
Appeal Decision

Site visit made on 18 September 2019

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 October 2019

Appeal Ref: APP/V2635/X/18/3209664

Land north of The Coach House, High Street, Thornham, Norfolk

- 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 Andy Brand of The Abbey Group (Cambridgeshire) Limited against the decision of King's Lynn and West Norfolk Borough Council.
 - The application Ref 17/00868/LDE, dated 2 May 2017, was refused by notice dated 15 June 2018.
 - 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 use of land for garden (domestic) purposes.
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Decision: the appeal is dismissed.

Application for costs

1. An application for costs was made by Mr Andy Brand of The Abbey Group (Cambridgeshire) Limited against King's Lynn and West Norfolk Borough Council. This application is the subject of a separate Decision.

Main Issue

2. Section 191(4) of the Town and Country Planning Act 1990 (1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operation or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development (LDC) was well founded. In this respect, the burden of proof is on the appellant to show that, on the balance of probability, the use described would have been lawful on the date on which the application was made.

Reasons

3. In support of his case, the appellant principally relies upon the sworn statement of Mr Victor Hardy, the occupier of Appletree Cottage and the

- previous owner of the land to which the application relates. The statement is properly signed and witnessed, and in that respect I afford it due weight.
4. In his sworn statement, Mr Hardy indicates that the land formed part of the garden enjoyed with Appletree Cottage and has been used as garden in excess of twenty years. It is explained that an area of lawn closer to Appletree Cottage is interspersed with trees and shrubs, and leaves little room for his grandchildren to play games. Mr Hardy then goes on to explain that the land has therefore always been used for ball games, Frisbee, kite flying and other garden games. All of that is consistent with use of the land as a domestic garden.
 5. My difficulty with Mr Hardy's statement is that it is short on detail. By way of example, Mr Hardy states that the land has been used by his grandchildren for playing games but the use of the word "always" then implies that this use has taken place in excess of the twenty years covered by the statement. Mr Hardy does not give any details about the ages of his grandchildren but, clearly, it follows that if the use commenced in excess of twenty years ago, then his grandchildren would have become adults by now. There is no detail in Mr Hardy's statement to explain that or how the use may have changed as his grandchildren have grown up. Furthermore, whilst I understand from other evidence before me that Mr Hardy now has great grandchildren, there is no reference to that in his sworn statement. Moreover, Mr Hardy's statement in this regard is not supported by corroborating evidence: for example, I have been provided with no photographs that show his grandchildren or great grandchildren playing on the land and/or undertaking any of the activities described in his statement.
 6. Similarly, aside from storing his boat over the winter months, Mr Hardy's statement contains no details about how he himself used the land as a garden. I find that instructive, particularly given that Mr Hardy has a garden closer to his house available to him for everyday use when his grandchildren are not visiting. The omission of any reference to his own use as a garden tends to suggest that he used it as such only when his grandchildren were visiting. It is clear that Mr Hardy mowed the grass on a regular basis, but that in itself does not necessarily indicate use as a domestic garden.
 7. For all these reasons, I attach only moderate weight to Mr Hardy's statement. I recognise that I have attached a lesser weight to a sworn statement than did my colleague in the appeal relating to Ripponden Road in Oldham (APP/W4223/X/16/3143392), but it is evident from the Inspector's decision that the affidavit in that case clearly explained how the land had been maintained and used as a garden. In that sense, it can be distinguished from the sworn statement provided by Mr Hardy which, for the reasons I set out above, is not similarly clear as to how the land has been used.
 8. There is then a further point arising from Mr Hardy's sworn statement, and that is the date on which it was signed. That date, 15 December 2016, is some four months short of the ten-year period required to show continuous use of the land as a domestic garden. It is, I accept, entirely possible that Mr Hardy continued to use the land as a garden right up until the point that he sold the land in April 2017. However, I have no evidence before me to support that and in the absence of that evidence I cannot discount the possibility that the use did in fact cease.

9. This then directly leads to the use of the land in the brief period between the appellant taking ownership of the land on 5 April 2017 and the submission of the application now subject to this appeal approximately one month later on 2 May 2017. In an email dated 27 April 2017, Mr David Sutton, a Director of The Abbey Group (Cambridgeshire) Limited, confirms that he maintained the land in question as a garden for The Coach House. I note that Mr Sutton refers specifically to 'maintaining' the garden rather than using the land as a garden. It is evident from this email that Mr Sutton did not live at The Coach House at that time, and I have been provided with no evidence that the house was occupied by anyone else during that one-month period. There is therefore no evidence before me that the land in question was actually used as a garden during the month immediately before the application was submitted.
10. In his email, Mr Sutton also states that, to his knowledge, the land has always been used as garden since at least November 2009. The latter is the date on which The Abbey Group (Cambridgeshire) Limited purchased The Coach House, and Mr Sutton explains that he visited the site on average at least once a month after that date. Two points emerge from this. Firstly, Mr Sutton does not explain how he came to know that the land has been used as a garden since 2009: it is not clear to me whether this was from personal observation, through conversation with the previous owner of The Coach House or knowledge gained during the purchase of the land in question. Secondly, Mr Sutton has no direct knowledge of the use of the site prior to November 2009, such that his knowledge of the site does not extend across the full duration of the relevant period. For these reasons, I attach only limited weight to this evidence.
11. The appellant also refers me to a letter from Mr David B Thompson, dated 29 August 2017. In his letter, Mr Thompson confirms that for 20 years he helped Mr Hardy maintain his garden and that he supports Mr Hardy's statement. The letter written by Mr Thompson is brief and again short in detail. I also note that Mr Thompson only confirms that he helped Mr Hardy maintain his garden. At no point does Mr Thompson provide any evidence (for example, verifiable dates) relating to the use of the land as a domestic garden, either by Mr Hardy himself or by his grandchildren/great grandchildren.
12. Finally, the appellant refers to a letter from Mr Antony Needham. In his letter, which is undated, Mr Needham confirms that he has known the occupiers of Appletree Cottage for 30 years and during that time watched Mr Hardy *treat the plot in question as his garden* by mowing and raking the grass and strimming edges for his grandchildren and now great grandchildren to play *when visiting* (my emphasis). I find the language used by Mr Needham to be instructive. At no point does he state that Mr Hardy himself used the garden: rather, the phrase he uses is that Mr Hardy treats the land as his garden. In my view, the latter connotes something quite different from actually saying that the land is his garden.
13. I acknowledge that Mr Needham does then go on to say that the reason why Mr Hardy mowed and raked the grass was so that his grandchildren and great grandchildren could play when they visited. However, the implication behind that statement is that the land was only used as a garden when they visited. That is itself consistent with the sworn statement made by Mr Hardy himself, which makes no reference to his own use of the land as a garden. This does not of course mean that the use by Mr Hardy's grandchildren and great

grandchildren would not potentially qualify as use of the land as a domestic garden. It does, however, raise the question as to whether that use was continuous and substantially uninterrupted throughout the relevant period.

14. This is important because case law has established that a use has to be continuous throughout the ten year period in order to become lawful in planning terms. In assessing whether that use has been continuous throughout that period, the appropriate question to ask is whether the local planning authority could have taken enforcement action against the use at any time during that ten year period. In the context of this case, the pattern of use of the land, as explained by Mr Hardy in his sworn statement and supported by others, is a relevant consideration.
15. The problem is that I have no indication in the sworn statement provided by Mr Hardy or in the supporting letters how frequently or infrequently the land was used as a domestic garden. From the limited evidence available to me, the impression gained is that the use was infrequent and limited to those occasions when Mr Hardy was visited by his grandchildren and great grandchildren. On that basis, it is not possible for me to reach an informed view, on the balance of probability, as to whether any use as a domestic garden was continuous or not, and therefore whether the Council could have taken enforcement action during the relevant period.
16. As part of his evidence, the appellant has provided photographs of the land in question taken in January 2017 (and therefore at a time when the land was still owned by Mr Hardy). In these photographs, the grass is relatively short and the land is well-kept. As such, these photographs are entirely consistent with the proposition that the land has been maintained and/or treated as a garden, and I have taken them into account on that basis. Nevertheless, the photographs do not show the land actually being used as a domestic garden or for any of the activities referred to in Mr Hardy's sworn statement, and to that extent do not greatly assist the appellant.
17. At the time of my site visit, the land looked somewhat different to how it appears in these photographs. The grass was still mown but there were a number of scalloped raised borders containing stone chippings and tree planting around the edges of the land. There was a randomly placed basketball hoop in the centre of the land and a football net on one boundary. There was also a timber shed on the land. In addition, there was a slope leading from a gate into The Coach House which had the distinct appearance of being recently constructed. These features all gave the land the appearance of a domestic garden. However, other than that they post-dated January 2017, I have no evidence as to when the above-mentioned features were added. I have therefore taken the photographs submitted as part of the appellant's written evidence as being more representative of the appearance of the land during the relevant period (or, at least, part of it).
18. In addition to making reference to the Oldham decision referred to above, the appellant has also drawn my attention to a number of other appeal decisions that are considered relevant. Whilst these decisions set out some of the principles that should be applied to this type of case, by their very nature those cases turned on the particular facts that underpinned them. For that reason, whilst I have read and understood them, those cases do not assist me in my consideration of the facts relevant in this case.

19. Against the evidence provided by the appellant, the Council refers to the planning history of Appletree Cottage and in particular to the references therein to the land in question. It is helpful to briefly set out that planning history here, albeit I focus only on the two applications that were submitted within the relevant period.
20. In December 2015, an application was submitted by Mr Hardy for the conversion of workshop/storage unit to a dwelling (Council Ref:15/02017/F). The application site did not include the land now in question. I also note that the land said to be in the ownership of the appellant but not to forming part of the application site, and edged in blue on the application drawings, did not include the land subject to this appeal. The Design & Access Statement makes reference to a 'grassed paddock to west'. Whilst it is not entirely clear that this is a reference to the land subject to this appeal, it is nonetheless entirely consistent with a description of that land. I therefore consider it more likely than not that this is a reference to the land in question.
21. There was then an application to fell two protected trees on the land submitted at some point in 2017. I have only limited details of that application, although the plan provided by the Council shows Appletree Cottage as the application site as being edged in red. That plan shows the cottage itself and a structure immediately to the rear of that, but not the land subject to this appeal.
22. It is not possible to draw any firm conclusions on the basis of the limited evidence available in respect of these applications, and I take the appellant's point that applications for tree works need not identify all of the land in the appellant's ownership. Nevertheless, it is in my view instructive that on both of the above occasions the appellant chose to not include within the 'red line' application site the land subject to the certificate application. The inference I draw is that the applicant considered the land to fall outside of the functional curtilage of Appletree Cottage, a position that is consistent with phrases such as treating the plot in question as his garden rather than it properly being Mr Hardy's garden.
23. The Council also produces an aerial photograph taken in August 2010, and therefore firmly within the relevant period. It is, I acknowledge, not possible to reach any firm conclusions on the use of land from one aerial photograph. Nevertheless, to my mind the appearance of the land subject to the certificate application has more in common with the field immediately to the north than with the gardens of surrounding residential properties (including, I note, Appletree Cottage itself). In particular, the light brown colour of the surface is similar to that of the land to the north and distinctly different from the lush green colour of the surrounding gardens. I recognise that this might be a result of the size of the plot but it is nonetheless indicative of a difference in the maintenance of that land. There is also a discernible pattern to the surface which, to my mind, would tend to suggest that the grass (if that is what it is) is not uniformly mown across the piece as shown in more recent photographs of the appeal site. All of these considerations point towards use of the land other than as a domestic garden.
24. The Council points out that the appeal site falls outside of the settlement boundary for Thornham, as defined in The Kings Lynn and West Norfolk Borough Council Site Allocations and Development Management Policies Plan 2016. The land was similarly outside the settlement boundary as defined in the

former Local Plan dating to 1998. The fact that the use of the land as a domestic garden may or may not be considered contrary to policies in the development plan is not in itself relevant to my consideration of this appeal, but I concur with the Council that the historical background and current policy position is relevant to some extent.

25. I have not been provided with details of the actual assessments that led the Council to the view that the land should be declared outside the settlement boundary of Thornham, and the Council does not expand upon the point in its evidence. Nevertheless, it is reasonable to conclude that the use and condition of the land was a factor in that assessment and that, on the evidence then available to it, the Council concluded that the land was not in residential use. Indeed, had the Council been satisfied that the land was a domestic garden, it occurs to me that the logical approach would then have been to square off the settlement boundary rather than follow a somewhat convoluted route that follows the rear boundaries of the residential properties fronting onto High Street. In the absence of any evidence about the actual procedure followed, this is a matter to which I give only very limited weight but is nevertheless a material consideration that I have taken into account.
26. Representations have been received from the occupiers of Gardeners Cottage and Sutton Cottage, both immediately to the south of the appeal site. Both of these representations make points mostly relating to the planning merits of a potential development of the land to rear of their properties. Those are matters that I am not able to take into account in the context of this appeal. However, the occupiers of Gardeners Cottage indicate that they purchased their property in 2013 at which time the appeal site was, in their view, in agricultural use. The views expressed in that respect is not substantiated with other evidence, which limits the weight that I can attach to them. Nevertheless, the observation relates to a time within the relevant period and is consistent with other evidence, including the aerial photograph taken in 2010 and the omission of the land from within the settlement boundary. I have no doubt that the reference is correctly made in connection with the appeal site, and is therefore relevant to my consideration of this appeal.

Conclusions on the evidence

27. Having regard to the sworn statement provided by Mr Hardy and the letters in support of that, I consider it more likely than not that at certain times during the relevant period the land has been used as a domestic garden. However, on the limited evidence available to me, I am not persuaded that this use has been continuous, such that the Council could not have taken enforcement action against the use. There is, as part of that, the uncertainty about the use of the land between the signing of Mr Hardy's sworn statement in January 2017 and the date on which the application was submitted some four months later.
28. I am also not convinced, on the evidence available to me, that the use as a domestic garden commenced during the relevant ten-year period. The aerial photograph taken in 2010: the omission of the land from within the settlement boundary in 1998 and again 2016: the omission of the land from the planning application in 2015 and the reference to it there as a paddock: and the observation by the occupiers of Gardeners Cottage in 2013 that the land was in agricultural use at that time all constitute evidence that land was not in use as a domestic garden at some points during the relevant period.

29. This is therefore not a situation where the local planning authority has no evidence of its own to contradict that of the appellant or make his version of events less than probable. On the contrary, I find that the appellant's evidence is not sufficiently precise and unambiguous to show that the use as a domestic garden has been continuous throughout the relevant period and to counter the evidence produced by the Council and the occupiers of Gardeners Cottage. Accordingly, I conclude that, on the balance of probability, the use of the land as a domestic garden has not been shown to have been lawful on the date on which the application was made, such that the appellant has not discharged the burden that falls upon him.

Conclusion

30. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect the land north of The Coach House, High Street, Thornham, Norfolk 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.

Paul Freer
INSPECTOR