

Appeal Decision

Hearing held on 22 May 2018

Site visit made on 22 May 2018

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 16 July 2018

Appeal Ref: APP/W3005/X/17/3181325

Land at Yew Tree Farm, Main Road, Jacksdale NG16 5HW

- 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 D Collins against the decision of Ashfield District Council.
 - The application Ref 2017/0003, dated 23 December 2016, was refused by notice dated 2 March 2017.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is the siting of a mobile home for residential use.
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This decision is issued in accordance with section 56 (2) of the Planning and Compulsory Purchase Act 2004 as amended and supersedes that issued on 3 July 2018.

Formal Decision

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

Application for costs

2. An application was made by Mr Collins for an award of costs against Ashfield District Council. This application is the subject of a separate Decision.

Background and preliminary matters

3. It is common ground that the mobile unit, otherwise known as the "bungalow" is not a building, but has been in the same position on the site at least since 1985. I have found no reason to disagree.
 4. Planning permission Ref V/1985/0206 was granted on 30.07.1985 for siting of mobile home for a temporary period of two years, renewed on 27.11.1987 under Ref V/1987/0557 for a further two years, expiring on 27.11.1989.
 5. Prior to the hearing the available evidence focussed on events after 1989, however I had requested that the planning files be available in respect of both permissions. The Council produced a bundle of microfilmed and redacted documents which included the application forms for the 1985 and 1987 permissions, decision notices, reports and associated correspondence. At the
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hearing time was spent reading them through to ensure that both parties had an opportunity to appreciate and comment on their relevance to the appeal.

6. Both parties had also produced correspondence regarding Council tax records, listed at the end of this decision, which I have also taken into account.

Procedural matters

7. The decision notice wrongly refers to the applicant's duty to discharge the criminal burden of proof, namely "beyond reasonable doubt". The reasons are confusing in that a reference to the civil burden of proof is also included. The burden of proof, although it does lie with the appellant, is on the balance of probabilities. The reasons also refer to the need to show a four year period of use of the mobile home rather than the ten year period which, as explained in my reasons below, is the more relevant period. Despite these errors it is recognised in case law that the main issue is whether the refusal of the application was well founded, irrespective of the reasons given by the Council.
8. The identity of the appellant and the planning merits of the operation, use or activity are not relevant to the legal and factual issues in an LDC appeal.
9. Planning Practice Guidance (PPG) advises that if the Council has no evidence itself, nor from others, to contradict or 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 probabilities.

Reasons

10. The appeal site is a farm south of Westwood village. The farmhouse and an office building are nearer to the entrance whilst the three bed mobile home sits further into the site, surrounded by other agricultural buildings and stables.
11. The basis of the application is that the appeal site has been used for the siting of a mobile home for use as a dwelling more than ten years before the date of the application and at the date of the application that use is still subsisting.
12. The appellant relies on s171B of the 1990 Act the effect of which is that where there has been a breach of planning control consisting of the material change of use of land, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
13. The Council says that the application relies on an assumption that the mobile home was residentially occupied following the expiry of the 1989 permission. It also asserts that the evidence does not demonstrate any continuous period of ten years' occupation as a residential dwelling.
14. The Council adds that had lawfulness been achieved through ten years' continuous residential use, subsequent continuity of use is no longer required, unless periods of non-use amount to abandonment. It argues that there are long periods where residential use cannot be shown and having regard to its state, any such use is likely to have been supplanted by an agricultural use.
15. The first evidence of residential use in the appellant's evidence is in a statutory declaration of 10 March 2016 by Mrs Janet Elizabeth Fry. It was made, not in connection with an LDC application but to facilitate the sale of the farm that took place four days later. It describes the various properties and facilities

thereon. Mrs Fry declares that within the confines of the properties there is "a separate bungalow known as 220 Main Road, Westwood...which to my knowledge has been in place for at least 35 years". She and her late husband (Graham Fry) "lived there for over 20 years until my said late husband purchased the said properties from his father".

16. She also declared that "shortly after" the purchase from her husband's father, Ivan Fry, she and her husband moved into the farmhouse. As to when that particular purchase took place an earlier paragraph in the declaration states that "*when my late husband's grandparents died approximately 38 to 40 years ago the said properties were inherited by my said late husband's father, Ivan Fry*" and it was "shortly thereafter" that her husband bought them.
17. Graham Fry's grandfather, William Fry owned the farm at least until 26 March 1985, as can be seen by examining the certificate accompanying application Ref V/1985/0206. He would have passed not long after then since in the officers' report it is stated that the Council was told in June of that year that he had passed away, leaving a widow aged 83 to run the farm.
18. The device of "shortly after" or similar wording is often used when the declarant, for whatever reason cannot be precise about dates. I have no good reason to doubt, based on the statutory declaration that the mobile home had been there since at least 1981 and that there was a period of some 20 years during which Mrs Fry and her husband lived there, although it is unclear exactly when they moved into the farmhouse.
19. The temporary permission granted in 1985 for the siting of the mobile home was a personal permission for the benefit of Graham Fry so that he and his family could provide care for his elderly grandmother in the main farmhouse. Since it was renewed in 1987 for the same reason it is likely that the family continued to occupy it throughout this period.
20. Further support for the application can be found in the 1985 and 1987 planning files. The Agricultural Development and Advisory Service of the Ministry of Agriculture, Fisheries and Food had reported to the Council in June 1985 that there were two dwellings on the farm, the original farmhouse occupied by the applicant's grandmother, and "*a three bedroomed mobile home occupied by the applicant and his family. I understand that this mobile home has been on the farm for 10 years.*"
21. In addition there is a note of a site visit undertaken on 13 May 1985 which clearly states, redacting the names: "*_____ has lived on site in temporary accommodation for ten years. Building in its present form has been up for several years. Very substantial temp home concrete slab etc. Agrees to temp permission - upon vacation of home by _____ he will move in.*" Those referred to can only reasonably be, respectively, Graham Fry and his grandmother.
22. Mr Vaughan in the Council's Technical Services department saw the note but was not satisfied that the mobile home was not a building, or that it had been on site for ten years. He requested information as to the exact nature of the "building" and when it was first located on the farm. The signature on the reply he received is redacted although it is probably that of Graham Fry, the applicant. He stated that the van was a Rencast mobile home built of wood on a portable steel chassis, transported on two sets of wheels with no rigid foundation. Blocks around the base kept vermin and livestock from under it.

23. A layout plan of the mobile home was attached which shows three bedrooms, a bathroom, living room and separate kitchen. The reply to the Council added that *"there has been a mobile home on this site since March 1974. I have a receipt when it was purchased"*.
24. Mrs Fry used the words "has been in place" referring to the same structure in place since about 1981. There is no suggestion that the mobile home in situ or any eventual previous structure was sited anywhere else on the farm.
25. The officer report merely stated that the mobile home was occupied and was stationed on the site *"for some considerable time without the benefit of planning permission"*. To my mind the information in possession of the Council should have prompted it to consider that the use of land for siting of the mobile home might be established for the requisite ten years so that no planning permission was required for its existence on site, and indeed that the land so occupied might have been used for residential purposes for ten years.
26. Graham Fry would have been a young man working on his grandfather's farm around the time when he stated that the mobile home, or its predecessor, was first purchased in 1974. I also note that in the planning file for the 1987 renewal application, further planning history is annotated at the foot of a document entitled "Planning Application – Working Sheet". There is a reference to an agricultural worker's bungalow, Ref 75/0154. There is a note alongside that reads "R 4/5/75". This suggests to me that an application was refused in May 1975, yet there is no record of enforcement action being taken.
27. It seems likely to me that the land currently occupied by the mobile home has been so occupied by that mobile home or a similar structure since about March 1974. It is also likely on the balance of probabilities that Graham Fry occupied the site residentially for a period of at least ten years until the Council had cause to inspect the farm on 13 May 1985, at which point Mr Fry sought to confirm the position as described above. The reason the Council then came to assess the mobile home situation may well be that unauthorised tipping was taking place on the farm. On the 10th or 19th July 1985 a Council officer requested a colleague to undertake a site visit to check that all tipping had ceased, whilst noting that "___ has visited the site yesterday to discuss the siting of the mobile home."
28. There is no necessary connection between the tipping activity and the use of the mobile home and it is not suggested that any undue pressure was applied to Mr Fry to apply for and accept the terms of the 1985 permission. However given my findings based on the above information including the statutory declaration, I am satisfied that by the time the first temporary permission was granted on 30 July 1985 there was no need for any such permission.
29. It is a long established principle that a grant of planning permission does not prevent it from being subsequently contended that no such permission was necessary on account of an existing use right, save where the permission is of such a character that its implementation led to the creation of a new planning unit or the beginning of a new chapter in the planning history, in which case the rights attached to the former planning unit would be extinguished. In this case the character of the land had not changed from when it was first began to be used in or around 1974, at variance with its existing agricultural use.

30. Furthermore when the permission came to be renewed the planning officer considered that Condition 3 on the 1985 permission, which limited occupation of the dwelling to a person mainly employed in agriculture, had not been satisfied. I would agree with that assessment. The Ministry of Agriculture had concluded at the time that the unit was unlikely to provide sufficient livelihood for it to be considered a viable unit and the officer report noted that the applicant supplemented his farm income with agricultural contracting. It is also clear from Mrs Fry's declaration that her husband had two businesses, plant hire and demolition that operated from the appeal site for over 35 years. The site was also used to store plant and machinery in connection with the businesses over the same period, in other words as long ago as 1981. Condition 3 was at the heart of the planning permission and as such, continuation of the unauthorised use contravened the condition and cannot be described as commencing the development authorised by the permission.
31. The renewal of permission in 1987 was again on a personal basis, the understanding being that at as soon as the farmhouse became vacant the mobile home should be removed from the site. This permission omitted the condition that limited occupation to an agricultural use. However that does not detract from the principle that a use may become immune from enforcement action prior to an unnecessary grant of planning permission that purports to affect that immunity where the character of the land has not changed. In any event the essential point is that the subject matter of both planning permissions, the authorised use, is of a nature that is subsumed within the prior user, the character of which had not changed as a result of the permissions, whether or not they were implemented. The unauthorised use continued throughout 1985 to 1987 and in all likelihood from 1987 to 1989.
32. Based on the above information and on the balance of probability I find that there was a continuous period of ten years prior to the date of the application commencing around 1974 when the appeal site has been used for the siting of a mobile home for residential purposes. The use was established by 30 July 1985, the date of the first planning permission, and as the uses authorised by both permissions, assuming they were implemented, did not change the character of the land over which the unauthorised use had subsisted, there was no change in the planning unit or new chapter in the planning history.
33. Consequently it must be decided if the existing use right thus acquired was subsequently lost by the time the LDC application was made on 23 December 2016. The evidence should be examined through the lens of what is required to maintain the existing use rather than what is necessary to establish it.

Whether the use is subsisting: the case for abandonment

34. In *Hughes v Secretary of State for the Environment, Transport and the Regions and Another* CA 19 Jan 2000 [2000] EWCA Civ 506 it was recognised that a residential use might be considered to be abandoned, having regard to four criteria, namely: the physical condition of the building; the length of time for which the building had not been used for residential purposes; whether it had been used for any other purposes; and the owner's intentions. What matters is the view of "a reasonable man" with knowledge of all relevant circumstances; the wishes and intentions of the site owner are not necessarily decisive.
35. Furthermore the weight of any particular fact depends on the circumstances of the case. Case law shows that in considering abandonment, use as a dwelling

- should not be judged on a day by day, but on a broader and longer-term basis. Dwellings are often vacant for long periods with no question of abandonment.
36. At the hearing Mr Morley for the Council accepted that after expiry of the last permission the family seemed to be in occupation until 1991. Although generally there were gaps in the records Mr Dudley told me that the appellant had asked Mrs Fry for what she could find in the way of documents. A Community Charge receipted invoice is provided. It is addressed to Janet E Fry, recording payments made from June 1991 to February 1992. An aerial photograph of the site dated December 2001 shows it in its current position, in front of what are said to be pig sheds.
37. There are also invoices from NWF Fuels Limited for the delivery of heating oil to the mobile home in 2002, 2003, 2004, 2007 and 2013. Each is addressed to Mr G Fry at Yew Tree Farm but specifically delivered to "The Bungalow 220 Main Road". Each invoice is for a substantial amount of fuel with an average value of £600-£700. The Council suggests that the oil was for the farm office.
38. By 2002 it can be seen from the heating invoices that Mr G Fry had moved into the farmhouse but it is likely that the heating supplied was specifically for the bungalow/mobile home. The office is on a separate part of the site and if that was where it was to be used there would be no good reason not to deliver it there. Each available invoice bears the name Janet, Graham or Wil alongside the Order No. corresponding to the family member who ordered it. In all likelihood the oil was for the upkeep of the mobile home, and is consistent with Mrs Fry's declaration that since she and her husband moved out their son William and daughter Ann had used it as a residence at various times.
39. As far as concerns Council tax records, the Council states that the mobile home was first registered, as The Bungalow, on 1.4.1993. It has been recorded as The Caravan, r/o Yew Tree Farm from 24.7.2009. The revenues officer states that Council tax charges would have applied during this period and the relevant occupants and tenants made liable for such charges. The appellant has been liable for the charge from 14.3.2016 when he acquired the farm properties.
40. A Council tax summary table provided to the planning officer Mr Steel in reply to his data protection request, indicates more precisely that the mobile home was empty from April 1998 to April 2007, was then occupied by a single person from April 2007 to the end of July 2009, after which it was empty again until August 2014. During the periods 1998 to 2007 and 2009 to 2014 there was no inspection of the premises. Viewed against the background of previous active use, it cannot be assumed that because Council tax was not being paid, they were necessarily vacant or, more to the point, they had lost the quality of a residential property.
41. The appellant provided Council tax demand notices in respect of "Caravan Rear of Yew Tree farm". One is for the period 1 April 2011 to 31 March 2012 which contains a discount for "Class C Long Term Empties". Class C dwellings are long-term empty homes, which are substantially unfurnished, and are not exempt from Council Tax. It is understood that the discount applies for up to 6 months so it is unclear why the discount applied for a 12 month period.
42. Be that as it may, a second demand for the period 10 March 2014 to 31 March 2015 added to rather than reduced the nominal amount in respect of a "2 year

empty property premium (50% charge)".¹ Whatever the basis of the adjustments however, it seems that the mobile home was empty during these periods. Two further demand notices for 2014-15 and 2015-16 addressed to Miss A Fry at the Caravan Rear of Yew Tree Farm, allowed for a single occupier's discount, thus tending to show resumption of occupation of the unit.

43. The Council points to the long gap in evidence between 1993 when it is accepted that the mobile home was registered for Council tax, and 1998. No Council tax records prior to 1998 have been provided and the Council's statement asserts that they only go so far back as 1998, but that is clearly incorrect. As Mrs Brown explained to me, a manual search could be made further back than 1998 but it would cost too much or take too much staff time to deal with the request. Planning Practice Guidance states at Paragraph: 006 Reference ID: 17c-006-20140306 that the applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land.
44. Whatever the reason for the lack of records between 1993 to 1998, I consider that this period of five years, in the context of the longevity of occupation prior to this period, should not be determinative of the question whether the home was then abandoned. The other significant gap that the Council argues for is from 1998 to 2007. However the heating oil invoices are consistent with an intention to maintain the home in actual occupation for substantial periods within this "gap".
45. As to the photographs taken in February 2017, the Council claims that they show the structure is not in a state to be occupied as a dwelling. The only points taken by the Council are that the kitchen floor is dirty, and there are no carpets and no paraphernalia associated with a dwelling being lived in such as ornaments, or personal requisites in the bathroom. This confuses actual occupation with the character of the property. Clearly in my view the home is shown as adequately equipped with all the necessary accoutrements of daily living, and there are rugs, albeit not carpets in the living area. It is a spacious and comfortable, although basic dwelling with a modern bathroom and kitchen. I also saw that it appears watertight and generally in good condition.
46. The Council suggests a change of use might have occurred by farm employees using the home as an office or for welfare facilities. For evidence it points only to the dirty kitchen floor, a somewhat tenuous basis from which to draw such a conclusion. Any such use is likely to be occasional. No robust evidence persuades me that the residential use has been displaced by another use.
47. As to the previous owners' intentions, following the passing of William Fry and according to the statutory declaration the property then passed to his son, Ivan Fry who does not feature in the correspondence. "Shortly thereafter" it passed to Graham Fry who has been the main actor as far as concerns deliberations about what was to be done with the mobile home. It seems unlikely to me that at any stage he came to the state of mind where he was saying, "I do not regard this property as ever being available for residential use".

¹ Section 12(2) of the Local Government Finance Act 2012 and the Council Tax (Administration and Enforcement) (Amendment) (No.2) (England) Regulations 2012 allowed local authorities in England to set a council tax rate for dwellings that have been left empty and unfurnished for two years or more, of up to 150% of the normal liability.

48. The present owner, the appellant has a son who lives at the farmhouse but he himself intends to move there. A recent application for a dwelling on the site supports, so the Council says, the suggestion that the appellant would not live in the mobile home, but even if true that would not preclude an intention to continue its residential use. Taking all of the above information into account the use of the application site for siting of a mobile home for residential use was not, on the balance of probability, abandoned prior to the LDC application.
49. In summary therefore, the Council's case does not include evidence that makes the applicant's version of events less than probable, and I find the appellant's evidence sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probabilities. Clearly since the evidence is confined to residential use of the mobile home exclusively by relatives of the occupiers of the main farm dwelling, the certificate should be limited to a use that is ancillary to the use of the main dwelling.

Conclusion

50. For the reasons given above, I conclude that the Council's refusal to grant a LDC in respect of Land at Yew Tree Farm, Main Road, Jacksdale NG16 5HW was not well founded and that the appeal should succeed. I will exercise accordingly the powers transferred to me in section 195(2) of the 1990 Act as amended.

Grahame Kean

INSPECTOR

Annex

APPEARANCES

FOR THE APPELLANT:

Mr Andrewe Dudley MRTPI	Aspbury Planning
Mr David Collins	Appellant
Ms Laura McCombe MTCP	Graduate Planner, Aspbury Planning
Mrs Denise Knipe MRTPI	Principal Planner, Aspbury Planning

FOR THE LOCAL PLANNING AUTHORITY:

Mr Robbie Steel	Planning Officer
Mr Mick Morley MRTPI	Planning Officer
Mrs Beth Brown	Principal Solicitor

DOCUMENTS submitted at the hearing:

Letter from Council legal department to planning officer dated 22 January 2018 replying to data protection request, summarising Council records for Caravan at rear of Yew Tree Farm

Letter from Council to Ms McCombe dated 30 January 2018 replying to Freedom of Information request, related to the Bungalow, 220 Main Road

Redacted bundle of documents of application forms, decision notices, plans and other documents relating to planning applications V/1985/0206 and V/1987/0557



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT: 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 23 December 2016 the use described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto and coloured red 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 reasons:

The use was lawful because:

- a) No enforcement action could be taken in respect of it because the time for taking enforcement action had expired – a material change of use of the land to use for the siting of a mobile home for residential purposes has continued for a period in excess of ten years (s171B(3)), and there is nothing to show that the use was subsequently superceded or abandoned.
- b) The use does not constitute a contravention of the requirements of any enforcement notice in force.

Signed

Grahame Kean

Inspector

Date: 16 July 2018

Appeal Ref: APP/W3005/X/17/3181325

First Schedule

Use of the mobile home for residential purposes ancillary to the main farmhouse dwelling, on land described in the Second Schedule and as shown coloured red on the Plan attached to this Decision.

Second Schedule

Land at Yew Tree Farm, Main Road, Jacksdale NG16 5HW.

NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 (as amended) and in response to an application made under Section 191(1)(a).
2. 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.
3. 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.

Plan

This is the plan referred to in Lawful Development Certificate dated: 16 July 2018

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

Land at Yew Tree Farm, Main Road, Jacksdale NG16 5HW.

Appeal ref: APP/V5570/X/17/3181623

Scale: Not to Scale

