



Appeal Decision

Inquiry held on 23 September 2009
Site visit made on the same date

by **Gloria McFarlane LLB(Hons)**
BA(Hons) Solicitor (Non-practising)

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

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Decision date:
16 October 2009

Appeal Ref: APP/D1780/X/09/2097252

16 Bassett Heath Avenue, Southampton, SO16 7FY

- 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 Mrs S Kaur against the decision of Southampton City Council.
- The application Ref 08/01376/ELDC, dated 2 October 2008, was refused by notice dated 10 December 2008.
- 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 "use of building as managers accommodation ancillary to the use of the main house as an HMO".

Summary of Decision: The appeal is dismissed.

Application for costs

1. At the Inquiry an application for costs was made by the Council against the Appellant. This application is the subject of a separate Decision.

Procedural Matter

2. All oral evidence was given to the Inquiry either under oath or by the witness having made an affirmation.

The Appellant's case – Main points

3. The building is the rearmost of a number of outbuildings within the curtilage of 16 Bassett Heath Avenue. It shares the outside space and the parking area and there is no separate planning unit. It was completed in 1988 under permitted rights of the main house. The building was let independently and an enforcement notice issued on 3 June 1993 prohibited its use as a dwellinghouse. An appeal against that notice was withdrawn on the basis that the Council accepted that its occupation was ancillary to the main house. By 1998 the Appellant was letting the main house which had effectively become a house in multiple occupation (HMO) with the Appellant and her family living in the building.
4. There is no application for an independent unit. The Appellant and her family, as managers of the main house, have occupied the building for more than ten years.

The Council's case – Main points

5. An enforcement notice served was served on 3 June 1993 prohibiting the use of the building as a dwellinghouse. The notice came into effect on 5 July 1993 and was not complied with within the 56 day period for compliance and the use of the land as a dwellinghouse is therefore not capable of becoming lawful.
6. In the alternative, the Appellant has failed to establish the use of the building as managers accommodation ancillary to the main house for the requisite period.

Appraisal

7. The onus of proof in a LDC application is firmly on the Appellant. The Council need not go to great lengths to show that the use specified in the application is, or is not, lawful¹. The test of the evidence is 'on the balance of probability'. The Appellant's own evidence does not need to be corroborated by independent evidence. If the Council has no evidence of its own, or from others, to contradict or otherwise make the Appellant's version of events less than probable, there is no good reason to refuse the appeal, provided the Appellant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate².
8. In this case the Appellant therefore has to prove, on the balance of probability, that the use of the building as managers accommodation ancillary to the use of the main house as an HMO has continued without any material interruption for a period of ten years before the application was made, that is, from or before 2 October 1998.

The enforcement notice issued in 1993

9. The building was constructed under permitted development rights in 1988 as a double garage³. The breach of planning control alleged in the enforcement notice⁴ was the change of use of the building to use as a dwellinghouse. The land that was the subject of the notice, and therefore the planning unit, was the whole of the property known as 16 Bassett Heath Avenue. An appeal against the notice was withdrawn on the basis that family members were occupying the building ancillary to the main front building⁵. It appears that the main house may not have been a single family dwelling at the time as students had begun to occupy at least part of the main building by 19 October 1993⁶ and in a statutory declaration in respect of a LDC application relating to the use of the main house the Appellant says that the main house had been let to nine tenants since 1986⁷.
10. Whatever the Appellant's reasons may have been for withdrawing the appeal and whether the Council acted wisely in accepting those reasons is now a matter of speculation. The facts are that the appeal was withdrawn, the notice became effective, it is extant and its status is no longer challengeable.

¹ Paragraph 8.12 of Circular 10/97 Enforcing Planning Control : Legislative Provisions and Procedural Requirements

² Paragraph 8.15 of Circular 10/97

³ Statement of Common Ground paragraph 3.2

⁴ Document 3 to Mr Lawrence's Proof

⁵ Statement of Common Ground paragraph 3.2

⁶ Statement of Common Ground paragraph 3.2

⁷ Document 11 to Mr Lawrence's proof paragraph 5

Whatever the use of the building may have been since 1993/4, and the Appellant concedes that at some time in the 1990s it was let to tenants for a year, no further action has been taken by the Council in respect of the use of the building.

11. It is an established principle that an enforcement notice must tell the recipient what he has done wrong and what he needs to do to put it right. The notice prohibits the use of the building as a dwelling; it is not concerned with the status of the building because the prohibited use is 'as a dwelling' and there is no qualification of this in any way by words such as 'separate' or 'ancillary'. There is no dispute that the building has the characteristics of a dwelling⁸ and that it has been used by the Appellant and her children as a dwelling. I therefore consider that the current use of the building is in contravention of the notice.
12. The Appellant also submitted that the building is not a separate planning unit, independent of the main house because the Appellant treats the whole site as one unit. It appears that no plan was attached to the application for the LDC but a plan was attached to the Council's decision which shows the relevant land to be the whole of 16 Bassett Heath Avenue. The planning unit for the enforcement notice and the LDC are one and the same and there can therefore be no argument that the building is a separate planning unit. The enforcement notice relates to the whole site and prohibits the use of the building as a dwelling which, using the ordinary meaning of the word, it is and there is no dispute about this. I do not find any merit in the Appellant's submissions in this respect.
13. I therefore consider that the use of the building as managers accommodation ancillary to the use of the main house as an HMO is not lawful because it constitutes a contravention of a requirement of an enforcement notice that is in force⁹.

Managers accommodation ancillary to the use of the main house as an HMO

14. It may be that I am wrong in my finding above. I will therefore consider the Appellant's contention that the use of the building is ancillary to the main house. Whether a use of land is ancillary or incidental is a matter of fact and degree and evidence was presented and submissions were made in respect of this aspect of the appeal.
15. The main house has a lawful use as an HMO for eight people following an application for a LDC dated 19 September 2003 which was granted on 23 September 2004¹⁰. The plan accompanying that application is in relation to the whole of 16 Bassett Heath Avenue but it does not show the footprint of the building¹¹. The Appellant makes no mention of the building in her statutory declaration in support of the application¹². I appreciate that the application was in respect of the main house but I find the omission of the building as the place in which the Appellant and her children were living to be surprising.

⁸ Statement of Common Ground paragraph 5.1

⁹ S.191(2) of the 1990 Act

¹⁰ Ref 03/01331/LDCE

¹¹ Document 2 and Statement of Common Ground paragraph 3.4

¹² Document 11 to Mr Lawrence's proof

16. The Appellant bought the appeal property in about 1985 with her then husband, Mr S Singh. In about 1992 they separated and Mr S Singh moved out, although the property remains in joint names. Mr S Singh has lived at three different addresses since that time and their son, Mr G Singh who is now 24 years old, lives with him. Their daughter, Ms N Ghag who is now 38 years old, lives with the Appellant at the building.
17. The principal reasons why the Appellant says that the building is ancillary to the main house include the following: All services, that is, water, gas and electricity, are shared by the main house and the building. When the children were ill, which unfortunately appears to have been quite frequently, Mr S Singh would occasionally stay overnight in the building, or more often in the main house, to care for them when the Appellant was working. Visiting family and friends would stay in the main house. There is only one postal address for both the main house and the building. The main house and the building share amenity and parking space. The Appellant is responsible for cleaning the communal parts of the main house and the rooms when tenants leave. The Appellant and her daughter deal with all the bills and other administrative matters for the main house and there is office space in the building where these tasks are undertaken.
18. However, the evidence to the Inquiry also included the following: The bills for water and gas provided by the Appellant were dated February 2009 and August 2009, that is, outside the period with which I am concerned in this appeal. Although addressed to the Appellant at 16 Bassett Heath Avenue only the water bill said it related to that property and there was no indication whether it was for the main house and/or the building. I have no reason to believe that Mr S Singh did not stay overnight to care for his children on occasions but the Appellant's evidence was that she did not work during the night until two/three years ago. No evidence other than that of the immediate family was provided about extended family and friends staying. Whilst the Appellant is responsible for cleaning rooms when tenants leave I noted on my visit that there appeared to be no communal rooms and given that Mr S Singh and the extended family and friends were sleeping in what was alleged to be the lounge, it seems to me unlikely that there was any communal space. The Appellant instructed agents to find tenants for the main house, the agents drew up the tenancy agreement and made arrangements for the payment of rent. Mr S Singh comes to the house daily and undertakes work to the main house himself or instructs builders etc. as necessary. On my visit it was Mr S Singh who showed me around and who had the master keys to the rooms. At the time of my visit the office in the building consisted of a small desk with a laptop computer and printer in what appeared to me to be a storage room; this room was shown in photographs taken by Mr Grayer in November 2008 and at that time it did not have the equipment I saw but appeared to be almost completely full of stored items.
19. I appreciate that the Appellant has limited English, both written and spoken, but her evidence was confused and confusing and I consider at times, evasive. I was also not persuaded by Mr S Singh's evidence which was lacking in clarity and also, at times, evasive.

20. I was referred to the cases of *Whitehead*¹³ and *Uttlesford District Council*¹⁴ but the facts of those cases are different from this case in a number of respects including in those cases the main houses were family dwellings, not HMOs.
21. I find as a matter of fact and degree for the reasons given above and all other matters raised that the use of the building as managers accommodation ancillary to the use of the main house as an HMO has not been proved on the balance of probability by the Appellant.

Conclusions

22. I have found above that the use of the building as managers accommodation ancillary to the use of the main house as an HMO is in contravention of an enforcement notice. I have also found, in the alternative and in addition, that the use of the building as managers accommodation ancillary to the use of the main house as an HMO has not been proved on the balance of probability by the Appellant.
23. For the reasons given above I therefore conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the building as managers accommodation ancillary to the use of the main house as an HMO was well-founded and 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

24. I dismiss the appeal.

Gloria McFarlane

Inspector

¹³ *Whitehead v SSE and Mole Valley District Council* [1992] JPL 561 – Doc 4

¹⁴ *Uttlesford DC v SSE and White* [1992] JPL 171 – Document 6 to Mr Lawrence's proof

APPEARANCES

FOR THE APPELLANT

Mrs Julia Barrett Planning Law Consultant
LLB

She called

Mrs S Kaur Appellant
Mr S Singh Appellant's former husband
Mr G Singh Appellant's son
Ms N K Ghag Appellant's daughter

FOR THE LOCAL PLANNING AUTHORITY

Mr S Whale Counsel, instructed by the Solicitor to Southampton
City Council

He called

Mr S Lawrence Planning Officer, Team Leader, Southampton City Council
Dip TP MRTPI

Mr G Grayer Planning Enforcement Officer, Southampton City Council

DOCUMENTS AND PLANS SUBMITTED AT THE INQUIRY

Document 1 - Copy of the Council's letter of notification and list of persons notified

Document 2 - Copy of plan attached to LDC application ref 03/01331/LDCE, submitted by the Council

Document 3 - Plan of the building and photographs, submitted by the Council

Document 4 - *Whitehead v SSE and Mole Valley District Council [1992] JPL 561*, submitted by Mrs Barrett

Document 5 - Statement of Common Ground