



Appeal Decision

Site visit made on 14 May 2024

by H Davies MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 May 2024

Appeal Ref: APP/U3935/X/24/3336985

269 Cricklade Road, Swindon SN2 1AG

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) (the Act) against a refusal to grant a certificate of lawful use or development.
 - The appeal is made by Mr Martin Jones against the decision of Swindon Borough Council.
 - The application ref S/LDE/23/0855/JP, dated 4 July 2023, was refused by notice dated 14 November 2023.
 - The application was made under section 191(1)(a) of the Act.
 - The use for which a certificate of lawful use or development is sought is 'use of the annex as a separate dwelling'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application sought a certificate of lawful use or development (LDC) for an existing use, comprising use of an annex as a separate dwelling. The burden of proof rests with the appellant and the appropriate test of the evidence is the balance of probabilities. The planning merits of the use are not relevant to this appeal. Under s191(4) of the Act, the relevant date for ascertaining whether an existing use is lawful is the date of the LDC application.
3. Section 195 of the Act refers to the refusal of an LDC being well-founded. This means that the Council decision is well-founded, not necessarily the reasons for that decision. This appeal is made to ascertain what is lawful. If the evidence taken as a whole suggests that the matter in question is lawful, I will grant an LDC. However, if the evidence suggests that the matter is not lawful, I cannot grant an LDC, even if the Council had different reasons for reaching the same conclusion.
4. The building in question is a detached building to the rear of a property known as 269 Cricklade Road. The building is referred to in the submissions as the 'annex' so I have used that term in this decision.

Main Issue

5. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development was well founded.

Reasons

Background

6. The annex was built without planning permission. Householder planning permission was sought retrospectively on 18 December 2018 for 'annex in rear garden' (permission ref S/HOU/19/0008/LOMO). This was granted on 18 July 2019. The approved plans include a sitting room, kitchen, bathroom and bedroom within the annex. Condition 2 of that permission (subsequently referred to just as 'the condition') specifies that 'the accommodation to be provided within the development hereby approved shall remain as permanently ancillary accommodation to the principal dwelling at 269 Cricklade Road and shall be occupied only by persons of the same household'. The condition was attached for the stated reason that 'the site is unsuitable to accommodate an additional residential unit'.
7. On 6 July 2023, the LDC application subject to this appeal was submitted. The application form gave the grounds on which the certificate was being sought as '*the use as a single dwelling house began more than four years before the date of this application*'. To the question '*is the certificate being sought for a use, operation or activity in breach of a condition or limitation*' the answer was given as 'yes', with condition 2 of permission S/HOU/19/0008 being specified.
8. In accordance with section 191 of the Act, an unauthorised use, or a breach of condition, is lawful if the time for taking enforcement action has expired and it does not constitute a contravention of the requirements of any notice then in force. I have not been informed of any notice being in place, so this appeal rests on whether the time for taking enforcement action had expired at the time the LDC application was made.

The relevant time period for taking enforcement action

9. Section 171B of the Act specifies the time periods for taking enforcement action. S171B(1) specifies a period of four years for a breach relating to building operations, but this appeal does not relate to a building operation. S171B(2) specifies that where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. Section 171B(3) specifies that in the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
10. In accordance with case law set out in *Arun*¹, the four year time period for taking enforcement action set out under s171B(2) applies to both development without planning permission and a breach of condition relating to a change of use to use as a single dwellinghouse. The condition in this case is designed to prevent use of the annex building as a single dwelling house, so s171B(2) could potentially apply to a breach of the condition.
11. Whether it is a breach of planning control, or a breach of condition, s171B(2) requires there to have been a 'change of use'. Therefore, the first use of the annex is key in establishing the relevant time period for taking enforcement action.

¹ FSS v Arun DC & Brown [2006] EWCA Civ 1172; [2007] JPL 237

12. In accordance with case law set out in *Welwyn Hatfield* and applied in *Lawson Builders*², s171B(2) does not apply in cases where the building was constructed unlawfully and used as a single dwellinghouse from the outset, meaning that there was no subsequent change of use. In such cases, the ten year time period for taking enforcement action set out under s171B(3) would apply.
13. The householder application form (ref S/HOU/19/0008/LOMO dated 18 December 2018) for the retrospective permission for the annex building, specified that the works to create the annex had been completed on 1 January 2018. The LDC application subject to this appeal states that the annex was used as a separate dwelling from 26 January 2018. Given that this is the date that a tenancy agreement was signed, it is highly likely that the annex would need to have been marketed for use as a separate dwelling prior to a tenant being found and the tenancy agreement being signed. I also note that the appellant statement provides a comment from a neighbour that '*since he built this annex it's been given on rent basis*'. The appellant does not dispute this comment.
14. In one of several inconsistencies, submissions with this appeal contradict the application for the annex building and indicate that works to the annex building were completed in early 2017. Despite this assertion, no substantive evidence has been provided to demonstrate that on substantial completion³, the annex was first used as ancillary or incidental to the use of the main original dwelling (or indeed that it was first used as anything other than a separate dwelling). The burden of proof is on the appellant and they have not demonstrated that the use of the annex has changed.
15. On this basis, it is more likely than not that on completion, the annex was first used as a separate dwelling. Therefore, there was no 'change of use'. Consequently, whether this case is considered as a breach of planning control, or a breach of the condition, s171B(2) cannot be applied. Therefore, s171B(3) of the Act must be applied and the relevant period for taking enforcement action in this case is 10 years.

Had the time period for taking enforcement action expired?

16. The appellant states that the annex was first rented out as a separate dwelling on 26 January 2018. The LDC application was submitted in July 2023, which is significantly short of the required 10 years.

Was the breach continuous?

17. As set out above, the period for which evidence of a breach has been provided is significantly less than the required 10 years. It is therefore not actually necessary for me to consider if the breach was continuous. However, both parties have made detailed submissions, so for completeness, I have given this matter some consideration.

² *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15 [2011] JPL 1183; *Lawson Builders Ltd & Lawson v SSCLG & Wakefield MBC* [2013] EWHC 3368 Admin

³ Meaning its completion in its current form, not any original garage structure which may have existed and has subsequently been extended to create the current annex building.

18. Case law⁴ in *Thurrock, Swale, and Basingstoke and Deane*, has set out that there is a difference between an established dwellinghouse where an occupier does not have to be continuously or even regularly present for the dwelling to remain in use as such, and where there is no established dwellinghouse use. Use as a dwellinghouse must be 'affirmatively established' before an occupier does not have to be continuously or regularly present in order for it to remain in such use. For a breach to be continuous, it has to have been possible for the Council to take successful enforcement action against the use of the annex as a separate dwelling at any point during the relevant time period. The relevant time period may have included times when the building was not occupied (perhaps due to refurbishment and/or while marketing) but the test remains whether the Council could have taken successful enforcement action during those times. It is also necessary to consider whether any periods of non-occupation were de-minimis, as a matter of fact and degree.
19. From January 2018 forward, there were around 10 periods where the annex was not occupied as a separate dwelling, ranging from 2 days to 26 days. None of the individual periods were excessively long and I accept that active marketing for a tenant was undertaken during those times. Regardless of this, taken together, the overall number of days of non-occupancy, spread right across the time scale of the evidence, is too significant to be considered de minimis.
20. More significantly, in considering if the breach was continuous, I must consider if the Council could have taken successful enforcement action during those periods of non-occupancy. Had the Council visited the site during any of the periods when the annex was not occupied by a tenant, as a separate dwelling, what they would have been able to observe was the annex building set up for residential use. This is what was approved under the annex building permission, subject to the condition. It would therefore not have been apparent that the annex was being used as a separate dwelling, since that would depend on who was occupying it and how. As a consequence, I do not consider it likely that the Council would readily have been able to identify a breach, and hence have taken successful enforcement action, during those periods of non-occupancy. On this basis, I do not consider the breach to have been continuous.

Other matters

21. Although not raised by the Council, some of the evidence provided is quite inconsistent and strongly suggests that the appellant has misrepresented what was actually occurring at the site at key times. I have therefore considered whether there has been deception in this case to the extent that the statutory time limits should be disapplied anyway.
22. The retrospective application for the annex building was submitted on a householder form. This was at a time when the annex was already being rented out as a separate dwelling, and the main dwelling had been subdivided, so the annex could not have been considered as an extension to a single dwelling.

⁴ *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226, [2002] JPL 1278;
Swale BC v FSS & Lee [2005] EWCA Civ 1568, [2006] JPL 886;
Basingstoke and Deane BC v SSCLG & Stockdale [2009] EWHC 1012 (Admin), [2009] JPL 1585

23. In the delegated report for the annex building application, the Council noted that *'The annexe is currently being used by the father of the applicant. Full time care is not currently required but some day to day assistance is required and necessary to the well-being of the relative.....the annexe would remain associated with the host dwelling and not occupied as an independent residential unit'*. It is logical to conclude that this information was provided by the applicant and the Council decision to grant conditional permission was made on that basis.
24. The applicant and appellant in all cases is the same person, Mr Martin Jones. The retrospective application for the annex was made in December 2018 with permission granted in July 2019. That application period forms part of the period for which Mr Jones now provides evidence seeking to demonstrate that the annex was rented out as a separate dwelling.
25. The appellant evidence for this LDC application appeal includes a tenancy agreement for Mr Tom Lethbridge covering the period for 21 November 2018 to 21 August 2019. In December 2018, if Mr Jones' father was actually occupying the annex in association with the main dwelling, as claimed in the retrospective annex building application, it cannot also have been rented out at the same time, as a separate dwelling, to Mr Lethbridge.
26. In addition to the matters relating to the annex, the original main dwelling at 269 Cricklade Road was subdivided into two separate dwellings without permission. An LDC application (submitted in January 2023 and granted on 23 June 2023, ref S/LDE/23/0011/JP) was granted on the basis that it had been used as such for more than 4 years, starting in December 2017. However, when retrospective planning permission for the annex building was applied for in December 2018, this subdivision of the original main dwelling does not seem to have been made evident, despite the fact that it was ongoing at that time.
27. The annex building application was made by Mr Martin Jones, giving 269 Cricklade Road as his address. Contrary to this, the LDC application for the subdivision of the dwelling gives evidence to show that in December 2018 both the ground and first floor flats at 269 Cricklade Road were rented out to tenants by Mr Jones, rather than being occupied by him.
28. Given that Mr Jones has been the applicant and appellant in all relevant cases, and the landlord who rents out the various elements of the appeal site, I have to assume that he was aware of how the site was being used at all times. The inconsistencies and clear contradiction in the evidence leads me to conclude that, on the balance of probability, deception has taken place.
29. I have therefore considered the principles established in case law under *Welwyn Hatfield* and applied in *Jackson*⁵. In *Welwyn Hatfield*, Lord Mance concluded that s171B(2) could not apply where there was positive deception, in matters integral to the planning process, which was intended to and did undermine the planning process, to the appellants benefit (ie the deception enabled them to pass the four year period for taking enforcement action and hence seek to resist enforcement action). Overall, I consider the *Welwyn* principles set out by Lord Mance are met in this case and such conduct takes the case outside of the scope of the section 171B(2) time limit.

⁵ *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15, [2011] JPL 1183; *Jackson v SSCLG & Westminster CC*; *Bonsall v SSCLG & Rotherham MBC* [2015] EWCA Civ 1246, [2016] JPL 506

30. I have considered other referenced appeal decisions in so far as they are relevant. My decision is based on the facts, circumstances and evidence of this specific appeal.

Conclusion

31. The relevant time period for taking enforcement action in this case is 10 years. As of the date of the LDC application, the use of the annex as a single dwelling had not taken place continuously for 10 years. Consequently, use of the annex as a separate dwelling was not lawful, in the terms set out under s191 of the Act.
32. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of use of the annex as a separate dwelling was well-founded and the appeal fails. I will exercise accordingly the powers transferred to me in section 195(3) of the Act.

H Davies

INSPECTOR