfulness the onus is upon you to prove the condition has been breached continually for the past four years”. However, when the application was submitted it was on the basis, whether intentionally or not, that “the use began more than 10 years before the date of this application”. The application was then determined, and the Council’s case made, on the basis that the “ten year rule” and not the “four year rule” applied. To resolve this confusion it is relevant to look at the provisions of section 171B of the Act and at case law.

6. Section 171B provides, so far as relevant, as follows:

(1) Where there has been a breach of planning control consisting of the carrying out without planning permission of building, engineering or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(2) 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.

(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

7. The Encyclopaedia of Planning Law and Practice summarises the relevant case law, at paragraph P171B.14 (Volume 2, page 2-3598/1), thus:
In Bloomfield v Secretary of State for the Environment, Transport and the Regions [1999] 2 P.L.R. 79 the relevant planning permission, which had been granted in 1993, allowed an unauthorised building to be retained but required it to be used "solely for recreational purposes during the months of April to October inclusive and shall not be used at any time for permanent residential accommodation". The question was therefore whether its unauthorised permanent occupation as a dwellinghouse was a material change in use under subs. (2) or a breach of that condition....The Court...held that, given the physical characteristics of the building, it was clearly a dwellinghouse (following Gravesham Borough Council v Secretary of State for the Environment (1982) 47 P.&C.R. 142; and Moore v Secretary of State for the Environment, Transport and the Regions (1999) 77 P.&C.R. 114). Upon completion, it would have permission under section 75(3) for use for the purpose for which it was designed. Therefore, the breach of planning control was not the change in use to dwellinghouse, but the breach of the condition on the 1992 permission. That was governed by subs.(3) rather than subs.(2), and was therefore subject to the 10-year rule rather than the four-year rule.

8. However, the concluding sentence of the paragraph states that:

In First Secretary of State v Arun DC [2006] EWCA Civ 1172 the Court of Appeal reversed the High Court decision and held that residence as a single unit of occupation in breach of a specific condition was nevertheless subject simply to the four year limitation.

9. It may well be this case that led the Council, when writing to the appellants, to indicate that the four year rule applied to their case. However, Arun related to a building that had not commenced life as a dwellinghouse and where the change of its use to a dwellinghouse was itself a material change of use. This is not the position in this case, where the appeal property has always been a dwellinghouse. The position in this case is therefore more akin to breach of an agricultural occupancy condition, where the relevant case law indicates that the ten year rule still applies (see, for example North Devon DC v Secretary of State for the Environment & Rottenbury [1998] EGCS 72 and Peter Ellis v Secretary of State for Communities and Local Government [2009] EWHC 634 (Admin)). This seems to be on the basis that there is a conceptual difference between a change of use and a breach of condition not involving a change of use.

10. Accordingly it is the ten year rule that applies in this case. On the other hand, the case of North Devon DC V First Secretary of State and Stokes (QBD 12/3/04) is authority for the argument that breach of a seasonal occupancy condition can become immune from enforcement action and therefore lawful through the passage of time, even though the breach cannot, by definition, be continuous during the permitted season. However, the Court of Appeal decision of Secretary of State for the Environment v Holding and Thurrock Borough Council [2002] EWCA Civ. 226 confirms that, to become lawful, a use must have continued actively throughout the four or ten-year period, (or in this case the various winter periods) to the extent that enforcement action could have been taken against it at any time during that period. Only once lawful use rights have been accrued in this way can the principle described in the Panton and Farmer v Secretary of State for the Environment judgement apply, and the use become “dormant” without losing its use rights, unless it is abandoned, replaced by a different use, or extinguished following the formation of a new planning unit. Any significant interruption in the continuity of an unauthorised use, before it has gained rights under the four or ten-year rule, means that the particular breach is at an end, and, when the use recommences, the four or ten-year period must start again.

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11. This is important because, in the case of a dwellinghouse which already had a lawful use throughout the year, it would normally be possible to go away for considerable periods without running a risk of losing that lawful use. That is not the case where a property has not yet secured such lawful use rights. As a consequence it is perfectly possible for the casual observer, unaware of such distinctions, to consider that a dwellinghouse continued in use as such notwithstanding being unoccupied in circumstances where, because that use was not lawful, the correct interpretation of case law would indicate otherwise.

12. The *Thurrock* judgement has been considered in the more recent Court of Appeal case of *Swale Borough Council v The First Secretary of State* [2005] *EWCA Civ 1568*. In his judgement Keene L J referred to the judgement of Newman J at first instance in *Thurrock*, subsequently approved by the Court of Appeal, and in particular to the following summary by Schiemann L J at paragraph 15 of the Court of Appeal judgement, as follows:

> “The rationale of the immunity is that throughout the relevant period of unlawful use, the LPA, although having the opportunity to take enforcement action, has failed to take any action and consequently it would be unfair and/or could be regarded as unnecessary to permit enforcement. If at any time during the relevant period the LPA would not have been able to take enforcement proceedings in respect of a breach (for example, because no breach was taking place) then any such period cannot count towards the rolling period of years which give rise to the immunity. It was for the land owner to show that at any time during the relevant period enforcement action could have been taken”.

13. The application was dated 14 October 2009, and it is therefore, in essence, the winter period of 1999 to 2000 through to the winter period of 2008-2009 with which we are concerned.

14. Mr and Mrs Day did not themselves purchase the property until September 2006. However, they produced Council Tax Bills for the period from 13 September 2006 onwards, and the Council accepted that, as indicated by Mr Day, they had occupied the property as a dwellinghouse at all times since. That, therefore, satisfactorily disposes of the winter periods of 2006-7, 2007-8, and 2008-9.

15. Unfortunately, due to the illness of a grandchild, Mrs Coppock, who has lived at No. 7 Seawick Road for around 40 years, could not attend the Inquiry. However, she had completed a sworn statement which, amongst other things, indicated that Richard Newton (also known as Smith) and Tia Smith had become the owners in 1999 and that they resided at the Property as their main residence. Attached as an Exhibit to that statement was a copy of a letter which, Mr Day explained, had been written to the estate agents when these previous owners were in the course of selling the property to the appellants and which Mr Day had passed to Mrs Coppock for the purpose of her Statement. That letter, dated 3rd August 2006, and signed by R Newton and T Smith, confirms that they have resided at 9 Seawick Road since 12 September 2000.

16. There can, of course, be a distinction between ownership and occupation and so the suggestion that Mr Newton (aka Smith) and Tia Smith, purchased in 1999 but did not occupy until September 2000 would not necessarily be fatal to the application, particularly as the October 1999 Electoral Register suggests that a Mr Michael Moore was in occupation at the time. In fact the October 2000 Electoral Register still has Mr Moore as the elector registered at the address. This is clearly at variance with the letter of 3rd August 2006, though again would
not necessarily be fatal to the application. However, for each of these winter periods it would be necessary to show that the property was occupied as a dwellinghouse with sufficient continuity that enforcement action could have been taken at any time during those periods.

17. In any event the winter period of 2001 to 2002 provides real problems for the appellants. Whilst, in August 2006, Mr Newton and Tia Smith claimed that they had resided at 9 Seawick Road since 12 September 2000, this is not what Tia Smith was saying in support of an appeal that she lodged in April 2002. In support of her appeal, against the refusal to grant retrospective planning permission for all year round occupancy of the property, she states, amongst other things, that “it’s very necessary for me to be able to stay at the bungalow at times to keep an eye on it as it’s my main home, but I do spend most of the time abroad in the winter months; but somebody needs to be here sometimes to take care of it. I came back this year and all my fences to the side were down; the back fences down but had been vandalized and kicked down. A slate off the roof. My bedroom damp”. Later in the same statement she says that “...last year I left in Oct. 23rd and didn’t return till end of March. The...mess of the place has made me realise that I have to be here more to take care of it”.

18. At the Inquiry it was suggested that it was not Tia Smith who went away in the winter, but her mother, a Mrs Rita Smith. However, that does not sit very happily with the other evidence available to the Inquiry. For example, Mrs Coppock’s Statement mentions no such person: nor does the letter of 3rd August 2006. Nor does she appear on the Electoral Register. Nevertheless, I have quoted from the appeal statement at some length as, had anyone been left in occupation of the premises during this period, it would resolve what otherwise appears as a substantial gap in occupation. However, the clear implication of Tia Smith’s Statement is that the property was unoccupied over the Winter period of 2001 to 2002 and that this was, in her view, the reason why the property was in such poor condition when she returned to it.

19. Nor is there any other contemporary documentary evidence to suggest that the property was occupied during this period for no electors were registered in October 2001. Whilst there were initially erroneous references to Seaview Road amongst details of Council Tax records, the records as clarified by the Council appear to indicate that the property was registered exempt from Council Tax between 29 January 2000 and 28 July 2000, which suggests that the property may well have been unfurnished and unoccupied during that time and that, after the initial maximum six months’ exemption, it continued to receive a 50% discount up until 10 August 2002. The latter could indicate use as a second home but is also consistent with non-occupancy.

20. Mr Leather suggested that Mr Smith might have been the type of person to try to “get away with” paying reduced Council Tax if he could, and that might be a possible explanation. However, when added to Tia Smith’s detailed description of what happened to the property in the winter period of 2001-2002 and the fact that nobody was on the Register of Electors, it seems to me that the balance of probability lies with the property indeed being unoccupied through this winter period. I appreciate that this then presents a conflict with the letter of 3rd August 2006. It may be that the winter period of 2001-2002, by then some years in the past, did not come to mind when Mr Newton and Tia Smith wrote that letter. It must also be remembered that, at that time, they were seeking to sell their property and might therefore have sought to remove possible obstacles to so doing.
21. The appellants could not assist with this period as they only came to the area first in 2002, when they bought a caravan which was itself subject to a seasonal occupancy condition. I am borne in mind that to reach a view that the property was unoccupied during this period does not sit happily with Mr Leather’s recollections of meeting Mr Newton, who he knew as Mr Smith, regularly at the pub. However, Mr Leather did not move to the area until around July 2000, initially occupying a seasonal caravan, and did not move to 8 Seawick Road until about 2001. Whilst it is his recollection that he first met Mr Smith during the period that he was occupying a caravan, he did not live in neighbouring property until somewhat later and rarely went in to the appeal property.

22. It is indeed hard to recall with precision everyday events from almost a decade ago and I do not consider that, for the winter period of 2001-2002, Mr Leather’s evidence, or that of Mr Devonshire, outweighs the other evidence, which includes contemporary documentary evidence, suggesting that the appeal property was unoccupied throughout this period.

23. It has also been suggested that the idea of the property being empty is at variance with the fact that Tia Smith had a number of children, who were collected for and delivered from school by coach. However, that is information which Tia Smith provides in support of application reference 03/00345/FUL, and this was not submitted until February 2003, by which time circumstances may well have changed. Indeed, planning applications submitted in February 2003 and January 2005 both name the appeal property as the applicants’ address, which could be indicative that by then it was being occupied during the winter periods. However, that does not resolve the difficulty that arises with the 2001-2002 winter period and which, under the current case law, precludes the grant of a LDC on the basis of the information supplied.

24. I have considerable sympathy for the appellants. In seeking to secure their LDC they have, in particular, been hampered by the inability to trace the previous owners of the property who might, for example, have been able to clarify the status of the property in the winter period of 2001-2002 and to explain the position with regard to the payment of Council Tax. However, I have to reach a decision based on the evidence available to me and, indeed, my decision could be challenged if I did not, and I am afraid to say that, on the evidence before me, the Council’s decision to refuse the application was well-founded. I have, however, set out the law as it stands at some length in the hope that it may assist the appellants to reach a view as to whether they could obtain further evidence which would justify the grant of a LDC. I appreciate that the Council’s Breach of Condition Notice could, if it remains in place, prevent a LDC being issued but, bearing in mind that this is the appellants’ home, I trust that they will afford the appellants the opportunity to secure and present further evidence if they can obtain it. However, that does not alter the fact that I must dismiss this appeal.

Felix Bourne
Inspector
APPEARANCES

FOR THE APPELLANTS:

Mr Tony Devonshire
He called
Mr Barry Leather
Mr Michael Day Appellant
Cllr Ronald Walker Ward Councillor
Himself
Mrs Helen Day Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mr David Whipps Solicitor, LARTPI
Partner with Holmes & Hills, Solicitors, instructed by the Council
He called
Mr James Ryan BSc(Hons) MSc MRTP
Senior Planning Officer with the Council

DOCUMENTS
1 List of persons attending the Inquiry
2 The Council’s letter of notification of the Inquiry and list of those to whom it was sent
3 Copies of planning application forms relating to application references 03/003454/FUL & 05/00171/FUL
4 Copy of transcript of Court of Appeal Decision in First Secretary of State v Arun District Council and another [2006] EWCA Civ 1172 together with extract from Journal of Planning Law Current Topics of December 2006 & article from the J.P.L from March 2006 (concerning the decision at first instance in the Arun case)
5 Estate Agents’ details concerning the appeal property
6 Extracts from the Register of Electors and Schedule relating thereto.