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## Appeal Decision

Site visit made on 22 May 2018

**by Roy Merrett BSc(Hons) DipTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 08 June 2018**

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**Appeal Ref: APP/X1355/X/17/3181946**

**Wood Cottage, Hesleden Road, Hesleden TS27 4PA**

- 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 Les Sara against the decision of Durham County Council.
  - The application Ref DM/17/01401/CEU, dated 25 April 2017, was refused by notice dated 5 July 2017.
  - 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 application seeks to have made lawful the use of the land as contained within the submitted red line boundary as being part of the garden of the residential property known as Wood Cottage".
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### Decision

1. The appeal is dismissed.

### Application for costs

2. An application for costs was made by Mr Les Sara against Durham County Council. This application is the subject of a separate Decision.

### Reasons

3. The use is lawful if no enforcement action can be taken in respect of it and provided it does not contravene the requirements of any enforcement notice then in force (s191(2)). I have not been told that there was any extant enforcement notice relating to the property at the time of this application. Accordingly it is necessary to consider whether, on the balance of probability, the use of the land as part of the garden has continued for a period of ten years or more prior to the date of the application, that being 25 April 2017, so as to be immune from enforcement.
4. The onus is on the appellant to demonstrate that, on the balance of probability, the use has continued for the aforementioned ten year period. The appellant has submitted various items of evidence in support of the application. Documents which purport to be sworn affidavits are provided by both the appellant and his neighbour. The appellant states that the appeal site has been part of the garden for the last twenty years; has been regularly mown and

manicured; has had children's play equipment placed on it and has been used for various social gatherings. The appellant's neighbour states that they have occupied the neighbouring property for 14 years and throughout that time the land has always been used as a garden. The appellant has also provided, as part of the supporting documentation for his application, a timeline and narrative of the evolution of the garden.

5. In response the Council has provided a series of aerial photographs. The first and second of these, which date from 2010 and 2015 respectively, appear to show the appeal site and adjacent land mown as a single continuous open area and enclosed to the east and south-east by a continuous boundary feature. An aerial photograph from 2001 appears to show a large proportion of the appeal site beyond the eastern-most building segregated by a form of boundary feature. Google imagery, dating from 2009 and taken from around the site entrance, appears to show a field gate in place to the side of a single storey building and the appeal site and adjacent land mown as a single entity. The Council also says that despite the appellant's claim about the use of the site for children's play, from the aforementioned aerial photographs provided there is an absence of evidence of play equipment in place.
6. With regard to the aerial photograph provided by the Council dating from 2001, this image relates to a time significantly before the key date, ten years before the application was made, from which the assessment of continuous garden use would need to be taken. Therefore even if this did show a large part of the appeal site to be segregated from the original garden it would not weigh against the granting of a certificate.
7. The absence of play equipment in the snapshot imagery could not in itself be relied on as a reason to cast doubt over the claim that the land in question had been used for recreational garden purposes. Notwithstanding this, it does raise the question as to the length of time certain items of play equipment referred to in the appellant's affidavit, such as climbing frames and slides, which would reasonably be expected to have a degree of permanence, were actually in place.
8. Turning to the appellant's timeline, it is indicated that in 1997 hedgerows were planted and bird boxes were sited to encourage garden birds to the area and that the area has been managed to encourage nesting garden birds. However, from the information provided the location of bird boxes and details of the management measures undertaken are uncertain. Whilst the mowing of the land as part of extended garden lawns is said to have occurred since 1997, and is shown to be occurring from the more recent aerial photographs and the 2009 Google imagery, without any apparent physical boundary in place, this in itself would not confirm garden use.
9. In terms of recreational garden activities, such as football and badminton, it is unclear whether all of the land or just a small portion of it was used for these purposes and where exactly any related equipment was sited. Furthermore whilst various social gatherings are said to have occurred over the lawns, the regularity with which they occurred in order to enable a view to be formed about whether this would materially weigh in favour of the claim of continuous use of the land, or whether it amounted to an extensive but temporary use only, remains open to question.

10. I am mindful that planning practice guidance states *"In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability."* Despite a lack of evidence from the Council to contradict the appellant, and the steps evidently taken to enclose and maintain the land, for the above reasons I am not persuaded that the appellant's evidence is sufficiently precise and unambiguous when considering the substantial area of the land in question. It seems to me that even if land is enclosed as a single entity, details of the nature and extent of use and how much of the whole area was involved are an important part of the assessment.
11. Contrary to the appellant's assertions, the so-called affidavits provided do not appear to constitute statutory declarations as they do not contain the necessary form of wording set out in the Schedule to the Statutory Declarations Act 1835. Furthermore they appear to have been witnessed by a resident of Wood Cottage rather than a solicitor or commissioner for oaths. I therefore afford these documents limited weight given that there can be no sanction such as a fine or jail term if found to be untruthful. However even if the affidavits submitted had been properly sworn, they would still not provide the detail that would overcome the aforementioned ambiguity. Contrary to the appellant's claim, continuous use of the land as a garden has, on the balance of probability, not therefore been demonstrated.
12. The appellant has referred to a High Court decision<sup>1</sup> as "relevant case law". That case dealt with the question of whether a wall and gates development had taken place within the curtilage of a listed building. I am not persuaded that this adds weight to the argument that the use of the land at Wood Lodge as a garden would be lawful, given the ambiguity I have identified above and the limited weight I have ascribed to the affidavits.
13. I acknowledge that the appellant has also referred to various successful appeal decisions where lawful development certificates for extended gardens have been granted. However I have been provided with limited information regarding these cases, including how the scale of the sites compare with that of the present appeal site. There is no evidence provided to persuade me that my concern regarding the ambiguity of the appellant's supporting information, when considering the scale of the site in question, is disproportionate or misplaced. In addition with regard to the Sherway Farm appeal<sup>2</sup>, the Inspector considered that the lack of reference in statutory declarations to the detail of the use was not unreasonable given that the Council did not request this in relevant correspondence beforehand. I have not been made aware that similar circumstances apply in this case. The appeals cited do not therefore weigh in the appellant's favour.
14. Therefore for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of "the application seeks to have made lawful the use of the land as contained within the submitted red line boundary as being part of the garden of the residential property known as Wood Cottage" at Wood Cottage, Hesleden Road, Hesleden

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<sup>1</sup> Sumption v. Greenwich LBC [2007] EWHC 2776 (Admin)

<sup>2</sup> Ref APP/U1105/X/15/3011447

TS27 4PA was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

*Roy Merrett*

INSPECTOR