The Planning Inspectorate

Appeal Decision

by Chris Hoult BA(Hons) BPhil MRTPI

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

Decision date: 19 October 2020

Appeal Ref: APP/L2250/X/19/3242030
87 Coast Drive, Greatstone, New Romney, TN28 8NR

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development ("LDC").
- The appeal is made by Mr Ian Smith against Folkestone & Hythe District Council.
- The application (Ref. Y19/0843/FH) is dated 23 July 2019.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended ("the 1990 Act").
- The use for which a LDC is sought is described as follows: "Use of a building to the rear of the residential curtilage of 87 Coast Drive, Greatstone, New Romney, TN28 8NR as an annex to the aforementioned property. Variously described since 1997 as a Beach Chalet, Chalet, Annex and Building."

Decision

1. The appeal is dismissed.

Preliminary Matters

2. I have taken the appellant's name from the name given on the appeal form. I note that, in statements and statutory declarations submitted as evidence, including by him, his name is given as Michael Thomas Smith.

3. In an appeal of this kind the planning merits of the use are not for me to consider. My decision will turn on the legislative provisions, relevant planning case law and the submitted evidence. Given therefore that it was not necessary in order to reach a decision to see the appeal site and its surroundings, a site visit was not carried out

Background and Main Issue

4. The background to the appeal requires some explanation. The appeal property is a detached house in the village of Greatstone with a rear garden which backs on to dunes and the beach. The building subject of the appeal appears to have been demolished and in its place there has been erected a detached building of significantly increased footprint. Photographs forming part of the Council's evidence show the works taking place. The building which has been replaced is described by the appellant as an annex or chalet and looks like an outbuilding. An aerial photograph from 2015 shows its location in the rear part of the

garden and gives an indication of its footprint. It may be contrasted with a photograph from 2018 which shows the footprint of the replacement building.

5. The new building is to all intents and purposes a detached dwelling. The main dwelling at the front of the plot appears to have been rented out for a number of years and the appellant's intention is that it will continue to be tenanted and that he will live in the new dwelling. A swimming pool which was built in the rear garden has been infilled to create a terrace for the dwelling.

6. The origins of the building, to which I shall hereafter refer using the more neutral term "the outbuilding", appear (to coin a phrase) to be lost in the mists of time. The Council's records refer to a planning application from 1964 for the use of an existing domestic building at the appeal property for the sale of teas and provision of dressing facilities for bathers. In 2002, an application was received for the erection of a replacement chalet for holiday accommodation.

7. The appellant has submitted evidence which seeks to demonstrate that the outbuilding has been used over time, in the period of his ownership of the property, as residential accommodation in connection with/ancillary to the main house. There are indications in the evidence that it was also used as holiday accommodation. His evidence points to the building providing self-contained facilities for day-to-day living. It was in existence when he purchased the property in 1997 and he understands that it dates from the 1940s. It has its own separately-connected services – gas, electricity and water – and separate access to the rear directly on to the beach.

8. The Council's account of the events which led to the outbuilding being replaced by a detached dwelling derive mainly from an officers' report to its Planning and Licensing Committee meeting of 29 October 2019 which recommended taking enforcement action against the new dwelling. An enforcement notice was issued on 3 December 2019 and came into force on 17 January 2020. No appeal has been submitted against it although the appellant now questions whether it was correctly served. The notice alleges the unlawful construction of a dwellinghouse and requires it to be demolished and the site restored to its original levels, citing a period of 12 months for compliance.

9. Following delays in validating and then determining the LDC application, the appellant has appealed directly to the Secretary of State for an outcome, so it has become what is known as a "failure case". The Council subsequently prepared an officers' report on the application which reached a decision to refuse to grant a LDC, and issued a decision notice, but jurisdiction over the application had been taken out of its hands following the appeal. The officers' report and notice are helpful in providing evidence of the decision that the Council would have taken but neither represent a formal determination and decision notice for purposes of the appeal.

10. Accordingly, my strict remit in this appeal is governed by the provisions of s195(2)(b) of the 1990 Act and is to decide, in the case of a failure to determine, whether, if the Council had refused the application, their refusal would have been well-founded. However, I am mindful of the appellant's purpose in submitting the application, which is to establish the replacement dwelling as lawful (see below), and the evidence in relation to it, including the enforcement notice now in force. It is therefore appropriate to go on to consider, in the circumstances of its erection, whether, in relation to its proposed use, it would be lawful. These are the main issues for this appeal.

Reasons

Introduction

11. My understanding of the appellant's case is as follows. It is premised on the existence of an outbuilding when he purchased the property which has been subsequently maintained and used as part of the residential use of the main dwelling, as a residential annexe to it. It was provided with services and formed self-contained living accommodation, albeit not used independently. The LDC application seeks to demonstrate that it had a lawful use to that effect. In 2015, works were carried out to repair it but it was necessary for it to be demolished. A replacement annexe was erected in which the appellant intends to live, much as occupiers of the main dwelling over the years would have done in the former annexe, while continuing to rent out the main house. This building would continue the former annexe's lawful use.

12. In the light of this, it is incumbent on me to consider the evidence in relation to the claim that the outbuilding had a continuing lawful use as a residential annexe. If I find that it did not, or that any previous lawful use on that account has been abandoned, the new dwelling now erected could not have a continuing lawful use as a residential annexe. If, in the alternative, a view were taken that a continuing lawful use as a residential annexe was not abandoned, I need to examine the circumstances of the erection of new dwelling.

13. There is an enforcement notice in force which alleges that the dwelling is unlawful as a building whose validity, given the provisions of s285(1) of the 1990 Act, cannot be questioned. However, the appellant has questioned whether it was correctly served as a possible precursor to legal proceedings against it. I am aware of the relevant case law on the interface between LDCs and enforcement notices which come into force[1]. Notwithstanding that, it is pertinent to consider whether the new dwelling would nevertheless have been lawful as a residential annexe continuing a lawful use of the land as such.

14. It is helpful to begin by setting out the legislative provisions in relation to the use of outbuildings as part and parcel of a wider residential use. S55(2)(d) of the 1990 Act says that the use of any buildings or other land within the curtilage of a dwellinghouse for purposes incidental to the enjoyment of the dwellinghouse shall be taken not to involve development. The building was plainly within the curtilage of the main dwelling. The use of an outbuilding as a residential annexe would form part and parcel of the residential use itself, not incidental to it. Any change to that use from a use incidental to the enjoyment of the dwelling would not necessarily amount to development. A fact and degree assessment would be required to ascertain whether, if a building came to be used in this way, that would amount to a material change of use and therefore to development for which planning permission would be required.

Evidence of building's history

15. There is some anecdotal evidence of the outbuilding having had a variety of previous uses but the appellant's case rests on the period from 1997 onwards where he says that it was always understood to be maintained and available, and was used, as a residential annexe. No clear account of its history prior to the time is given by him. That said, if, say, any use as an annexe had involved

[1] See *Staffordshire CC v Challinor* [2007] EWCA Civ 864

a material change of use from a use incidental to the enjoyment of the main dwelling or from a use unconnected with the residential use of the plot, the use could have become lawful through the passage of time, in this case, 10 years. It would therefore help the appellant to be able to demonstrate an unbroken period of 10 years' use as a residential annex. However, it would not be necessary for him to do so if the building's history prior to 1997 could be demonstrated. Its use as a residential annexe could have been lawful in 1997.

16. Given these uncertainties, and the basis on which lawfulness is claimed, it is therefore for the appellant to furnish the Council with sufficient evidence to explain reliably the building's history or, alternatively, to demonstrate an unbroken period of at least 10 years when it was used as a residential annexe. His evidence focuses on the latter route in establishing lawfulness. His contention is that it has been used for a period of at least 10 years and in reality, very much longer as a residential annexe. I shall go on therefore to examine the evidence in support of that claim.

17. Before I do so, I should for clarity reiterate the Government's Planning Practice Guidance (PPG) in relation to the evidential burden in cases of this type. The onus in demonstrating his case is firmly upon the appellant. The PPG goes on to say that, if a local planning authority has no evidence itself or from others to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application provided that the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability[2].

18. The evidence from the main parties in relation to the outbuilding's history is sketchy. For the appellant, it consists of statements from himself and his agent (in his case, a statutory declaration) as to its history since 1997. The evidence is lacking in any precision. The appellant says that there has always been an element of residential accommodation centring on the occupancy of the main dwelling but that is a vague assertion and no further details are provided. The outbuilding appears on the aerial photographs to be of modest size but no details are provided of its internal layout. Having services connected would not of themselves demonstrate that as that could equally apply to a building used, for example, as a workshop or for storage.

19. The appellant's agent, Mr Kendrick, goes further and asserts in his (unsworn) statement that it is a self-contained unit used as separate accommodation. He comments on its internal layout and refers to it having had a self-contained bedroom and living room, bathroom and kitchen area but no evidence is submitted to support this description. Further evidence is provided from a Mr Wallis, in the form of a letter to the Council. He maintains that he and his family used the appeal property and its annex for enjoyment of the beach and also as accommodation but no further details are given.

20. The appellant will have been familiar with the building since 1997 and his agent says he started to act for him in the late 1990s so will have been involved with it for about as long. Given that the lawfulness of the new dwelling will have depended on demonstrating the outbuilding's lawful use as an annexe, he will have been familiar with the evidential burden. He is professionally represented, as Mr Kendrick is keen to demonstrate. In spite of that, and in the totality of their evidence, there are no details, say, in the form of plans, photographs or

[2] PPG paragraph 006 Reference ID: 17c-006-20140306

records of maintenance works, that give any indication of its appearance, dimensions, internal layout or condition at any point in its history. This is in spite of repeated reference to it as an "annex" in the appellant's evidence as a whole. Given the case they are required to make, I find that surprising.

21. For what appears to be a more reliable account of the outbuilding, I turn to the evidence of Mr Barnes who lives at no. 89 Coast Drive. He is one of a number of third-party objectors to the detached dwelling which has been built as a replacement for the outbuilding, as he indicates at the outset. However, he also explains that his family has owned no. 89 since 1964. His account of events is endorsed by two other objectors – Mrs Hakes, who lives at no. 83, and Mr Jones, who says his family have owned a property close by since 1966.

22. Included in his representation is a photograph of the outbuilding in 2015, showing it to be both modest in size and in a very dilapidated condition. He explains that, prior to 1964, the building was used a summer house by the then owners of the property who lived in it in the summer months when renting out the main dwelling as a summer let. He describes it as very basic and quite small. He says it deteriorated in condition from 1964 to 1982, when he knew it, before being abandoned. He investigated it in 1983 but was of the view that too much was required to bring it to a safe condition to rent out. From 1997, after the appellant purchased it, it became totally derelict and uninhabitable and was used by vagrants and vandals. From this time until 2013, the property was rented out to a taxi driver while it remained derelict and abandoned.

23. He says that the outbuilding was at no time used by tenants as a summer house and that, in 2015, it was demolished and the site cleared. He then goes on to rebut various statements made on behalf of the appellant, saying that the building was never repaired, as is asserted, and that it was demolished and the site cleared prior to construction of the swimming pool. He describes Mr Wallis as the main builder responsible for the renovation of the main dwelling who may have slept there during its renovation but who could never have used the outbuilding as accommodation owing to its derelict condition. He gives some insight into the various items of anecdotal evidence regarding the outbuilding's previous history, saying it was never a tearoom nor was it ever used for the sale of seafood, both of which are suggested in the appellant's evidence.

24. I acknowledge that Mr Barnes' evidence is plainly that of an objector to the replacement dwelling, a matter which he does not seek to hide. That said, his knowledge of the appeal property and of the outbuilding itself over a lengthy period of time enable him to furnish more detailed evidence of its use, size, appearance, condition and history. Such evidence is conspicuously lacking in the appellant's account. Moreover, he has been able to support his written account with at least one photograph of the building, which shows it to have been unlikely to have (according to Mr Kendrick) afforded all the facilities to support day-to-day living. Its appearance in this photograph lends support to the view expressed by him that it was in a derelict and abandoned state.

25. This evidence must cast significant doubt on the appellant's evidence of its availability and use as a residential annexe from 1997 onwards. The appellant has been able to consider it. In response, he accuses Mr Barnes of making defamatory comments and refers to "the potential for defamation proceedings", requesting that his evidence should be "struck from the record". However, he does not contradict his account with evidence of his own with regard to the

descriptions given on such matters as layout, appearance and state of repair. One obvious conclusion to draw from this is that there is no evidence available that would support his alternative version of events in relation to the building's maintenance and pattern of use.

26. In the light of this, I go back to the test set out in paragraph 17 above. In this case, the appellant's evidence is both lacking in precision and ambiguous and also contradicted by evidence from others. This serves to raise significant doubts as to its reliability and render his account of events less than probable, on the available evidence and on the balance of probabilities. The claimed lawfulness of the use of the outbuilding as a residential annexe for any reasonably substantial period of time has not been demonstrated. The third-party evidence relating to its history indicates that it has not actively been used for that purpose since 1982 and that, probably since 1997 and most likely since before that time, the indications are that any use it did have was abandoned. There is no evidence of any substance on the appellant's behalf to counter that version of events. I therefore go on to consider abandonment in more detail.

Whether residential use abandoned

27. I am mindful that Mr Barnes' evidence, for all that it casts doubt on claims as to the outbuilding's more recent history, nevertheless indicates that it was used for some time in the 1960s to the 1980s as a summer house and that it remained in situ up to 2015 when it was demolished. I do not rule out that it might have been possible to carry out refurbishments to it, within the footprint it then occupied, in order to resume a use as a residential annexe. It is therefore necessary to consider relevant planning case law in relation to abandonment in greater detail.

28. The broad principle established by *Hartley*[3] is that (in the words of Lord Denning) where a building or land *"remains unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned"*, the concept of abandonment applies. The courts have held subsequently that four tests are relevant: (1) the period of non-use; (2) the physical condition of the land or building; (3) whether there had been any other use; and (4) the owner's intention as to whether to suspend the use or cease it permanently. Application of these tests is a matter for judgement on the part of the decision-maker.

29. In this case, the available evidence indicates that any use as a residential annexe last occurred prior to 1982. Since then, the building's condition seems to have deteriorated, with no evidence of any ongoing maintenance. Its poor condition is borne out by the photograph of it in 2015. These factors point towards any use as a residential annexe having been abandoned. Countering that is the lack of evidence as to any other use to which the building was put and the lack of clarity in the evidence relating to the owner's intentions for it.

30. That said, there is no evidence before me to indicate that it had been maintained at any point with a view to an intended resumption of the use, if the intention had been merely to suspend it. The evidence is that, rather than being refurbished within its footprint, the outbuilding was demolished in its entirety and a significantly different new building erected in its place. The case

[3] *Hartley v MHLG* [1970] 1QB 413

of *Iddenden*[4] is authority for the view that a use cannot survive the destruction of buildings and installations necessary for it to be carried on.

31. In my view the weight of the evidence points to any intermittent use as a residential annexe from before 1982 having been abandoned rather than suspended pending an intended resumption of the use, notwithstanding how the appellant now portrays his intentions. The complete demolition of the building and its replacement with a significantly different new building amount to persuasive evidence that any remaining use rights as an annexe vested in the outbuilding as it then existed were in effect abandoned. Accordingly, on an objective fact and degree assessment, including in respect of evidence of the appellant's intentions, I conclude that any lawful use that the outbuilding might have had as a residential annexe has been abandoned.

Whether new dwelling would have been lawful

32. Given the presence of an enforcement notice in force and being mindful of the provisions of s285(1) of the 1990 Act, I accept that the question is to a large degree academic. The new dwelling is unlawful as a building. It was open to the appellant to appeal the notice and he has not done so. S285(1) provides that there is no other way under the 1990 Act to challenge a notice. He may seek to challenge the service of the notice but that is normally in any event a ground of appeal (s174(2)(e)) under the Act.

33. It is nevertheless pertinent to ask whether the new dwelling would have been lawful in so far as it may have continued a lawful use of the former outbuilding as a residential annexe. This is the premise under which it was erected and I deal with it on the basis that an alternative view might be taken that the use of the outbuilding as a residential annexe has somehow survived. If that were the case, it would be necessary to go back to the legislative provisions and consider the circumstances of its construction and size, layout etc. I go on to examine the evidence in relation to these matters.

34. The evidence shows that what has replaced the outbuilding is a detached bungalow of reasonably conventional internal layout, of significantly increased footprint (63 sq m as opposed to 22 sq m). In terms of its footprint, materials and appearance, it is a different building altogether from that which it has replaced. The dwelling has, on the Council's evidence, from the start been conceived and erected as a dwelling, for all that it is called an annexe, as opposed to having initially accommodated a use incidental to the enjoyment of the main dwelling. Permitted development rights under the provisions of Class E of Part 1 of Schedule 2 to the GPDO[5] do not apply to it nor do questions as to whether any change of use from a previous incidental use might not be material and therefore not amount to development.

35. Moreover, the evidence also indicates that a new plot has been formed in the rear garden of the original plot for the main dwelling. A clear plot boundary has been established across the former rear garden and access from the main dwelling to the newly created plot is now restricted. A separate pedestrian access has been created from the new dwelling to Coast Drive. In the circumstances, this would appear to amount to the creation of a new planning unit involving the subdivision of the main dwelling's original plot. The new

[4] *Iddenden v SSE* [1972] 26 P&CR 553
[5] The Town and Country Planning (General Permitted Development)(England) Order 2015 as amended.

dwelling would be used as living accommodation independently of and in addition to the residential use of the former main dwelling at no. 87. The appellant would live in the dwelling independently of any tenant in the main dwelling. There would be no functional link between the two.

36. By any measure, a material change of use of the appeal site has therefore occurred involving a new independent residential use on a separate plot. This amounts to development for which planning permission is required but has not been sought. Accordingly, in the circumstances of its erection, the replacement dwelling would be unlawful as any purported continuation of the use of the land as a residential annexe. The appellant could not benefit from an alternative view that the use had not been abandoned, given what has occurred.

Other Matters

37. I note the appellant's comments regarding his family circumstances, as well as other comments made regarding the planning merits of the development and in relation to the Parish Council's support for his case. A number of the objections against the replacement dwelling also raise planning merits considerations. However, for the reasons given above, these are not matters that I can take into account in an appeal of this kind.

Conclusions

38. I have concluded that any lawful use of the outbuilding as a residential annexe has been abandoned. For that reason, the new dwelling, if it purports to be a residential annexe continuing the lawful use of the land, cannot be lawful. An enforcement notice is in force in respect of the new dwelling, under which it is unlawful as a building, whose validity cannot be questioned. I have examined the circumstances of the erection of the new dwelling and I have concluded that it could not be lawful as a continuation of use of the land as a residential annexe even if a different view is taken on the question of abandonment.

39. In the light of this, I conclude that, had the Council refused to grant a LDC for the use of a building to the rear of the residential curtilage of 87 Coast Drive, Greatstone, New Romney, TN28 8NR as an annexe to the aforementioned property, that decision would have been well-founded. I conclude also that the new dwelling which replaced the building would have been unlawful even if a different view had been taken on this issue. I shall exercise accordingly the powers transferred to me under s195(3) of the 1990 Act.

C M Hoult

INSPECTOR