

Council of the Isles of Scilly

Delegated Planning Report

Certificate of Lawful Use Application

Application Number: P/21/037/CLE

Received on: 17 May 2021

UPRN: 000192001446

Application Expiry date: 14 July 2021

Neighbour expiry date: 14 June 2021

Consultation expiry date: 14/06/2021

Site notice posted: 24 May 2021

Site notice expiry: 14 June 2021

Applicant: Mr Kevin Sherris

Site Address: Penhallow
4 Pilots Retreat
Hugh Town
St Mary's
Isles of Scilly
TR21 0PB

Proposal: Application for a Certificate of Lawful Use of the dwelling
(Use Class C3) as a guest house (Use Class C1).

Application Type: Certificate of Lawfulness – Existing

Recommendation:

That a certificate is GRANTED.

1. It is considered that the change of use of the dwelling to a unit of Guesthouse accommodation with a self-contained owners' flat, has become lawful and immune from enforcement action by virtue of this change of use taking place for a period in excess of 10 years. Under Section 171B(2) of the Town and Country Planning Act 1990, the Local Planning Authority cannot legally take enforcement action after the end of the period of ten years beginning with the date of the breach. Therefore, the certificate sought by the applicant can be granted.
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Reason for Delegated Decision

No Councillor has requested that the application come to the Full Council. The decision defaults to the level of Delegated:

- Not a Councillor ✓
- Not a Senior Officer (or Officer with influence over planning Decisions) ✓
- No relation to a Councillor/Officer ✓
- Not Major ✓
- Not Council's own application ✓
- Not a departure from the Development Plan ✓
- Not Called in ✓

Lead Member Planning Agreed

Name: Dan Marcus

Date: 25/05/2021

Site Description and Proposed Development

A certificate has been submitted to demonstrate the dwelling has been operating as a Guesthouse since June 2010. For a period in excess of 10 years, and as such is no longer enforceable under the Town and Country Planning Act.

Penhallow is a Local Need Dwelling, permitted in 2000. It is located on Pilots Retreat at the end of the Cul-de-Sac, which is the south east end at the foot of the hill. The dwelling is a 6-bedroom property with accommodation over 4 floors including within the basement and roofspace.

Consultations and Publicity

The application has had a site notice on display for 21 days (24/05/2021 – 14/06/2021). The application appeared on the weekly list on 24th May 2021. Due to the nature of the proposal no external consultations are required.

Representations from Residents:

Neighbouring properties written to directly:

- **Basement Flat, 3 Pilots Retreat**
- **3 Pilots Retreat**
- **Northwethel, Pilots Retreat**

[0] letters of objection have been received and include the following points:

[0] letters of support have been received and include the following points:

[0] letters of representation have been received.

Relevant Planning History:

Ref	Description	Decision	Date Determined
P4203	Erection of dwelling.	REFUSED	20/03/1997
P4557	Erection of Dwelling	Permitted	20/10/2000

P4630	Erection of Dwelling	Permitted	20/10/2000
P/10/104/FUL	New UPVC window in North West elevation.	Permitted	15/12/2010

Supporting Information

Reservation Diary (5 Rooms) June 2010 – September 2011

Email – Kier Booking Confirmation: 15/06/2010 (5 night booking 23/06/2010 – 28/06/2010)

Statement of Income (B&B): 20/06/2010 – 22/03/2011

Advertising Evidence: 2011 Brochure

Trip Advisor Reviews: April 2013/Aug 2012/July 2012/July 2012/July 2012

Floor Plans, showing layout of accommodation over 4 floors: Lower Ground Floor (En-suite bedroom and attached conservatory), Ground Floor (4 bedrooms, 5 WC/bathrooms, Boiler Room and office), First Floor (lounge, kitchen/diner, study, utility and garage) and Second Floor (Attic en-suite bedroom). Total: 6 bedrooms, 8 WC/bathrooms

Food Hygiene Rating: 5 Dated: 31/01/2018

Applicants/Owners Statement of Truth: confirms guesthouse use continuously from June 2010.

Photographs of Reservation Diaries (cover photos only of Reservation Diaries 2017, 2018, 2019 and 2020):

- Page 1: 5 Rooms Available Dates: June 2010 – Oct 2010
 - No more than 2 rooms let at any one time
- Page 2: 5 Rooms Available Dates: Nov 2010 – Mar 2011
 - No more than 2 rooms let at any one time outside of one 2-day period when 3 rooms were let
- Page 3: 5 Rooms Available Dates: Apr 2011- Aug 2011
 - Three rooms consecutively let out
- Page 4: 5 Rooms Available Dates: Sept 2011 – Dec 2011
 - Three rooms consecutively let out
- Page 5: 3 Rooms Available Dates: Feb 2012 – May 2012
 - only bookings in May during this period with two rooms booked
- Page 6: 3 Rooms Available Dates: June 2012 – Sept 2012
 - Three rooms consecutively let out
- Page 7: 3 Rooms Available Dates: Oct 2012 – Nov 2012
 - Only bookings for Oct during this period of 3 rooms
- Page 8: 3 Rooms Available Dates: Jan 2013 – Mar 2013
 - No bookings
- Page 9: 3 Rooms Available Dates: Apr 2013 – Jun 2013
 - Bookings for May and June only – 3 rooms
- Page 10: 3 Rooms Available Dates: July 2013 – Sept 2013
 - Three rooms consecutively let out
- Page 11: 3 Rooms Available Dates: Oct 2013 only
 - Three rooms consecutively let out
- Page 12: 3 Rooms Available Dates: Apr 2014 – May 2014

- Four rooms consecutively let out
- Page 13: 3 Rooms Available Dates: Jun 2014 – Jul 2014
 - Four rooms consecutively let out in June, Three in July
- Page 14: 3 Rooms Available Dates: Aug 2014 – Sep 2014
 - Three rooms consecutively let out in Aug, Four rooms in Sept
- Page 15: 3 Rooms Available Dates: Oct 2014 – Nov 2014
- Partial Page 16: Unclear No of Rooms Dates: Feb 2015? – Mar 2015?
- Page 17: 4 Rooms Available Dates: Apr 2015 – May 2015
- Page 18: 4 Rooms Available Dates: Jun 2015 – July 2015
- Page 19: 4 Rooms Available Dates: Aug 2015 – Sept 2015
- Page 20: 4 Rooms Available Dates: Oct 2015 only
- Partial Page 21: Unclear No of Rooms Dates: Dec 2015 only
- Partial Page 22: Unclear No of Rooms Dates: March 2016
- Page 23: 4 Rooms Available Dates: April 2016 – May 2016
- Page 24: 4 Rooms Available Dates: Jun 2016 – Jul 2016
- Page 25: 4 Rooms Available Dates: Aug 2016 – Sep 2016
- Page 26: 4 Rooms Available Dates Oct 2016 – Nov 2016 (no bookings)
- Page 27: Unclear No of Rooms Dates: April 2018 and April 2019 only
- Page 28: Unclear No of Rooms Dates April 2020 and April 2021 only

Island Guide Photographs:

- 2017 Photograph of Advert for Penhallow (4 Rooms)
- 2018 Photograph of Advert for Penhallow (4 Rooms)
- 2019 Photograph of Advert for Penhallow (4 Rooms)

Statutory Declaration:

- A sworn statutory declaration from the applicant: Mr Kevin Sherris, confirms use of the property as a guesthouse since 14th June 2010. This is witnessed and dated 27th August 2021. Received on 02/09/2021

Analysis: This is a Certificate of Existing Lawful Use application for a change of use and therefore it is not a matter of considering the planning merits of the scheme, but it is a legal determination based on the facts, to establish whether the stated activity is established and lawful by period of time and therefore beyond the scope of enforcement action. The test of the evidence is “on the balance of probabilities” rather than the stricter criminal test of “beyond reasonable doubt”.

The burden is on the applicant to show, on the balance of probabilities, that the breach has been continuous throughout the whole of the relevant period (Swale Borough Council v First Secretary of State and Lee [2005] EWCA Civ 1568).

In outline, on the application form it is stated that the use of “Penhallow” as guesthouse began more than 10 years before the date of the application. The details submitted as part of the application state that the use began in June 2010 and that there has been no interruption in its use.

The applicant has not provided any Council Tax/Business Rates information. They have however, as of September 2021, submitted a sworn declaration. The evidence is based on bookings and Trip Advisor reviews supported by the applicant's declaration of truth and now Statutory Declaration. In 2019 the LPA served a Planning Contravention Notice on a number of properties on Pilots Retreat (including Penhallow). At that time the property was paying Band E for Council Tax. Although at the time of this application the property is not listed for Council Tax under the Post Code: TR21 0PB or under the property name: Penhallow or Street Name: Pilots Retreat. In 2019 it was confirmed that the property was similarly not on the Non-Domestic Rates list for Businesses. In 2019 the applicant/owner made a claim on the returned PCN that they were advised by the Council, when they commenced the Guesthouse use, that they should continue to pay council tax and that the use would therefore not need planning permission. No evidence was provided as to written confirmation of this being the Council's position back in 2010.

The Council have historically allowed for 'seasonal' and 'low level' B&B use without a formal planning application being required (see fig 1 below). Similar practices of such an interpretation of planning regulations is consistent across the country. On Scilly this has always been as a supplementary measure for islanders' income. This allowed for 1 room of a property to be 'let out' on a B&B seasonal basis, with a home that has 3 bedrooms or 2 bedrooms for a property with 4 bedrooms or more. A property looking to rent out 5 bedrooms as a guesthouse would, even in 2010, have required planning permission.

31 Many households supplement incomes by providing bed and breakfast. This can become a commercial venture where the primary function of a house is no longer as a home. The Council considers that the letting of more than two rooms (more than one room in a property with three or less bedrooms) is a change of use (from Class C3 to C1) and requires planning permission.

Figure 1 Extract from the 2005 Local Plan

It has to be assumed that the 'informal' view referred to on the PCN, of the use not requiring planning permission would have been based on this low level use assumption, and not for a use as a 5-bedroom guesthouse. Notwithstanding this assumption, the applicant has made a 'statutory declaration' as to the property being used as a guesthouse. The declaration of truth suggests that this commenced around 10 years after planning permission was first approved for the dwelling, which is subject to a Section 106 legal agreement.

Based on the evidence provided it has now been proven that the use has been continuous. Whilst some of the entries, on the booking records do not appear to be room bookings, it would appear on the balance of probabilities that these rooms have been available and this is now supported by the applicants Statutory Declaration. It would appear that lettable rooms of Penhallow have been available variously since 2010 even though this would appear to be initially no more than two rooms let at any one time: increasing to 3 rooms at various busy periods and then 4 rooms from 2015 onwards,

which is further informed by the extracts from Island Guides listing which clearly show this property has 4 rooms available.

Based on the evidence submitted it would appear that 2 rooms were used as a B&B on a seasonal basis, as per the Council's view (at that time) that no planning permission was required. The evidence does, however, appear to now confirm that Penhallow has continuously been used as a guesthouse for a period of 10 years.

Whilst there are some evidential gaps within this case of permanent and continuous use over the last 11 years, on the balance of probability, it would appear that Penhallow has been operating as a guesthouse since 2010. It would appear that throughout this period accommodation has been retained for the permanent occupation of the applicant/property owners. The certificate would need to clarify that which parts of the property are now lawfully guesthouse and which parts have been permanently occupied.

Section 191(4) of the TCPA 1990 requires that a local planning authority ("LPA") must issue a certificate of lawfulness if it has been provided with information to satisfy it of the lawfulness of the use at the time of the application. The LPA must be satisfied on a balance of probabilities. In any other case, the application must be refused. The LPA should consider whether they have any information to contradict or cast doubt on the information provided by the applicant. If they do not, the certificate should be issued.

Conclusion

National Planning Practice Guidance advice is that in the case of application for existing use, if a local planning authority has no evidence itself, nor any 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, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

In this case, the applicant's evidence relies largely on assumptions that the use back to 2010 has been for all 5 rooms on a year-round basis, which is not explicitly stated in the submission. Following the submission of a statutory declaration, however, in September 2021, it would appear that the use of Penhallow as a guesthouse, with a dedicated owners accommodation, is now lawful

Taking all of the above into consideration, it is considered that the conversion of the local need dwelling to a 5-bedroom guesthouse with a 1 bedroom self-contained owners flat is lawful on the balance on probabilities, and is no longer open to enforcement action by virtue of this change of use taking place for more than 10 years. Under Section 171B(2) of the Town and Country Planning Act 1990, the Local Planning Authority cannot now legally take enforcement action against the use of this property as a guesthouse. It is clear that the property has maintained an element of permanently occupiable owners accommodation for the purpose of operating and managing the guesthouse.

The breach in legal agreement is still a matter to be addressed and the certificate of lawful use for the planning change does not bear any relevance in terms of the breach of the S106 legal agreement/planning obligation. This obligation, agreed to by the applicants, requires the property to only ever be occupied by qualifying persons, which


does not include letting out the majority of the accommodation as a guesthouse. Notwithstanding this it is considered that the certificate sought by the applicant must be approved and the Council will need to consider the matter of the breach in the legal agreement separately.

EIA: Due to the scale, nature and location this development will not have significant effects on the environment and therefore is not considered to be EIA development.

Section 171 of the Town and Country Planning Act 1990 ("TCPA 1990") provides that a material change of use to use will be immune from enforcement action after a period of 10 years. The breach must be continuous throughout the 10 year period. Section 191(4) of the TCPA 1990 requires that a local planning authority ("LPA") must issue a certificate of lawfulness if it has been provided with information to satisfy it of the lawfulness of the use at the time of the application. The LPA must be satisfied on a balance of probabilities. In any other case, the application must be refused. The LPA should consider whether they have any information to contradict or cast doubt on the information provided by the applicant. If they do not, the certificate should be issued.

Considerations under Human Rights Act 1998 and Equalities Act 2010

The provisions of the Human Rights Act 1998 and Equalities Act 2010 have been taken into account in reaching the recommendation contained in this report.

Print Name:	Lisa Walton	17/09/20021
Job Title:	Chief Planning Officer	
Signed:		
Authorised Officer with Delegated Authority to determine Planning Applications		