



The Planning Inspectorate

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Your Reference
RR/CCS/RS92/064
Council Reference
GAD/BEG/618187
Our Reference
T/APP/C/93/L2820/628864
Date
20 SEP 94

Dear Sirs

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 174 AND SCHEDULE 6
PLANNING AND COMPENSATION ACT 1991
APPEAL BY MS S STRACHAN
LAND AND BUILDINGS AT 2 GORDON STREET, ROTHWELL

1. I have been appointed by the Secretary of State for the Environment to determine your client's appeal against an enforcement notice issued by the Kettering Borough Council concerning the above mentioned land and buildings. I held an inquiry into the appeal on 19 April 1994. The evidence was taken on oath. At the inquiry, an application was made by your client for an award of costs against the Council. This is the subject of a separate letter.

THE NOTICE

2. (1) The notice was issued on 28 April 1993.
- (2) The breach of planning control as alleged in the notice is, without planning permission, the making of a material change of use of the property from a single residential dwelling to two separate flats without the benefit of planning permission.
- (3) The requirements of the notice are to cease using the property as two separate flats and reinstate its use as a single dwelling house.
- (4) The period for compliance with these requirements is ninety days.

GROUND OF APPEAL

3. Your client's appeal was made on grounds (a), (d) and (f) as set out in section 174(2) of the 1990 Act as amended by the Planning and Compensation Act 1991. As the prescribed fees, under the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989-1993, have not been paid to the Secretary of State for the Environment and the Local Planning Authority within the period specified, your client's appeal is not proceeding on ground (a). Likewise the deemed application for planning permission, under section 177(5) of the Act, does not fall to be considered. At the inquiry your client said that her appeal on ground (f) had been withdrawn.



RECYCLED PAPER

THE APPEAL ON GROUND (d)

4. Section 171B(2) of the Town and Country Planning Act 1990, as amended, states that enforcement action cannot be taken if the alleged breach of planning control, namely, the making of a material change of use of the appeal site from a single residential dwelling to 2 separate flats, occurred more than 4 years before the date of issue of the notice and continued uninterrupted until the date of issue of the notice. I must therefore first be satisfied, for your client's case to succeed, that the appeal building, an end of terrace dwelling, 2 Gordon Street, in Rothwell, had been converted into use as 2 self-contained flats more than 4 years before issue of the notice.

5. In the hall of the building I saw that the door which would have opened into the rear main room had been secured by a few plastic blocks, such as are used for assembling fibreboard. The stairs lead to the first floor rear landing, where stand a kitchen sink and cooker; to the rear is a bathroom. Access to the ground floor is obtained via the outside passage and a rear door to the building; former outbuildings behind the kitchen accommodate a bathroom; there are no fastenings on the inside of the door from the hallway.

6. Your client gave evidence, as did Mr Howard, Mr Maskrey, and Mr and Mrs Strachan, that use as 2 separate flats had begun earlier than 28 April 1989, 4 years before the date of issue of the notice. The Council alleged that not to be the case; Mr Ginns, Mr Sturgess and Mr White, Council employees, Mr Kilsby the former owner of the appeal building, and Mr Burgon, a former neighbour gave evidence for the Council; a neighbour, Mr Pears, made representations.

The case for the appellant

7. Mr Strachan, your client's father, had been a builder and developer, who had helped Burgon Developments Ltd, in early 1988, locate and buy suitable properties in the area. This dwelling appeared a suitable investment as it had already been divided into 2 self-contained flats; there had been a connecting door at the foot of the stairs. Mr Howard had given a spot appraisal and valuation. Mr Maskrey had assisted with some work including sealing up the intercommunicating door on the ground floor. Although he had no specific records of it, Mr Strachan was satisfied that there had been tenants in the property, either when Burgon Developments Ltd had owned it or after that, when he had bought it, during the calendar year 1988, and certainly well before April 1989. He also said that he did not know whether tenants had been in occupation before he bought the property. Later, Mr Strachan said that the first tenant was an Irish dentist, Mr O'Brien, with a practice in Corby, but he was not able to provide dates for that tenant, who had left the area and was believed to have gone abroad. On 23 March 1990 the site was sold to Ms Strachan, the appellant; she recalled 2 self contained flats with separate entrances here, when her father had bought the building in September/October 1988, although she could not for certain say whether they had been lived in at that time. The property had been in 2 flats when she bought it from her father, and she had since let them out to various tenants.

8. Mrs Strachan had made curtains, in the late summer of 1988, for letting the 2 self contained flats which she specifically remembered. Mrs Strachan and Ms Strachan also said that an Irish dentist, a Mr O'Brien and wife, had been the first tenant, first on the ground floor and then on the first floor.

9. Mr Howard, an estate agent, and Mr Maskrey, a builder, had looked at the property at Mr Strachan's request. Mr Howard could produce his diary which referred to meeting Mr Strachan twice in July of 1988; he also remembered some discussion in June. Mr Maskrey's site notes were not dated; he placed his visit in late September or early October 1988. Mr Maskrey was to advise on the practicability of converting 2 self contained flats back to a house, by taking out the upstairs kitchen and the downstairs bathroom, making good walls, doors, etc and restoring it to one building. Although the paint work and decorations were not new, he believed that both the flats were in good decorative order. As a builder he believed that both flats had been lived in and not been simply painted out, decorated and left empty for a long time.

10. Mr Lilley, damp proofing contractor, did not appear, so his written statement does not carry the weight attributable to evidence which has been subject to cross-examination. According to his statement he did some work here in July or August of 1988; there had been items of personal property and belongings and/or furniture in several rooms; the appeal property appeared to have been occupied recently, and not very long before he came to work here.

The case for the Council

11. The Council's Register of Electors showed members of the Kilsby family at the dwelling from the qualifying dates for the Registers from 1985 to 1988; the qualifying date is residence on 10 October in the previous year. For the years 1989 and 1990 there was no elector registered for the appeal building.

12. Council tax records for the empty appeal building registered Mr Kilsby to 25 October 1988, Burgon Associated Ltd until 10 April 1990, and Mr Strachan until 18 August 1990, when the ground floor was registered to Mr S J Skilton. He moved upstairs as the first person in the first floor flat, for which he was registered on 1 April 1991, when Mr and Mr Wallace were registered for the ground floor flat. 1 April 1991 was the first date in Council records showing both flats in the building occupied. The Void Inspection Record, produced by the Revenues Officer who compiled it, confirmed the appeal property had been empty when inspected several times between 9 February 1988 and 29 June 1989.

13. These records confirmed Mr Kilsby's evidence, as did the 2 neighbours. His parents had carried out various repairs and some minor alterations. He and his parents occupied the building as a single dwelling until 31 October 1986, when he bought it from them; he had made no changes to the property. Mr Kilsby was unsuccessful in trying to sell his property; it was empty for some 18 months. He thought that he had sold to a Mr Strachan but, being so pleased to have a buyer, he had not taken any particular note when other names had been mentioned to him by his solicitor. His sale of the single dwelling, still unconverted, to Burgon Associates was completed on 28 October 1988.

14. Mr Burgon, Director of a development company, whom the Council had called, stated in writing that the property had been bought by his company, Burgon Associates Limited, on 28 October 1988, from Mr M J Kilsby. Mr Burgon was not aware that the property had been converted to or occupied as separate flats during his company's ownership; still a 4 bedroomed house, not 2 flats, it had been sold to Mr G Strachan, your client's father, on 30 March 1990.

15. Mr Bush, formerly of 4 Gordon Street, said that when he bought no 4, in June 1987, the appeal property was empty and for sale. He added that no 2 remained empty during 1988 and well into 1989; Mr Kilsby occasionally called at the premises. Building work started in the Spring of 1989; the property was not occupied by the first tenant till after 1 August 1989, a date this witness had a particular personal reason to remember. Mr Bush had been inside no 2 only after then, to help take a 3 piece suite and a gas cooker upstairs.

16. Mr Pears, of 6 Gordon Street, said that he could confirm the evidence given by Messrs Kilsby and Bush; the property had been empty for some time. As far as he was aware work on the property had not begun till after its sale; under cross-examination he thought that he could not be accurate with dates.

17. The local planning authority's involvement began in 1991 with a planning application for the conversion into 2 flats and an incomplete Building Regulation application; the planning application was withdrawn as the correct fee had not been paid. In 1992 a second planning application was refused. A third application, to correct an ownership technicality, was refused in 1993.

Inspector's Conclusions

18. The Council said that, as the first record of 2 separate flats in the appeal building being occupied was 1 April 1991, the 4 year period had not been demonstrated. The Electoral Register confirmed that on 10 October 1988 and 1989 no one was here. Your client said that an act of physical conversion was sufficient to start time running; the relevant date was the work of conversion not when separate living units were first occupied. Your client said that earlier occupation had been made out and attested by her witnesses.

19. I consider that the question, whether there had been a change of use, is a matter of fact and degree, to be determined by the existence of any degree of physical reconstruction and the extent to which the alleged separate residential units can be regarded as separate in the sense of being self-contained and independent of other parts of the same property. I note the analogy, which your client supplied, that a local planning authority does not await occupation of a site where physical works suggest that a change of use has occurred; the local planning authority would be prompted to take enforcement action by the erection of a block of flats on a green field and not await occupation by tenants. I also bear in mind, however, that physical works might be carried out in some circumstances which, in your client's opinion, would indicate a change of use; a developer might fail to occupy the converted site and carry out further works or even restore its original state.

20. I do not find your client's argument, namely that carrying out internal conversion works started the 4 year period which is necessary to secure her appeal on ground (d), to be persuasive. Section 55(2)(a)(i) of the Town and Country Planning Act 1990 states that, for the purposes of the Act, works for the maintenance, improvement or other alteration of any building which affect only the interior of the building do not involve development. I also consider Section 55(3)(a) of the Act pertinent; it refers to the use as 2 separate dwelling-houses not physical conversion as involving a material change of use.

21. Section 171B(2) of the Act states that the time limit in a case such as this is 4 years from the date of the breach. It would, in my judgment, strain the proper interpretation of the statute to accept in this matter that the change of use from a single dwelling into 2 separate self-contained flats, the unauthorised breach, occurred merely if a door had been closed off or if another bathroom and kitchen had been installed. After considering, in the round, the accepted facts of the change of use and cases referred to me by the Council - *Lake District Special Planning Board v Secretary of State for the Environment and Impey (1980) JPEL 363* and *Backer v Secretary of State for the Environment and Another (1983) JPEL 602* - I am fully satisfied that here the unauthorised actual change of use took place, as a matter of fact and degree, not when conversion works were completed but when a tenant took up occupation.

22. In any event your client has an additional problem in this matter, for your client did not show, by what in my judgment was strong evidence, when the works of conversion were carried out. In particular I note that your client's argument turns on when the conversion works were completed; only vague assumptions were suggested about the actual start of carrying out of the work.

23. Your client's witnesses spoke of seeing clear signs of 2 flats in 1988 and 1989. Mr Strachan saw the building about 6 weeks before the exchange of contracts; to him and other witnesses 2 kitchens and 2 bathrooms meant 2 flats; completion was on 10 October 1988. Your client's other witnesses gave similar evidence. However Mr Howard, the only person called by your client with a note as to the date of any event, had had a number of dealings at this time with Mr Strachan. Moreover all her witnesses had to make an assumption, necessarily, about any tenants having lived here because Mr Kilsby, who had lived at the property alone, and earlier with his family, had sold the property with vacant possession to Burgon Developments Ltd on 28 October 1988.

24. Your client said that the various statutory records kept by the Council were not comprehensive; they could show the situation only on a certain date, and so conclusions could be drawn from them only with caution. I accept that little can be deduced from the submission of planning applications in 1991, 1992 and 1993, for the disputed development, or the failure to obtain Building Regulation approval. I attach a greater weight, however, to those Council records which confirm other evidence and were compiled for other purposes.

25. Answers to my questions indicate, in my judgment, that the Electoral Registration Officer had made determined attempts to secure the correct statutory returns. As for Council tax records, I asked if occupiers might have been reluctant to reveal their existence; the Council accepted that this was a possibility, but said that their response rate had been, at 98% to 99%, slightly higher than many comparable authorities; extensive enquiries had been made by the employees who had compiled its tax records. These statutory records support the Council's case which is strengthened, I believe, by the unequivocal statement of Mr Kilsby who lived here for many years, at first with his family and then alone. The property was, said Mr Kilsby, still a single dwelling when he lived there, and the statutory records do not disagree. Although Mr Kilsby did not appear eager to attend the inquiry or to give evidence, I noted that his evidence stood up well to cross-examination. The Electoral Registers showed latterly 4 people named Kilsby living in the building. A bathroom and kitchen on each floor of this dwelling would reduce materially the living space available. It seems to me unlikely, in the light of Mr Kilsby's unshaken evidence, that the building had been so physically altered, let alone divided into 2 flats, whilst the Kilsby family lived here.

26. I attach more weight, overall, to the evidence for the Council about occupation. Statutory records strengthen the Council's case which is also supported, I believe, by the unequivocal statement of Mr Kilsby who lived here for several years, first with his family and then alone. He was adamant that the property was still a single dwelling when he lived there, and the Council records support him. Mr Burgon, Director of a development company, whom the Council had called, did not appear, so I do not accord to his evidence the weight which I would attribute to oral evidence subject to cross-examination. However I note that his statement is consistent with both the statutory records and other witnesses. Mr Bush, who lived next door, had a very strong personal reason to remember what happened after 1 August 1989; the evidence of Mr Pears, who lived next door but one, also confirmed the Council's case.

27. I do not find the evidence for your client compelling. Whilst several people spoke in support, I noted that your client's own personal recollection of events at the site was far from clear. Although people called by her were more knowledgeable and positive, I found your client's case seriously weakened by general confusion about details. Land transactions are usually accompanied by a number of documents, not least bills from solicitors. Conveyances often describe the property as also, in my experience, would a mortgage of flats; your client is said to have had the mortgage; she said that her parents had it. In spite of prompting by the Council, who asked about any Land Registry records, your client did not produce any documents in support of her case. Your client cast doubt on the Council's case, but in my opinion it was up to your client to substantiate ground (d), and not for the Council to refute it.

28. Neither your client nor Mr Strachan were able to give detail of changes in the ownership when Mr Kilsby sold the property or subsequently. Indeed the witnesses for your client gave inconsistent evidence and did not agree on whom or which company had bought this property from Mr Kilsby. Mr Strachan said that it was bought on 10 October 1988, not by the original company interested but by Burgon. Mr Strachan also said that the door had been blocked after his daughter bought the property, but she gave different evidence about the door. Mr Strachan said that there had been tenants in the property, either when Burgon Developments Ltd had owned it or after that, when he had bought it, during 1988, and certainly well before April 1989. He also said that he did not know whether tenants had been in occupation before he bought the property. I note the difficulty your client had in not finding Mr O'Brian the Irish dentist, said to be the earliest tenant; the Council was unable to trace him.

29. The vague, sometimes inconsistent and generally incomplete history of the property that your client presented, and which I believe would have been documented in records available for production, does not lead me to attach greater weight to other parts of your client's case than that put by the Council. It is for the appellant to demonstrate on the balance of probability that the use of the dwelling as 2 self-contained flats was commenced before 28 April 1989. I am not convinced that your client's case has been satisfactorily substantiated, and so I find that her appeal on ground (d) must fail.

30. The written representations submitted by the Council after I closed the inquiry have not changed my conclusions. I have considered all other matters put forward at the inquiry and in the documents, but I find nothing which carries more weight than the considerations which have led me to my decision.

FORMAL DECISION

31. For the above reasons, and in exercise of the powers transferred to me, I dismiss your client's appeal and uphold the enforcement notice.

RIGHTS OF APPEAL AGAINST DECISION

32. This letter is issued as the determination of the appeal before me. Particulars of the rights of appeal against my decision to the High Court are enclosed for those concerned.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'C G West'.

C G WEST LLB ACIarb FIMgt FCIS Solicitor
Inspector

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APPEARANCES

FOR THE APPELLANT

Mr R T L Rose

- of Eden & Company, Solicitors,
of 5 Sun Hill, Rothwell Northants
NN14 2AB

He called

Mr G M Strachan

- The Cottage, 4 School Lane,
Wilbarston Leics

Ms S Strachan

- The Cottage, 4 School Lane,
Wilbarston Leics

Mrs P Strachan

- The Cottage, 4 School Lane,
Wilbarston Leics

Mr G H Howard

- 10 Brockshill Drive Oadby Leics

Mr J D Maskrey

- 2 De Roos Way, Stoke Albany
Northants

FOR THE LOCAL PLANNING AUTHORITY

Mr G Grynowski

- Borough Solicitor with the Kettering
Borough Council

He called

Mr M J Kilsby

- 8 Selby Court, Kettering

Mr L D Sturgess
BSc DipTP MRTPI

- Chief Development Control Officer
with the Kettering Borough Council

Mr I D White

- Senior Administrator Elections with
the Kettering Borough Council

Mr M Ginns

- Revenues Officer with the Kettering
Borough Council

Mr A T Bush

- 53 Chatsworth Drive, Wellingborough

INTERESTED PERSON

Mr H I Pears

- 6 Gordon Street, Rothwell, Kettering
Northants NN14 2BH

DOCUMENTS

- Document 1 - List of persons present at the Inquiry
- Document 2 - Council's letter of notification of the Inquiry and list of persons notified
- Document 3 a+b - Responses to the Council's letter
- Document 4 - Pages from Halsbury's Laws submitted by Mr Rose
- Document 5 a+b - Law Reports submitted by Mr G Grynowski

PLANS

- Plan A - Plan attached to the notice