
Appeal Decision

Site visit made on 4 April 2017

by Sukie Tamplin DipTP Pg Dip Arch Cons IHBC MRTPI

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

Decision date: 21 April 2017

Appeal Ref: APP/M1710/X/16/3162746

Shrover Lodge, Anmore Lane, Waterlooville PO7 6HN

- 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 Ms Donna Maplesden and Fred Dunaway against the decision of East Hampshire District Council.
- The application Ref 34869/012, dated 28 July 2016, was refused by notice dated 5 October 2016.
- 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 Residential use of land (incidental to the enjoyment of Shrover Lodge).

Summary of Decision: The appeal is dismissed.

Procedural matters

1. Signed and completed affidavits were provided by the appellants after the site visit. These had previously been provided to the Council at application stage and thus there is no prejudice in taking them into account in my decision.
2. For the purposes of my decision I shall refer to the area (shown hatched in red) subject of the Lawful Development Certificate application (LDC) as the 'mown land'. The area immediately to the west and south of the house and shown as white space will be referred to as the (original) 'garden'. It appears that the residential use of the 'garden' area is not disputed by the parties and I see no reason to disagree.

Background

3. Shrover Lodge is a detached 2 storey house accessed via a driveway to the east of Anmore Lane. The land in the appellants' ownership includes a wide swathe of undulating mown land (said to be about 5 acres) to the west of the house and flowing down to the lane. An electricity line supported by two wooden poles crosses the land. This 'mown' land is divided from the 'garden' closer to the house by an abrupt change in level and thus is delineated, for the most part, by a steep earth bank¹. At the time of my visit there was substantial building work in progress and this has included earth moving and the erection of garden buildings and structures and ornamental planting. This work has largely taken place on the 'garden'. Notwithstanding this recent

¹ The appellants suggest in their final comments that Mr and Mrs Halliday removed a boundary hedge between the 'mown land' and the 'garden' but that is inconsistent with the statutory declaration made by Mrs Halliday.

construction work, the application falls to be determined on the circumstances as at the date of the application.

4. In order to succeed on appeal it is necessary for the appellants to demonstrate, on the balance of probabilities, that the residential use of the land (the 'mown land') incidental to the enjoyment of Shrover Lodge has been continuous for 10 years². The date of the application is 28 July 2016 and thus the use would have had to have commenced by 28 July 2006 and been used as such for 10 years continuously, or alternatively for another continuous period of 10 years without any other intervening use. The onus of proof falls on the appellants but the Courts have held the evidence of the appellants should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellants' version of events less than probable and their evidence alone is sufficiently precise and unambiguous, that is enough³.
5. The appellants say that they are not seeking to claim that the 'mown land' is part of the 'domestic curtilage'. On the contrary what is sought by them is confirmation that the lawful use of the land is for residential use incidental to Shrover Lodge⁴.

Main Issue

6. The main issue in this appeal is whether or not the use of the 'mown land' (shown hatched in red on the application plan) has been in use incidental to the enjoyment of Shrover Lodge for a continuous period of not less than 10 years.

Reasons

7. The appellants purchased Shrover Lodge in April 2015 from the former owners Mr and Mrs Halliday. Mrs Halliday says in turn⁵ that she owned Shrover Lodge between June 1999 and April 2015. Her evidence is that in 1999 and 2000 a local farmer cut the grass in the large field. The 'field' appears to equate to the 'mown land'. From 2001 onwards, the affidavit says that Mr Halliday cut this grass with a sit-on grass cutter. He subsequently practiced golf on the 'mown land' but no date for the commencement of this activity is given in the affidavit. The appellants have provided a 'Google Streetview' image said to be from June 2009⁶ which shows golf pins on the 'mown land'. The appellants say that an earlier aerial photograph of 2007 shows what is said to be Mr Halliday playing golf; however the image is very indistinct. In any event none of the submitted evidence suggests that the 'mown land' or field was used for playing golf prior to or at the relevant date in July 2006.
8. Mrs Halliday also says that the 'mown land' was used by her to walk her 3 dogs. She says in her affidavit that she "would often take them for a walk across the field, through the gate onto the local footpaths". I was shown the gates onto Anmore Lane within the western boundary of the 'mown land' or field.

² S191 (4) of the Town and Country Planning Act 1990 as amended (the Act)

³ *Gabbitts v SSE and Newham LBC* [1985] JPL 630

⁴ Email dated 30 September 2016.

⁵ Affidavit dated 9 August 2016

⁶ The image date of the streetview and aerial photographs is not legible on the copies I have been provided with but the Council does not dispute the given dates and the appellants gave precise dates for 3 of these in their final comments.

9. Thus the submitted evidence appears to show that the land has been mown by an occupier of Shrover Lodge since about 2002, used for golf practice since 2007 or 2009, and has been used as part of a dog exercising and training routine. Moreover at some point (no date given) a wire fence was put up around the perimeter of the site. No planting, structures or domestic paraphernalia were put on or in the 'mown land' in the relevant period. Thus the uses of the 'mown land' said to be 'incidental' to the enjoyment of Shrover Lodge are limited to these activities.
10. On the other hand Mrs Halliday says that she and her husband would sit by their summerhouse, which was located in the 'garden' and would look out across the 'mown land' enjoying the views and the peace and quiet. The garden appears to have been where passive recreation took place and where garden buildings were located. From the evidence before me the use of the 'mown land' was in the relevant period different to that of the garden. Indeed the claimed use of the 'mown land' was mainly as an area used for golf practice; a use which was facilitated by the mown condition of the land. In contrast the use of the garden appeared, from the submitted evidence, to be for passive recreation and was enhanced by ornamental planting and soft and hard landscaping.
11. In these circumstances it is necessary to consider if these differences between the 'mown land' and the 'garden' are significant. In particular whether the use of the 'mown land' has been in a use incidental to the use of Shrover Lodge.
12. The Council says the uses of the 'mown land' do not constitute a change of use to residential purposes, because the activities are neither unique nor particularly indicative of domestic garden use. Moreover they are not likely to take place exclusively in residential land as opposed to other open land.
13. In terms of mowing, the evidence shows that this activity commenced prior to suggested 'residential' use of the land. Mowing is an activity common to many pieces of grassland and is not restricted to land in residential or garden use. Mowing of agricultural land, playing fields, parks, open space around hotels, offices, churches and many other non-residential uses is standard practice. Thus in itself mowing is not indicative of residential use. In this case mowing appears to have been done at least in part for aesthetic reasons, so that the land could be enjoyed in views from the garden. Later from about 2009, or possibly earlier in 2007, the land appears to have been mown to enable the practising of golf. I return to this point below.
14. In respect of dog walking, this is an activity that tends to take place generally but not necessarily beyond and outwith gardens. The act of taking a dog or dogs for a walk, or indeed dog training, is not restricted to land in residential use and is described by Mrs Halliday as an activity which took place on (the field) and footpaths in the vicinity. She also said that the dogs could roam free on the land, but that also does not indicate that the 'mown land' was in residential use, and could equally have occurred when the field was mown by a local farmer.
15. The third use is that of playing golf and there appears to be no indication that anyone other than Mr Halliday used the land to practice golf. Therefore the question before me is whether the action of playing golf goes beyond what could be considered "incidental to the enjoyment of the dwellinghouse as

such”⁷. Case law indicates (*Wallington*⁸ and *Emin*⁹) that the question to be addressed is “whether the nature of the activities to be carried on ... are incidental or conducive to the very condition of living in the dwellinghouse”. There is little doubt that Mr Halliday enjoyed playing golf and this appears to have been a favourite hobby of his. But *Wallington* says that there is a distinction between the enjoyment of the occupier in pursuing a hobby and activity that is incidental to the enjoyment of the dwellinghouse as such. Thus, the enjoyment of the occupier does not necessarily equate with the enjoyment of the dwellinghouse as a dwellinghouse.

16. Moreover it is necessary to consider whether the use is reasonably required in the context of the enjoyment of the dwellinghouse as such. It is not enough that the activity is undertaken solely by an occupier of the dwellinghouse. The word “required” in this context means considering whether practicing golf is genuinely and reasonably required for a purpose incidental to the dwellinghouse as such.
17. It seems to me that golf or golf practice is not usually an activity carried out on land associated with dwellinghouses. It is a use that normally takes place on other land, for example golf courses, golf driving ranges, hotel grounds, playing fields or similar areas of land. I acknowledge that the area of land involved here is much larger than that usually associated with a dwellinghouse so in physical terms it could accommodate golf practice. But in the context of *Wallington* it is not a use incidental to the enjoyment of the dwellinghouse as a dwellinghouse. Consequently, in my planning judgment, it is not an indicator that the ‘mown land’ has been in residential use incidental to the enjoyment of Shrover Lodge.
18. Even if I am wrong in this, the evidence does not show that the ‘mown land’ has been used for golf practice for a continuous period of 10 years, as the earliest evidence of this activity is 2007 or 2009. It is also not clear how the land was used between April 2015 and July 2016¹⁰, other than it is likely that mowing was continued by the new owners, the appellants. But this is not determinative in this appeal.
19. The appellants rely on 2 linked appeal decisions dated September 2009¹¹ in connection with an enforcement notice for the use of land as residential use ancillary to the residential use of a property known as Highmere Meadow. The appeals were allowed but the circumstances are significantly different to the circumstances in the appeal before me. In those cases there was evidence of ornamental planting, passive recreation and use of the land in a manner that was probably similar to the use of the garden area closer to the house and thus the facts of those appeals appear to have been materially different.
20. Similarly in *O’Flynn*¹², a case relied upon by the appellants, the land subject of the appeal and challenge appears to have been extensively landscaped and planted, including specimen trees, a fruit and vegetable patch, composting area and a greenhouse. It appears that the evidence indicated that the whole planning unit had become an extensive and ‘fine garden’. Unlike golf practice,

⁷ S55(2)(d) of the Act

⁸ *Wallington v SSE and Montgomeryshire DC* [1990] JPL 112; [1991] JPL 942 (CoA)

⁹ *Emin v SSE and Mid Sussex District Council* [1989] 58 P.& C.R 416

¹⁰ The date of the LDC application

¹¹ Appeal references APP/L1765/C/09/2101962 and 2101963

¹² *Richard O’Flynn and SSCLG and Warwick District Council* [2016] EWHC 2894 (Admin)

gardening activity is “quintessentially an activity carried out by home owners’ incidental to the residential use of the dwellinghouse”. In this subject appeal the pattern and nature of the use of the original ‘garden’ appears to have been materially different from the use of the ‘mown’ land. In any event it is a clearly established principle that appeals must turn on their own facts.

21. The circumstances in *O’Flynn* are also clearly distinguishable from the appeal before me because in that case part of the land subject of the appeal had already been identified as lawful by the issue of a lawful development certificate. Whilst Mr and Mrs Halliday clearly walked around the ‘mown land’ practising golf or walking dogs, this is in my judgment, materially different to cultivating the ground as part of creating an integrated garden. Golf and dog walking are not in themselves a quintessential domestic or residential activity.
22. Finally the appellants suggest that in the context of *Burdle*¹³ the dwelling, garden and mown land should be regarded as single planning unit. No reasons are given for this conclusion other than that the garden, house and the ‘mown land’ are in a single ownership. However, as is confirmed by *Burdle*, ownership is not the only factor that needs to be taken into account. From the evidence before me, the single unit of occupation comprises separate and distinct areas used for substantially different purposes; indeed the appellants say in terms that Mr Halliday used the ‘mown land’ as “his own private mini golf course”.

Decision

23. For the reasons given above I conclude that the Council’s refusal to grant a certificate of lawful use or development in respect of residential use of land (incidental to the enjoyment of Shrover Lodge) was well-founded and the Appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended and uphold that decision.
24. Consequently the appeal is dismissed.

Sukie Tamplin

INSPECTOR

¹³ *Burdle vs SSE* [1973]3 ALL ER 240