



Appeal Decision

Site visit made on 5 November 2019

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 December 2019

Appeal Ref: APP/J1860/X/18/3219273

The Cherry Ash and Cherry Ash Annex, Bank Lane, Abberley WR6 6BQ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal in part to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr R T Jukes against the decision of Malvern Hills District Council.
- The application (Ref. 18/00593/CLE), dated 23 April 2018, was refused in part by the Council by notice dated 6 December 2018.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is described on the application form as: *"The use of a building previously used as a single dwellinghouse as two separate single dwellinghouses, specifically not subject to any occupancy conditions"*.

Summary of Decision: The appeal is allowed and a certificate of lawful use is issued in the terms set out below in the Formal Decision.

Application for costs

1. An application for costs was made by Mr R T Jukes against Malvern Hills District Council. This application is the subject of a separate Decision.

Main Issue

2. The main issue is whether it has been shown that the material change of use to two separate dwellings resulted in a new chapter in the planning history of the appeal site.

Reasons

3. The burden of providing sufficiently precise and unambiguous evidence to show that an LDC should be granted in the terms applied for rests firmly with the appellant, the relevant test of the evidence being on the balance of probability.
4. The site contains a single storey building comprising two separate dwellings. One dwelling is known as 'The Cherry Ash', the other 'Cherry Ash Annex'. Whilst the application was refused in part, an LDC was nevertheless granted in modified terms in respect of 'Cherry Ash Annex', as the Council was satisfied that the material change of use to a separate dwelling had occurred more than four years before the application date and was therefore immune from enforcement action.
5. The original dwelling, 'The Cherry Ash', was erected in the early 1990s following the grant of outline planning permission in July 1988 and reserved

matters approval in July 1990. Agricultural occupancy conditions were attached in both instances¹. In April 1999, planning permission was granted to extend the original dwelling to provide a garage and office/store. In January 2000, planning permission was granted to convert part of the garage and office, then under construction, to provide a 'granny flat'².

6. The approved drawing accompanying the 2000 permission shows the granny flat accommodation consisting of a bedroom, bathroom, lounge and kitchen at the rear of the garage. Therefore, this accommodation had the ability to afford those who used it the facilities required for day-to-day private existence, this being the distinctive characteristic of a dwelling identified by the Court in *Gravesham*³. However, that does not necessarily mean that the accommodation was used as a separate dwelling. In *Uttlesford*⁴, it was held that a granny annexe would normally be regarded as part and parcel of the use of the main dwelling. Whilst there might be facilities for independent day-to-day living, where the accommodation was only intended to function as an annexe, with the occupier sharing their living activity in company with the family in the main dwelling, no separate residential planning unit would be created.
7. Condition 4 attached to the 2000 permission restricted use of the granny flat accommodation other than as an integral part of the original dwelling or for incidental purposes and prevented its use as a separate unit. The stated reason for that condition was the inappropriateness of the site for an additional independent unit. The approved drawing shows that the accommodation was physically connected by an internal doorway to the central corridor of the original dwelling. The 'red line' on the approved drawing included the whole building and the associated grounds. According to the appellant's Statutory Declaration (SD), the accommodation was initially intended to be occupied by an aged relative in conjunction with the occupation of the original dwelling by him and his family. Therefore, the above factors are consistent with the accommodation being occupied in conjunction with the original dwelling, akin to the circumstances in *Uttlesford*; they do not show that the 2000 permission authorised the formation of a separate dwelling.
8. I am given to understand that the site was visited by Abberley Parish Council (PC), probably at some stage prior to the 2000 permission, when it was observed that there had been internal alterations to the accommodation, including a bedroom to the right of the garage. This partly reflects the layout of 'Cherry Ash Annex' observed during my site visit, which also included habitable rooms in the former garages and the roof space. Notwithstanding being inconsistent with the layout shown on the approved drawing, what the PC observed does not provide firm evidence to suggest that the accommodation was physically and functionally separate from the original dwelling at that time. The Council accepted that the changes to the internal layout had not affected implementation of the 2000 permission; I found no reason to conclude otherwise.
9. In his SD, the appellant also explained that his aged relative had sadly passed away in 2002 before occupying the accommodation. He stated that in 2003,

¹ Council Refs: MH 813/88 & MH 978/90.

² Council Refs: 99/00229/FUL & 99/00873/FUL.

³ *Gravesham v SSE & O'Brien* [1982] 47 P&CR 142.

⁴ *Uttlesford DC v SSE & White* [1992] JPL 171.

the accommodation had been occupied by his son, who from time to time shared meals with other family members in the original dwelling, the internal door remaining in place until at some stage during 2004. The appellant's evidence was not challenged by the Council in terms of its factual basis and I found no reason to do so. Therefore, the available evidence is that up to 2004 at least, the whole building was used as a single dwelling; the accommodation formed an integral part of the original dwelling and no physical and functional separation had occurred. Due to the above, as a matter of fact and degree I find that following the 2000 permission the whole building remained in use as a single dwelling and there had been no formation of a separate residential planning unit.

10. In reaching this conclusion, I am also mindful of the appeal decision referred to by the Council⁵. However, that case concerned the proposed use of a detached residential building as a separate dwelling. The building in question was physically and functionally separate from the main dwelling. No condition restricted the use of that building as a separate dwelling. Therefore, the circumstances in that appeal are not comparable. As the Supreme Court's decision in *Welwyn*⁶ was not concerned with subdivision of a dwelling into two separate units, it is of limited relevance to this appeal.
11. According to the appellant's SD, not disputed by the Council on the facts therein, physical and functional separation of the accommodation from the original dwelling occurred when the internal doorway was blocked up in around 2004. Thereafter, he stated that the accommodation was continuously occupied independently to the original dwelling, as recognised by the Council when granting an LDC in modified terms.
12. The Act provides at s55 (3) (a), that "*the use as two or more separate dwellings of any building previously used as a single dwelling involves a material change in the use of the building and of each part of it which is so used*". Therefore, the material change of use which occurred around 2004 was of the whole building, not just that part comprising the accommodation in 'Cherry Ash Annex'. The original dwelling was also a part of the material change of use and was not left unaffected. It follows that by granting an LDC which excluded the original dwelling, the Council has not paid proper regard to the relevant part of the Act.
13. Development consisting of a material change of use of the building from one dwelling to two separate dwellings has resulted in two residential planning units. The undertaking of this development required express planning permission and meant that there has been a new chapter in the planning history of the site. Accordingly, the agricultural occupancy condition in respect of the original dwelling has been supplanted, together with condition 4 attached to the 2000 permission.
14. For the above reasons, I find that, on the balance of probability, the available evidence shows that more than four years before the application date there was a material change of use of the building to two separate dwellings. This resulted in a new chapter in the planning history of the site, thereby superseding the past planning permissions and the conditions attached thereto.

⁵ Appeal Ref: APP/H1840/X/08/2081705.

⁶ *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15.

Conclusion

15. For the reasons given above I conclude, on the evidence now available, that the Council's refusal in part to grant a certificate of lawful use or development in respect of the use of a building previously used as a single dwellinghouse as two separate single dwellinghouses, specifically not subject to any occupancy conditions, was not well-founded and that the appeal should succeed. I will exercise accordingly the powers transferred to me under section 195 (2) of the 1990 Act as amended.

Formal Decision

16. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is considered to be lawful.

Stephen Hawkins

INSPECTOR



The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 23 April 2018, the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The available evidence shows that more than four years before the date of the application there was a material change of use of the building to two separate dwellings, The Cherry Ash (cross-hatched black on the attached plan) and Cherry Ash Annex (hatched black on the attached plan). This has resulted in a new chapter in the planning history of the site, thereby superseding past planning permissions and the conditions attached to those permissions have consequently been supplanted.

Signed

Stephen Hawkins

Inspector

Date: 17 December 2019

Reference: APP/J1860/X/18/3219273.

First Schedule

The use of a building previously used as a single dwellinghouse as two separate single dwellinghouses, specifically not subject to any occupancy conditions.

Second Schedule

The Cherry Ash and Cherry Ash Annex, Bank Lane, Abberley WR6 6BQ.

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 17 December 2019

by Stephen Hawkins MA MRTPI

Land at: The Cherry Ash and Cherry Ash Annex, Bank Lane, Abberley WR6 6BQ.

Reference: APP/J1860/X/18/3219273.

Scale: Not to scale

