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27 April 2021

EP ref: 20-630

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Dear Mared

Re: The Stables, Gatewen Hall, Gatewen Road, Wrexham

Further to your email of 21st April 2021, we provide further information below on the points raised.

4 or 10 year rule

Condition 1 on planning permission P/2012/0487 states that Building B shall only be used as a workshop and for storage and display purposes. The council have taken the view that it is the 10 year rule relating to breach of condition that must be applied rather than the four year rule given the condition specifically restricts the use of the building to that set out within the application documents under P/2007/0435 and P/2012/0487.

As set out in the planning statement, case law (Arun DC v. FSS [2006] EWCA Civ 1772) has confirmed that any breach of planning control, including non-compliance with any condition limiting the use of a building, that results in a change of use to use as a single private dwellinghouse falls within the provision of 171 B (2) of the Act 1990 (i.e. four year rule).

The case in Arun related to the unlawful conversion of an extension to an independent residential dwelling used for student accommodation, and whether the breach of condition restricting the change of use fell under the four year rule pursuant to section 171B (2) or ten year rule pursuant to section 171B (3). Arun District Council as local planning authority argued for the ten year period in section 171B (3). The High Court found in favour of the local planning authority and permission was granted for an appeal to the Court of Appeal.

At the Court of Appeal Lord Justice Auld states that:

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" (1). This appeal raises a narrow but important point of construction as to the applicable time-limit in the Town and Country Planning Act 1990 ("the 1990 Act") governing enforcement action for breach of planning control in the form of failure to comply with a condition of planning permission restricting change of use to use as a single dwelling-house, namely whether it is four years from the date of the breach, pursuant to section 171B(2), or ten years, pursuant to section 171B(3), of the Act."

Lord Justice Auld goes on to explain the timeline of the case as follows:

"30. In April 2004 Arun issued an enforcement notice, alleging that –

"without planning permission the ... planning condition ha[d] been breached in that the annex authorized under [the] planning permission ... ha[d] been occupied as a separate unit of residential accommodation".

31. Following an inquiry into Mrs Brown's appeal against the notice, an inspector decided that the condition was invalid, and that, in any event, the time limit for enforcement was four, not ten, years, and so the enforcement proceedings would be barred. He, therefore, allowed her appeal.

32. On Arun's appeal to the High Court, the Judge found for it on both issues and allowed the appeal. He held that the condition was valid and enforceable and, for the reasons he had given (see paragraphs 8 and 9 above), the period for enforcement was ten, not four, years. He, therefore, held that the enforcement notice was not time-barred. The First Secretary's sole ground of appeal to this Court relates to the time bar."

In coming to his conclusions, Lord Justice Auld stated that:

"In my view, the breach of planning control by Mrs Brown falls squarely within the words of section 171B(2), and is, therefore, enforceable for a period of four years only after the breach. Prior to 1996 the extension was used for a purpose ancillary to the house. From 1996 its use changed to independent use as student accommodation. By virtue of s. 55(3)(a) of the 1990 Act (see paragraph 2 above) that change constituted a material change of use, and was therefore development without planning permission within the meaning of s.171A(1)(a) and/or it was a breach of condition of the permission within the meaning of s. 171A(1)(b). Either way, it was clearly a "breach of planning control" consisting in "the change of the use" of the extension from a residential use which was ancillary to and part of the main dwelling, to use as a separate single dwelling house within the meaning of s.171B(2).

Accordingly, I would allow the Secretary of State's appeal so as to quash the decision of the Judge and to uphold the inspector's decision"

Lord Justices Sedley and Carnwath agreed with Lord Justice Auld and the appeal was successful. Lord Justice Sedley states:

"35. I agree that this appeal succeeds. The legislation is unambiguous in first defining a failure to comply with any condition attached to a planning consent as a breach of planning control (s. 171A (1)(b))) and in then providing (s.171B(2)) that where such a breach consists in change of use to a single dwellinghouse, which was the case here, any enforcement action has to be taken within four years."

In summary, a breach of condition which results in a property being used as a single private dwellinghouse is governed by the 4 year rule. The judgement is attached.

Extent of evidence

The council is also of the view that the evidence submitted is not sufficient to demonstrate the continuous use of the building as a dwelling house.

The requisite principles that govern the consideration of such applications are as follows:

- The requisite standard of proof is the balance of probabilities. A LPA should not refuse a certificate because the applicant has failed to discharge the stricter, criminal burden of proof, namely 'beyond reasonable doubt'.
- The burden of proof lies on the applicant to establish that a certificate should be granted for the development sought.
- If the LPA have no evidence of their 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.
- The courts have confirmed that the appellant's own evidence does not need to be corroborated by 'independent' evidence, particularly if it is unchallenged, in order to be accepted, see for example *Gabbitts v SSE and Newham LBC [1985]* JPL 630.

We enclose an appeal decision which relates to a certificate of lawful use for garden land (APP/W4223/X/16/3143392) where the accompanying evidence comprises two sworn affidavits, photographs taken in 1998 and 2002 and google earth images taken in 2000 and 2005. The Inspector stated:

"4. The onus is on the appellant to demonstrate that, on the balance of probability, the land has been used as a garden for a continuous period of 10 years. The Council does not provide evidence to contradict the evidence provided by the appellant. Rather, the Council considers that the evidence provided is not sufficient to demonstrate the continuous use of the land.

7. The affidavits are rather limited but nevertheless clearly explain how the land in question has been maintained and used as a garden since 1987. Given that any person who lies about the information contained in an affidavit could be prosecuted for the crime of perjury, and if convicted may be ordered to pay significant fines or sentenced to time in jail, I give these significant weight.

9. Whilst I agree with the Council that both the aerial images and photographs do not demonstrate a continuous use of the land, when considered in the round alongside the sworn affidavits and in the absence of any evidence to the contrary, I consider the appellant has discharged the onus of proof, on the balance of probability, incumbent upon him."

In this case, the application is accompanied by statements of truth from nine different parties. The council notes that the statements are not sworn by a solicitor. The reason for this was the complications arising from the Covid 19 lockdown restrictions. However, the evidence does not have to possess any particular formal status in order to carry weight particularly where it is not opposed and this is the case here. We have been advised by leading counsel on this point in relation to other certificate of lawfulness applications during the Covid19 pandemic. Furthermore, each of the signatories to the statements of truth state that they understand that proceedings for contempt of court may be brought in the case of a false statement verified by a statement of truth. This is comparable with the circumstances in the appeal above.

In terms of the evidence presented the statements of truth are precise and unambiguous. They confirm that The Stables was converted to an independent dwelling in 2012 and that the building was progressively revised and upgraded into the current layout during 2015 and 2016. Most importantly, the statements clearly set out that Andrew Mackinley-Brown has lived in the Stables as an independent private dwelling continuously since September 2016.

If you would please clarify where you consider the information to be 'vague' we will seek to provide additional clarification.

Yours sincerely
Emery Planning

Caroline Payne

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Director**

Enc. Case law and appeal decision