Appeal Decision

Inquiry held on 4 September 2012
Site visit made on 4 September 2012

by Paul Dignan  MSc PhD
an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 19 October 2012

Appeal Ref: APP/G5180/X/12/2173787
Cudham Frith, Cudham Lane South, Knockholt, Sevenoaks, Kent, TN14 7NZ.

• 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 Alan Robson against the decision of the Council of the London Borough of Bromley.
• The application Ref. DC/11/02295/ELUD, dated 15 July 2011, was refused by notice dated 13 December 2011.
• 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: Use of existing outbuilding for residential use.

Decision

1. The appeal is dismissed.

Reasons

Background and preliminary matters

2. Cudham Frith is a detached house set in a large plot. It has generous front and rear gardens, some woodland, stables and a paddock. The rear garden is laid to lawn with woodland edging. The building the subject of the appeal is just over half way along the rear garden near the southern boundary. It is about 70-75m from the main dwelling. Other buildings in the rear garden are a double garage near the appeal building and a pool building on the opposite side of the garden. The vehicular access to Cudham Frith runs along the southern side of the property. The main dwelling has a gravelled parking and turning area to the front. The access road continues on to terminate in a gravelled parking/manoeuvring area between the appeal building and the double garage.

3. The appeal building was originally built under planning permission for a single storey detached garage/workshop, replacing an older building. It was commenced in August 2005 under Council Ref. DC/04/03966/FULL6, dated 4 March 2005, but discrepancies between the building under construction and that permitted led to a further application incorporating the changes, Ref. DC/05/03927/FULL6, dated 23 December 2005. The garage/storage building was apparently completed in October 2005, although a completion certificate was not issued until February 2006. A few days after the completion certificate was issued works commenced on the conversion of the building to a small
dwelling to accommodate Alison Robson, the appellant’s daughter. Externally this involved the insertion of dormer windows into the roof. The conversion works were completed at the end of April 2006 and Ms Robson moved into the property in early May 2006. She has lived there since.

4. The appeal building, referred to as The Cottage, has a garage, bathroom, living/dining area and fully equipped kitchen on the ground floor, with 2 bedrooms and a bathroom on the first floor. There is access to the building through the garage, but the main external door leads onto a small paved patio area, bounded by a low box hedge but with direct access onto the lawn. Electricity, gas and water are provided from the main dwelling, but the building has separate telephone and broadband/satellite TV.

5. Planning permission DC/05/03927/FULL6 was subject to a condition that the building should not be converted to living accommodation. The Council issued a breach of condition notice on 7 July 2011 requiring the residential use to cease within 1 month. The LDC application was subsequently submitted and the breach of condition notice is in abeyance pending the outcome of this appeal.

6. The reason given for the Council’s decision not to grant a LDC was that the residential use had not subsisted, on the balance of probabilities, for more than 10 years continuously. The Council was of the view that the s171B(3) 10 year rule applied since the building had been built as a residential building and no change of use had occurred, in accordance with the recent Welwyn Hatfield judgement. Whether that was the correct interpretation of that judgement or not, having heard evidence that the building was used for a short time for storage purposes, the Council is no longer pursuing the reason given for refusal.

7. I set out the Council’s current stance below. In LDC cases it is open to the Council to change its position at appeal since I cannot in any case issue a LDC if I consider that the development is not lawful. The appeal is against the Council’s decision to refuse to issue the certificate, not against its reasons for so doing, the main issue being whether the Council’s decision was well founded. My decision rests on the facts of the case and on relevant planning law. The burden of proof in an LDC appeal rests with the appellant and the appropriate test of the evidence is the balance of probabilities.

The purpose of the application

8. It is not disputed that the appeal building has the ability to afford to those who use it the facilities required for day to day domestic existence, and hence can be described as a dwellinghouse in accordance with the test applied in Gravesham. In other words the main dwelling at Cudham Frith and the appeal building are physically capable of separate occupation.

9. However, what the application and appeal seek to establish is that there has been a change of use of the building from storage/garage use, in effect ancillary to the enjoyment of the dwellinghouse at Cudham Frith, to use as a separate dwellinghouse. Such a change of use would amount to development under s55(1) of the 1990 Act. Having commenced in May 2006 and continued uninterrupted since then, it would be subject to the s171B(2) 4-year rule and

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1 Secretary of State for Communities & Local Government and another v Welwyn Hatfield Borough Council (2011) UKSC 15.
immune from enforcement action after May 2010, and hence lawful at the date of the application.

Appraisal

10. The Council’s view is that the appeal building has not been used as a separate dwellinghouse. By reference to the first of the tests in Burdle\(^3\) for assisting in determining the appropriate planning unit, it considers that it remains within the same planning unit as the main dwelling. It contends that the main dwelling and the appeal building have as a single main purpose of the occupier’s use of the land the provision of residential accommodation to members of the same family.

11. The appellant argues that the Council’s reliance on Burdle is legally incorrect, by reference to the judgement in Moore\(^4\). That judgement endorsed the finding in Van Dyck\(^5\) that the concept of the planning unit had no part to play in a case where there has been a change of use from use as a single dwelling house to use as two or more separate dwelling houses under s55(3)(a). However, s55(3)(a) is concerned only with the use as separate dwelling houses of a building previously used as a single dwelling house, which is not the case here. It is submitted, nonetheless, that the principle, insofar as it related to the applicability of the concept of the planning unit, extends to the present situation. I disagree. Separate units of occupation were readily identifiable in Van Dyck, and in Moore following the application of the Gravesham test. The concept of the planning unit was redundant in Van Dyck because of s55(3)(a), but the judgement still makes it clear that the purpose of the concept is to decide whether or not there has been a change of use, which is what is at issue here.

12. The appellant also argues that the identity of the occupier of the appeal building is not relevant to the question of whether it is being used as a separate dwelling. I have been referred to an appeal decision\(^6\) which set out the circumstances in which a relative’s use of a caravan stationed within a residential curtilage might involve a material change of use. This was no more than a hypothetical scenario, but in essence the Inspector was saying that there could be circumstances where a material change of use might occur even though the occupier was a relative, not that the identity of the user was irrelevant, nor that it was the facilities provided by the accommodation that determined whether a separate dwelling had been created.

13. It is not unusual for large properties to have ancillary residential accommodation, even self contained, and whether a building is being used as a single dwellinghouse is a matter of fact and degree. In my view this requires effective physical and functional separation. Relative to the size of the rear garden, the appeal building is not particularly distant from the main dwelling, and its position along the garden edge in a cluster with the double garage, along with its close relationship with the open lawned area, makes it appear far more as an integral part of the residential property than as a separate dwelling house. Such close proximity to the rear lawn, where a high degree of privacy would be expected, would be likely to be unacceptable in residential amenity

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3 Burdle v Secretary of State for the Environment (1972) 1 WLR 1207.
terms if the building was not occupied by a family member. In this case the occupier of the appeal building is the daughter of its owners and is living there on a relatively informal basis. Rent is being paid, but there is no formal tenancy agreement, nor is there any separate metering of utilities, Ms Robson paying a set proportion of Cudham Frith’s utility bills. She stables her horse in a separate part of the property, which involves crossing the garden or the patio immediately to the rear of the main dwelling, and uses the Cudham Frith driveway for access to the appeal building. The appeal building does not have a separate TV licence or post box, and Mr Robson or Mrs Robson complete the electoral roll for the overall property. The building is now separately rated for Council Tax purposes, but as I understand it this only came about as a result of the planning investigations. The building was converted for residential use solely in order to accommodate Ms Robson.

14. Taken individually, none of these factors would inevitably lead to the conclusion that the building was not being used as a separate dwelling house, but cumulatively they are strongly indicative of the use of the building as living accommodation ancillary to the main dwelling at Cudham Frith. In my view the close proximity of the appeal building to the garage and rear lawn and main dwelling places the building squarely within the residential curtilage of Cudham Frith, so that its use for purposes incidental to the residential use of Cudham Frith would fall with the ambit of s55(2)(d) of the Act. Overall, I consider, as a matter of fact and degree, that the use of the appeal building to provide residential accommodation for a family member, even on the reasonably independent basis claimed, is use for a purpose incidental to the enjoyment of the dwellinghouse at Cudham Frith. It is not necessary to invoke the concept of the planning unit, but in effect the appeal building is part of the same planning unit as Cudham Frith, which is occupied by the Robson family for domestic residential purposes. I conclude that the use of the appeal building by Ms Robson does not involve development as described in s55(1) of the 1990 Act. For this reason I consider that the granting of an LDC for its use as a separate single dwelling house is not warranted.

15. Accordingly, having considered all other matters raised, I conclude that the Council’s decision to refuse to grant an LDC on the terms applied for was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me under section 195(3) of the 1990 Act as amended.

Paul Dignan

INSPECTOR
APPEARANCES

FOR THE APPELLANT:

Lee May
   He called
   Alan Robson
   Alison Robson
   David Moore
   M D Exeter

Solicitor, Brachers LLP
The appellant, Cudham Frith
Cudham Frith
Builder
Planning Consultant

FOR THE LOCAL PLANNING AUTHORITY:

Greg Ullman
   He called
   Peter Wilson

Solicitor, London Borough of Bromley
Planner, London Borough of Bromley

DOCSUMENTS

1. Council’s letter of notification of the Inquiry
2. Application Plan
3. Replacement Plan AR1
4. Bundle of legal cases and appeal decisions relied upon by the appellant
5. Appeal decision APP/P1615/C/08/2075254