



Appeal Decision

Site visit made on 24 July 2017

by Jean Russell MA MRTPI

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

Decision date: 04 September 2017

Appeal Ref: APP/A0665/X/16/3164245

Annexe, The Laurels, Sibbersfield Lane, Farndon, Chester, CH3 6NX

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mrs M Nesbitt against the decision of Cheshire West & Chester Council.
 - The application ref: 16/03406/LDC, dated 4 August 2016, was refused by notice dated 12 October 2016.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990.
 - The use for which a certificate of lawful use or development is sought is described as 'a building has been used as a separate unit of accommodation in excess of four years and is now immune from enforcement action'.
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DECISION

1. The appeal is dismissed.

The Laurels, the Annexe and the Background to the Appeal

2. I shall describe the land owned by the appellant as 'the land at the Laurels'. It includes the existing dwellinghouse known as the Laurels; a patio to the rear of the dwelling; an expansive garden; and a separate grassed area. From its size, appearance and enclosure by stock fencing, the grassed area seems to be or have been a paddock; I shall refer to it as such but am not aware of its lawful use.
3. The appeal site is entirely within the land at the Laurels. It includes the building known as the Annexe and a 'curtilage' area which extends south to the paddock. The 'curtilage' is partly flagged to provide a patio, partly laid to gravel for parking and partly grassed. A drive which leads from the highway to the parking area on the site is separate to the drive which serves the original house.
4. The Annexe was built following a grant of planning permission (ref: 06/00979/FUL) on 27 July 2006 for an 'annexe'. Condition no. 3 imposed on the '2006 permission' stated that: *'the accommodation hereby permitted shall be occupied solely for purposes incidental to the occupation and enjoyment of the main house as a dwelling and shall not be used as a separate unit of accommodation or be sub-let or sub-divided into independent accommodation'*.
5. The Annexe is now used by the appellant's parents as their home. The Laurels is occupied by the appellant with her husband and children. She seeks an LDC to ascertain that the use of the Annexe as a separate unit of accommodation or dwellinghouse is lawful. Her Planning Statement confirms that the Annexe contains all of the rooms (or facilities) needed for independent day-to-day living. I accept this evidence, although I have not seen any floor plans and could not inspect the interior of the Annexe due to ill-health of the appellant's father.

Main Issue

6. This appeal is only concerned with lawfulness; the personal circumstances of the occupiers and the planning merits of the use do not come into this determination. The main issue is whether there has been a change of use of the Annexe to use as a separate unit of accommodation and the use is immune from enforcement action.

Reasons

The Legal Context

7. Where a LDC is sought, the onus of proof is on the appellant and the standard is the balance of probabilities. If there is no evidence to contradict or make the appellant's version of events less than probable and their evidence is sufficiently precise and unambiguous, a LDC should be granted. The appellant's case is that the use of the Annexe as a separate unit of accommodation is lawful because the time for taking enforcement action against the use has expired.
8. Under s171B(2) of the Town and Country Planning Act 1990 (the 1990 Act), no enforcement action may be taken after the end of the period of four years beginning with the date of a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse. A four year immunity period is also set out under s171B(1) in relation to operational development. For any other breach of planning control, s171B(3) provides that no enforcement action may be taken after the end of a ten year period beginning with the date of the breach.
9. A breach of planning control consisting of a failure to comply with a condition falls to be considered under s171B(3) unless, as the appellant points out, the condition prevents a change of use of a building to use as a single dwelling¹. In order to be immune from enforcement action, a change of use of the Annexe to a dwelling in breach of condition no. 3 would need to have occurred by no later than 4 August 2012, four years prior to the LDC application, in accordance with s171B(2).

Material Change of Use, the Planning Unit and Incidental Uses

10. To ascertain the lawfulness of a material change of use, it is necessary to address whether the change of use has occurred as a matter of fact and degree; there needs to be a significant difference in the character of the activities undertaken on the land. The concept of the planning unit and its primary use(s) is fundamental.
11. The planning unit is usually the unit of occupation, unless a smaller area can be identified which is physically separate and distinct, and/or occupied for different and unrelated purposes. The planning unit is different in principle, and may be different on the ground to land which is deemed to be curtilage, because that is simply an area which is closely associated with a building.
12. I do not have the remit to determine whether the original planning unit at the Laurels comprised the whole unit of occupation or excluded the paddock. Either way, the 2006 permission appears to have been granted on the basis that the Laurels had a lawful dwellinghouse use and the Annexe would be built on the domestic garden. The appeal site is land with an existing lawful residential use.
13. The Annexe was permitted strictly for use for purposes incidental to the existing dwelling. The term 'incidental' describes uses which have a functional relationship to a primary use; they must be distinguished from activities which are part and parcel of the primary use, but they will still take place within the same planning unit. Uses incidental to a dwellinghouse might include parking or a home gym.

¹ *FSS v Arun DC* [2006] EWCA Civ 1172

14. There is no dispute that the Annexe is used for living and sleeping purposes. Since those activities are part and parcel of, or integral to a dwellinghouse use, it is clear that the Annexe is not used for purposes incidental to the use of the Laurels – and there has been a breach of condition no. 3 imposed on the 2006 permission.
15. However, it does not follow that there has been a change of use, because the land already had a lawful residential use. It is necessary to assess whether the Annexe is a physically and/or functionally separate dwelling, or whether the use of the site is to provide living accommodation that is integral to the use of the Laurels. There is another matter to address, however, before I can consider the evidence of use.

The Original Use of the Annexe

16. The 2006 permission was granted by Council members contrary to advice from the planning officer that 'the proposed extension will effectively result in a separate unit of accommodation being created...' The appellant put it in her Planning Statement that 'the planning officer was correct and this is a separate dwelling'.
17. Building control records (ref: 06/01584/DOM) show that a 'new dwelling to form granny flat' at the Laurels was completed on 31 August 2007. The appellant's mother affirmed in a statutory declaration that 'the building was completed in July 2007 and we moved in during August 2007'. The Council seems to accept that the appellant's parents have lived in the Annexe since 2007.
18. I am not aware as to why the Council did not seek to enforce compliance with condition no. 3, or indeed if the Council understood that use of the Annexe for living purposes would not be an incidental use. A more important question from the evidence, however, is whether this LDC application does fall to be considered with regard to s171B(2), because that only applies where there has been a *change* of use of a building to a dwellinghouse.
19. It was held in *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15 that where a building was used from the outset for a use contrary to that permitted, 'the building...could [not] be regarded as having any permitted use'. Lord Mance expressed doubt as to whether a change of use under s171B(2) could consist of a departure from a permitted use, without any actual prior use².
20. If the Annexe was used for living and sleeping from the outset, and never used in accordance with the 2006 permission and condition no. 3, then the permission might not have been implemented. If that is right, the building might still be lawful by reason of s171B(1), but it would not be regarded as having a permitted use. The lawfulness of use as a dwelling could not be considered under s171B(2).
21. However, the appellant and the Council have both proceeded on the basis that s171B(2) does apply, despite being cognisant of *Welwyn*. The Council's reason to refuse to grant a LDC was that there is insufficient evidence of continuous occupation of the Annexe as an *independent* dwelling [my emphasis]. I find below that there has been no change of use to create a separate unit of accommodation, and so it makes no difference whether s171B(2) should be applied or not.

The Physical and Functional Relationship between the Annexe and the Laurels

22. The Annexe is physically attached to the Laurels, but that fact does not count against this appeal; semi-detached houses are normally independent dwellings in separate planning units. Similarly, the provision of a separate 'curtilage' does not tell me whether or not the Annexe has a lawful use as a separate dwelling.

² The appellant has referred to a separate finding in this judgment. There is no suggestion that the appellant in this case has engaged in positive deception as described in *Welwyn* which would preclude the grant of a LDC.

23. There are more significant connections between the appeal site and the land at the Laurels. The Annexe and original dwelling have separate patios, but neither is enclosed from the main garden area. Indeed, there is no boundary treatment to the appeal site except for the paddock fence. The appellant has conceded that her parents can use her garden – and her children play on their grandparent’s space.
24. The appellant’s parents have their own ‘pedestrian entrance’ but, if this is a reference to the gate from the road to the drive in front of the Annexe, then it is outside of the appeal site, as is the drive itself. The Annexe and its parking space can only be reached by crossing land in residential use outside of the site.
25. I saw that a fence separates the original house and the drive in front of the Annexe – but there are two ‘side’ gates in this fence so that the occupiers of the Laurels can readily access the drive. The letter boxes for the Laurels and the Annexe, and a shed serving the whole unit of occupation are beside the drive in front of the Annexe³. It seems that the drive is outside of the site, despite being required for access to the Annexe, because, like the garden, it is a shared space.
26. The appellant’s aerial photograph confirms that the gate to the paddock is within the appeal site. It follows that the occupiers of the Laurels would need to cross the site in order to access and use the paddock. On the date of my visit, the paddock looked to be in active use for play and growing vegetables in proximity to the gate.
27. I also saw that while the occupiers of the Laurels would be likely to walk from their house to the shed described above via the side gates and drive, the easiest way for them to carry equipment or toys between the shed and their garden or paddock would be through the appeal site.
28. A screenshot shows that the Council has listed the Laurels and the Annexe as two ‘properties’ on its planning website, but not what the Council considers the lawful use of either ‘property’ to be. The Annexe has its own postal address, but this arrangement between the occupiers and Royal Mail does not show physical or functional separation in planning terms. I saw that the letter boxes are placed together without locks or name signs to keep correspondence apart.
29. There are different telephone lines for the Laurels and the Annexe, but relatives can have separate landlines within one family home. In this case, combined bills for both telephone accounts are sent to the appellant’s husband at the Laurels. The Annexe is supplied with heating oil and electricity through the Laurels, and this is another, albeit minor, indicator of physical and functional connection.
30. The appellant’s parents make direct payments for water and sewerage charges, but that is not enough on its own to show that the Annexe is in separate residential use⁴. Their bank statements show that they paid the appellant £100, rising to £175, most months from January 2011 to January 2015. Like the Council, I find that those sums fell short of what other occupiers might have been expected to pay over the period for a separate dwelling with parking and amenity space.
31. It has been explained that the monthly payments are not rent; the appellant’s parents helped to fund the construction of the Annexe, and now only contribute to running costs. Those arrangements are of a piece with there being a functional connection between the use of the Annexe and the Laurels. I agree with the appellant that tenure is not determinative of use, but her parents do not own or rent the appeal site because it forms part of a larger unit, being the land at the Laurels, which is in their daughter’s ownership and single family occupation.

³ A smaller shed by the original dwellinghouse is semi-derelict.

⁴ The appellant’s parent’s bank statements show no payment to Dee Valley Water until after 4 August 2012.

32. The appellant's mother said that her daughter 'may send some meals over a couple of times a week but we rarely visit each other's houses' and they do not go out together more often than when they lived apart. The appellant is the 'telephone response' for her parent's emergency call button but she does not assist in her father's day-to-day care. I accept that the appellant and her parents do not see each other any more frequently than might be the case if they lived at greater distance – but the same could also be true if they dwelt in the very same building.
33. Taking all of the evidence together, I find that the residential use of the Annexe was facilitated and is sustained by the family use of the Laurels as a dwellinghouse. The Annexe was built to meet family needs and it has been funded accordingly. The appellants and her parents have private rooms, but the appellant has access to the appeal site for domestic purposes, and her parents share use of the drive and garden outside of the site. As a matter of fact and degree, the use of the Annexe is physically integrated with and functionally connected to the original dwelling.
34. The appellant's parents do not pay Council Tax; they were granted an exemption certificate on the basis that the Annexe is used as part of the main house and not as a separate dwelling. Since Council Tax falls under separate legislation, non-payment alone would not show that there has been no change of use. In the context of the evidence discussed, however, I find that the exemption certificate was granted for reasons which exactly reflect the use of the land in planning terms.

Conclusion

35. The appellant has referred to a decision by another Inspector to grant a LDC for a single family dwelling above a garage in Elstree⁵. In that case, there was no dispute that there had been a change of use; the building was furnished, let and used as a self-contained flat. The question was whether the appellant had sought to positively deceive the Council of the use; the Inspector found on the facts that this was not so. Notwithstanding the common issue of a failure to pay Council Tax, the Elstree case does not have parallels with this such that I could grant a LDC.
36. The appellant objects that the Council placed undue weight on the matters of rent, the shared garden and Council Tax. I have considered the physical and functional relationship between the Annexe and the Laurels in the round, and find that the appellant has not shown that a change of use of the Annexe to use as a separate unit of accommodation has occurred.
37. As a matter of fact and degree, the appeal site is not physically separate or distinct from, or occupied for different or unrelated purposes to the land at the Laurels. On the balance of probabilities, the use of the Annexe has continuously been integral to the use of the Laurels as a dwellinghouse; there has not been a material change of use. With regard to all other matters raised, I conclude that the Council's decision to refuse to grant a LDC was well-founded and the appeal must fail.

Jean Russell

INSPECTOR

⁵ Appeal refs: APP/N1920/C/15/3017883 and /X/15/3003650