
Appeal Decision

Inquiry held on 24, 25 and 26 January 2017

Site visit made on 26 January 2017

by Wendy McKay LLB Solicitor (Non-practising)

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

Decision date: 11 April 2017

Appeal Ref: APP/R3705/X/16/3147355

Lake House, Bakehouse Lane, Whitacre Heath, Nether Whitacre, Warwickshire, B46 2EB

- 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 and Mrs Nicholas Horton against the decision of the North Warwickshire Borough Council.
- The application Ref PAP/2015/0307, dated 21 May 2015, was refused by notice dated 2 October 2015.
- 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 use of the Lake House, Bakehouse Lane, Nether Whitacre as a single dwelling house.

Summary of Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Decision.

Main Issue

1. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development (LDC) was well-founded. In reaching a conclusion on that issue, it is necessary to consider first, whether the 4 year or 10 year rule under s.171B of the 1990 Act is applicable in terms of assessing the relevant immunity period and, secondly, whether the development is immune from enforcement action though the passage of time and thereby lawful by virtue of s.191(2)(a) of the 1990 Act.

Background matters

2. At the Inquiry, the evidence was taken on oath.
3. Neither the identity of the Appellants, nor the planning merits of the operation, use or activity is relevant to the purely legal issues which are involved in determining an LDC appeal. The onus of proof in an LDC appeal is on the appellant and the relevant test is "*the balance of probability*".
4. The Appellants' own evidence does not need to be corroborated by "*independent*" evidence in order to be accepted (*FW Gabbitts v SSE and Newham LBC [1985] JPL 630*). If the local planning authority has no evidence of its own, or from others, to contradict or otherwise make the Appellants' version of events less than probable, there is no good reason to refuse the

appeal, provided the Appellants' evidence alone is sufficiently precise and unambiguous to justify the grant of an LDC "*on the balance of probability*".

The Statement of Common Ground

5. The Statement of Common Ground (SCG) dated 23 January 2017 sets out the matters upon which there is common ground between the Council and the Appellants and identifies those areas where disagreement lies. It includes the following matters:

The Planning History

6. Planning permission¹ was granted by the Council on 11 March 1998 to "*enlarge existing fishing pool*" at the site. Condition 7 of that permission required details of the design and materials of a shelter to be erected on the land to be approved in writing by the Council prior to its construction. The details of the shelter were discharged on 24 September 1998. The approved details were for a Curdale type wooden structure 5.5m wide, 4.2m deep and 2.7m high to the ridge.
7. The parties agree that the existing dwelling house measures 3.6m to the ridge but the Council accepts that it has no evidence of its own to contradict the Appellants' claim that, in extending the building, they did not increase its height.
8. The Council's Committee Report for the LDC application was written by a professional planning officer who assessed it against the 4 year rule under s.171B(2). The report recommended approval of the application and the grant of an LDC on the basis of satisfying the 4 year immunity period. However, the application was refused by the Council on the ground that: "*The applicant has not discharged the burden of proof that, on the balance of probabilities, the Lake House has been used continuously as a residence for a period of 4 years prior to the application date*".

The Appeal Site

9. The appeal site forms a roughly rectangular parcel of land located towards the end of an informal access track off Bakehouse Lane. It predominantly comprises a fishing lake. The remainder consists of the appeal building, patio area, paved pathway and storage shed. The appeal building measures 8m wide, 7m deep and 3.6m high.

The Absence of Concealment

10. The parties agree that there have been no attempts made by the Appellants to conceal the appeal building since the purchase of the site in 2009.

Building works

11. It is agreed that the appeal building has been capable of permanent residential use from 2009 and for at least 4 years prior to the date of the LDC application.

Matters in dispute

12. The matters in dispute are:

¹ Ref: 0123/98/FAP

- Whether, on the balance of probabilities, the Lake House has been used continuously as a residence for a period of 4 years prior to the application date.
- Whether the appeal building, itself, is a different building to that approved under Condition 7 of planning permission 0123/98/FAP in 1998 and whether the 4 year or 10 year period provided for under s.171B applies.

Reasons

Whether the 4 year or 10 year period provided for under s.171B is applicable in terms of assessing the relevant immunity period

13. The Council submits that the building the subject of this appeal has not been converted into a dwelling. It contends that the extent and circumstances of the relocation and works carried out to the original shed instead created a new building. That new structure was used from the outset as a dwellinghouse so that there was no change of use to use as a dwellinghouse and the breach of planning control is subject to the 10 year immunity period in s.171(B)(3), rather than the 4 year period in s.171(B)(2).
14. The Council draws support for this proposition from the case of *Welwyn Hatfield Borough Council v SSCLG [2011] UKSC 15*. That case is referred to in the 2013 edition of 'Planning Enforcement' by Richard Harwood QC which states, in relation to s.171B(2), that: "*Subsection (2) relates solely to the change of use of a building and so the building must have been in a non-dwelling house use prior to the change. Consequently, if a building is constructed as a dwelling house and put to that use there is no change of use of a building to use as a dwelling house. The four-year time period in subsection (2) does not apply and the use of the building is subject to the ten-year period in subsection (3)*".
15. The Appellants recognise that this book might provide a helpful guide but do not accept that Mr Harwood is the leading authority upon planning enforcement or that his succinct and summary observations could alter the purport of the *Welwyn Hatfield* judgment.
16. It is, of course, that judgment, itself, that must be interpreted and upon which I rely in reaching my conclusions. Turning to that case, Lord Mance, at paragraph 17, states: "*Protection from enforcement of a building and its use are thus potentially very different matters....The building attracts a four year period for enforcement under sub-s (1), while its use attracts, at any rate in theory, a ten-year period for enforcement under sub-s (3).*" Lord Brown, at paragraph 68, agrees that: "*s.171B(2) is simply not apt to encompass the use of a newly built house as a dwelling house and the nil use concept provides no coherent escape from this conclusion.*" In my view, Mr Harwood's summary represents a fair reflection of the principle that can be derived from these obiter comments made in the *Welwyn Hatfield* case.
17. It is therefore necessary to consider whether the package of measures involved in the relocation and extension of the structure amounted to the creation of an entirely new building. For the Council, the proof of evidence of its senior enforcement planner, Mr Gittins, puts forward four points in support of the contention that the appeal building is a different one to that approved in 1998, namely, (1) it has been relocated; (2) it is larger in footprint from that approved; (3) it is of a different construction and (4) the motive of the Appellants.

18. On the first point, the Appellants do not deny that the building was relocated before it was extended or any other works were undertaken to it. There is a degree of uncertainty as to the precise extent of that relocation. Mr Horton, in his statutory declaration, stated that he moved it about 1.8m closer to the lake. In cross-examination, he explained that he had arrived at such a precise estimate as he had measured it with a tape measure after the LDC application was submitted. However, in examination-in-chief he stated that it was moved "*a couple of metres, perhaps a little more*". There were also varying distances given by other persons providing evidence on his behalf in their statutory declarations. It was apparent at the site visit, when comparing the position of the new structure with the old hardstanding on which it had been sited, that it had, indeed, been moved somewhat further than Mr Horton had stated in his evidence, certainly more than a couple of metres.
19. At the Inquiry, Mr Horton confirmed that it was moved by means of a digger and skate rollers which had been hired for that purpose. The work involved in relocating the structure required more than one person. To prepare the new location, the loose soil and mounds were cleared with a digger before slabs were laid down upon which the structure was placed.
20. It is clear that the process of relocating the structure was extensive, skilled and intricate. The works involved in re-siting the building cannot be regarded as de minimis. The old structure had been in place for over a decade before it was moved in 2009. The Council does not seek to suggest that it should not be regarded as a building for planning purposes, even though it was physically capable of being moved. Although the relocation process involved an engineering operation which would have required planning permission, no enforcement action was taken by the Council at that time, or since, in relation to those works which are now immune from enforcement action.
21. On the second point, the Appellants accept that the footprint has been enlarged in that an extension has been added to the rear of the building. However, there was no alteration to the footprint of the original structure; there was only an, albeit substantial, addition to the rear. The SCG confirms that the Council now accepts that there has been no change to the height of the structure.
22. On the third point, the Council draws support from the other changes which have taken place to the original shed. It refers to the installation of cavity wall insulation; additional windows; service connections and internal residential accommodation including a loft/attic together with the transformation of the internal layout.
23. The Appellants acknowledge that certain works by way of extension and modification of the shelter occurred including the introduction of additional windows, cavity insulation, the wiring of the property, and the introduction of a bathroom, kitchen, lounge, attic bedroom and master bedroom which were completed in late July/early August 2009. Nevertheless, Mr Horton gave clear evidence to the effect that the attic was an original feature and the changes to the fenestration were limited. Apart from the rear extension and fenestration, the works carried out were for the most part internal and the timber sides and roof of the original structure by and large remained in situ.
24. On the fourth point, Mr Gittins confirmed in his evidence that the question of motive on the part of the Appellants was strictly irrelevant to the questions before this Inquiry. The Council did not identify any statutory law, policy or

authority that indicated that there was any relevance to the issue of intention in the context of this appeal. The SCG confirms that the Council does not pursue its case on the basis that the Appellants attempted at any point to conceal the appeal building.

25. Turning to the various steps involved in the 'package of measures' as a whole, the position is that the shelter that existed at the time the Appellants acquired the site was first moved closer to the lake and placed upon slabs. The structure was emptied pre-location and following its relocation, the works to extend it began as soon as it was moved or very shortly thereafter. Whether or not it was ever actually used as a shelter once it had been moved, the available evidence indicates that it was capable of being physically accessed by anyone who sought to use it for that purpose and it was not prevented from being so used either by the extension or other works that were being undertaken by the builders.
26. The 1998 planning permission did not impose any planning condition restricting the siting of the shelter within the plot. I do not consider that the engineering operation involved in relocating the building resulted in the loss of its extant lawful use as a shelter associated with the fishing lake. The building did not undergo any change of use simply due to its change of position within the same planning unit and its placement upon a slab/concrete base. The works subsequently undertaken either in their own right or in combination with the relocation did not, as a matter of fact and degree, result in the creation of an entirely new building. In my opinion, they amounted to no more than the alteration and extension of the original structure. There was a change of use of that building from its lawful purpose when the dwellinghouse use began after those works were completed. This is a different situation from that which pertained in the *Welwyn Hatfield* case which can be distinguished on its facts.
27. I conclude, as a matter of fact and degree, that the 'package of measures' did not result in the creation of an entirely new structure. The old shed has been altered and extended and undergone a change of use to use as a single dwellinghouse. Since there has been a breach of planning control consisting of the change of use of that building to use as a single dwellinghouse the 4 year period provided for under s.171B(2) is applicable in terms of assessing the relevant immunity period.

Whether the development is immune from enforcement action though passage of time and thereby lawful

28. It is therefore for the Appellants to demonstrate that, on the balance of probability, the change of use of the building to use as a single dwellinghouse has existed for a period in excess of 4 years prior to the date of the LDC application and continued actively throughout the following 4 year period. There can be no 'dormant' periods in the 4 year period. The Appellants must show when the change of use first occurred and demonstrate that it had continued actively throughout the relevant period, to the extent that enforcement action could have been taken against it at any time.
29. The change of use of the building to use as a Class C3 dwellinghouse would only have arisen at the time when the works were substantially complete so as to make it a structure capable of providing the facilities required for day-to-day private domestic existence and it was so used for that purpose.

30. There is no dispute that the appeal building has been capable of permanent residential use since the works were carried out in 2009. Mr Horton gave evidence as to his involvement in the external and internal works carried out to the shed. This was supported by statutory declarations and evidence from tradesmen who provided detailed accounts and invoices for work undertaken at the site. There is also photographic evidence to show the interior and exterior of the structure at that time. There is clear and cogent evidence to the effect that, after the carrying out of the works to the shed in 2009, it was capable of providing the necessary facilities required for day to day private domestic existence.
31. The Council still expresses doubt that the single dwellinghouse use actually commenced prior to May 2011. It draws support from the fact that the building was not connected to conventional services from the outset. The structure was not connected to the water supply until December 2011 or to the mains electricity and telephone until 2012. The gas connection was not provided until summer 2013. The Appellants did not register the property for a TV licence until November 2012, or as a postal address until November 2013. The registration for Council Tax did not take place until July 2015, albeit that it has been backdated and paid as from 2009/2010.
32. The Council suggests that this pattern of connection to, and registration for, services is more consistent with a gradual escalation of the use rather than a "*clean start*". It also points to the absence of contemporaneous documentary evidence such as receipts for the furniture which the Appellants claim was installed in 2009. It submits that the Appellants may have "*camped out*" in the cabin on occasion, rather than the dwelling having been created and lived in before the relevant date in May 2011.
33. The Appellants have provided evidence to the effect that, prior to the installation of mains electricity and Calor gas tank, the property was served by a generator which is presently stored in a shed on the site. Mr Horton asserts that, at the outset, this level of provision was sufficient for his needs. The e-mail from Gas Centre Ltd confirms that in 2009 Bayliss Ltd (now Gas Centre Ltd) assisted him with the fittings for the filtration system to serve the property. They also state that once the works were complete in 2009, they started to provide Mr Horton with about ten 47kg propane gas cylinders per year at the lake up until about 2013 to provide fuel for heating the property. The use of cylinders ceased when he had a more permanent Calor gas tank installed outside the building.
34. The drinking water was initially pumped from the lake and was filtered using a system purchased from East Midlands Water Company. Pumped water was also used for flushing the toilet prior to the mains water being connected. The Appellants have provided a copy of the order for the water filtration unit from East Midlands Water dated 8 July 2009.
35. At the Inquiry, Mr Horton also explained that he used bottled water for drinking prior to the installation of the mains water. He stated that the reason for delaying the installation of the main electricity was due to the cost and his available funds at that time. He informed the Inquiry that an operation to his lower back meant that he was absent from the site for a few months and that the use of the building fell significantly in 2015 and 2016 in response to the unwelcome attention sparked by the LDC application. The Council complains

that this new oral evidence had not appeared in his proof of evidence and that these new points have the effect of seeking to '*explain away*' shortcomings in his evidence. Whilst this new evidence may indeed have that effect, it was given on oath and I find no reason to doubt the truthfulness and honesty of what was said by Mr Horton on these matters.

36. Even though mains services were not connected at the start of the period of occupation claimed by Mr Horton, the use of a generator, gas cylinders, water bottles and water filtration system would have enabled the residential use to take place. I consider that the Appellants have provided a reasonable and plausible explanation for the delay in the connection of the property to the mains services. The same applies to the reasons given for the delay in registering the property for a TV licence, Council Tax and as a postal address. It is clear that the actual use could have commenced at an earlier time and the delay in connection provides little basis for the supposition that the Appellants were only "*camping out*" in the building prior to the relevant date.
37. Turning now to the question of the extent of the actual use made of the building as a dwellinghouse and the continuous nature of its occupation, the Council, in its closing submissions, acknowledges that its professional witness, Mr Gittins, agreed in cross-examination that, should the 4 year immunity period be found to be applicable, there were no breaks in that immunity period so as to defeat the continuous use as a single dwellinghouse. Nonetheless, the Council still puts the Appellants to proof in respect of whether they have discharged the legal burden of proof that is upon them in that respect.
38. Mr Horton's evidence is that when he first purchased the site, it was his intention to use the dwelling for occasional breaks. Due to security concerns at the site, there was a need for him to stay at the premises overnight on a more regular basis. He submits that once the dwelling became habitable in 2009, he began to stay on a regular basis predominantly from Wednesdays to Sundays. He spent the rest of the time at his property in Sutton Coldfield with his wife and children. The pattern of Mr Horton's residence was initially varied with some stays being shorter and some longer. He owns four businesses in the Midlands and has meetings that require him to be in a variety of locations. This has sometimes meant him residing at the Lake House outside his '*regular pattern*'; on the other hand he has sometimes needed to stay with his wife in Sutton Coldfield. The arrangements were not always fixed and varied according to the weather and work patterns. However, he confirmed that, on the whole, he would stay at the Lake House three or four times a week, for most weeks of the year.
39. Mr Horton's residency at the Lake House has been corroborated by his wife, friends, family and tradesmen with varying levels of supporting evidence including, in some cases, evidence on oath, statutory declarations, receipts and photographs.
40. The evidence of Mrs Horton both in her statutory declaration and in oral evidence to the Inquiry, confirms the security issues at the lake which she claims led to her husband residing at the Lake House. Mrs Horton also describes the pattern of her husband's living arrangements at the Lake House and that she considers this to be his main residence. Mrs Horton kept a diary in 2013, 2014 and 2015 which provides a record of events, notes and appointments. Her diary entries evidence some of the sustained periods of

time that Mr Horton has spent at the lake and the frequency of the visits/overnight stays by Mrs Horton and the children over a two year period. Mrs Horton has also submitted a series of photographs taken at the Lake House between May 2011 and August 2014 which provide evidence of time spent at the property over that period.

41. The Council acknowledges that Mrs Horton's diary entries provide contemporaneous evidence as to the extent of the use of the building. However, it points out that this only began in 2013 and the entries lend no support to the period before then. That is, indeed, a clear shortcoming of the diary entries but they still provide a consistent record of a pattern of residency that corresponds with and supports her oral evidence of the usage made in the unrecorded earlier period.
42. The evidence of Neil Spittle, the gardener, in his statutory declaration and as confirmed by his oral evidence to the Inquiry, is that he first visited the site in the summer of 2009. During the summer months since then he has visited the site every two weeks to undertake gardening work. His visits varied between mornings, afternoons or a full day. He stated that Mr Horton was usually there when he carried out the gardening and he advised him on what work needed to be done. Mr Horton was there to let him in about 80% of the time but otherwise he entered the grounds with a key that he has been provided with. Mr Horton supplied him with tea and coffee and sometimes a bacon sandwich when he was around.
43. In cross-examination, he confirmed that his view that Mr Horton was living at the Lake House was based upon what Mr Horton had led him to believe rather than his own personal knowledge. There are obvious limitations to that which can be attributed to his own personal knowledge of the precise nature of Mr Horton's occupation. Nonetheless, what he observed and experienced during his frequent and regular visits to the site is consistent with the Appellants' version of events.
44. Mr Tom Badger, a former police officer, is a friend of the family. Mr Badger gave oral evidence to the Inquiry to the effect that he had made social visits to the property and had stayed overnight in the cabin once in either 2011 or 2012. He slept in the attic space which was in existence but contained no beds at that time.
45. The statutory declaration and oral evidence of Janet Turner, Mr Horton's sister-in-law, also confirms the Appellants' initial security concerns in relation to the lake. She stated that it was some time in 2009 when Mr Horton decided to live there. Since 2009, she has visited the lake on special occasions such as birthdays and also on the odd Sunday. In total, she has visited about six times a year and for the majority of her visits she did not stay over. She visited most frequently between 2009 and 2010 before she moved to Shropshire. She has provided photographic evidence in the form of some 26 photographs taken on 3 July 2011 and 18 February 2013.
46. The Appellants have submitted statutory declarations of friends and family to show that the dwellinghouse and its immediate setting have been used for social activities associated with the domestic use of the building during the relevant period. They also draw support from the statutory declarations and oral evidence of Mr Spittle, the gardener, and the statutory declarations of Mr Turvey, the electrician, together the evidence of Mr Hollins and Mr Williams,

tradesmen of Sparta Construction, that the dwelling and its immediate surroundings have been continuously maintained and/or improved since 2009.

47. All in all, there are a number of statutory declarations made by various individuals submitted in support of the Appellants' case. This evidence does not attract the same weight as the oral evidence given by witnesses to the Inquiry, as it has not been tested by cross-examination. Whilst recognising the limitations of evidence given in this form, it must be given due weight as a solemn declaration under the Statutory Declarations Act 1835 with all that that implies. These statutory declarations provide some, albeit modest, support for the Appellants' case.
48. The Council submits that none of the witnesses called to give oral evidence to the Inquiry on behalf of the Appellants could be characterised as independent witnesses since they are either family members or friends or had an ongoing business relationship with Mr Horton, as in the case of Mr Spittle. However, the Appellants' witnesses gave evidence on oath that was tested by cross-examination. In the absence of contradictory evidence, there is no reason to suppose that their evidence was given other than in an impartial and conscientious manner, or that their recollections should be disbelieved.
49. I shall now consider the scope and value of any such contradictory evidence before the Inquiry. The Council called three local residents, namely, Mrs Debra Starkey, Mrs Beverley Woollaston, and Mr Steve Young, in addition to Mr Peter Gittins, to provide evidence contrary to the Appellants' case. The local residents did not seek to suggest that Mr Horton was never present at the site but their recollection of the frequency of his visits was not in-keeping with his stated case that he spent most of the week living there.
50. Mrs Woollaston lives about two miles from the site in Lea Marston but she owns stables and land in Bakehouse Lane. The only access to Lake House is off Bakehouse Lane and onto the farm track which is adjacent to her stables. She is very aware of any vehicles driving down the track and is suspicious of vehicles that she does not know. She is at the yard every morning arriving anytime from 6am to 8.30am depending on her plan for the day. She is often at the yard all day maintaining the land, fencing and buildings. She goes "poo-picking" in the paddocks in the evenings, even when it was dark with the use of a head torch. In so doing, she would have had a clear line of sight towards the Lake House. She is sure that, if it had been illuminated, she would have noticed it but she had never seen any lights on.
51. She first spoke to Mr Horton in 2012, when the works to the access track were carried out in order to connect the water supply to the Lake House. On that occasion, he told her that the Lake House was a retirement project; a place where he could look forward to spending time relaxing and fishing the lake. Mrs Horton told her that she liked to occasionally stop there overnight with her sister to paint and enjoy a bottle of wine.
52. Although she has seen Mr Horton arrive on the odd occasion and walking his dogs, she has never had any reason to think that he was living at the Lake House. She had always assumed that he was just enjoying spending time maintaining and fishing the lake. She walks past the Lake House most days as, when she finishes the stables, she takes her dog for a walk before going home. She maintained that had Mr Horton been living there then she would have witnessed it.

53. However, in cross-examination, she acknowledged that the land and buildings of Mr Duffy, who has provided a written statement to the effect that he had seen Mr Horton at the fishery a few times a week from 2009, was closer to the Lake House than her own property. She did not recall the building works being carried out to the shelter in 2009 and she agreed that she could not see into that building from her stables.
54. Mrs Starkey has lived at Bakehouse Barn, Dingle Lane, Nether Whitacre since January 2001. Her property lies within a few hundred metres of the appeal site. There is a public footpath which runs between her garden and paddocks and links up to another footpath which runs close by the fishery. Her initial contact with Mr Horton was in 2009 but her sightings of him since then have been limited. Since 2011, when walking past the fishery, she has observed that the main metal farm gate with razor wire has always been locked and it appeared to her to have been locked from the outside. When walking past the property she has only seen Mr Horton once in that period, in August or September 2015, when he was returning from walking his two husky dogs. On all other occasions, the main gate has been padlocked from the outside.
55. During her walks nearby and along the lanes she has not seen Mr Horton on the local footpaths since 2011 and she has only seen him at most on five occasions in the adjacent lanes. Three of those sightings were in the summer of 2015. She has also not seen Mr Horton on Dingle Lane, except for one occasion. She produced photographic evidence to show that she could see into the site from the footpath which runs near to the eastern boundary.
56. She also gave evidence in relation to Mr Horton's visit to her house when it was up for sale in September 2012. He explained that the reason he was interested in buying her house was because of its proximity to the fishery. She understood from what he said that, if he lived in her house, it would enable him to maintain the fishery and monitor its security. At no point did he say or suggest that he already occupied the fishery permanently or occasionally. Either Mr Horton or his wife told her that they lived in Sutton Coldfield and that they did not need to sell their house in Sutton Coldfield in order to buy her house as they had funds from elsewhere. She was later advised by the estate agents that the Hortons did not intend to pursue the purchase. She does not accept that Mr Horton has lived continuously at Lake House and finds it most surprising that she has seen him so infrequently, if he is living there.
57. In cross-examination, Mrs Starkey conceded that she had no recollection of the building works being carried out to the structure in 2009 and that there was no direct line of sight from her dwelling. Although she told the Inquiry that she had not seen Mr Horton's motorcycle, she subsequently recalled that the presence of motorbikes on the land had caused her to visit the site one evening after the hours of darkness. She also recognised that her contention that she would be aware of traffic passing her property going to the Lake House would not arise, if that traffic proceeded from the north via Bakehouse Lane and entered the track that way. That was her explanation for not having noticed the other motor bikes until they were on the site and, as the Appellants point out, the same approach must apply in respect of other vehicular traffic.
58. As regards the occasion in 2012 when Mr Horton came to her property, that conversation took place some four and a half years ago and there is no contemporaneous note or other documentary record which she made at the

time to recall its contents. In cross-examination, she very fairly accepted that the conversation simply did not extend to whether Mr Horton did or did not live at the appeal property or cover similar ground. I do not find her recollection of that meeting to be of much assistance in this case. The same applies to Mrs Woollaston's recollection of her first meeting with Mr Horton in 2012, and the fact that he did not convey to her the information relating to his residency at the Lake House.

59. Mr Steve Young has lived at Pear Tree Cottage, Bakehouse Lane since December 2011. His property is located about 50m from the entrance to the track which leads to the Lake House. He walks his dog past the Lake House most mornings and evenings. His evidence is that from December 2011 to October 2015, there have been no vehicles present, apart from a few occasions. He and his wife have kept a note for the three month period from 13 April 2015 to 7 June 2015. During that period, either himself, or his wife, walked their dog past the Lake House each morning and evening. He states that there were no vehicles and the timber gates to the Lake House were always locked with a hasp and staple and the padlock was in the locked position. The metal gates were locked with the chain and padlock facing outwards. He submits that no-one could have been living there at that time unless they were able to climb back over the gate to lock or unlock the padlock.
60. In addition, for the seven weeks from 3 June until 25 July 2016 between 7am and 10pm he has taken a photograph each time he has walked past with his dog and there has been no sign of anyone living there. From 24 July until 9 December 2016 he has placed a small twig resting on the metal gates to indicate if anyone has entered. As well as the photographic evidence, he has kept a daily walk log. He contends that, apart from the gardener working there most Mondays, the only other visits have been about twice a month from which he concludes that no-one is living at the Lake House.
61. In cross-examination, he confirmed that he did not keep any notes or other record of his walks past the site for the period from December 2011 until 12 April 2015. The relevant immunity period for the purposes of this appeal is the period prior to the date of the application, namely, the 21 May 2015. Mr Horton acknowledges that the use of the Lake House fell significantly in 2015 and 2016 following the submission of the LDC application. The Council does not, as part of its case, assert abandonment of a lawful use once that status had been achieved. The Appellants seek to explain Mr Young's twig observations by suggesting that it was placed on the side of the metal gate that remains shut whilst vehicles, other than large delivery vehicles, are going in and out. This is disputed by Mr Young. However, given the dates when this exercise was undertaken, whatever can be deduced from the placing of the twig on the metal gates does not having a direct bearing upon the lawfulness of the single dwellinghouse use.
62. There is also a letter from Stephanie Dunbar who has a smallholding adjacent to the access track which leads to the appeal site. Like Mrs Woollaston, she is at the smallholding on a daily basis and concludes that Mr Horton has not been living at the premises during the relevant period given the lack of activity that she has observed. There are letters from other local residents which pursue a similar theme. However, neither they, nor Stephanie Dunbar, attended the Inquiry to give evidence on oath and what is said in these letters has not been

tested by cross-examination. As such, only limited weight can be attributed to them and the oral evidence of others which has been given on oath must be strongly preferred.

63. The Council's witnesses were unable, as a matter of fact, to assert from their own personal knowledge that Mr Horton had not been in occupation during the relevant period. The basis for their opposition to the LDC application is that they have seen little or no evidence of residential occupation during that time. However, it seems to me that Mr Horton has provided reasonable and plausible explanations for the lack of obvious manifestations of his physical presence and residential occupation of Lake House. For example, the relatively secluded nature of the dwelling and the fairly low-key and inconspicuous nature of his occupation. Although witnesses had not seen any lights on at the property, there are factors such as its orientation and the existence of internal blinds and roller shutters that can reasonably account for this. Mr Horton explained that the property has both blinds and exterior shutters which would preclude any light being emitted so as to indicate any activity within. Those blinds were installed at a relatively early stage with that in the main bedroom at the rear of the property that is orientated towards the nearby public footpath being installed almost immediately.
64. In relation to the absence of sightings of Mr Horton when dog walking, he explained at the Inquiry that he does not always take the dogs with him to the Lake House. When he does take them with him, the large grounds of the property are usually sufficient to allow him to let them run round without the need to take them for a walk. When they are occasionally taken for a walk outside the fishery that is generally on the fields that are located to the west and north of the site. In the light of his explanation as to the presence and manner in which the dogs are kept and exercised when on the site, I do not find that this aspect of the Council's evidence materially undermines the Appellants' case.
65. The Council's lay witnesses conceded in cross-examination that they could not categorically rule out the Appellants' case. They also agreed that their interest in the site effectively arose in response to the LDC application. There was no reliable evidence that they had paid any real attention to the lake, the fishing shelter or the converted building, until 2015/16. For example, Mr Young's notes, log and photographic evidence arises during the period after 12 April 2015, and no such formal records are available for the period from when the Appellants' claim the use commenced in 2009 until that date. There is also a remarkable lack of notice and knowledge on the part of Mrs Woollaston and Mrs Starkey of the building works that were carried out in 2009.
66. The Council draws support from Mr Horton's evidence, and that of its own witnesses, in relation to the locking of the gates. During cross-examination, Mr Horton indicated that, if the gates were padlocked then he was not present. However, confusion has arisen in relation to the correct interpretation of that response, largely as a result of there being two sets of gates at the entrance to Lake House. Although I appreciate how a misunderstanding on the part of the Council could easily have arisen, from my own notes and recollection of what was said I am satisfied that that particular statement was made in respect of the inner wooden gates and not the outer metal gates.

67. The Council also queries Mr Horton's stated practice of locking the metal gates and leaving the padlock on the outside, even if he was still on the site. It submits that it would be surprising if the gates were to be locked in that way giving the impression to people that no-one was there and that a more straightforward inference from the fact that the main metal gates were locked on the outside is that, at those times, no-one was present on the site. However, it seems to me that Mr Horton provided a plausible explanation for adopting this practice, namely, for security reasons and to avoid being unnecessarily disturbed whilst in residence, for example, by those seeking to fish. This action is consistent with his acknowledgement that it was the locking of the inner gates that signalled his absence from the site.
68. The Appellants also place reliance upon the available records showing usage of utilities. They have submitted numerous power electricity bills dating back to May 2013 and the evidence of their planning consultant, Joanne Russell, includes a table which provides a summary of the electricity bills and the dates of electricity usage. The evidence also includes a utility bill from Severn Trent Water Ltd to show usage of water between 15 October 2014 and 1 April 2015.
69. The Council is critical of the low level of electricity usage that is revealed, given that Mr Horton's evidence is that he lived at the cabin most of the week, almost every week of the year. The Council contends that having regard to the array of electrical goods on display in some of the photographs, one would expect the electricity usage to be higher than is presented in the bills. Although the usage of utilities does indeed appear small, this has to be considered in the light of the fact that the Lake House building is a small structure, which has been inhabited by just one person for most of the time, and that gas has been used as an alternative energy source. I do not consider that the level of electricity usage casts doubt upon the credibility of the Appellants' evidence of residential occupation.
70. In conclusion, the Appellants have provided cogent and consistent evidence setting out the timing and nature of the works carried out in 2009; the commencement of the use in 2009 and the continuation of that use thereafter for a period well in excess of four years. This evidence is precise, robust, and comprehensive and has not been materially undermined, or contradicted by the Council's evidence. Whilst the evidence of the Council's lay witnesses has been given honestly and fairly, the limitations of their recollections was exposed during cross-examination. Their evidence taken either individually or cumulatively does not render the Appellants' version of events less than probable.
71. Since the carrying out of the works in 2009, the building has provided all the necessary facilities required for day-to-day private domestic existence. The residential use of that structure from September 2009 following the carrying out of those works amounted to a material change of use of the building to use as a single dwellinghouse. The frequency and character of Mr Horton's occupation has been sufficient to establish the continuous nature of that residential use, even though his general pattern of occupation was to live there for only part of the week and he has also been absent at times due to taking holidays elsewhere and to recuperate following back surgery. Those periods of absence were insufficient to break the continuity of the use. I find, on the balance of probabilities, that the single dwellinghouse use continued actively throughout the relevant period, to the extent that enforcement action could

have been taken against it at any time. The development is immune from enforcement action through the passage of time and thereby lawful.

Formal Conclusion

72. For the reasons given above, I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the Lake House, Bakehouse Lane, Nether Whitacre as a single dwelling house was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under s.195(2) of the 1990 Act as amended.

Formal Decision

73. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the existing use which is considered to be lawful.

Wendy McKay

INSPECTOR

APPEARANCES

FOR THE APPELLANT: Mr Peter Goatley of Counsel

He called:
Mr Nicholas Horton
Mrs Christine Horton
Ms Janet Turner
Mr Neil Spittle
Mr Tom Badger
Mrs Joanna Russell BA
DipTP MRTPI

FOR THE LOCAL PLANNING AUTHORITY: Mr Jack Smyth of Counsel

He called:
Mrs Debra Starkey BA
DipTP
Mrs Beverley Woollaston
Mr Steve Young
Mr Peter Gittins MRTPI

DOCUMENTS SUBMITTED AT THE INQUIRY

- 1 Attendance lists
- 2 Statement of Common Ground
- 3 Outline Opening Submissions on behalf of the Appellants
- 4 Opening Submissions on behalf of the Council
- 5 Closing Submissions on behalf of the Council
- 6 Outline Closing Submissions on behalf of the Appellants
- 7 Bundle of case law transcripts submitted in support of the Appellants' Closing Submissions

PHOTOGRAPHS SUBMITTED AT THE INQUIRY

- 1 Bundle of agreed dated photographs submitted by the Appellants
- 2 Bundle of thumbprint photographs of the site taken by Mr Young and submitted by the Council
- 3 Two of Mr Young's photographs at A4 size submitted by the Appellants.
- 4 Mr Young's photographs in electronic form

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 21 May 2015 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and coloured and edged black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

Since there has been a change of use of a building to use as a single dwellinghouse, the relevant immunity period in this case is the period of four years prescribed by section 171B(2) of the 1990 Act. As the building has been used continuously as a single dwellinghouse for a period in excess of four years prior to the application date, the development is immune from enforcement action through the passage of time and thereby lawful.

Signed

Wendy McKay
Inspector

Date: 11 April 2017

Reference: APP/R3705/X/16/3147355

First Schedule

The use of a building as a single dwellinghouse within Class C3 of the Use Classes Order 1987, as amended.

Second Schedule

The Lake House, Bakehouse Lane, Nether Whitacre, Warwickshire, B46 2EB shown coloured black within the area edged black on the attached plan.

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

This is the plan referred to in the Lawful Development Certificate dated:11 April 2017

Land at: The Lake House, Bakehouse Lane, Nether Whitacre, Warwickshire, B46 2EB

Scale: 1:1250

