



Appeal Decision

Site visit made on 17 December 2019

by Timothy C King BA (Hons) MRTPI

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

Decision date: 30 March 2020

Appeal Ref: APP/N1730/X/18/3212108

The Annexe, 57 Bloomsbury Way, Blackwater, Camberley GU17 9LY

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development ("LDC").
 - The appeal is made by Ms Ann Miller against the decision of Hart District Council.
 - The application Ref 18/00175/LDC is dated 24 January 2018.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is described as 'Use of "The Annexe" as a separate dwellinghouse.'
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Decision

1. 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.

Application for costs

2. An application for costs was made by Ms Ann Miller against Hart District Council. This application is the subject of a separate decision.

Background

3. In March 2002 the Council granted planning permission (ref 02/00084/FUL) for a two-storey side extension, subject to a condition which stipulated that the extension shall be occupied only in conjunction with the existing dwelling, and no separate dwelling should be created.
4. The approved drawing (no 1283/1A) shows the permitted floor layout which indicated a granny annexe over two floors, comprising a lounge, kitchen/dining area and WC on the ground floor, and two bedrooms and a bathroom at first floor level. The ground floor kitchen is shown to connect with the main dwelling's dining room via a doorway, but the proposed 'annexe' is also shown to have its own, independent external entrance door.
5. The appellant, the owner of the property, says that in November 2002 an amendment to the scheme, by way of drawing no 1281/1B, was approved, which removed the connecting door. This is backed up by a letter dated 21 November 2002, sent from the Council's planning section, which confirmed that the amendment was acceptable. The Council's decision effectively allowed for the erection of an extension completely separate and independent from the main dwelling in terms of its internal layout and access.

6. The appellant says that her mother, Mrs Beatrice Mills, lived in the annexe from 2003 until her death in March 2017. Following this the unit was empty until November 2017 when a new tenant took occupation having signed a twelve month contract. A copy of this tenancy agreement has been supplied.
7. The application for the Certificate of Lawfulness was submitted to the Council in January 2018, but no decision was ever issued, causing the appellant to appeal against the failure of the Council to determine the application within the prescribed period. This appeal was lodged in September 2018.
8. S171B of the 1990 Act sets out the time limits within which enforcement action can be taken. In the matter of a breach of planning control comprising the change of use of any building to use as a single dwellinghouse, as is the case here, the relevant time period is four years (s171B(2)). Whilst the time period for enforcing a condition (generally) is ten years (s171B(3)), the court judgement in *FSS v Arun DC and Brown (CoA 10/8/06, J.1158)* held that where a breach of condition relates to a change of use to a single dwellinghouse the relevant time period is also four years. Therefore, irrespective of whether the matter is considered as a change of use or a breach of condition, the time period is four years.
9. In an appeal under s195 of the Act against the refusal of a LDC the burden of proof is upon the appellant. The test of the evidence is one of balance of probability. As such, the planning merits of the matter applied for do not fall to be considered. The decision will be based strictly on the evidential facts and on relevant planning law.

Main Issue

10. In response to the appeal the Council produced a case report which indicated that, had the Council still been able to determine the application, it would not have issued the LDC requested. The main issue in this appeal is whether, on the balance of probability, the use was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990.

Reasons

11. The Council, from its representations, considers that there is insufficient evidence to show that The Annexe has been used as an independent dwelling for more than four years prior to the date of the application, or before 24 January 2014. The Council cites a clear break in the use, from March 2017 until November 2017.
12. Given the fact that the building's ground floor layout, as originally intended by way of the March 2002 planning permission, was altered and, moreover, approved by the Council as an amendment to the layout in November 2002, I am satisfied that the extension was built independent to the main dwelling, without any internal connection. Realistically, it would be less than credible that the amended layout was submitted for approval with a view to a future application for a lawful development certificate which from the date that the amendment was submitted for approval to the date of the LDC application was in excess of 15 years.
13. The Council confirms that the amended drawing no 1281/1B only related to the change to the ground floor layout. This was obviously the case as the proposed change only involved the removal of the ground floor connecting

door. However, the Council says that, as the Annexe's first floor retained its annotations or labels 'bedroom 5' and 'bedroom 6', there remains some ambiguity in the applicant's evidence. The fact that the original labelling of the first floor bedrooms had not been altered and submitted for approval simultaneously with the revised ground floor layout amendment is hardly evidence in itself. Indeed, it would seem to me unlikely that these labels would have even registered as a consideration for the appellant at the time.

14. In the case of *Swale BC v FSS & Lee* [2005] EW.CA Civ 1568, [2006] JPL 886, the issue of continuous residential use for the four year period was discussed. It was held there is a difference between an established dwellinghouse when an occupier does not have to be continuously or even regularly present in order for it to remain in use as a dwellinghouse and, where there is no established use, the use has to be "affirmatively established" over the four year period. Accordingly, it is necessary to examine whether there were any periods of non-occupation and, if so, whether these were de minimis or insignificant, or not.
15. As in the *Swale* case it is necessary to consider whether there was any period during the four relevant years of the breach when the flat was not physically occupied or shown to have been occupied, even though perhaps available for occupation, when the Council could not have taken enforcement action against the use. The case of *Thurrock BC v SSETR and Holding (CA)* [2002] JPL 1278 is the authority for that test.
16. The court explained in both *Thurrock* and *Swale*, the rationale of the immunity provision was that the planning authority had a four year window in which to take enforcement action after which it would lose the right to object to the development. In the current appeal there is no evidence that the Council sought enforcement action against the use during Mrs Mills' tenancy and, moreover, the evidence put forward suggests convincingly that Mrs Mills' occupation was continuous for some fourteen years until her death.
17. As Mrs Mills was the appellant's mother it is hardly surprising that there was no tenancy agreement drawn up. Nevertheless, there is clear evidence in the form of letters from South East Water and Southern Electric Scottish Hydro, which confirm that Mrs Mills paid her public utility bills independently of No 57. Past bank statements also supplied corroborate this. A letter from the Council also shows that the Annexe was separately rated to the main dwelling for Council Tax purposes. Taken together, the various evidence is persuasive and compelling. There were no breaks in the Annexe's occupation throughout Mrs Mills' tenancy, and it would seem clear that it was occupied independently of No 57. Accordingly, it seems to me highly probable that immunity was achieved during this period.
18. In instances where a residential use has ceased but the owner intends to resume residential use at a later date it is unlikely that the Council would be entitled to serve an enforcement notice merely on the basis of the owner's intention. However, in the case of the Annexe, the question is, whether the eight month break before the building was reoccupied is so significant as to have broken the continuity and affected the immunity. Given that the building's lawfulness as an independent unit in use for residential purposes has been demonstrated up to March 2017 I am not convinced, in the general context, that the length of time before the building was reoccupied for

residential purposes was so significant as to amount to being the determinant factor in this case. Accordingly, I consider that the residential use had become affirmatively established. Further, there is no suggestion that the Council sought to take formal enforcement action during the eight month break in occupancy.

Conclusion

19. Although the onus is on the appellant to prove her case the Council has, nonetheless, provided little evidence of substance in rebuttal. In the circumstances, and having had regard to the substance of the appellant's case, I consider that sufficient precision and unambiguity has been shown to demonstrate, on the balance of probabilities, that the use as an independent dwelling had built up immunity over a period considerably in excess of the requisite four years. Moreover, the eight month vacancy period which followed Mrs Mills' death before the independent residential use resumed, meant that, in the context of things, the break was not so significant as to affect this immunity and result in its loss.
20. For the reasons given above I conclude, on the evidence available that, on the balance of probability, the use was lawful on 24 January 2018, within the meaning of section 191(2) of the Town and Country Planning Act 1990.
21. Accordingly, I will exercise my powers under section 195(2) of the Act.

Timothy C King

INSPECTOR

Lawful Development Certificate

APPEAL REF. APP/N1730/X/18/3212108

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191

(as amended by section 10 of the Planning and Compensation Act 1991)

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

IT IS HEREBY CERTIFIED that on 24 January 2018 the development described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto and shown edged in red 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 time period for enforcement had expired and the use did not contravene any of the requirements of any enforcement notice or breach of condition notice then in force.

Date: 30 March 2020

First Schedule

Use of The Annexe as a separate dwellinghouse.

Second Schedule

The Annexe, 57 Bloomsbury Way, Camberley GU17 9LY

CERTIFICATE OF LAWFULNESS FOR PLANNING PURPOSES

NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 as amended.
2. It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful on the certified date and, thus, would not have been liable to enforcement action under section 172 of the 1990 Act as amended on that date.
3. This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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 attached to the Lawful Development Certificate dated: 30 March 2020

by Timothy C King BA (Hons) MRTPI

**The Annexe, 57 Bloomsbury Way, Blackwater,
Camberley GU17 9LY**

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Scale: Do not scale

