



Appeal Decision

Site visit made on 7 January 2025

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 January 2025

Appeal Ref: APP/B0230/X/23/3323624

163 Barton Road, Luton LU3 2BN

- 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 Samir Riaz against the decision of Luton Borough Council.
 - The application ref 23/00334/LAWE, dated 20 March 2023, was refused by notice dated 16 May 2023.
 - 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 described in the application as a 'non material change of use from a garage (incidental use) to ancillary (some primary accommodation)'.
-

Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Mr Samir Riaz against Luton Borough Council. This application is the subject of a separate decision.

Main Issue

3. Section 191(4) of The Town and Country Planning Act 1990 as amended (the 1990 Act) indicates that if, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application was lawful at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application. My decision is, therefore, based on the facts of the case and judicial authority. The main issue in this case is whether the Council's decision to refuse to grant a LDC is well founded.
4. The test of the evidence is on the balance of probability and the onus of proof is on the appellant.

Reasons

5. The site at 163 Barton Road is occupied by a large 1 ½ storey building and two smaller outbuildings to the rear. Whilst the site location plan submitted with the LDC application identifies the whole of the site at No 163, it is clear that the LDC is only sought for the use of the outbuilding adjoining the site's northern boundary. There appears to be no dispute that the building in question was constructed as a garage some time ago. The appellant says that in more recent years there has been a change in how the building is used. The suggestion is that, despite this

change use, development within the meaning of section 55 of the 1990 Act did not occur. It is for this reason that the appellant says that the existing use of the building (i.e. its use at the time the LDC application was made) is lawful.

6. Whilst I have been able to establish the above from the submissions before me, there is still uncertainty with regard to the matter for which the LDC is sought. In this regard, I am mindful of the advice at paragraph 005 of the Planning Practice Guidance on Lawful development certificates, which informs that an application for an LDC needs to describe precisely what is being applied for. It goes on to state that, without sufficient or precise information, a local planning authority may be justified in refusing a certificate.
7. The LDC application form has been completed to say that the matter for which the LDC is sought is a change of use of the building from a 'garage (incidental use)' to what is described as 'ancillary'. There is also reference in the description to 'some primary accommodation' within the building. I find this description to be ambiguous. The term 'ancillary' is not a use of land. In the context of land use planning, it is a term used to describe the relationship between one use and another. Indeed, I find the suggested change from an 'incidental use' to an 'ancillary' use to be confusing in this case, as the terms can often be used interchangeably in the context of land use planning.
8. The case of *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207, which is referred to in the appeal decision that has been drawn to my attention¹, is settled caselaw that deals with the matter of the planning unit. It confirms that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes. Three broad categories of distinction are suggested in the judgment:
 - a) A single planning unit where the unit of occupation has one primary use and any other activities within it are incidental or ancillary;
 - b) A single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and
 - c) The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.
9. It will be noted that in *Burdle*, the terms 'incidental' and 'ancillary' are used to mean broadly similar things. Having regard to *Burdle*, an ancillary use is one that takes place within the same planning unit as the primary use; it is not the same use as the primary use, but is nevertheless functionally connected to the primary use.
10. In the context of a dwellinghouse, the term incidental is more often used than the term ancillary. This is largely because relevant legislation, including section 55(2)(d)² of the 1990 Act and Class E³, of Part 1, Article 3, Schedule 2 of the Town

¹ Appeal decision provided by the appellant relating to 1 Downside, Westbrook Street, Blewbury; appeal reference APP/V3120/C/16/3147099.

² This relates to the use of buildings or land within the curtilage of a dwellinghouse.

³ This relates to the provision of buildings, etc. within the curtilage of a dwellinghouse.

and Country Planning (General Permitted Development) (England) Order 2015, uses this term.

11. Adding to the ambiguity in the description of the matter that is the subject of the LDC application is the reference to 'primary accommodation'. The term 'primary living accommodation' is used in the MHCLG Technical Guidance on permitted development rights for householders. The Guidance informs that 'the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen' would not be a purpose (i.e. a use) incidental to a house.
12. Here the case of *Uttlesford District Council v Secretary of State for the Environment and White* [1992] JPL 171, which is also referred to by the parties, is of assistance. The case relates to a garage building used as residential accommodation, which would mean that it contained primary living accommodation as referred to in the MHCLG Technical Guidance. In such cases, *Uttlesford* assists in clarifying the distinction between an outbuilding that is used in a way that is part and parcel of a use as a dwellinghouse (the use as a dwellinghouse being the primary use of the planning unit) and the use of an outbuilding that is incidental to a use as a dwellinghouse.
13. Having regard to *Burdle*, *Uttlesford* and the MHCLG Technical Guidance, in the example of a dwellinghouse, an outbuilding that includes facilities one would expect in the ordinary living accommodation of a dwellinghouse (i.e. primary living accommodation) that is used, for example, as a bedroom for sleeping in by a member of the household that occupies the dwellinghouse, its use would be part and parcel of the use of the dwellinghouse, rather than being incidental to it. On the other hand, an outbuilding used for a use that is incidental to the use of the dwellinghouse might include an outbuilding used by a person living in the dwellinghouse as a garage to park a car. The use of the outbuilding would be connected to the domestic activities of that person, but would not be used in the same way as the living accommodation used by that person.
14. The 1 Downside appeal decision, referred to above, deals with a third alternative. This case also related to the use of an outbuilding. As the outbuilding in that case contained primary living accommodation, there was no question that its use was incidental (or ancillary) to the existing dwellinghouse use. This is right, having regard to *Uttlesford* and the MHCLG Technical Guidance. In that case the Inspector considered whether the building was being used in a way that was part and parcel of the existing dwellinghouse use on the appeal site, or if the building was being used in a way that was entirely separate from the dwellinghouse, such that it might have been a planning unit of its own, separate from the existing dwellinghouse. I note that the Inspector concludes that the dwellinghouse and the outbuilding 'remain as a single planning unit in residential use' and that 'the material change of use of the outbuilding to use as a separate dwelling has not occurred'.
15. It is having regard to all of the above (i.e. the relevant caselaw and guidance) that I find the description of the matter for which the LDC is sought to be ambiguous and contradictory. This is because it describes there having been a change of use from an incidental use to an ancillary use, which are terms that the above demonstrates can mean broadly the same thing, while at the same time referring to primary living accommodation within the building, which indicates a use that is not incidental.

16. Notwithstanding the above, the provisions of section 191(4) of the 1990 Act allow me to modify or substitute the description of the existing use, in the event that I am minded to issue a certificate. In order to exercise these powers, I must understand how the building in question was used on the date the application was made (the relevant date). I must also understand how the wider site was used at this time and consider the matter of the relevant planning unit in this case. This is necessary because the appellant refers to the use of the building as 'ancillary'. Their reference to 'primary accommodation' might also mean that the existing use of the building is part and parcel of the use of the remainder of the site. Accordingly, it is not enough for me to establish how the building was used on the relevant date. I must also establish how the wider site was used at this time and consider the relationship between the two uses. This will allow me to determine whether the use of the building was ancillary to the use of the wider site; if not ancillary, whether its use was simply part and parcel of the primary use of the planning unit; or whether its use was physically and functionally separate from the primary use of the planning unit at No 163, such that the building would be regarded as a planning unit of its own.
17. With the above in mind, the information submitted with the LDC application and subsequent appeal is vague with regard to what activities took place in the building (i.e. the actual use of the building) at the time the LDC application was made. In the statement that accompanied the LDC application, the appellant refers to the building control record from 2021 and suggests that this confirms that the building has been converted from a 'garage (incidental use)' to a 'ancillary (some primary accommodation) accommodation'.
18. The building control record, together with the 'existing' and 'proposed' plans of the building provided by the appellant, indicate that works were undertaken to change the door and window openings, change the internal layout of the building, provide a separate w.c. and shower room, and provide a fitted kitchen. The location of the fitted kitchen, w.c. and shower room within the building, and the external appearance of the building as I observed it on site was consistent with the 'proposed' plan.
19. The building control record gives the description of the works as 'converting the garage into a summer house & gym to include a kitchenette and shower room'. However, the completion certificate issued under The Building Act 1984 and Building Regulations 2010 (as amended) does not certify how the building was used at that time. By this I mean that it does not certify what particular activities were taking place in the building when it was issued. The certificate relates to 'works' to the building, not to its use. It does nothing more than to certify that the works undertaken, that are controlled under the stated building legislation, are approved in accordance with that legislation.
20. Furthermore, the description of the works stated on the certificate is likely to have been taken from the description given by the appellant in relevant building control forms completed by them.
21. Even if I were to rely on the building control record as an indication of the use of the building in September 2021, its use as a summer house and gym is not entirely consistent with my observations of the building during my site visit. In addition to the fitted facilities (e.g. kitchen, w.c. and shower cubicle), I observed at least 2 fridges, a substantial array of kitchen equipment stacked on a large shelving unit, a

foldable table and the storage of bulky food items. There was no obvious gym equipment or furniture one would expect to see in a summer house.

22. I acknowledge that the use of the building may have changed since the building control record in 2021 and, indeed, since the LDC application was made. There is, however, nothing before me to indicate that this is the case.
23. When referring to the 'ancillary accommodation' within the building, in their appeal statement the appellant says that this 'would be used by the residents of 163 Barton Road'. This statement could be read as indicating a future use of the building, rather than an existing use. That aside, even if the residents of No 163 use facilities within the building at present, and did so at the time the LDC application was made, there is no indication of what their use of the facilities involves and, having regard to my observations on site, none is obvious to me. I say this because I observed a large portion of the building occupied by a fitted kitchen and a substantial array of kitchen equipment and food. However, on my inspection of the main building on the site, I also noted a large fully fitted kitchen. In view of this, what use residents of No 163 would make of the building is not obvious and there is no explanation to assist.
24. All things considered, the evidence before me is not sufficiently precise or unambiguous with regard to the existing use of the building in question and, in particular, its use on the relevant date.
25. Turning to the matter of the wider appeal site, the planning unit and how this is used, in completing the part of the form that asks for the relevant use class⁴ of the existing use, the appellant has stated Class C3, which is a use as a dwellinghouse. I have assumed that this is with reference to the whole of the appeal site at No 163, rather than the building in question. This being the case, my observations of the appeal site during my site visit are not entirely consistent with a use of No 163 as a dwellinghouse within the meaning of Class C3 of Part C, Schedule 1 of The Town and Country Planning (Use Classes) Order 1987 as amended (the 1987 Order).
26. The use of the first floor appeared to be consistent with a residential use, in that I observed a number of bedrooms (the occupants of some were present in the bedrooms at the time of my visit) and a bathroom. However, it appeared that the ground floor of the property was being used as a place to care for children, either as a nursery or a place where childcare is provided. Signs on the front elevation of the property advertised this service. I was asked to sign into the property in a register in the hallway and here I observed a notice board with notices consistent with a place of childcare. In the kitchen a group of some 5 or 6 young children were at play around a table, supervised by a number of adults.
27. On the ground floor I observed 5 rooms, including the kitchen, a bathroom, and a room used as an office or study, occupied by a desk and chair, some storage furniture and a dining table. There was also a room to the front of the property occupied by around 5 made up cots and a number of prams. At the rear of the ground floor was a large room overlooking the garden that appeared to be only occupied by children's play equipment and toys. In the garden there was an array of children's outdoor play equipment. There was no obvious living room (i.e. a

⁴ Being a class of use under The Town and Country Planning (Use Classes) Order 1987 as amended.

room with sofas, a television, etc.) in the property or a place one might expect in a dwellinghouse where the household might relax together.

28. Whilst it is possible that the childcare use may have commenced since the LDC application was made, nothing before me indicates that this is the case. Indeed, there is a lack of detail in the appellant's submission with regard to the childcare use.
29. I acknowledge that in some instances a dwellinghouse can be used for childcare provision without there being a material change of use of the dwellinghouse. However, much will depend on the particular circumstances of the case, including the extent of the childcare use, whether there remains a single household within the dwellinghouse, and whether the occupants of the dwellinghouse provide the childcare. If the childcare use was taking place in the property at the time the LDC application was made, without any information regarding this use, the nature of the existing residential use, and the relationship between the two, I have difficulty in finding that the use of No 163 on the relevant date was, on the balance of probability, a dwellinghouse within the meaning of Class C3 of the 1987 Order.
30. Even if it were the case that, despite the childcare activities within the property, No 163 was nevertheless used as a dwellinghouse on the relevant date, I am unable to conclude that, on the balance of probability, the use of the building in question is for a purpose that is ancillary to the use of No 163. Neither am I able to conclude on whether the use of the building is part and parcel of the use of No 163, or entirely separate to it. This is because the evidence regarding the use of the building in question is not sufficiently precise and unambiguous.
31. I note the details of the case at 5 Knoll Rise, Luton, referred to by the appellant. These relate to an application submitted under section 192 of the 1990 Act, for proposed development, rather than existing (i.e. section 191) as in the case before me. Notwithstanding this, other than the plans, I have not been provided with the other information that might have accompanied that application, setting out how the accommodation in question would be used. The officer report is briefly stated and, therefore, does little to assist in setting out the basis for the Council's decision. In view of the level of information I have regarding that case, I am unable to make an informed comparison with the case before me.
32. Nevertheless, I do not discount that the circumstances of the case before me are comparable to those of the 5 Knoll Rise case. However, without sufficient detail regarding the existing use of the building, the use of the wider site at No 163, and the relationship between the two, I cannot conclude that my determination of the appeal should be the same as that of the Council in the application relating to 5 Knoll Rise.
33. I have already referred to the 1 Downside appeal decision, which relates to an enforcement notice that alleged the material change of use of an outbuilding to use as a separate dwelling. As I have noted above, the Inspector in that case considered whether the use of the building in question was part and parcel of the existing dwellinghouse, or entirely separate from the dwellinghouse and in a planning unit of its own.
34. The appeal decision considers in detail not only the layout of the appeal site and the buildings in question, but also how these buildings are used. There is detail in the decision regarding the sleeping arrangements of the occupants of the appeal

site; the use that these occupiers make of various parts of the appeal site and rooms within the appeal buildings; and the comings and goings of these occupiers between the buildings on site. This appeal decision is based on a level of detail that has not been provided in the case that is before me. I do not have the same understanding of the use of the building in question and the wider appeal site as the Inspector did in the 1 Downside appeal. Accordingly, unlike the Inspector in that case, I have been unable to conclude one way or the other in the case before me.

35. Bringing all of the above together, I can only find that the appellant has failed to discharge the burden of proof that is upon them. Their evidence is not sufficiently precise and unambiguous to demonstrate that on the date the LDC application was made, the use of the building in question was lawful, on the balance of probability.

Conclusion

36. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development for a non material change of use from a garage (incidental use) to ancillary (some primary accommodation) is 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.

J Moss

INSPECTOR