
Appeal Decisions

Site visit made on 23 September 2019

by B M Campbell BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25th November 2019

Appeal A: APP/K2230/X/18/3211641

Land rear of 1 Church Cottages, Wrotham Road, Meopham, Kent DA13 0AB

- 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 M Lay against the decision of Gravesham Borough Council.
- The application Ref 20180186, dated 11 February 2018, was refused by notice dated 16 August 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 "additional residential garden".

Summary of Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out in the Formal Decision.

Appeal B: APP/K2230/X/19/3233340

Land rear of 2 Church Cottages, Wrotham Road, Meopham, Kent DA13 0AB

- 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 A Smith and Mrs J Secker-Smith against the decision of Gravesham Borough Council.
- The application Ref 20190111, dated 29 January 2019, was refused by notice dated 3 May 2019.
- 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 rear of 2 Church Cottages as domestic garden".

Summary of Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out in the Formal Decision.

Preliminary matters

1. The Council in its decision on each of the applications has described the proposal as "continued use". This is not correct since an application under s191 of the Act simply seeks a determination as to whether the use described was lawful at the time of the application (s191(4)). It is not an application to continue a use.
2. The application form for an LDC, the subject of Appeal B, is dated 28 January 2018 but there is plainly an error in that the wrong year has been

entered as the application was received by the Council in 2019. I have, therefore, taken the time of the application to be 29 January 2019.

3. At the site visit I sought confirmation as to which plan had formed part of each application and have used the agreed plan for each appeal. In relation to Appeal B, it was acknowledged at the visit that the northern boundary of the appeal site had been drawn incorrectly, following a grid line on the ordnance survey plan rather than the fenced northern boundary of the site. However, it had been decided by the Appellant not to try to increase the extent of the appeal site to include the narrow, omitted strip of land.
4. It should be noted that the applications relate to the residential use of the appeal sites as garden land. The decision in either case cannot address the question of whether the sites fall within the curtilage of either dwelling because curtilage is not a use of land. It is my understanding that the Appellants in each case accept that proposition.
5. In its representations, rather than keeping the two applications/appeals separate, the Council has cross referenced material from each. For example, for Appeal A I am asked to refer to the delegated report for Appeal B, and the delegated report for Appeal B refers to the evidence submitted for the application the subject of Appeal A. I can understand the logic of taking all available evidence into account given that, historically, the two appeal sites formed one parcel of land. I intend to do the same.
6. For clarity, I shall refer to the site in Appeal A as "Appeal site A" and that in Appeal B as "Appeal site B".

The appeal sites

7. Nos 1 and 2 Church Cottages comprise a pair of semi-detached houses. The original rear gardens to each property were of the same depth and their extent is still discernible on the ground not least because there is a change in level to the land beyond. With regard to each property, the application for an LDC relates to land to the rear of the original garden extending back to the boundary of a field to the west. There is no boundary division between the two appeal sites and there is no dispute that historically the two areas have been used as one.
8. The relevant test for lawfulness as set out in s191(2) of the Act is that (a) no enforcement action can be taken because (in these cases) the time for enforcement action has expired and (b) the use does not contravene the requirement of any enforcement notice then in force. There was no enforcement notice in force at the time of either application so that (b) is satisfied in each case. With regard to (a), no enforcement action could be taken at the end of the period of ten years beginning with the date of the breach provided the use continued throughout that ten-year period with no material change thereafter. Thus, the residential use of the land would need to have begun at least ten years before the date of each application, that is: by 11 February 2008 in the case of Appeal A and by 29 January 2009 in the case of Appeal B.

Reasons

The case for the Appellants

9. The land (both appeal sites) has been in continuous use as domestic garden since 1995. A letter from Mr French (a farmer) states that he sold land to the rear of Nos.1 and 2 Church Cottages to Mr Collins (the then occupier of No.2) in 1995 to form a larger garden. A post and rail fence was erected as part of the sale agreement and that same fence stands today. The letter goes on to say the purchaser kept the grass mowed and planted trees on it and at one point there might have been a golf green on it. The land has been kept that way for the last 23 years.
10. A letter from Mr and Mrs Meakin and a statutory declaration from Mr Meakin state that they owned No.2 from August 1998 to March 2013. The letter states that beyond the garden were fenced paddocks and that their paddock was separated from adjoining land by an existing post and rail fence. The declaration (prepared to support Appeal B only and thus relating to that land only) says the land was continuously used for domestic purposes during their ownership and that they planted a number of trees, installed a flag pole and a concrete path and steps.
11. Mr Smith and Mrs Secker-Smith (Appellants Appeal B) purchased No.2 in March 2013. In an email submitted to support Appeal A, Mr Smith writes that the rear field/paddock had been utilised as a garden for many years. The previous owner had planted trees and a hedge and installed a flag pole and concrete steps and path to facilitate ease of access. In the corner, a small copse of trees had been planted to hide garden refuse and compost. Within the copse they had installed a tree house. The previous owner advised him that they had hand mown the area behind the hedge where he used to play football and sit with his family whilst the remainder of the area was machine mowed. Mr Smith says he has continued to use the field in a similar vein with a gazebo and domestic furniture in clement weather. He also recalls an old shed that was present on Appeal site A.
12. Statutory declarations from Mr Smith and his wife in support of Appeal B state that the former owners Mr and Mrs Meakin had used Appeal site B for general domestic purposes. They have continued to use it so since purchase for general residential enjoyment, socialising with friends, hosting garden parties and other functions. The declarations state that the land has been continuously used for domestic purposes as additional garden land throughout their ownership.
13. A statutory declaration from Mr Lay (Appellant Appeal A), has been submitted to support Appeal B. Mr Lay and his wife bought No.1 in February 2001. He confirms from first hand observations that both Mr and Mrs Meakin and, latterly, Mr Smith and Mrs Secker-Smith have used the land as a garden. In particular he says Mr and Mrs Meakin used the rear area for composting and storage of garden refuse and constructed a tree house for their son to play in. Mr Lay bought Appeal site A from Mr Smith and Mrs Secker-Smith (in July 2016 according to the land registry).
14. A further four statutory declarations from friends of Mr Smith and Mrs Secker-Smith confirm that the land in Appeal B has been used for domestic

purposes during the Appellants' ownership and list various activities connected with that use.

15. Aerial photographs have been provided. That from 1990 shows the appeal sites to form part of the large field to the west. That from 1999 shows the appeal sites and another piece of land to the north to have been separated from the field to the west. A large rectangular area partially enclosed by a hedge to the rear of No.2 and a small copse in the south-western corner to the rear of No.1 can be made out in the 2003 photograph. Subsequent photographs show planting developing. In that from 2009, the L shaped hedge is clearly defined and the land seen to be in active use. Tree planting has matured, the concrete path from the original rear garden of No.2 is evident, and something is visible in the area behind the small copse, said to have been used for compost and garden waste.
16. The Council has referred to two planning applications made by Mr Meakin in 2001 and 2010. In both of those, both appeal sites are included as being within his ownership and, in the 2001 application, form part of the application site. A photograph taken in connection with the 2001 application shows a goal post to the rear located in Appeal site B.
17. Both appeal sites have been used for residential purposes since 1995 in connection with the dwellinghouse at No.2 until 2016 when Appeal site A was transferred to No.1.

The case for the Council

18. An extract from estate agent's details for No.2 distinguishes the garden to the rear of the house from a fenced paddock beyond (Appeal sites A and B). Mr and Mrs Meakin purchased the property in 1998 and their letter confirms their paddock was separated from neighbouring land by post and rail fencing. There would appear to have been two distinct areas at that time – the garden to the house with a paddock beyond.
19. Historically, fences and hedges have separated the original gardens from the land to the west, the subject of these appeals, and this can be seen in the aerial photographs. Usage of the appeal sites appears to have been open land with some trees/vegetation. The land has the appearance of a paddock or small field and not a garden. There has been a distinct difference between the land to the rear and the original gardens to Nos.1 and 2 which are more formal, cultivated and tended. The change in character between the original gardens and the land to the west is still discernible.
20. The evidence provided by way of letters and statutory declarations are largely made by those who have an interest in the outcome of these appeals or from their friends and should thus be treated with caution. In any event they lack detail, for example: how often did the friends visit to observe what was going on.

Assessment

21. It is, in my view, unfortunate that the statutory declarations appear to have been prepared for the signatories rather than being expressed in the individuals' own words. As such they are limited in detail, and in what is said, as they are close to being identical. They are not personal recollections. Nonetheless, each one has been properly signed and witnessed. It is sworn

evidence, a solemn declaration made under the 1835 Statutory Declarations Act. With all that this implies, it does not seem to me that eight people would have signed such declarations unless they believed the content to be true. Whilst the Council has criticised the individuals' relationship to the Appellants, it seems to me that the people best placed to know how the land has been used would be the owners, past and present, and friends. This must especially be so of Mr Lay who has looked out over the land for some 18 years and so would have first-hand knowledge of how the land has been used throughout that period. Without evidence of substance to contradict those declarations, I give them due weight.

22. Turning then to aerial photography, this has limited value in identifying use. However, the photographs do, in my view, lend credence to the account given for the Appellants of the historic use of the land. For example, in comparing those from 1990 and 1999, it is clear that the land did become physically separate from farmland to the west at some time between those dates. That would correlate with the statement that the land was bought from the farmer in 1995. Planting is seen to have been carried out in the 2003 photograph including the hedge and small copse, and they are shown maturing in subsequent years.
23. In the 2009 photograph, the claim that Mr Meakin had hand mown the area behind the hedge (so that it could be used for playing football and the like) and machine mowed the rest appears to be borne out by the pattern on the ground. Since Mr Meakin also owned the small field to the north, I find it unsurprising that that has similar mowing lines. The 2009 photograph also suggests some active use of the land on that day with structures/vehicles present. Other features referred to in declarations and letters are also discernible in some of the photographs such as the area said to have been used for compost and garden waste and the concrete path. Further, in most, the surface is different in colour to the agricultural land to the west suggesting a different maintenance regime. What the aerial photographs do not show, in my view, is land still in agricultural use or with the character of a typical paddock.
24. Other photographs taken from the ground have been supplied. Most are of little assistance but a few again depict some of the items mentioned in letters and statements, for example the flag pole (which I saw was located some 14m beyond the ends of the original gardens), a raised shed, the closely clipped L shaped hedge and a goal post. The mature tree planting which I saw at my visit (the hedge having been removed) gave me a firm impression of being ornamental in species and positioning such as one might expect to find on a large residential property.
25. Whilst photographs cannot demonstrate continued use, what they do demonstrate, in my view, is that when the land was separated from the agricultural land to the west in 1995, it ceased to be used for agricultural purposes. "Open land" as the Council describe it is not a use of land and neither is "paddock" which has been loosely used by estate agents and former owners to describe the land. Although a paddock is usually associated with grazing, and generally by horses, there is no evidence whatsoever to suggest that the appeal sites have been used for such a purpose or indeed any other agricultural purpose since 1995. Moreover, even if the land had been used as a paddock for grazing, that could have been an incidental residential use if the

livestock was kept for the personal enjoyment of the occupants of the dwellinghouse.

26. I do not find the information from title deeds to be especially helpful and, having regard to the Zoopla information gathered by the Council, it appears to contain inaccuracies. What it does show, however, is that the land to the west of Nos.1 and 2 was formerly one parcel which was subdivided into the appeal sites for Appeals A and B when Mr and Mrs Lay bought that part behind their house, No.1, in 2016. Similarly, when looking at historic development proposals relating to the house at No.2, I am not surprised that the use of the land to the rear of the property was not mentioned as that was not the subject under consideration.
27. The Council sets much store on the difference in character and the physical separation by fencing/vegetation/levels between the original gardens to Nos.1 and 2 and the land the subject of these appeals. It is unsurprising that No.1 was separated and fenced since the owners of that property did not purchase the land to the rear until 2016. With regard to No.2, the land did not have to be part of the formal garden to that property to be in the same residential use and historic photographs, including from the estate agent's details thought to be from around 1998, show that a way through from the original garden was formed and retained.
28. From the evidence available, I conclude that both appeal sites (as one parcel of land) came under the same ownership as No.2 from 1995 to 2016. During that time, there was some physical separation between the land and No.2 by fencing/vegetation. However, a pedestrian way between the two was available so that there was not complete physical separation. The available evidence on use from individuals and supported by photographs is that the land has been continuously used in connection with the residential use of No.2 for ordinary domestic purposes such as recreation and leisure. There is no contradictory evidence to suggest any functional separation. Thus, I conclude that during that period the appeal sites formed part of the residential planning unit, No.2 and were in use for residential purposes in connection with the use of No.2 as a dwellinghouse.
29. The description of the use in each application as "garden" can embrace a wide range of outdoor activities that one might associate with the use of a dwellinghouse such as playing, drying washing, recreation and leisure, and growing plants and produce. It might include formal planting areas but not necessarily so. People use their gardens in a variety of ways and not always in the same manner, but what is consistent is that the activities carried out are ancillary or incidental to the use of the dwellinghouse as such.
30. The relevant test of lawfulness is "on the balance of probability" and not some more onerous test such as beyond reasonable doubt. From the evidence before me, I find it more likely than not that there was a material change in the use of the land (both appeal sites) when it was purchased in 1995, from land in use for agriculture to residential use in connection with the dwelling, No.2. That use continued for in excess of ten years so as to become the lawful use in 2005. There was a change when that part of the land to the rear of No.1 was purchased by the owners of that property and became part of the planning unit, No.1, but that did not bring about a material change in use as there was

no change in character. The land (the subject of Appeal A) was still used for residential purposes albeit now associated with the use of the dwelling at No.1.

31. As a matter of fact and degree and on the balance of probability I find that the date of the breach was 1995 and that the use then continued for ten years such that the residential use of both appeal sites became lawful in 2005, with no material change thereafter. I find nothing of substance to contradict the Appellants' version of events.

Conclusion

32. For the reasons given above I conclude, on the evidence now available, that the Council's refusals to grant certificates of lawful use or development were not well-founded and that the appeals should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Formal Decisions

Appeal A: APP/K2230/X/18/3211641

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

Appeal B: APP/K2230/X/18/3233340

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

B M Campbell

Inspector

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: 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 11 February 2018 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and outlined in 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 reason:

No enforcement action could be taken in respect of the use because the time for taking such action had expired (s191(2)(a) of the Act) and the use does not contravene the requirements of any enforcement notice in force (s191(2)(b) of the Act).

The use began more than 10 years before the date of the application and has continued thereafter with no material change.

B M Campbell

Inspector

Date

Reference: **Appeal A: APP/K2230/X/18/3211641**

First Schedule

Use of land as domestic garden ancillary to the main dwelling

Second Schedule

Land rear of 1 Church Cottages, Wrotham Road, Meopham, Kent DA13 0AB

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

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.

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

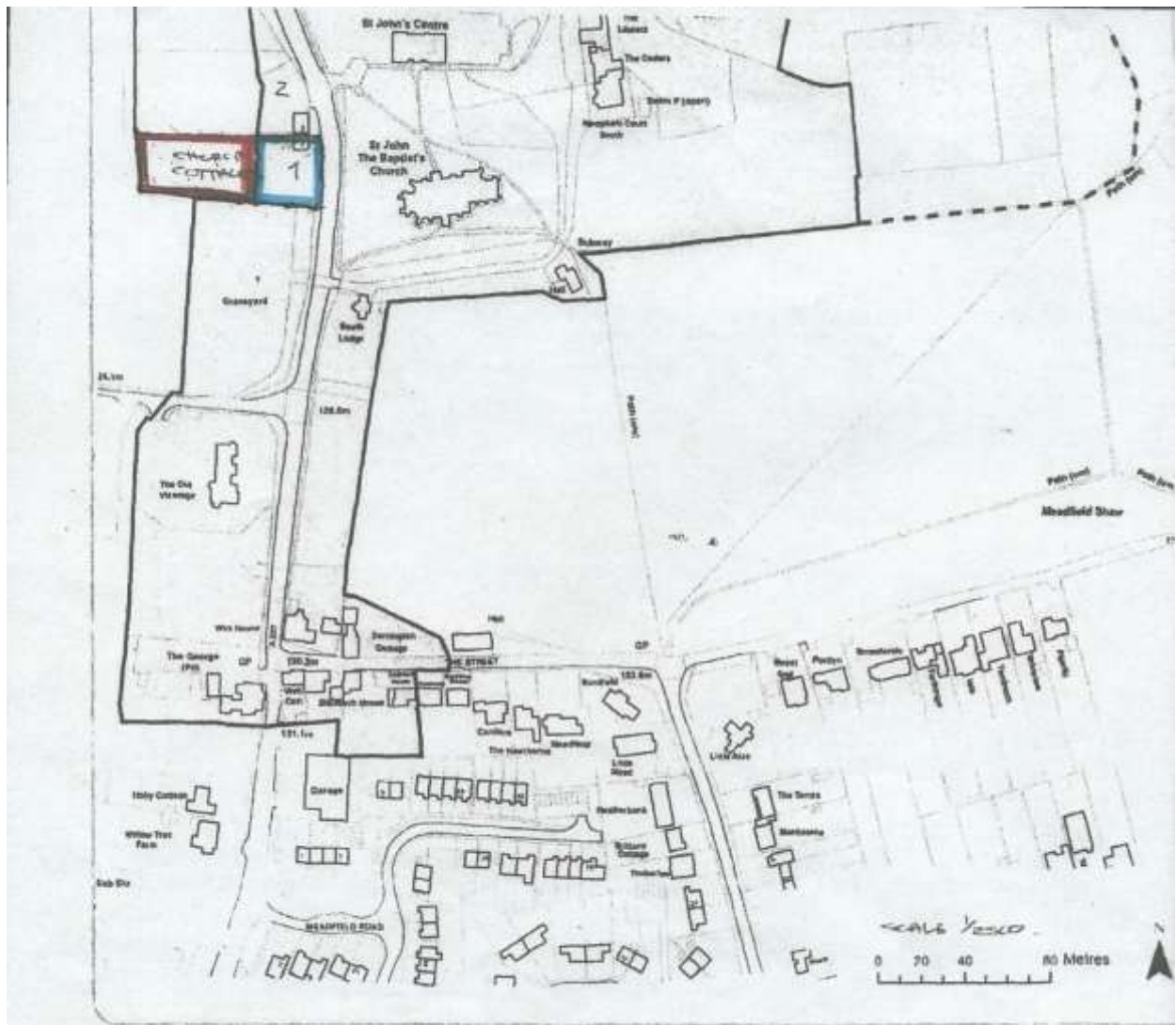
This is the plan referred to in the Lawful Development Certificate dated:

by B M Campbell BA(Hons) MRTPI

Land rear of 1 Church Cottages, Wrotham Road, Meopham, Kent DA13 0AB

Reference: Appeal A: APP/K2230/X/18/3211641

Not to Scale



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: 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 29 January 2019 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and outlined in 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 reason:

No enforcement action could be taken in respect of the use because the time for taking such action had expired (s191(2)(a) of the Act) and the use does not contravene the requirements of any enforcement notice in force (s191(2)(b) of the Act).

The use began more than 10 years before the date of the application and has continued thereafter with no material change.

B M Campbell

Inspector

Date

Reference: **Appeal B: APP/K2230/X/19/3233340**

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Use of land as domestic garden ancillary to the main dwelling

Second Schedule

Land rear of 2 Church Cottages, Wrotham Road, Meopham, Kent DA13 0AB

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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.

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 the Lawful Development Certificate dated:

by B M Campbell BA(Hons) MRTPI

**Land rear of 2 Church Cottages, Wrotham Road, Meopham,
Kent DA13 0AB**

Reference: Appeal B: APP/K2230/X/19/3233340

Not to Scale

