
Appeal Decision

Site visit made on 22 November 2016

by Jean Russell MA MRTPI

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

Decision date: 23 December 2016

Appeal Ref: APP/E2001/X/16/3145202

The Annexe, Drewton Lane, South Cave, Brough, Yorkshire, HU15 2AG

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) 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 Mr Richard William Turner and Mrs Charlotte Lucy Turner against the decision of East Riding of Yorkshire Council.
 - The application ref: DC/15/03696/CLE/WESTES, dated 18 November 2015, was refused by notice dated 19 January 2016.
 - The application was made under sections 191(1)(a) of the 1990 Act as amended.
 - The development for which a certificate of lawful use or development is sought is a separate dwellinghouse in occupation by a single family and curtilage and access.
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Decision

1. The appeal is dismissed.

Preliminary Matters

Application for Costs

2. An application for costs was made by Mr Richard William Turner and Mrs Charlotte Lucy Turner against East Riding of Yorkshire Council. This application is the subject of a separate Decision.

The LDC Application

3. The appeal concerns a two storey building known as 'The Annexe' and surrounding land. The site is owned as part of the property associated with a dwellinghouse known as Ash Lea.
4. Planning permission (ref: 318-367B) was granted on 10 March 1994 for the erection of the Annexe 'for use as office and study'. The '1994 permission' was subject to one condition that the building '*shall only be used for purposes incidental to the enjoyment of the dwellinghouse, "Ash Lea" as such, and...not...for any business or commercial purposes whatsoever*'. The reason for the condition was that '*the site is situated in an area...where it is intended that the existing uses of land shall remain, for the most part, undisturbed*'.
5. When completing the LDC application form, the appellants ticked several boxes as to the grounds and the Council took the view that a LDC was sought in respect of a breach of condition no. 1 imposed on the 1994 permission. The appellants had indicated in their 'planning statement', however, that a LDC is sought in respect of a change of use of the Annexe to a single dwellinghouse – which would have become lawful, because no enforcement action could be taken against it, after a shorter period of time than would be the case with a breach of condition.

6. Under s171B(2) of the 1990 Act, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach of planning control, where the breach consists in the change of use of any building to use as a single dwellinghouse. Under s171B(3), no enforcement action may be taken in the case of any other breach of planning control until after the end of the period of ten years beginning with the date of the breach.
7. While most breaches of condition fall to be considered under s171B(3), there is an exception where such a breach arises from a change of use of a building to use as a single dwellinghouse¹. The condition on the 1994 permission precluded the use of the Annexe as a dwellinghouse but the claim is that the use of the building has been changed to that. The LDC application is made under s191(1)(a) to establish whether an existing use of a building as a dwellinghouse is lawful and the relevant immunity period is four years as set out under s171B(2).
8. The Council's reason for refusing to grant the LDC was flawed not only because it was based on the ten year rule, but also in other respects. However, it does not follow that the appeal must succeed. My remit is to determine whether the refusal was well-founded, and not whether the reason for refusal was correct².

Occupation and Use

9. The LDC application was made for a 'dwellinghouse in occupation by...' but 'occupation' does not denote development as defined by s55(1). It would be more precise to say that a LDC is sought for 'the material change of use of a building to use as a separate dwellinghouse with a separate curtilage and access'. Having said that, who occupies the land on what basis are relevant considerations.

Main Issue

10. The main issues are whether a material change of use of the Annexe to use as a separate dwellinghouse has occurred, and whether any such use has taken place on a continuous basis so as to be immune from enforcement action.

Reasons

11. Where a LDC is sought, the onus of proof is on the appellants and the standard is the balance of probabilities. If there is no evidence to contradict or make the appellants' version of events less than probable and their evidence is sufficiently precise and unambiguous, a LDC should be granted. The LDC application was dated 18 November 2015 and so the four year or material date is 18 November 2011.
12. Ash Lea was purchased in 2005 by Mrs Turner's father, Mr Bradley. He moved into the house and allowed the appellants to move into the Annexe. They altered the interior of the building so that it would contain a full kitchen, utility room, living room, bathroom and two bedrooms. They claim that the works were substantially completed *and* the Annexe was used as a separate dwelling from 15 October 2005.

Material Change of Use

The Planning Unit

13. Whether there has been a material change of use is a matter of fact and degree; there needs to be some significant difference in the character of the activities from what has gone on previously. The concept of the planning unit and its primary use

¹ *FSS v Arun DC* [2006] EWCA Civ 1172; s171B(3) *does* apply where permission is granted for a dwelling subject to a condition which restricts occupation, and a change in occupation is in breach of the condition but does not change the use of the building as a dwelling.

² S195(2) and (3) of the 1990 Act as amended

or uses is fundamental. It was held in *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207 that the planning unit should be determined with regard to the unit of occupation and the concept of physical and functional separation. The area to be looked at should be that which is used for a particular purpose, including any part of the area put to incidental uses. The planning unit is not to be confused with 'curtilage' which is simply an area of land that is closely associated with a building.

14. The appellants suggest that the Annexe was within the same planning unit as Ash Lea when acquired by Mr Bradley in 2005. I agree with and would expand upon that assessment: the property at Ash Lea was a single unit of occupation with a single primary use, residential use, from the use of the dwellinghouse. The Annexe replaced a piggery which may have been outside the curtilage of Ash Lea, but I have seen no evidence that the planning unit was in a mixed use from 1994.
15. When considering whether there has been a change of use of a building to a single dwelling, it is necessary to look at when the premises were capable of providing viable facilities for living and the use commenced³. The Council does not dispute that the Annexe has provided viable facilities for living since October 2005; it has been capable since then of use as a dwellinghouse. However, it is still necessary to consider when such a use might have begun. It has been held that too much stress ought *not* to be placed on 'actual use'⁴ – but that will be critical in this case because the Annexe was already within a residential planning unit.

Incidental and Ancillary Uses

16. Since the condition imposed on the 1994 permission restricted the use of the Annexe, the parties have discussed the meaning of 'incidental' and 'ancillary' uses. If referring to a condition such as this, or indeed to legislation, I would normally quote the wording originally used, in the interests of precision and clarity⁵. In a general planning context, however, the words 'incidental' and 'ancillary' can be used interchangeably; they are not distinguishable as the appellants suggest.
17. Incidental or ancillary uses are uses which are subservient to a primary use taking place within the same planning unit. They are not integral to or part of the primary use, but they are functionally related to it and the functional relationship should be one that is normally found. By way of example, if the primary use of the planning unit is a dwellinghouse, living accommodation would be integral to that use, while a home office or study would be an incidental or ancillary use.

The 1994 Permission

18. The appellants have considered how the 1994 permission ought to be interpreted. It was held in *Telford and Wrekin BC v SSCLG* [2013] EWHC 79 (Admin) that, 'as a general rule, a planning permission is to be construed within the four corners of the document itself, ie, including the conditions in it and express reasons for those conditions unless another document is incorporated by reference or it is necessary to resolve an ambiguity in the permission or condition'.
19. When the 1994 permission is read with condition no. 1, it is plain that approval was granted for an office and study only to be used for purposes incidental to the enjoyment of the dwellinghouse, Ash Lea⁶. The appellants accept that point, but also suggest that the permission did not authorise 'residential occupation'. That

³ *Impey v SSE & Lake District SPB* [1981] JPL 363; *Backer v SSE* [1983] JPL 167; *Grendon v FSS & Another* [2006] EWHC 1711 (Admin)

⁴ *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15

⁵ S55(2(d) of the 1990 Act and parts of the Town and Country Planning (General Permitted Development) Order 2015 specifically use the term 'incidental'.

⁶ This finding is consistent with *Sevenoaks DC v FSS* [2004] EWHC 771 (Admin)

submission is right insofar as the building was not to include living accommodation. However, the 1994 permission did not authorise any 'non-residential' use of the planning unit because the 'office/study' was to be incidental to the use of the dwellinghouse and not a new primary use⁷.

20. I find the 1994 permission unambiguous but, if that is not the case, *Telford* would allow reference to other documents⁸. The address of the land given on the application form was 'Ash Lea, Drewton, South Cave'⁹. It was stated on the form that the development was to be an 'alteration or extension', and a supporting statement described that 'the building is intended for multi-purpose family use...storeroom, a study/office, a library/store, and childrens [sic] playroom'¹⁰.
21. The 'site edged red' on the plan submitted with the 1994 application was drawn tightly around the Annexe, but it was placed within a wider site edged blue, encompassing Ash Lea and all land at the property. Article 3(1)(b) of the *Town & Country Planning (Applications) Regulations 1988* – in force at the time – only required that a planning application be accompanied by 'a plan which identifies the land to which it relates.' The 1994 plan did not identify any separate access to or curtilage around the Annexe to facilitate independent use.
22. Thus, the Annexe was approved for use for purposes incidental to the enjoyment of the dwellinghouse, Ash Lea. It was to be sited within a planning unit which had a sole primary residential use. The former owner has confirmed that the 1994 permission was implemented in accordance with the plans and condition.

Uttlesford

23. The Council suggested, citing *Uttlesford DC v SSE & White* [1992] JPL 171, that the occupation of the Annexe by close relatives of the owner of Ash Lea is 'an ancillary act'. The judgment is relevant but the Council has misinterpreted the findings.
24. The situation in *Uttlesford* was that enforcement action had been taken against a change of use of a garage to private living accommodation. As with the Annexe, the *Uttlesford* garage had been permitted for incidental use. It was held that although the garage now had the facilities of a self-contained unit, it nonetheless remained part of the same planning unit as the original dwellinghouse and the planning unit remained in single family occupation. In that situation, a material change of use had not occurred.
25. Since the Annexe contains living accommodation, its use is no longer incidental to the enjoyment of Ash Lea. The question is whether the building remains part of the same planning unit as Ash Lea and the unit remains in single family occupation – or whether the planning unit was subdivided in October 2005 as a result of a change of use of the Annexe to a separate dwelling. It follows from *Burdle* and *Uttlesford* that regard must be had to physical and functional connections in the round and not simply the relationship between the occupiers of the land.

Has a Material Change of Use Occurred?

26. From October 2005, the appellants state that they have been the sole occupiers of the Annexe and surrounding land; the site is a separate unit of occupation. Mrs

⁷ Appeal statement paragraphs 6.7 and 6.65

⁸ Later judgments have supported taking 'a pragmatic view' such that it may be permissible to look at extrinsic evidence when interpreting the uses subject to a planning permission: *Wood v SSCLG* [2015] EWHC 2368 (Admin); *R (oao Kemball) v SSCLG* [2015] EWHC 3368 (Admin); *University of Leicester v SSCLG* [2016] EWHC 476 (Admin)

⁹ The Council changed the address to 'Ash Lea, Drewton Lane' – and yet the building was accessed from Station Road – but this does not seem to be of any consequence.

¹⁰ Quoted in the Council's report

- Turner's parents and brother, however, continue to occupy Ash Lea and so the pre-existing planning unit remains in single family occupation. Whether the Annexe is a discrete unit of occupation will depend on its physical and/or functional separation.
27. The Annexe is some metres from Ash Lea and the appellants have emphasised that the building now has its own curtilage. A yard in front of the Annexe is enclosed on one side by a garage wall. In November 2005, the appellants erected fences to the sides of the yard and the Annexe and within land at the rear so as to create play, garden, parking and woodland areas. However, I saw gates at both sides of the yard and in a fence by the woodland which link to the retained land at Ash Lea.
28. I also saw that the drive to the Annexe from Drewton Lane is rocky and rough. Drivers would need to turn on it to exit, or continue through the site to an egress onto Station Road with poor sightlines. The parking spaces by the drive are at the rear of the Annexe and set behind an intervening garden area. By contrast, the access to Ash Lea from Station Road leads shortly from the highway to a generous and well-surfaced parking area that is close to the Annexe. There are gates allowing passage between this parking area and the front of the appeal building.
29. This access is the only one to Ash Lea and it is not included within the appeal site. However, there is a large sign on the roadside verge stating that the access serves 'Ash Lea and the Annexe'. The appellants may prefer to use the Drewton Lane drive because of traffic on Station Road, but it remains true that a shared access is available, which would be convenient for all to use, and this denotes physical if not functional links between the appeal building and original dwellinghouse.
30. The Annexe was registered separately for Council Tax in 2006 and the appellants have separate bins. They have their own landline for telephone and internet connection and do not need to use any facilities within Ash Lea on a day-to-day basis. However, those are not decisive indications of functional separation – and the appellants have not said how other utilities are supplied to the Annexe or if they receive separate electricity or water bills.
31. The appellants have described that they use the Annexe as their own home: they have added a sun room; Mr Turner's children stay regularly; they have two dogs; and they use the internet for shopping. They visit Ash Lea on occasion for Sunday lunch but do not spend more time with Mrs Turner's parents than might be the case in any other family. I do not dispute these points but the appellants could live in this way whether the use of the Annexe is integral to that of Ash Lea or if there has been a material change of use.
32. Moreover, the evidence suggests that some weight should be attached to the relationship between the appellants and Mrs Turner's father. The appellants were able to move into the Annexe because Mr Bradley purchased and occupied Ash Lea. They pay rent to Mr Bradley but at less than the market rate. The rent has been low because the appellants had to fund the conversion of the Annexe – but most works were completed some ten years before the LDC application was made. I have seen no books or bank statements to confirm that rent has been paid.
33. The use of the Annexe for living accommodation has been facilitated and sustained by family ownership of the land and family ties, such as to indicate a functional link between the use of Ash Lea and the Annexe. That Mr Bradley now wishes to sell Ash Lea but still let the Annexe to the appellants does not alter that finding.
34. The appellants suggest that there has been a fundamental change to the character of the area but the evidence does not support that proposition. As a matter of fact and degree, I find that the use of the Annexe and its 'curtilage' was physically and functionally connected to the use of Ash Lea as a dwellinghouse on the date of the

LDC application. On the balance of probabilities, the site was still part of the planning unit at Ash Lea which was still in single family occupation. The appellants have not shown that a material change of use to a separate dwellinghouse had occurred. Had I reached the opposite conclusion on this issue, however, it would have made no difference to my decision.

Continuity of Use

35. An unauthorised use must continue substantially uninterrupted before it can acquire immunity from enforcement action¹¹. Had a material change of use taken place, the Annexe would need to have been used as a dwellinghouse for four years from 18 November 2011 or earlier, such that any periods of non-occupation were *de minimis* and the Council could have taken enforcement action at any time. Where a dwelling is lawful, the occupiers do not need to be continuously or even regularly present but, prior to that, the use must be affirmatively established¹².
36. The appellants claimed in their statutory declarations that they have lived in the Annexe continuously since 15 October 2005. Mr Bradley agreed in his statutory declaration, and I note that a family friend said the same in a letter. The sworn statements in particular carry considerable weight, and I have had regard to the updated declarations from Mrs Turner and her father. However, the appellants have given little information to illustrate continuous occupation.
37. Mrs Turner did not say when the sun room was added to the Annexe, save that this was 'after 2005'. She submitted copies of a Council Tax notice dated 16 January 2006; letters from pension and pet insurance providers dated 23 June and 3 November 2006; her driving licence dated 8 May 2009; and her poll card for the May 2015 elections. These documents are addressed to her at the Annexe but do not show that it was used for a dwelling for any continuous four year period.
38. I have seen no correspondence addressed to Mr Turner at the Annexe, which might have plugged the gaps in the evidence from his wife. I have seen no copies of any rent book or utility bills; such documents are commonly provided in cases such as this. The appellants have children and pets but they have not recounted family events or provided photographs taken at the Annexe over time. I conclude that they have not shown continuous occupation or use of the Annexe for any four year period, such that enforcement action could have been taken at any time

Conclusion

39. The appellants made detailed submissions regarding case law, but their evidence regarding their actual use of the site was imprecise and ambiguous. They have not shown that, on the balance of probabilities, a material change of use of the Annexe to use as a separate dwellinghouse had occurred by the date of the LDC application or that any such use took place for a continuous four year period. I have had regard to all other matters raised but none alter my conclusion. The Council's decision to refuse to grant a LDC was well-founded and the appeal fails.

Jean Russell

INSPECTOR

¹¹ *Thurrock BC v SSETR & Holding* [2002] JPL 1278; *North Devon v SSE & Rottenbury* [1998] EGCS 72 applies a similar principle to a breach of condition.

¹² *Swale BC v FSS & Lee* [2005] EWCA Civ 1568