



Appeal Decision

No Site Visit Required

by Simon Hand MA

an Inspector appointed by the Secretary of State

Decision date: 27 August 2021

Appeal Ref: APP/D3125/X/21/3270698

Annex at Bondeni Station Road, Kingham, CHIPPING NORTON, OX7 6UH

- 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 Mr & Mrs P Clarke against the decision of West Oxfordshire District Council.
 - The application ref 20/01454/CLE, dated 11 June 2020, was refused by notice dated 16 September 2020.
 - 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 a residential annex in use as a separate dwelling to Bondeni.
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Decision

1. The appeal is dismissed.

Reasons

2. In 2010 planning permission was granted for a residential annex with an attached garage at Bondeni, in order to house Mr Clarke's father. A condition was attached requiring the annex to remain in ancillary use to the main dwelling. In 2019, the Council became aware the annex was being used as a separate dwelling and the LDC application subject to this appeal was made to regularise the situation.
3. The Council have forensically assessed the various items of evidence provided, but it seems to me there is no real dispute the annex was occupied for the following periods.

Up to 2 April 2013 it was occupied lawfully by Mr Clarke's father.

15 January 2014-12 March 2017 it was occupied by John Carpenter.

In June and October 2017 it was occupied for a month at a time by Carolyn Minton.

30 June 2018-29 August 2018 it was occupied by Heather Marshall

30 November 2018-1 April 2019 occupied by Barry Linney

1 May 2019-12 August 2019 occupied by Simon Morris

1 November 2019 to the present day by Roger Drinkwater.

4. The issue is what was the nature of the occupation by these various people and what happened in the gaps in between. The first doubt suggested by the

Council is John Carpenter. On the face of it this seems to be a simple case of a private tenant living separately and so in breach of the condition. But it seems that he became very ill and towards the end of his occupation and so he was cared for by the appellants. This suggests to me the occupation may at that time have been ancillary and so not in breach of the condition. The Council also point out there is no tenancy documentation for this period and given the care provide it would seem Mr Carpenter was a friend of the family, further adding to the sense the occupation may not have been in breach.

5. On this reading of the evidence if there was a breach of condition in 2014, it had ceased by March 2017 when Mr Carpenter's occupation ceased, as by then the use was ancillary – in that care was given by the occupants of the house so there was a functional link between the two buildings. If that is so then the breach could not have begun until June 2017 at the earliest when Carolyn Minton first occupied it, which is only 3 years before the application was made and so the LDC cannot be issued.
6. However, I accept the evidence for this is uncertain so I have gone on to assume the breach did begin with Mr Carpenter and each subsequent resident was also in breach, in which case it is the gaps that are important. These comprise 13 March 2017 to 29 June 2018, except for 2 months in 2017 when Ms Minton lived there. 30 August – 29 November 2018, April 2019 and 13 August – 30 October 2019.
7. The appellant relies on Basingstoke and Deane¹ for the proposition that it is not significant breaks that are important, but whether there was a continuous breach. In that case a long period of vacancy in between two tenants who were both in breach of an agricultural occupancy condition counted towards the time limit for the breach as the council could have issued an enforcement notice at any time during the vacant period. This is a difficult judgement as although Mr Justice Collins made it clear it sat comfortably within the parameters set down by the Court of Appeal in Swale² and Thurrock³ it does not, on first reading, seem to do so. The principle set out by the CoA is that a breach is occurring if at any time during the relevant period an enforcement notice could be issued. In Swale when the property was vacant, for more than de minimis periods, an enforcement notice could not be issued as no-one was occupying the building as a dwellinghouse. In Basingstoke the court held that for a breach of condition to be continuous then vacant periods when, nevertheless, there was activity to further the breach still counted. This begs the question how the enforcing authority would know what the purpose behind the activity was. If the owner told them it was to refurbish the property in order to continue complying with the condition then the Council would have to have contrary evidence to show this wasn't the case and it is difficult to see what this could be. But Mr Justice Collins dealt with is when he accepted that intention, by itself, cannot lead to enforcement action, but if the refurbishment work followed occupation that was in breach "*and it was apparent and clear on the facts that the activities thereafter were being carried out in order to further that breach, then in my view that breach would properly be regarded as continuing*"⁴. So the key to Basingstoke is that the purpose of the works has to be clear and apparent on the facts.

¹ Basingstoke and Deane BC v SSCLG & Stockdale [2009] EWHC 1012 (Admin); [2009] JPL 1585

² Swale BC v FSS & Lee [2005] EWCA Civ 1568; [2006] JPL 886

³ Thurrock BC v SSETR & Holding [2002] EWCA Civ 226; [2002] JPL 1278

⁴ Basingstoke transcript - paragraph 42

8. The first gap is over a year when the appellants say they were struggling to find time to carry out the significant works required once Mr Carpenter had moved out. Although Mr Clarke is a builder and Mrs Clarke a decorator, part of the problem was they were busy refurbishing Ms Minton's property. She was resident in Canada and occasionally turned up in this country to oversee the works. To that end the appellants made the annex temporarily fit for occupation and kept it vacant for her to stay in, and she did so for two separate periods, each of a month. It wasn't until works on Ms Minton's house were complete were they able to properly refurbish the annex.
9. This seems to me to be quite different to the situation in Basingstoke. Here the annex has been made habitable, but no more, and then left empty for a significant period on the off-chance a person might want to stay there. The refurbishment was completed in early January 2018 but no one came forward to rent the property until 30 June, so it was empty for another 5½ months. It is difficult to see how the Council could have issued an enforcement notice at any time during this period as it would be far from clear the ancillary condition was being breached as the property was mostly vacant. In which case the time period is broken and the clock starts again in June 2018, which is far too late.
10. I do not need to consider the other gaps as the LDC cannot be issued, but for the sake of completeness I would say there is a gap of 3 months at the end of 2018 when the annex was vacant, the month of April in 2019 and then a further 2½ months later on in 2019. De minimis gaps while tenants are sought are reasonable, but the 3 months and 2½ months seem to be more than de minimis. I accept these might be typical for a landlord trying to find a tenant, but that is not the correct comparison. The issue is not what happens in the case of a lawful rental, but whether the Council can issue an enforcement notice in the case of an unlawful rental. There are no activities going on in furtherance of the breach as suggested in Basingstoke. How could the council determine from an empty property what the future use was? These two gaps are also fatal to establishing the correct time period.

Conclusion

11. There are two fundamental problems with the evidence provided by the appellants. Firstly it seems occupation of the annex by Mr Carpenter may well have been ancillary and so there was no breach and secondly long gaps in the rental record when the property was vacant meant the Council could not issue an enforcement notice during those periods. There was no ongoing breach of the condition at those times and no activities that were clearly in furtherance of the breach.
12. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use in respect of a residential annex in use as a separate dwelling was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Simon Hand

INSPECTOR