



Appeal Decision

Site visit made on 12 November 2019

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 November 2019

Appeal Ref: APP/W4515/X/19/3220707

**66 Blueburn Drive, Simonside Park, Killingworth, Newcastle Upon Tyne
NE12 6GA**

- 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 Norman Fenwick against the decision of North Tyneside Metropolitan Borough Council.
 - The application Ref 18/01150/CLEXIS, dated 20 August 2018, was refused by notice dated 10 October 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 "to be used as a garden as shown on enclosed photographs, as fruit trees and bushes can clearly be seen".
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. From the application form it is unclear as to the existing use of land for which a certificate of lawfulness is sought. This is also unclear from the Council's decision notice which refers to "residential curtilage", which is not actually a use of land. I have therefore taken the description of use from the appeal form which refers to 'garden' use, as reflected in the various representations from the parties.

Reasons

3. Uses and operations are lawful at any time if no enforcement action may be taken in respect of them, whether because they did not involve development or because the time for enforcement action has expired (s191(2)). In this case, the appellant seeks to rely on the passage of time.
4. It is necessary to consider whether, on the balance of probability, the use of the land as a garden area has continued for a period of ten years or more prior to the date of the application, that is from at least 20 August 2008, so as to be immune from enforcement. 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 reasons why the land has been used as it has; any merits that may flow from this; its potential future enclosure and whether there are

similar circumstances relating to other sites elsewhere, are not relevant factors in an assessment of whether the existing use of the land as a garden, in this particular case, is lawful.

5. The appeal site is roughly rectangular, situated between the rear of the appellant's property, delineated by a vertical boarded fence, and highway land, delineated by a substantial hedge. From my visit it was evident that this land comprises a grassed area that is quite densely planted with trees and bushes, with a small vegetable plot at one end and some portable chairs and water butts nearby. I am in no doubt that the land, which is connected to the rear of No 66 via a pedestrian gate, has the appearance of a garden, with the presence of cut grass, a well-maintained vegetable growing area and seating. These factors indicate that the area is being used for recreational purposes.
6. The appellant has submitted various information in support of the application. He says that he started to plant trees, bushes and vegetables on the land just after moving into No 66 in June 2005 and that trees and bushes can clearly be seen to be over 10 years old, having been grown from cuttings. Photographs, apparently from 2005 and 2008, are provided which appear to show the land being cleared. The appellant says that he uses the land regularly during the summer, tending vegetables, trimming plants and cutting grass.
7. The Council has referred to the photographs being undated and the possibility of trees being purchased at various levels of maturity. Its position is that the information provided is not sufficiently precise or unambiguous to demonstrate that the land has been used continuously for the 10-year period.
8. The photographs provided of the land, which the appellant claims were taken in 2008, show an area characterised by unkempt grass, with evidence of tree removal and intermittent planting. The land at that time lacks its current appearance of a practical and manicured garden, and accordingly I am unable to conclude that its use was a garden at that time.
9. I concur with the Council that the evidence does not enable me to readily identify the age of the garden plants. In any event, and notwithstanding the statement given on the application form that the use began in June 2007, it is not possible from the information before me to reach a reasoned view as to when the appearance and use of the land as a garden first commenced, or to conclude that it continued in such use after this time. I am not therefore persuaded that the information and evidence provided by the appellant satisfactorily demonstrates, on the balance of probability, that the appeal site has been in continuous garden use for the entire 10-year immunity period.
10. 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 "to be used as a garden as shown on enclosed photographs, as fruit trees and bushes can clearly be seen" at 66 Blueburn Drive, Simonside Park, Killingworth, Newcastle Upon Tyne NE12 6GA 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