



Appeal Decision

Site visit made on 7 March 2023

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 22 March 2023

Appeal Ref: APP/W4705/X/22/3308924

Granny Flat, 17 Victoria Avenue, Ilkley, West Yorkshire LS29 9BW

- 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 to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr John Ogden against the decision of The City of Bradford Metropolitan District Council.
 - The application Ref 22/02567/CLE, dated 28 June 2022, was refused by notice dated 16 August 2022.
 - 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 '*existing use as residential annex in accordance with Condition 3 of permission ref 11/00135/HOU*'.
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Decision

1. The Appeal is dismissed. See formal decision below.

Background information

2. The appeal building, referred to as the '*Granny Flat*', was formerly a large, detached triple garage. It lies to the north and slightly behind the large detached dwellinghouse at No17 Victoria Avenue and forms part of the extensive, landscaped curtilage to the property. The dwelling is not listed but the house and the whole curtilage lie within the Ilkley Conservation Area (ICA).

3. Planning permission had been granted in March 2011 (11/00135/HOU) for conversion and use of the garage as a '*Granny Flat*'. Condition 3 of the permission and the reason for its imposition are as follows:

'The accommodation hereby permitted shall only be occupied in connection with and incidental to the occupation of the existing dwelling at 17 Victoria Avenue and shall at no time be severed and occupied as a separate, independent dwelling unit'.

Reason: The establishment of an independent residential dwelling would give rise to an over-intensive use of a site and lead to unsatisfactory relationship between independent dwellings. To accord with policies UR3 and D1 of the RUDP.

4. The Council had received complaints that the annex was not being used in compliance with the condition and that, in effect, it was being occupied completely separately by others to the main dwelling. The appellant was contacted by the Council's Enforcement Service and subsequently submitted a planning application

(21/02620/VOC) seeking to vary the condition. The variation was to allow for the occupation of the accommodation by a *'non-relative for a temporary period of 5 years'*.

5. The application was refused, and the appellant appealed the decision. However, the appeal (APP/W4705/W/22/3291267) was dismissed on 11 April 2022. The Inspector in that appeal concluded that the condition was necessary to make the development acceptable in planning terms to ensure that satisfactory living conditions are in place and that the development complied with Policy DS5 of the Bradford Core Strategy Development Plan Document (2017).

6. During the course of that appeal the issue was raised as to whether or not renting the *'Granny Flat'* to someone not related to the occupants of the host dwelling would fall within the confines of the condition. The previous Inspector considered that in order to lawfully conclude on that matter other mechanisms such as an LDC application or enforcement proceedings might be necessary.

7. On 12 May 2022 the Council issued a Breach of Condition Notice (BoCN) relating to Condition 3 of permission 11/00135/HOU. The BoCN required the cessation of the use of the *'Granny Flat'* as a separate independent dwelling unit and specified a compliance period of six calendar months. There can be no appeal against a BoCN. However, on behalf of the appellant it is contended that the requirements of the notice have been complied with, in that the requirements of the condition have *'always been met'*.

8. Based upon the previous Inspector's comment regarding a LDC, the appellant then submitted the LDC application which is now the subject of this appeal. This application seeks to confirm that on the date of the application the annex was lawfully in use in accordance with Condition 3 of the permission. That is, that it was only occupied *'in connection with and incidental to the occupation of the existing dwelling at 17 Victoria Avenue'* and that at no time had it been *'severed and occupied as a separate, independent dwelling unit'*.

9. As indicated above the application was refused on 16 August 2022 and the reason given was as follows:

'The applicant has provided no evidence to substantiate the claim that the building is presently occupied in connection with and incidental to the occupation of the existing dwelling at 17 Victoria Avenue. There is no evidence other than that the existing occupiers live in the annexe as a separate independent dwelling unit which is in breach of condition 3. There is no evidence that the existing use is lawful'.

10. The LDC application included a supporting statement and a plan showing the relationship between the main house and the *'Granny Flat'*. The statement set out the planning history and it was contended that a *'lodger'* of the appellant (then the applicant) had occupied the annexe legally. Reference was made to the complaint and that the LPA had *'invited the applicant to submit a planning application that sought to vary the wording of the condition to allow for the occupation of the existing accommodation by a non-relative for a temporary period of 5 years'*. The application is referred to above. However, a non-relative could have occupied the property, as long as it was in complete compliance with the condition and was not being used as a separate dwelling.

11. I now turn to the respective cases of the appellant and the Council.

The gist of the case for the appellant

12. It is contended that the annex has always been, and will always be, ancillary to No 17 Victoria Avenue and that it remains part of the single planning unit. It is stressed that the planning unit has always been in the ownership of previous owners and now the appellant. It is argued that the occupants of the 'Granny Flat' annex are 'lodgers' and that it is, therefore, used in accordance with the requirements of condition 3.

13. Reference is made to the Officer's Report, whereby it is inferred that the occupants cannot be viewed as 'lodgers' because they do not share any communal facilities with the appellant. However, it is indicated that in this instance the planning unit is fortunate to have a separate self-contained annex which is something that house 'lodgers' do not normally benefit from. It is stressed that both the 'lodgers' and the appellant *'share the grounds of the property in full'* and that there is no separation between the main dwelling and the annex.

14. It is indicated that to be a separate independent dwelling unit, a full planning application would need to have been submitted and approved by the Council. It is stressed that there is no intention to pursue such an application.

15. With regard to the fact that the annex was previously separately rated for Council Tax (CT), it is stressed that the Council has since accepted that a separate CT payment for the annex should not be made. A CT adjustment, dated 25 September 2022, confirms that the 'Granny Flat' is exempt from CT payments under Class T as it is an *'unoccupied property which is part of another property that cannot be let separately'*.

16. It is contended, therefore, that the main dwelling and the annex form part of a single residential unit and that it has been demonstrated that the annex has been occupied in accordance with the condition. It is further stressed that the appellant has no intention that the unit will be occupied as a separate independent dwelling unit and that at the time of the LDC application it was lawfully being occupied in accordance with condition 3.

The gist of the case for the Council

17. Reference is made to the appellant's case that the occupants of the annex are 'lodgers' which it is argued, means that it remains occupied in conjunction with the host dwelling. However, it is stressed that whether or not the accommodation created in the old garage building is occupied in accordance with the terms of condition 3 is a matter of judgement.

18. It is considered that the words used in the planning condition are clear and require that the annex is only occupied in connection *'with and incidental to'* the occupation of the existing dwelling at No 17 Victoria Avenue and shall at no time be severed and occupied as a separate, independent dwelling unit. It is indicated that a number of factors could influence, or determine, whether accommodation such as this is judged to be occupied in connection *'with and incidental to'* the occupation of a principal dwelling house, or whether it functions as a separate, independent dwelling unit.

19. Factors which could be seen to be in favour of the appellant's arguments include the facts that the accommodation remains in the appellant's ownership

and the that the building is subservient in scale to the principal dwelling house and falls within its curtilage. It is also the case that the annex shares the same vehicular access. However, the Council has been informed by others that the occupiers of the annex are not allowed to park within the site and do not, therefore, fully share the grounds and garden of the main dwellinghouse.

20. It is stressed that the building is physically detached from the principal dwelling; that there is no physical connectivity and that there is no evidence that the occupants of the annex share or make use of any of the facilities in the principal dwellinghouse. It is also stressed that the annex has a full range of domestic facilities (kitchen, bedrooms, bathroom and wc) and, therefore has no functional dependency on No 17 Victoria Avenue.

21. The Council indicates that the appellant has not defined the term 'lodger' or explained why the occupiers of the annex are regarded as 'lodgers'. It is further noted that the common interpretation of a 'lodger' is an occupier who rents accommodation in another person's house; that a 'lodger' would usually share some or all the facilities of a house and that a 'lodger' would typically occupy a room in a house, use furnishings, and access common parts of the property such as the kitchen and bathroom.

22. It is stressed that there is no evidence in this case to indicate that the previous or existing occupiers of this detached and independent annex live in that way. Neither is there any evidence that the occupiers of the annex have been able to come and go freely between the annex and the main dwelling or that they are able to freely use the facilities in the main house such as the applicant's bathrooms, kitchens or living rooms or its garden and parking areas. The only evidence is a statement that the annex is occupied as a separate and independent dwelling unit.

23. The Council refers to representations which it has received indicating that the property *'has been occupied since October 2019 by a paying tenant, as exemplified by a website link that advertised the annex to a paying 'tenant', not a 'lodger'.* Comment is also made that a 'no separate occupancy' clause by the Council was the correct course of action in allowing the residential annex initially.

24. The Council indicates that no information has been provided about billing arrangements for utilities, but Officers refer to the fact that the annex had previously been separately rated for CT. It is also noted that there is no evidence that all utility bills are paid by the appellant, as might be expected if the accommodation was only occupied in connection with and incidental to the occupation of the existing dwelling at 17 Victoria Avenue.

25. Furthermore, no evidence has been provided of any degree of personal/family connection between the residents of the annex and those of the principal dwellinghouse. It is contended that simply firmly *'believing that the property is occupied in accordance with the condition, is not evidence'*.

26. Thus, on the balance of probability, the Council considers that it seems clear that the annex has not been used and is not being used in connection *'with and incidental to the occupation of the principal dwelling house'*. It is considered that it has been occupied as a separate, independent dwelling unit in breach of Condition 3 and that this was the case on the date of the LDC application.

My Assessment

Introduction

27. An appeal relating to a LDC is confined to the narrow remit of reviewing the Local Planning Authority's (LPA's) reason for refusal and then deciding whether the reasons are well-founded. The planning merits of the case do not fall to be considered and the relevant test, relating to the submitted evidence, is '*the balance of probability*'. National Planning Practice Guidance (PPG) indicates that an applicant is responsible for providing sufficient information to support a LDC application and that, without sufficient, precise and unambiguous information (my underlining), an LPA may be justified in refusing to grant a certificate.

28. In this case the LDC application was made on the basis that the use of the 'Granny Flat' annex has always complied with condition 3 of the original permission. In order for the use to be lawful the appellant must demonstrate that there has been no breach of the condition. As referred to above the LPA issued a BoCN because it considered that the use of the annex was not 'incidental to the enjoyment of the dwelling house' or ancillary to it and that, in effect, it was in use as a separate dwellinghouse.

29. If there is an extant enforcement notice in place a LDC application cannot be made for a use which would constitute a contravention of the requirements of the notice. However, in this case the requirement of the BoCN is to cease the use of the annex as a separate dwellinghouse. The LDC application is not for that use, but for a certificate to confirm that the use is in fact incidental to the enjoyment of the dwellinghouse (and ancillary to it) and in accordance with condition 3.

Incidental/Ancillary use

30. I agree with the Council that, it is a matter of planning judgement as to whether or not the 'Granny Flat' is, or has been, occupied in accordance with the terms of condition 3. I also agree that the wording of the condition is quite clear and that the annex could only be lawful if it were to be occupied '*in connection with and incidental to the occupation of the existing dwelling*'.

31. Normally an 'incidental' use of a building within the curtilage of a dwellinghouse is a use that has a normal functional relationship with the primary use of the planning unit. Schedule 2, Part 1, Class E(a) of the *Town and Country Planning (General Permitted Development) Order 1995* as amended (the GPDO) allows buildings such as garages, garden rooms and swimming pools (subject to certain conditions) under permitted development rights.

32. However, the Government's *Technical Guidance: Permitted Development for Householders* advises that, in relation to Class E(a), a purpose incidental to a dwellinghouse would not cover normal residential uses, including primary living accommodation such as a bedroom or bathroom. This is the case here and that was the reason why planning permission was required for the incidental 'Granny Flat'.

33. The 'Granny Annex' was granted planning permission on the basis that it was to be an ancillary/incidental use to the main house. Such a use provides additional primary living accommodation, which retains a functional relationship with the main house. The additional living accommodation could, for example, be occupied by an elderly relative, by other family members or even people not related to the family. Occupants of such accommodation need not necessarily be related to the occupants

of the main dwelling. However, whoever occupies such a property cannot do so on the basis of it being a completely separate dwelling.

34. In this case, what was granted planning permission was for the use of an auxiliary/incidental building to the main house. The term 'auxiliary' is defined for planning purposes as being of secondary importance or supplementary to the primary use. Thus, the annex provided additional accommodation which was to function in a subsidiary capacity to the main house.

35. Condition 3 then qualified the approved use as having to remain connected to the use of the main house and also to remain 'incidental' to its use. The word 'incidental' connotes a use which is of a minor, casual or subordinate nature, as opposed to a separate and independent use.

36. Thus the use of the annex was to remain as having a normal functional relationship with the primary use of the planning unit, as opposed to being a separate residential use or 'lodging' in its own right.

The LDC application

37. It would appear that the enforcement action had commenced following a complaint to the Council that the annex was being let on a tenanted basis and being used as a separate dwellinghouse. Following the issue of the BoCN the appellant applied to vary the condition to allow use by a 'non-relative' for a temporary period of 5 years. However, as indicated above, any occupant need not necessarily be related to the occupant of the main house. But this does suggest that the occupants at that time might not have been related to the appellant and were basically tenants.

38. However, the issue is not who might occupy the auxiliary accommodation, but on what basis they occupy it. There are significant material differences between occupation that is secondary, additional, or subsidiary to the main house and occupation that is completely separate. The characteristics and nature of a separate occupation can have material implications for occupants of the main house, as well as for nearby residents. It seems for example that the occupants were not allowed access to the site for their vehicles, presumably having to leave them somewhere off-site. And the initial complaint to the Council was that that it was being used as a separate tenanted dwelling (and advertised as such).

39. I now turn to whether or not the appellant has demonstrated that at the time of the LDC application the annex was being used lawfully and in accordance with condition 3.

40. With regard to the contention that the annex was and is to be occupied by 'lodgers', I acknowledge the Council's points that normally such a person would simply rent a room within a dwelling and share the facilities with the owners of the house. However, there is nothing to stop a 'lodger' occupying several rooms in a property or even a full annexe.

41. Whether the occupant was an elderly relative, another relative or someone known as a 'lodger', again the critical factor relates to how the accommodation was occupied as a matter of fact and degree. Was it occupied in a manner that is connected functionally to the main house and incidental to its use or was it occupied completely separately as though the annexe was a separate dwellinghouse?

42. First of all there is no dispute that the annexe does in fact provide all of the facilities for day-to-day living. This is also be typical of a normal 'Granny Annexe'.

However such an annexe is normally regarded as part and parcel (ancillary) of the main dwellinghouse rather than being incidental to it. This was established in the case of *Uttlesford DC v SSE & White [1992] JPL 171*. The courts have held that the tests to be applied are, firstly whether the uses of an annexe would remain ancillary to the main use of the property as a dwelling and, secondly would be 'reasonably required'.

43. The evidence in this case does not demonstrate that the 'Granny Flat' was being used in an ancillary or incidental use to the main dwelling house. In fact there is evidence from others that it had been used separately and that the occupiers were obliged to park outside of the curtilage of the house as opposed to sharing the curtilage.

44. It would also appear that it was not being occupied by any member of the appellant's family. The fact that the application was made to vary the initial condition to allow for the occupation of the accommodation by a non-relative for a temporary period of 5 years reinforces this fact. On appeal the previous Inspector found that the condition was necessary to make the development acceptable in planning terms to ensure that satisfactory living conditions are in place and that the development complied with Policy DS5 of the BCSDP.

45. From that point onwards the onus was upon the appellant to demonstrate that the annexe was not occupied separately; that condition 3 had not been breached; that the use was incidental and ancillary to the use of the main house and, therefore, that on the date of the LDC application its use was lawful and in accordance with the initial conditioned planning permission.

46. I agree with the Council that whether or not the accommodation created in the old garage building is occupied in accordance with the terms of condition 3 is a matter of judgement. I also agree that the words used in the planning condition are clear and require that the annex is only occupied in connection '*with and incidental to*' the occupation of the existing dwelling at No 17 Victoria Avenue and shall at no time be severed and occupied as a separate, independent dwelling unit.

47. The Council accepts that some factors could be seen to be in favour of the appellant's arguments. These include the facts that the accommodation remains in the appellant's ownership; that the annexe is subservient in scale to the principal dwelling house; that it falls within its curtilage and that there is only one access. However, conversely, there is no evidence in support of a normal (family or lodger) shared use of the overall property.

48. One would normally expect the occupants of both properties to share some of the facilities of the main house. Instead it would appear that past occupants have occupied the annexe on the basis of a commercial tenancy agreement. There is no evidence to indicate that the existing occupiers of the detached and independent annexe live in a way that would indicate an incidental, ancillary or shared property. As also indicated by the Council neither is there any evidence that the occupiers of the annexe have been able to come and go freely between the annexe and the main dwelling or use the available parking space and garden within the curtilage of No 17.

49. It is also evident that the Council has received information indicating that the property '*has been occupied since October 2019 by a paying tenant, as exemplified by a website link that advertised the annex to a paying 'tenant', not a 'lodger'*'. The Council also stress that a 'no separate occupancy' clause was the correct course of action in allowing the residential annex initially.

50. With regard to Utility bills no information has been provided that would support any incidental or ancillary use or that the appellant had been fully

responsible for all charges to both units. In fact during my site visit I noted that there was a separate gas meter for the annexe and that the electrics were also separate. I agree with the Council that if the annexe was only occupied in connection with and incidental to the occupation of the existing dwelling the utility services and responsibilities for payment would not likely be separate.

51. The lack of personal or family connections between any residents of the annex and those of the principal dwellinghouse need not necessarily mean that the residential uses were separate. But I agree with the Council that '*believing that the property is occupied in accordance with the condition*' is not evidence that that was the case.

Overall Conclusion

52. In conclusion I also agree with the Council that, on the balance of probability, it seems clear that between the planning permission being granted and the date of the LDC application the annexe has not been used continually in connection '*with and incidental to the occupation of the principal dwelling house*'. It follows that I consider that the evidence indicates that it has been occupied as a separate, independent dwelling unit in breach of Condition 3 and that the Council was justified in issuing the BoCN.

53. I do not accept the appellant's contention that the condition has not been breached. I find that the evidence provided to demonstrate that the use has always been in accordance with the conditioned planning permission lacks the precision and unambiguity required. I conclude, therefore, that the use of the annexe in accordance with Condition 3 of the permission was not lawful on the date of the LDC application and that the Council's decision not to issue a LDC was sound. The appeal, therefore, fails.

Other Matters

54. In reaching my conclusions in this appeal I have taken into account all of the representations made by the appellant and the Council. These include the full planning and site history; the matters relating to Council Tax; the comments regarding the Breach of Condition Notice; the full appeal statements; the Council's Delegated Report; the photographic evidence and the submitted plans.

55. However none of these carries sufficient weight to alter my conclusions and nor is any other factor of such significance so as to change my decision.

Formal Decision

56. The appeal is dismissed and a Lawful Development Certificate is not issued.

Anthony J Wharton

Inspector