The Planning Inspectorate

Appeal Decision

No site visit required

by Simon Hand MA

an Inspector appointed by the Secretary of State

Decision date: 26 February 2024

Appeal Ref: APP/Y3940/X/23/3328012
The Annex, Kays Cottage, 489 Semington Road, Melksham, Wiltshire, SN12 6DR

- 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 Paul Williams against the decision of Wiltshire Council.
- The application ref PL/2023/02893, dated 2 May 2023, was refused by notice dated 1 August 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 the existing use as a dwellinghouse.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The Annex is an attached rear extension to No489 Semington Road. The appellant owns the annex and No489 as well as the adjacent dwelling, 489a. He argues that he moved into the Annex which he then used as his main residence while letting out Nos489 and 489a. The Annex is variously known as the Annex or Kays Cottage. The appellant says they are one and the same thing, but the Council consider Kays Cottage was sometimes used to refer to No489 itself. I shall therefore refer to the building in question as The Annex.

3. The question posed by the LDC is whether The Annex has been occupied as a dwelling for 4 years or more prior to the date of the application, May 2023, that is from at least May 2019. The appellant contends that he moved into the Annex in April 2017 when he began works to convert it into a separate dwelling.

Reasons

4. The Council do not dispute that No489 was rented out to tenants from at least 2018 onwards, they argue however, that does not tell us what was happening at The Annex. The appellant says the Annex was converted for separate residential use during 2018, when the connecting door to No489 was blocked-up and separate utilities were installed, as well as fencing to delineate a separate outdoor area. I don't think there is any dispute The Annex was converted into a dwellinghouse and was furnished and available for occupation for more than the required 4 years. There is also no dispute that the appellant lived in The Annex from time to time, but the Council argue his main residence was abroad and The Annex was empty for long periods. Again this is not

disputed by the appellant (except perhaps for the word 'long'), he did live abroad but also in England and when here he lived in The Annex. No-one else lived in The Annex in the meantime and it remained ready for the appellant to resume living there whenever he was in England. The only matter of substance between the parties therefore, and on which this appeal turns, is whether living in The Annex for periods of time is sufficient to demonstrate a material change of use to a dwelling.

5. The evidence from the statutory declarations is that the appellant lives in The Annex, but this is not in dispute. As far as I can se the only evidence for living abroad is a single page from an email to the appellant concerning his residential status for tax purposes. This is dated March 2020 and concerns the tax year 2019-20. The e-mail says is that he was a UK resident for 2017/18 and 2018/19. For 2019/20 because he stayed in the UK for more than 120 days during that period, has an accommodation tie here (The Annex) and stayed in the UK for more than 90 days in the previous 2 tax years he is considered resident for tax purposes.

6. It is not clear from the e-mail how long the appellant actually stayed in the UK in any of the years it mentions but it is quite clear from the e-mail, that the appellant himself considers his family home to be abroad. It seems to me there would not be a query about his residential status if he were not absent for considerable periods of time. If those absences had been just a few weeks at a time, such as for a holiday, or visiting relatives, then that would have been made clear, either in the e-mail or by the appellant subsequently. It is my view, therefore, on the balance of probabilities, the appellant was absent in 2019/20 for periods of time that are considerably more than de minimis and this is possibly the case also for the 2 previous tax years.

7. The question is, therefore, does this matter? The appellant refers to the judgement in Swale[1], which is the leading judgement in these issues. He quotes from the High Court judgement that, and I paraphrase here, unless there has been a clear-cut change in the planning circumstances, once a residential use has begun it continues through time. It notes that an occupier does not have to be continuously or even regularly present to establish an unbroken use as a dwelling.

8. However, the appellant does not refer to the subsequent Court of Appeal judgement that overturned the High Court. The Court of Appeal held that it was incorrect to consider the question of whether there had been a clear-cut change in planning circumstances, the key test is whether at any time the Council could have issued an enforcement notice. In Swale the Inspector failed to address the question of what was happening when the building was not physically occupied and whether the periods of non-occupation were more than de-minimis. The thinking behind this is that if the building was unoccupied for significant periods of time, even if it was capable of occupation, it would be difficult for the Council to allege a material change of use had taken place. A building with the characteristics of a separate dwelling need not be used for that purpose but could be used for a number of other purposes that did not amount to a material change of use, such as a granny annex, or staff quarters and so on. Consequently, if there are significant gaps of occupation then the Council may well not have been able to issue an enforcement notice alleging a

[1] Swale BC v FSS and Lee QBD 4.3.05 Evans-Lombe J s.288 & 289 [2005] JPL 1523 *and* CoA 17.11.05 Keene, Sedley, Chadwick LJs [2006] JPL 886

material change of use, the continuous use has not been demonstrated and the LDC cannot be issued.

9. This is quite different from the use of second homes for example, where that use has already been lawfully established, then Swale does not apply. But in the case of an unlawful use, such as the subdivision of a single dwelling into two, such as here, the unlawful use only subsists for as long as it is being actually carried out. Hence the concept of a 'continuous use' in Swale. Once the use ceases, because for example, the occupant goes abroad, the unlawful use reverts back to its previous lawful use, and the re-occupation, when the person returns, starts the clock again.

Other Matters

10. I do not need to deal with other matters raised such as the question of Council Tax, off-street parking, or the discrepancies in the red line on the plans as the lack of continuous occupation is determinative.

Conclusion

11. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of The Annex was 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 as amended.

Simon Hand

INSPECTOR