



Appeal Decision

Site visit made on 28 June 2022

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 July 2022

Appeal Ref: APP/B5480/X/21/3269278

Annexe, 1 Wheatley Close, HORNBURCH, RM11 2DR

- 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 Danny Wilkinson against the decision of London Borough of Havering.
 - The application ref E0031.20, dated 18 May 2020, was refused by notice dated 8 July 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 use of the Annexe as a C3 single 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 found to be lawful.

Background

2. The appeal relates to a small, detached building situated in what was the side garden of No 1 Wheatley Close. The larger host property is situated on the corner of Wheatley Close and Haynes Road and has a detached double garage in the front garden accessed from Wheatley Close. The boundary of the front garden and part of the side garden of the host property comprises a well maintained mature hedge.

Preliminary Matters

3. The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act), namely that an existing use is lawful. However, the use appears to have occurred in breach of a condition and so the application should have been made under s191(1)(c); this though does not affect the determination of the appeal.
4. The Council changed the description of the development to "Certificate of lawfulness (existing) with respect to use of the detached building as a self-contained residential unit". The Planning Practice Guidance (PPG) advises that precision in the terms of any certificate is vital, so there is no room for doubt about what was lawful at a particular date, as any subsequent change may be assessed against it.
5. The address of the site in both the application and appeal forms is The Annexe 1 Wheatley Close, with the annexe building and garden outlined in red, and the host property and garden outlined in blue on the submitted plan. The history

of the red and blue land site is that the original dwelling, No 1 Wheatley Close, was extended with a detached residential annexe, erected in 2004. A condition was imposed as part of the 2002 planning permission (reference P0351.02, the "2002 permission") which required that the residential occupation of the annexe should be ancillary to No 1 Wheatley Close.

6. As the current application is concerned with the occupation of the former annexe without complying with the relevant condition, the address of the site should refer to No 1 and No 1a¹ (formerly known as The Annexe) Wheatley Close. The description of the development should also be modified to the use of the former residential annexe to No 1 Wheatley Close, now known as No 1a (formerly known as The Annexe) Wheatley Close, as a self-contained dwelling without compliance with condition No 4 attached to a grant of planning permission Ref P0351.02. I believe there would be no injustice if I were to proceed on that basis.
7. The 2002 permission was for an outline application with all matters reserved. Condition 8 stated,

"The only access to the building hereby permitted shall be via the rear garden of the property known as No 1 Wheatley Close and not directly onto Haynes Road."

However, the approved reserved matters application drawings showed an access to the annexe building from both the front and rear elevations. The building was erected in accordance with these drawings and, due to the time that has elapsed, it is considered that the erection of the building is immune from enforcement proceedings. In addition, the Council subsequently permitted a vehicular access from Haynes Road in 2017, when approval was given to drop the kerb on Haynes Road to facilitate off-street parking in front of The Annexe.

Main Issue

8. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development was well-founded. That turns on whether the appellant can show, on the balance of probabilities, that The Annexe was occupied for the relevant period, without complying with condition No 4 attached to the 2002 permission. This states,

"The building hereby permitted shall not be occupied at any time other than for purposes ancillary to the residential use of the dwelling known as No 1 Wheatley Close."

9. Section 191(2) of the 1990 Act, indicates that uses and operational development are lawful at any time if (a) no enforcement action may then be taken in respect of them because, for instance, the time for enforcement action has expired and (b) they do not contravene the requirements of any enforcement notice or breach of condition notice in force. Lawfulness in this case is to be decided at the time of the application, that is the 18 May 2020.
10. Subsection 191(2)(b) is met here as there is no enforcement notice or breach of condition notice in force. With regard to subsection 191(2)(a), section 171B

¹ It appears it was not until during or after 2017 that The Annexe was given the address No 1A Wheatley Close as applied for by the tenant to the Council's Street Naming and Numbering Service

of the 1990 Act deals with the time limits for enforcement action. This sets out three time periods for three different types of development. The first deals with operational development which is not relevant to this case. The second sets out a time period of four years where there has been a change of use of a building to use as a single dwelling house. However, the appellant's claim is that The Annexe has been used as a self-contained dwelling house without complying with a condition.

11. The appellant's development therefore falls to be considered under the third time period. This states that where there has been 'any other breach of planning control', then no enforcement action may be taken after the end of the period of ten years, beginning with the date of the breach. Having said that, it has been held in case law² that the four year period rather than the ten year period applies to a breach of planning control consisting in the change of use of an extension to use as a single dwelling house. This is the case even though it amounted to a failure to comply with a condition imposed when planning permission had been granted for the extension, such that the condition could not be enforced more than four years after the breach. The relevant period for consideration in this appeal is therefore four years, which makes the relevant date the 18 May 2016.
12. The appellant must also show that any use established was not abandoned but the Courts have also held that the breach of planning control involving a breach of condition does not have to be continuing at the date of the LDC application to become lawful.

Reasons

The appellant's evidence

13. The appellant's evidence comprises his statutory declaration, plans, drawings and decision notices from previous applications, Land Registry details for the property, utility and Council tax bills, receipts and correspondence with the Council and local estate agents.

Assessment

14. The appellant made an outline planning application described as the erection of a "Detached building to create granny annexe for grandmother" (the 2002 planning permission). The decision notice for the subsequent reserved matters application granted August 2003 described the development as "Detached annexe". Building works began in the autumn of 2003 and the single storey building was completed in 2004.
15. The building was erected for the appellant's mother-in-law who wanted to be nearer her family. She was registered as a disabled person (registration details quoted on outline planning application form) and made use of a mobility scooter and the Transport for London "Dial-a-ride" service. However, the appellant states she lived an independent life from when she moved in on 31 December 2004 (stated on the LDC application form) until she passed away in November 2009.
16. Although the appellant states the manner of his mother-in-law's occupation was not ancillary to the host property, and no care was provided, nevertheless,

² FSS v Arun DC & Brown [2006] EWCA Civ 1172 [2007] JPL 237

access to The Annexe was from across the front garden of No 1 Wheatley Close. The rear garden of No 1 was divided into two and so The Annexe had a separate rear garden. However, at the front of the property, The Annexe appeared as a detached extension on the plot, by virtue of the shared front garden and the small gap between the buildings. The proximity of the annexe building to the host property also meant that the appellant's mother-in-law could easily have received assistance, should she have needed it.

17. Often the purpose of an annexe is not to provide accommodation for dependants in need of care but to provide self-contained accommodation near family. This can be for a variety of reasons such as to enable inter-generational living, where each family group also has their own space but bills can be shared. Annexes can also be occupied by staff employed by the family such as a nanny or a carer. The wording of condition No 4 does not mention the provision of care, only that the occupation of The Annexe should be ancillary to No 1 Wheatley Close, in other words that there should only be one self-contained residential unit on the plot.
18. It is not clear whether The Annexe was separately registered for Council tax when the appellant's mother-in-law occupied it. Nevertheless, occupation by a family member meant the character of the use was as one residential unit at No 1 Wheatley Close with an ancillary element, thus complying with condition No 4, in my view.
19. The second occupation of The Annexe by Mr J Belam began in October 2013, some four years after the first occupation ended. Prior to this the building was empty and no significant use was made of it by either the appellant or his partner. During this vacant period condition No 4 was not breached in my view and it appears that the appellant had no clear intentions for the future use of The Annexe. Mr Belam, a private individual unrelated to the appellant, agreed to rent The Annexe on 28 September 2013, to pay rent monthly and to pay all utility bills and Council tax dues.
20. There is no copy of a tenancy agreement signed by Mr Belam and no evidence from bank statements to show that rent was paid throughout his period of occupancy. However, a statement from the Council tax account shows that Council tax was paid from 1 October 2013 until 30 July 2017, which supports the appellant's case. None of the utility bills are in Mr Belam's name; instead, they are addressed to the appellant at The Annexe. This supports the appellant's case that the arrangement was Mr Belam paid what was owed directly to the appellant. The annual electricity summaries start in November 2013 and usage decreases in the period between November 2016 and November 2017, compared to previous years, which supports the appellant's case that Mr Belam left in July 2017.
21. Not all changes in the character of a use are evident in the surrounding area and additional noise or traffic, for example, are not the cause of a change of use but they sometimes show that there has been a material change of use. On occasion, there is a change in the character of a use without any effect on the surrounding area and it is my view that is what has happened at the appeal site. Mr Belam's occupation changed the character of the use as he rented The Annexe from the appellant and there was no other relationship between these people other than as landlord and tenant. Furthermore, Mr Belam was not

- employed by the appellant. At this point the occupation of The Annexe was no longer ancillary to the host property and condition No 4 was breached.
22. During Mr Belam's residential use, he would have walked across the front garden of the host property to access the Annexe in the same way as the appellant's mother-in-law did. However, that does not make Mr Belam's occupation ancillary to the host property, for the reasons I have given.
23. In April 2017 the appellant applied to drop the kerb to provide an independent vehicular access for The Annexe from the side, in Haynes Road. It is not clear whether this benefited Mr Belam or not, as the appellant states the dropped kerb "was installed later that year", possibly around October 2017 when builders were appointed to block pave the front drive of The Annexe, whereas Mr Belam vacated The Annexe in July 2017.
24. The Council submit that as the utility bills are addressed to the appellant, he had control over the property and, as such, it is possible condition No 4 was not breached at this point. However, it is not unusual for a landlord to retain control over the payment of the utilities when letting a property. This submission therefore attracts little weight.
25. In addition, during Mr Belam's occupation, the appellant applied for planning permission to extend The Annexe in 2016. He referred to the building as an annexe on the application form and the Council submits that this meant it was still being used in accordance with condition No 4. However, I agree with the appellant in that he could not use any other descriptor as it was not until after 2017 that The Annexe was given the address No 1a Wheatley Close by the Council's Street Naming and Numbering Service and this address then began appearing on bills, such as the November 2019 water bill.
26. Mr Belam's residential use continued without interruption for 3 years and 10 months. Once he moved out the appellant's intention was to either let The Annexe to another unrelated person or to sell it. A letter dated 2 August 2017 from Balgores estate agent provides a valuation for The Annexe as it was and if it was improved. This supports the appellant's submission on his intentions for the property. A receipt from Wickes dated 2 November 2017 further supports the appellant's stated plan of action, that The Annexe would be refurbished to either sell or let and that there was no intention to comply with condition No 4.
27. To that end I find his subsequent actions, albeit over a long period of time, demonstrate "intent", in line with *Impey*³ and contribute to the occupancy period, which was not in compliance with condition No 4. This is not unlike the situation for other landlords who have short gaps between tenants while they re-decorate/refurbish/replace a kitchen, for example, before new tenants move in. The residential use has not ceased and during the breaks in occupation it is open to the Council to take enforcement action if it appears that the use has not been established.
28. The appellant provided a full reference for the *Impey* case and so it was open to the Council to look it up and consider its relevance. "Intent" is important in this case because if the Council had a reason to visit and found the property to be vacant, they would have asked to be reassured that it was the appellant's intention to resume an ancillary use. This would have been an especially

³ *Impey v Secretary of State for the Environment* [1984] 47 P and CR 157

pertinent question to ask after an independent access was applied and paid for or if the Balgores' August 2017 letter was made known by the appellant and discussed. It would have been open to the Council at that point to take enforcement action.

29. The appellant's intentions for the future use of the property were evident during Mr Belam's occupation. This is when he began the process of creating a separate access. In spring 2017 he made an application to construct a vehicle crossing, (Response from Council dated 26 April 2017). He then block paved the drive in front of The Annexe and erected fencing to separate the front garden in October 2017. He subsequently re-turfed the lawn to the rear of The Annexe and jet washed the patio. He employed a decorator to paint all of the inside of The Annexe in November 2017 and he replaced the cooker at the same time (Receipt from Curry's dated 23 November 2017). He invited the estate agents to re-assess the value of The Annexe in 2018 and this prompted him to carry out more work. This included employing a handyman to sand and varnish the worktops in February 2018, to cover boiler pipes and to fit new kick boards in April 2018.
30. There is then a significant gap of one year before any other work takes place. However, the property is not occupied by any relatives, employees or a family friend in the manner of an ancillary use in the interim. There is evidence of a vacant use from the November 2019 water bill, which shows that only a payment of £3.00 was required and records that £3 was also paid in the previous month. The amount of electricity use is also significantly less than when The Annexe was occupied by Mr Belam (Bill dated November 2018).
31. Indeed, it appears from the evidence that it remained the appellant's intention to either let or sell The Annexe as the estate agent re-valued the property in October 2019 (Letter dated 10 October 2019 from Beresfords). The Council refer to the visit of a Planning Officer in 2016 to assess the application referred to above. It seems the Officer "concluded" that the building was an annexe. However, it is not clear on what basis this conclusion was reached, for example, whether the Officer entered the property and spoke to Mr Belam to ascertain the use or whether he was just referring to the disposition of the annexe building in relation to the host property.
32. Having regard to the totality of the evidence and its overall consistency, I find the evidence supports that there was a material change of use to a self-contained residential use in breach of condition No 4 in October 2013. The test for the evidence is, on the balance of probabilities, namely, what is more likely than not, and that balance of the evidence need only be slightly more than half, in order to satisfy the test.
33. In an appeal relating to an LDC, the burden of proving relevant facts rests with the appellant. The appellant's own evidence does not have to be corroborated by "independent" evidence. If there is no evidence to contradict or otherwise make the appellant's version of events less than probable, the appellant's evidence alone may be sufficient to justify the grant of a certificate. This is provided the evidence is sufficiently precise and unambiguous.
34. I conclude that a self-contained residential use began in The Annexe in October 2013 and continued thereafter, becoming immune from enforcement action after four years by the beginning of October 2017. There were no other intervening uses between October 2017 and the date of the application and the

appellant's actions and intentions show that the use was not abandoned. The self-contained residential use of The Annexe without complying with condition No 4 is therefore lawful.

Conclusion

35. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the property as two self-contained dwellings without compliance with condition No 4 attached to a grant of planning permission Ref P0351.02 was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

D Fleming

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(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 18 May 2020 the operations 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, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The use of No 1a (formerly known as The Annexe) Wheatley Close as a self-contained dwelling without compliance with condition No 4 attached to a grant of planning permission Ref P0351.02 began more than four years before the date of the application and continued thereafter; and the use does not contravene the requirements of any enforcement notice in force.

Signed

D Fleming

Inspector

Date: 21 July 2022

Reference: APP/B5480/X/21/3269278

First Schedule

The use of the former residential annexe to No 1 Wheatley Close, now known as No 1a (formerly The Annexe) Wheatley Close, as a self-contained dwelling without compliance with condition 4 attached to the grant of planning permission, reference P0351.02.

Second Schedule

Land at 1 and 1a (formerly The Annexe) Wheatley Close, Hornchurch RM11 2DR

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 192 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 would have been 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.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



The Planning Inspectorate

Plan

This is the plan referred to in the Lawful Development Certificate dated: []

by **D Fleming BA (Hons) MRTPI**

Land at: 1a(formerly The Annexe) Wheatley Close, Hornchurch RM11 2DR

Reference: APP/B5480/X/21/3269278

Scale: Not to Scale

