Directorate for Planning and Environmental Appeals

Appeal Decision Notice

T: 01324 696 400
F: 01324 696 444
E: dpea@scotland.gsi.gov.uk

The Scottish Government

Decision by Malcolm Mahony, a Reporter appointed by the Scottish Ministers

- Certificate of Lawful Use appeal reference: CLUD-290-2000
- Site address: Loanview House, Lang Loan, Straiton, EH20 9QT
- Appeal by Mr and Mrs J McGlynn against the decision by Midlothian Council
- Application for certificate of lawful use 11/00674/CL dated 30 September 2011 refused by notice dated 6 January 2012
- The subject of the application: occupation of the dwelling as a private house for over 10 years in breach of planning conditions
- Date of inquiry: 3-4 October 2012
- Date of site visit by Reporter: 5 October 2012

Date of appeal decision : 13 November 2012

Decision

I dismiss the appeal.

Reasoning

1. The subject application for a certificate of lawful use (CLUD) under section 150(1) of the Act has been submitted on the basis that the use as a dwellinghouse has existed at the site since at least September 2001 whilst in breach of planning conditions 3 and 4 of permission reference 00/00178/FUL, and is thus now immune to enforcement action.

2. Prior to the inquiry session, I ruled: that the appellants were not entitled to pursue the appeal on the basis that there has been a breach of control consisting in the change of use of Loanview House to use as a single dwellinghouse; and that the appeal was not restricted to the material available to Midlothian Council at the time it determined the application. The evidence from all witnesses heard at the inquiry was taken on oath.

3. In January 2001, Mr and Mrs McGlynn were granted planning permission to build a six bedroom detached house on their 1.6 hectare site to the west of Lang Loan and adjacent to the A720 Edinburgh city bypass, subject to 4 conditions. The key requirements of those conditions were: (1) the planning authority's agreement to various details of the building, landscaping and fencing prior to any work commencing on site; (2) demolition of a partly built house, prior to any work commencing on site; and removal of all other buildings, caravans, dog run and other debris on the site within 3 months of completion or occupation of the house; (3) that the dwellinghouse was not occupied until the kennels and cattery

accommodation were built and in use for boarding animals; and (4) that the dwellinghouse was occupied solely by persons employed or last employed in managing the kennels and cattery and the dependents of those persons, or persons residing with them, or the widow or widower of such persons.

4. In June 2011, the McGlynns were granted a planning permission which had the effect of amending condition 3, to allow occupation of the dwellinghouse until 1 July 2012, after which time it should remain occupied only once the kennels and cattery were constructed and in use for boarding animals.

The appellants' case

5. In summary, the appellants claim that at the time construction of the dwellinghouse known as Loanview House began they were living in a sub-standard caravan at Loanview Holdings. Construction from foundation level to being wind and water tight took some 12 weeks. As soon as the house became habitable and before it was completed, they moved to live in the house – on 1 September 2001 (sometimes expressed as *"early September"* or simply *"September"*). [redacted] Conditions and facilities at the caravan were poor, so even an incomplete house which was wind and water tight and had a functioning flush toilet was preferable as a place to live.

6. [redacted] The McGlynns still hope to run a kennels business and are now licensed to take 45 dogs. Only half (30) of the kennels have been completed, above ground works remain to be undertaken on the balance of the kennels, and no start has been made on the cattery. No animal boarding has taken place.

7. In support of their application and appeal, the appellants have provided the following documents.

- A Scottish Gas contract to provide gas supplies to the property dated 25 May 2001, and a letter dated 7 June 2001 acknowledging payment for the same.
- An email from Scottish Power confirming that it supplied electricity to 14 Lang Loan Road from 10 December 2000. A bill from SP Distribution Ltd, dated 15 January 2002, claimed to indicate a previous payment for usage for the autumn quarter, from August/September 2001. A summary of an electricity bill for the period May to November 2002. An amended bill showing electricity consumption from May to December 2002. A certificate of compliance for electricity (2003) and an electricity installation certificate (2003).
- Documents relating to sewer connection (April 2002).
- Documents from Lothian Valuation Joint Board and Midlothian Council, dated September 2002, August 2003 and September 2003, relating to Council Tax matters.
- From Ian Forbes, architect, a completion certificate (May 2004) and a letter regarding the date of occupation of the house (2011).
- A statement from Mrs McGlynn's employer dated February 2012 regarding her change of address in September 2001.

- A letter from the council's planning enforcement officer dated June 2004 stating that the house appeared to be occupied in breach of planning conditions.
- Sworn affidavits by Mr John McGlynn, Mrs Yvonne McGlynn (his wife), Claire McGlynn (their daughter, a solicitor), Gary Mackie (Mrs McGlynn's cousin, a painter and decorator), and David Roberts (a blacksmith/welder). These all relate to occupation of the house in early September 2001 and relate them to events including the deaths of relatives, the twin towers attack and temporary employment.

8. The McGlynns also referred to confirmation from the council that a drainage test for the property had taken place on 11 June 2011.

9. They point out that the council did not take any enforcement action against them until 20 January 2012. That notice, subsequently withdrawn, required that the kennels and cattery be completed and brought into use for boarding dogs and cats, failing which the dwellinghouse should be vacated.

The council's case

10. The reasons given by the council for the refusal of the application for the certificate and for maintaining that position in the light of the oral evidence are as follows.

- The appellants' account of the manner in which they occupied Loanview House strains belief.
- A number of the statements originally made by the appellants have proved to be false or misleading.
- Their account at inquiry changed significantly from that when they made the application.
- They gave a different account of their move to Loanview House in other contexts, and their explanations of those contrary accounts are unconvincing.

11. The council's enforcement officer gave evidence as to the condition of the house in March 2002, when he had made a note of a site inspection. The council produced a copy letter from the appellants' solicitors giving a later date for the McGlynn's occupation of the house than they have claimed.

12. The council states that the appellants have not discharged the burden of proof upon them to demonstrate on the balance of probabilities that they occupied Loanview House in breach of conditions for a period of 10 years before the CLUD application was made. In fact, the evidence points to Loanview House having been occupied at a date significantly later than September 2001.

Other matters

13. In closing submissions, the parties also debated the competence of any certificate which might be issued, what it might include and the effect of the planning permission granted in June 2011. In view of my conclusions, I do not need to address these matters.

Reporter's conclusions

14. The McGlynn's case is dependent on the exact month in which they maintain they took up residence in the house. Their application was submitted on 30 September 2011, so if their occupation started one month later they would fail to satisfy the 10 year period for claiming immunity from enforcement. The case in support of that month relies heavily on the recollections of family members. There is a lack of documentary evidence for this aspect of the appellants' case.

15. No oral evidence was provided from anyone outwith the family and close relatives. One potential witness (David Roberts) was not a relative. However, although he had submitted an affidavit and a precognition, I was informed on behalf of the appellants that his evidence was not to be heard at the inquiry, for medical reasons. Less weight can be placed on his evidence because it was not open to cross-examination. Mrs McGlynn's cousin, Gary Mackie, who is a self-employed painter and decorator by trade, gave evidence to explain that he had spent 2 months painting most of the interior of the house in his spare time at nights and weekends. He did so without payment as a favour to the family. It was clear from the evidence that the McGlynns are a very close and supportive family and that these characteristics extend to some members of the extended family; it would have been more persuasive had any witnesses outwith that family circle given evidence at the inquiry.

16. The McGlynns undermined their credibility as witnesses in several ways.

- Mr McGlynn stated that he had taken elaborate steps to deceive the council's building control service about the existence of an unlawful cesspool serving the house.
- The McGlynns breached all 4 of the conditions imposed on planning permission 00/00178/FUL.
- They claim to have failed to notify the Lothian Valuation Board that their residence had changed from a caravan to Loanview House between September 2001 and August 2003, and therefore had failed to pay the correct level of council tax for that period.
- They misrepresented documents as supporting their occupation of the house when they plainly did not do so. For example, a bill for connection of an electricity supply was said to be for usage of electricity in the quarter to January 2002. In questioning, Mrs McGlynn accepted that this was a *"slight error".* Another electricity bill states that the code "*S*" refers to customer self reading and applies that code to the amount charged, but Mrs McGlynn insisted that the bill was only an estimate, even when the code was pointed out to her. She then continued to insist that a subsequent bill had been issued to correct the estimated bill in the face of contrary evidence. I would have expected Mrs McGlynn, who works as an insurance advisor and whose role includes office management, to have understood the content of those bills.
- Mr McGlynn's precognition states that they *"had a three phase electricity supply put into the house in January 2002."* However, when his attention was drawn to a letter from Scottish Power Systems referring to the supply line being laid during the weekend of 13 April 2002, he accepted that the statement in his precognition was a *"mistake".*
- Their application statement and precognitions gave the impression that in September 2001 the house was complete but for cosmetic matters. Under questioning their claim became that at this date the house was capable of occupation but there were

no windows, no tiles on the roof, no legal mains foul drainage, no mains gas supply and no permanent electricity supply.

- Mrs McGlynn, although she claimed to have a good memory, repeatedly stated that she could not recall dates relating to the installation of utilities and facilities at the house.
- None of the witnesses could remember when the caravan had burned down.
- In answer to questions, the McGlynns differed as to whether photograph albums had been destroyed in the caravan fire and as to whether the police had been informed.
- There was no explanation as to why bills dated after the McGlynns claimed to have moved to Loanview House were allegedly stored in the caravan rather than in the house.
- [redacted]
- [redacted]
- Claire McGlynn stated in evidence that in September 2001 she recalled the windows being in place but covered in plastic to protect them. Her father says that he installed shutters with Visqueen plastic sheeting on both sides.
- When asked about the cesspool drainage, she replied that she was not sure she would be in a position to comment. That seems surprising given that it would have been in place from September 2001 to late 2002, including over the summer months, when its smell would likely have been obvious to a regular visitor.
- Mrs McGlynn's precognition states *"My husband is a builder and he undertook the construction of the house himself."* In the statement of case for the appellants, it was claimed that Mr McGlynn *"was undertaking all of the construction work himself, with specialists where required"*. By my reading, that referred to construction of the whole project. However, in oral evidence, Mr McGlynn maintained that some 8-10 tradesmen had worked on the site; he described his role as mainly supervisory. In closing submissions, it was contended that the reference to construction work related only to building of the kennels. I find that to be an unlikely interpretation in the context of the statement as a whole.

17. Many opportunities for corroboration of the facts were not taken or said not to be available, some of the reasons given being weak. Instances include that key documents had been stored in a caravan which subsequently burned down; they had been stored there despite the caravan being in a location remote from the house, being leaky, and having been previously vandalised. Although Mr McGlynn said that the police and fire brigade had attended the fire, there was no corroboration from those services. The only evidence of the alleged event is the testimony of Mr and Mrs McGlynn.

18. When Ms Pryde, the enforcement officer who processed the CLUD application, suggested to the appellants in November 2011 that they might forward any additional receipts or bills to support their claim, the McGlynns made no mention of documents having been lost in a caravan fire. The appeal statement of case claims that *"The appellants are fortunate to be in a position to have kept all records relating to the house and have been*

able to provide these along with the witness sworn statements to support their case." The first part of that statement turned out not to be correct.

19. Mr Forbes, the architect, was not called as a witness because he was *"difficult to contact"*; the statement in his letter of 2011 that *"I believe Mr and Mrs McGlynn moved into the house in September 2001"* is too tentative to carry much weight. Mrs McGlynn's employer was not called regarding his letter stating that she had advised him of her new permanent address in September 2001. The McGlynns say that they did not inform the Valuation Board, television licensing authority, post office, or bank of their change of address in 2001. No invoice or other record showing the date when the windows were installed was produced and there has been no testimony from the installer. The appellants have not submitted any utility bills, invoices or receipts which support their occupation in September 2001.

20. The house is said to have gone from foundation level to being wind and water tight in a period of some 12 weeks. It is claimed that around 8 to 10 workers helped to build the house in this limited time span. However, no documentary evidence is available to support that claim and none of these workers other than one relative (who worked out of hours and on decoration rather than construction) has corroborated the claim.

21. There is no record of electricity use at the house before May 2002. There is an unexplained jump in electricity usage between the six months from May to November 2002 (752 units) and the following 5 weeks (852 units), bearing in mind that space heating was not provided by electricity. It seems unlikely that the 752 units represents use for domestic occupation and construction work over the six month period, even if the house was only partly occupied.

22. Documentary evidence relating to three-phase connection, electricity consumption, application for sewerage connection, and assessment for Council Tax all point to occupation of the house after September 2001.

23. The inquiry was told by several witnesses that by September 2001 the house was wind and water tight, but that, since agreement over changing the window frames from hardwood to uPVC was still awaited, temporary blue Visqueen-covered shutters had been installed on all window openings. From photographs which I took on the site inspection I can see at least 27 window openings in the walls of the house, many of the windows being divided into two openings by central mullions.

24. [redacted]. The discovery that the sewer was 4 metres deeper than expected and therefore very expensive to connect to appears only to have come to light some time after the unlawful cesspool drainage had been dug.

25. I observed no visible sign of the alleged cesspool or the pit where its contents are said to have been dumped. The building standards surveyor saw no sign of these on his visits. Mr McGlynn's collaborator in constructing the cesspool has not given evidence. There is therefore no independent corroboration of the claim.

26. The council provided contrary evidence which cast considerable doubt over the McGlynn's claims.

27. Bruce Macleod, the council's planning enforcement officer, states that when viewing the site to check for compliance with condition 2 of its permission, he noted that Loanview House was nearing completion, but that, although the timber frame (meaning wooden roof trusses) was in place, there were no slates, doors or windows. He was challenged as to whether he would be able to clearly see such details of the house whilst driving past on the A720 dual carriageway and at around 5.35pm - 6.05pm on a March evening. From my site inspection viewing the site from the A720, I am satisfied that the house would have been clearly visible under such conditions. Nor am I convinced that the time of day would have presented any significant obstacle to visibility. Mr MacLeod states that he recorded his finding on returning to the office the next day. I find him a credible witness.

28. On 15 August 2005, Joyce Learmonth held a meeting with Mr and Mrs McGlynn to discuss an application for amendment to condition to allow occupation of the dwellinghouse prior to the kennels and cattery being built, completed and brought into use. Her note of this meeting states *"House has been occupied since Nov/Dec 2003".* Although written after the meeting, I consider it unlikely that Ms Learmonth would confuse that date with information from the McGlynns as to when the rest of the family moved in. The latter information would be of little interest from a planning point of view, whereas the former is critical in the calculation of immunity from enforcement action.

29. The McGlynns tried to depict Ms Learmonth's behaviour in this meeting, and generally, as antagonistic. But, given that they were still in breach of conditions governing their planning permission some 4½ years after the grant of permission, she would be obliged to point out the potential consequences of continued breaches. I have no evidence that she appears to have acted other than in a measured fashion. Moreover, during the whole period since consent the authority appear to have taken a humane approach to the exercise of their discretion in enforcing those conditions.

30. The McGlynn's solicitors, M J Brown, Son and Co, wrote to the council in July 2011 stating, *"We confirm that Loanview House has been occupied by Mr and Mrs McGlynn since May 2002 … They have documentation to support the entry date with an electricity account commencing in May 2002 for the first period of supply."* Eight days later, they wrote again stating that their previous letter *"is not presently required and we would be grateful if you could cancel the letter and remove it from your records at present ..."* The McGlynn's explanation was that this letter originated from a telephone message they made to a new receptionist or secretary at the solicitors' firm. That new member of staff is assumed to have confused Mrs McGlynn's reference to moving in with a reference to the first electricity supply. Confusion of two dates is, I note, a similar explanation to why Ms Learmonth might have recorded the wrong date for the McGlynn's first occupation of the house. This

repeated reliance on confusion by professional organisations in recording the McGlynn's statements regarding the date of their first occupation of Loanview House is unconvincing.

31. The McGlynns claimed that they wanted the CLUD to ensure that they would not be subject to enforcement in future should the kennels and cattery business fail. However, as the council's advocate pointed out, there are other options. In particular, it is evident from the terms of planning condition 3 that once a boarding kennels and cattery business had commenced, the condition would be fulfilled. If the business should then fail, the McGlynns would become *"persons employed or last employed in managing the kennels and cattery",* thereby satisfying the terms of condition 4. In consequence, no enforcement could be taken against their continued occupancy.

32. Their motivation in going to the considerable trouble and expense of the CLUD application and appeal is therefore questionable. Indeed, the council's advocate put it to Mr McGlynn that the value of the property without the burden of planning condition 4 would be considerably greater than with it. Although Mr McGlynn vehemently denied that this was his motivation, I am not convinced that it can be ruled out.

33. In drawing my conclusions, I am aware of the advice in Circular 10/2009: Planning Enforcement, particularly Annex F, paragraph 21, regarding contradictory and corroborative evidence.

34. I note that section 124(3) of the Act specifies that no enforcement action can be taken in respect of an unauthorised change of use (other than use as a single dwellinghouse) after the end of a period of 10 years beginning with the date of the breach in planning control. The use must also have continued without interruption during the 10 year period up to the date of the application. In the light of my findings as set out above, I conclude that, on the balance of probability, those requirements have not been satisfied.

35. Furthermore I note that section 154(3)(a) of the Act requires a certificate to be issued on appeal if the appeal decision maker is satisfied that the authority's reason for refusal is not well-founded. In this case I find that the authority's reason for refusal is well-founded, and therefore conclude that the certificate should not be granted.

Expenses

36. The council and the appellants have each applied for the award of expenses against the other. My decision on those applications will be the subject of separate notices to be issued in due course.

Malcolm Mahony

Reporter