

Appeal Decision

Site visit made on 13 March 2017

by **A U Ghafoor BSc (Hons) MA MRTPI**

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

Decision date: 24 April 2017

Appeal Ref: APP/J1915/X/16/3153082

Warrengate Farm, Money Hole Lane, Tewin, Hertfordshire AL6 0JD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 [‘the Act’] against a refusal to grant a certificate of lawful use or development [‘LDC’].
 - The appeal is made by Mr John Hesler against the decision of East Hertfordshire District Council.
 - The application ref 3/15/1738/CLE, dated 21 August 2015, was refused by notice dated 13 October 2016.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended¹.
 - The use for which a certificate of lawful use or development is sought is described in the application form as follows: *Use of land to the east of the existing dwellinghouse amenity land (garden space) ancillary to the use of the property as a private dwelling (Use Class C3) for the purpose of the enjoyment of the occupiers of the dwelling house since 1935.*
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Decision

1. The appeal is dismissed.

Preliminary matter

2. The applicant must precisely describe what is being applied for but the description of the existing lawful use given in the application form is not a planning land-use activity. The correct description of what use is being sought as lawful is the use of the application land for residential purposes incidental to the residential use of the dwelling-house. As convenient shorthand, I shall refer to this as the *incidental residential use*. All of the written representations refer to this residential use, and there is no prejudice caused to any party if I proceed on this basis, which I will do.

Inspector’s reasons

1. The main issue is whether the Council’s decision to refuse the LDC was well-founded. In this appeal, the onus of proof is firmly upon Mr Hesler whose evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make his version of events less than probable, there is no good reason to refuse the application, provided his evidence alone is sufficiently precise and unambiguous to justify the grant of a LDC, on the balance of probability².

¹ S. 191(1)(a) of the Act: if any person wishes to ascertain whether any existing use of buildings or other land is lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

² See *Gabbittas v SSE & Newham LBC* [1985] JPL 630. The authority of *Ravensdale Limited v Secretary of State for Communities and Local Government* [2016] EWHC 2374 (Admin) reviews the relevant case law regarding the onus of proof upon an appellant in s. 174(2)(d) appeal, which is similar to this type of case. Guidance is also available in the

2. Mr Hesler's submission is a simple one, namely, incidental residential use of the application land is lawful and falls within the scope of s. 191(2) and 171B of the Act³. According to *Richard O'Flynn*⁴, I must examine whether there was a lawful existing use of the application land for incidental residential use. This matter is approached by considering whether a use of the land for residential purposes had commenced on or before 21 August 2005 (ten years before the date of the LDC application), which is the relevant date, and had continued since that date in which case it would have become immune from enforcement proceedings, due to the passage of time. A further consideration is whether, at the date of the LDC application (21 August 2015), a use of the land for residential purposes was lawful since it did not constitute development by virtue of the dwelling-house exception in s. 55(2)(d) of the Act⁵.
3. The application land excludes the dwelling-house and land immediately around and about the building. It is mainly located to the dwelling's east and extends in an easterly direction towards woodland. It roughly forms a rectangular shape; the boundary to the east, north and south is defined by close-boarded timber fence. The boarder between the dwelling-house and application land has an irregular shape and is defined by vegetation. The application land and dwelling-house are not defined by a barrier and the land appears within the same field of view as the building and its immediate environs from different locations within the property. The evidence is that it was primarily used for agriculture, which is broadly consistent with its mainly undeveloped appearance and layout. Ms Cook and Mr and Mrs Barton suggest that it was part of wider agricultural land and that its use changed to orchard, grassland or vegetable patch, but photographic evidence suggests that it had been unmanaged and overgrown around September 2015.
4. While there is no subdividing barrier between the dwelling-house and application land, the latter is separate and generally unmanaged and appears open and empty in comparison to the former. It has a different character and appears much less like what one would label as garden. Indeed, at the time of my site visit, the land appeared uncultivated and the type and texture of grass is different. The application land has a different function to the rest of Mr Hesler's land, despite being in the same ownership. In my planning judgement there is a residential and agricultural use of land and both are not ancillary to a primary use. In applying *Burdle*⁶ to the facts of this case, I consider that all of the land under one occupation constitutes the planning unit as it forms one undivided unit of occupation but it is in a mixed residential and agricultural use.
5. A material change of use requires a change in the definable character of the use of the land. The evidence should show that the incidental residential use of the application land started on or before the relevant date. The existence of an overgrown footpath or remnants of a pond and summerhouse do not affirm a residential use. None of these show when the actual change from agriculture to incidental residential use occurred.

Department's Planning Practice Guidance paragraph 001 reference ID: 17c-001-20140306 to paragraph: 014 Reference ID: 17c-014-20140306.

³ S. 191(2) of the Act: Uses and operations are lawful at any time if – (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force. S. 171B sets out time limits.

⁴ See *Richard O'Flynn v SSCLG and Warwick District Council* [2016] EWHC 2894 (Admin).

⁵ The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land; (d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such.

⁶ See *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.

6. Mr Hesler has no direct knowledge of his own to show when the residential use commenced. He provides nothing firm to substantiate the claim that the material change of use occurred on or before the relevant date, or that the application land has been in continuous incidental residential use for a period of 10 years. Instead, he relies on anecdotal evidence to support the claim that the residential use started in 1935. However, the ownership certificate submitted with an application for planning permission in 1940 does nothing more than certify that the land does not form part of an agricultural holding. The historic survey plan and valuation report does not show when the change of use occurred or the nature of its residential use. In a similar vein, Ms Cook moved into South Barn in April 2003 and cannot provide detail of what happened in 1935. There is nothing from Mr and Mrs Barton to substantiate the claim that incidental residential use started at that time. I consider that none of this information shows the nature or scale of any residential use from 1935 onwards.
7. Ms Cook's evidence is that her property was sold by John Barton when he retired from farming. He also sold the majority of the land attached to the farm in circa 2002/2003, but retained those fields close to the farmhouse as grassland. In line with the lack of active farming, the land directly attached to the east of the farmhouse was used as garden, containing a vegetable patch, flowers and a hot tub in a summerhouse with the majority as grass, and there was no commercial use of the land. Mr and Mrs Barton state that the land has always been a garden but also an orchard. However, there is no plausible explanation as to the extent of any incidental residential use. The evidence presented is too weak to show residential use from 2002/2003 onwards, because it does not sufficiently substantiate an incidental residential use from that time onwards.
8. I find the quantum of evidence too ambiguous and unspecific as it does not adequately show the physical state of the application land on or before the relevant date, nor does it satisfactorily explain the type and level of residential activity for a continuous 10-year period. It does not clearly show the extent of domestic activity. There is no exact detail as to the frequency of use or how long the land had been used for residential purposes. For all of the reasons given in the preceding paragraphs, I am not persuaded that the definable character of the use of the application land changed from agriculture to incidental residential use on or before the relevant date. On the balance of probabilities, I find that there was no lawful existing use of the application land for incidental residential use at the date of the application.
9. The mere fact that the application land adjoins areas around and about the dwelling-house and is in the same ownership does not necessarily or automatically mean that it is curtilage land. In *Collins*⁷ it was held that an area of rough grass that lay beyond well-maintained lawns near a dwelling-house was not part of the curtilage. In *James* the Court held that a tennis court some 100 metres from the house was not within its curtilage; the latter defines an area of land in relation to a building and not a use of land. There is no definition of the word 'curtilage' in the Act, but it is an area of land in relation to a building and falls to be assessed as a matter of fact and degree. The Oxford English Dictionary refers to the term as a small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it and the area attached to and containing a dwelling-house and its outbuildings.
10. Curtilage is relevant to s. 55 (2) (d) of the Act and the Town and Country Planning (General Permitted Development) (England) Order 2015 ['the GPDO']. For example,

⁷ See *Collins v Secretary of State and Epping Forest DC* [1989] EGCS 15 and *James v Secretary of State* [1991] JPL 550.

Class P, PA and paragraph X of Part 3 to Schedule 2 of the GPDO. It defines the term as a piece of land, whether enclosed or unenclosed, immediately beside or around the building or closely associated with and serving the purposes of that building or an area of land immediately beside or around the building. The relevant case law was reviewed in *McAlpine*. The Court defined the following characteristics of curtilage: it is confined to a small area about a building, intimate association with the land which is undoubtedly within the curtilage necessary to make the area under consideration part and parcel of that undoubted curtilage land, and that physical enclosure of the land is unnecessary. The Court of Appeal found in *Skerritts* that a curtilage to a building is not always small. A curtilage must serve the purpose of a building in some necessary or useful manner and considerations such as the physical layout of the land, past and present ownership and use or functions are also relevant⁸.

11. The area immediately around and about the building is visually defined by outbuildings, laid to lawn and patio. These areas appear private and have a domestic appearance because of their intimate layout, close association and relationship with the dwelling-house. Due to the arrangement of outdoor furniture, access to a patio area and display of domestic paraphernalia, the area immediately around and about the building are connected to the house; they possess a sense of domesticity. In comparison to the size of the property, these are modest and serve a reasonably useful function as curtilage to the building.
12. In contrast, the application land appears set apart and disconnect from the dwelling-house. Visually, all of this area appears physically separate from the land closest to the building given its location and positioning. Despite remnants of a footpath and pond, the texture and type of grass combined with the area's layout is different to areas around and about the dwelling. The application land does not appear or seem to have a close association with the dwelling. It does not have an intimate relationship with the land which is undoubtedly within the curtilage. Additionally, the evidence about the historic agricultural use shows that the area was distinctly disconnect and separate from the dwelling-house. As a matter of fact and degree, and on the circumstances of this particular case, I find that the application land cannot be regarded as part of the curtilage to the dwelling (Warrengate Farm). At the date of the LDC application - 21 August 2015 - the use of the application land for residential purposes was not exempt by operation of law.
13. Even if an alternative view prevails and the land is found to be within the curtilage to the building, the evidence presented does not sufficiently show when and how this vast area was appropriated as curtilage to the dwelling-house. The type and nature of its incidental residential use is unclear. The information lacks detail as to the level, extent and scale of any domestic activity taking place on the application land, when and for how long is unclear. There is meagre information showing it had been used for ancillary or incidental purposes in connection with the residential use of the dwelling-house. There is simply nothing of substance at all.

⁸ See *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195, *Methuen-Campbell v Walters* [1978] P&CR 693, *Att. Gen Ex Rel. Stuccliffe v Calderdale BC* [1982] P&CR 399, *Debenhams plc v Westminster City Council* [1987] 1 All ER 51 (mainly to do with rates, hereditament, and listed buildings), *Dyer v Dorset CC* [1988] 3 WLR 213, *McAlpine v SSE* [1995] JPL B43 (*McAlpine*) and *SSETR and Another v Skerritts of Nottingham Ltd* [2000] EWCA Civ 60 (*Skerritts*) (the Court of Appeal), *Denis Lowe v FSS and Tendring DC* [2003] EWHC 537 (Admin), *Sumption and Sumption v Greenwich LBC and Rokos* [2007] EWHC 2776, and *R (ona of Gore) v SSCLG and Dartmoor National Park Authority* [2008] EWHC 3278 (Admin).

14. Therefore, on the available evidence, I am not able to draw any firm conclusion that, on 21 August 2015, the use of the application land fell within the scope of s. 55(2)(d) of the Act, and was exempt from the meaning of development in s. 55(1).

Conclusion

15. For all of the reasons given above and on the available evidence, I am not persuaded that the LDC sought should be granted, because the onus of proof has not been discharged. This does not necessarily preclude the submission of a further application if better evidence is subsequently available. Thus far, I am afraid, insufficient evidence has been presented to discharge the burden of proof.
16. I therefore conclude that the Council's refusal to grant a LDC in respect of the claimed residential use of the application land was well-founded and that the appeal should fail.
17. Accordingly, I will exercise the powers transferred to me in section 195(3) of the 1990 Act.

A U Ghafoor

Inspector