
Appeal Decisions

Site visit made on 7 August 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: 25 August 2017

Appeal A: APP/P1133/X/16/3163753

Hereford Cottage, Doddiscombsleigh, Exeter, Devon EX6 7PZ

- 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 Andrew Utting against the decision of Teignbridge District Council.
- The application Ref 15/03393/CLDE, undated but received and validated on 8 December 2015, was refused by notice dated 12 February 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 change of use of land behind Hereford Cottage to residential use (garden).

Summary of Decision: The appeal is dismissed.

Appeal B: APP/P1133/X/16/3163843

Hereford Cottage, Doddiscombsleigh, Exeter, Devon EX6 7PZ

- 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 Andrew Utting against the decision of Teignbridge District Council.
- The application Ref 16/01171/CLDE, dated 19 April 2016, was refused by notice dated 26 May 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 change of use of land behind Hereford Cottage to Residential Use (garden).

Summary of Decision: The appeal is dismissed.

Appeal C: APP/P1133/X/16/3164319

Hereford Cottage, Doddiscombsleigh, Exeter, Devon EX6 7PZ

- 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 Andrew Utting against the decision of Teignbridge District Council.
- The application Ref 16/02523/CLDE, dated 13 September 2016, was refused by notice dated 9 November 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 change of use of land behind Hereford Cottage to Residential Use (garden).

Summary of Decision: The appeal is dismissed.

Background and procedural issues

1. After the site visit the parties provided me with copies of photographs stamped with the Council planning application references together with a plan showing the land in the appellant's ownership outlined in blue.
2. All three appeals concern a steep and roughly triangular area of land (about 2 acres in extent) enclosed by hedgerows and rising from the back of the house. The land has been excavated close to the rear of Hereford Cottage thus providing a level area immediately to the rear. Beyond the terrace or patio adjacent to the house most of the land retains its original contours. This higher land is faced by steep banks that have been cut so that they provide an edge to the original land level. However some remodelling of the higher land has resulted in 2 grassed terraces and a tiered vegetable garden. Appeal A includes all the triangular site, Appeal B comprises the southerly portion of the triangular land (equating to about half of the Appeal A land) and Appeal C in turn is restricted to the land closer to the house and amounts to about a quarter of the land subject of Appeal A.
3. The appellant says he purchased the land together with the house in about 2004. His ownership also includes land to the north and west of the appeal site and another parcel to the south of the lane.
4. In order to succeed on appeal it is necessary for the appellant to demonstrate, on the balance of probabilities, that the residential use of the land (the 'triangular land') incidental to the enjoyment of Hereford Cottage has been continuous for 10 years¹. The dates of the three applications are 8 December 2015, 19 April 2016 and 13 September 2016 respectively. Thus the relevant parcels of land would have had to have been used for 10 years continuously, or alternatively for another continuous period of 10 years without any other intervening use since 8 December 2005 (Appeal A), 19 April 2006 (Appeal B) and 13 September 2006 (Appeal C).
5. The onus of proof falls on the appellant but the Courts have held the evidence of the appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, that is enough².
6. I shall assess all the appeals together as they raise similar considerations. Notwithstanding this, the dates for the 3 applications and the areas of land differ in extent and thus I differentiate between these as and when necessary.
7. The planning merits of the claimed change of use form no part of my considerations which must be determined on the lawfulness or otherwise of the development.

Reasons

8. In terms of the three appeals, the appellant says that all the triangular land has been used as garden since May 2004 when he purchased the house and surrounding land. In support of this he has provided a number of photographs with dated captions.

¹ S191 (4) of the Town and Country Planning Act 1990 as amended (the Act)

² *Gabbittas v SSE and Newham LBC* [1985] JPL 630

9. These photographs show that in 2004 and 2005 the land resembled a field and there is no demonstrable evidence that this land was used as garden. The Parish Council say that in 2004 and 2005 that sheep were kept on the land but this is not supported by photographs and it is unclear if it is direct testimony.
10. However the photographs said to have been taken in May 2006 show excavation work to create a terrace (Terrace 3) immediately adjacent to the house. An invoice dated 19 July 2006 confirms that excavation works had been undertaken at the property. The appellant also says in a letter dated 6 December 2015 there had been various landscaping and groundworks, including excavation of a driveway and parking area, terraced areas, groundworks for a shed and an access ramp. He says that the works were mostly completed in 2006/07 when the house was refurbished. Thus on the appellant's own testimony it appears that the works were not completed until at least 2007. The date (year) on the invoice from Teign Valley Nursery is illegible and there is no other evidence that sheds light on this date and thus it has little weight in this appeal.
11. A photograph captioned June 2006 seems to show a climbing frame located in rough grass at the northern edge of the land but this does not seem to be fixed to the ground and was later moved. Indeed, later photographs dated May 2008 show what appears to be the same climbing frame in what looks like a different position and surrounded by tall meadow grass. Such grass is not normally a feature of a domestic garden.
12. The Council has provided an aerial photograph dated 2006 and this appears to confirm that there is evidence of excavation work immediately adjacent to the house in the south-west corner of the triangular site. An access track to a small area of works at the northern and highest point of the site is also visible in the 2006 photograph, but is absent from the later 2010 aerial image. No other use of the land is discernible.
13. In 2007, the appellant made an application for a garage to the north east of the house which was to be cut into the land. An excerpt from the officer report says 'this proposal is to change the use of the adjacent countryside to domestic curtilage and erect the garage'. The application was refused because of the impact on the countryside.
14. Thus taking into account both the evidence from the appellant and the Council it appears that in early 2007 at least part of the triangular site was the subject of ongoing works and/or was countryside. Thus the land subject of Appeal A, Appeal B and Appeal C were not in use as garden for 10 years at the date of the relevant applications. This is confirmed by later photographs dated 2008 and 2011 which show the land, other than a vegetable plot, to be a rough area of grassland. The 2011 aerial photograph appears to show that active use of the triangular land is restricted to the excavated areas adjacent to the house, the vegetable plot and the parking area to the east.
15. I saw that the appellant has placed a seat on a grass terrace at the northern point of the triangular land. In addition a seat or bench and play equipment is located on a second grassed terrace to the north-east of the house. But none of these are fixed permanently to the ground and can be readily relocated. The wider area is mown but that is in itself not an indication that the land comprises garden. Indeed I saw that other land in the appellant's ownership to

the south of the lane has also been mown and in many respects this is no different to the triangular area subject of these appeals.

16. There is no definition of the term “domestic garden” in the Act³ which thus must be given its common meaning. In these circumstance it is necessary to consider whether the whole of the land subject of the three appeals has been used for activities such as passive recreation, cultivation of flowers and other plants and other domestic activities such as entertaining, hanging out the washing or children’s play space. I have no doubt that some of the land has been used in this way and in particular the area close to the rear of the house is planted with shrubs and flowers. This area also seems to be used for sitting out, container planting and children playing. But I do not agree that the character and use of the area adjacent to the house extends to the entire land area outlined in any of the three appeals.
17. From my visit it appeared to me that the excavated area immediately adjacent to the house, together with the vegetable patch constituted domestic garden. The wider area, whilst undoubtedly used by the family was akin to a pasture which has been used intermittently in connection with the house. In particular there was no physical difference between the land outlined in red in Appeals B and C and the land that lies to the north and east of what appears to be an arbitrary line on the plan.
18. In summary the evidence does not demonstrate, on the balance of probability, that the whole of the land, whether subject of Appeals A, B or C, has been used as domestic garden for a 10 year period. On the appellant’s own evidence there were ongoing works to the land until 2007 and this is less than 10 years before the date of any of the applications.
19. Moreover at the date of my visit I saw that most of the land simply comprised mown grass and thus it is probable that this was the state of the land at the date of the applications. There was no discernible difference between the land included in the applications and that excluded. I have considered whether to grant a certificate for a lesser area of land but the evidence, on the balance of probability, does not indicate that even a lesser area of land had become lawful by reason of the passing of time. In coming to these conclusions I have taken into account the letters of support that have been submitted, but these do not provide evidence of activities on the whole of the land subject of the appeals that are characteristic of a domestic garden.
20. Consequently for the reasons given above I conclude that the Council’s refusals to grant certificates of lawful use or development in respect of the change of use of land behind Hereford Cottage to Residential Use (garden) were well-founded and the appeals should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Decisions

Appeal A: APP/P1133/X/16/3163753

21. The appeal is dismissed.

Appeal B: APP/P1133/X/16/3163843

22. The appeal is dismissed.

³ Town and Country Planning Act 1990

Appeal C: APP/P1133/X/16/3164319

23. The appeal is dismissed.

Sukie Tamplin
INSPECTOR