



Appeal Decision

Site visit made on 27 October 2019

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 26 November 2019

Appeal Ref: APP/N2345/X/19/3228308

Land at Albin House, Cumeragh Lane, Whittingham, Preston PR3 2AL

- 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 Wayne Hayhurst against the decision of Preston City Council.
 - The application Ref 06/2019/0037, dated 14 January 2019, was refused by notice dated 12 March 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 is sought is: Existing use as a dwelling house (Class C3).
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Decision

1. The appeal is allowed and a lawful development certificate is attached below.

Matters of clarification

2. The LDC application form referred to the use being applied for as '*Use of land as residential*'. The Officer Report (OR) described the application as being for a '*Certificate of Lawfulness for existing use of land as residential garden*'. The Council's notice of refusal, in the first schedule, described the application as being for a '*Certificate of lawfulness for the existing use as a dwelling house (Class C3)*'. This latest description is then used in the Appeal Form.
3. There is no dispute that what was applied for was a LDC relating to the existing use of all of the land (as shown in the application plan) for residential use with the land to the south and south-west as being an ancillary residential use to the established dwelling house (Class C3) known as Albin House.
4. Thus, if it can precisely and unambiguously shown that, for a continuous 10 year period (from 14 January 2009 to 14 January 2019), the use of the whole of the application land (the house and garden land plus the land to the south and south-west – two parts) was for residential purposes in conjunction with the occupation of Albin House, then it would be lawful for planning purposes. Consequently the LPA would have been precluded from taking enforcement action for its use as such if for example it had previously been in agricultural or some other use.
4. However, a '*residential use of land*' is not determinative of whether that land falls within the '*curtilage of a dwelling house*' and this is not what is being considered in this appeal. I have dealt with this appeal on the basis of what was applied for: namely '*the use of the land as residential*' and as shown to be in the ownership of the appellant within the red-line of the application plan. Namely the house, garden and immediate curtilage as one area (Land Area A) and the extensive area of land to the south and south-west as the second area (Land area B).

Background information

5. The land is registered under the single HM Land Registry Title Number, LA619836. But, as referred to above the application/appeal land is in two parts. The first part comprises the Grade II listed Albin House and garden, within its small curtilage and this fronts on to Cumeraugh Lane (B5269). I refer to it as Land Area A. It is shown as ref: 7297, with an area of 0.053 hectares (0.13 acres).

6. The second, much larger parcel of land, lies outside of the residential curtilage of the house and slopes away to the south-east and south, forming a rough L-shape, and bounding land associated with Albion Cottages. I refer to it as Land Area B. It is shown as ref: 7300; extends to 0.732 hectares (1.81 acres) and comprises open grassland/garden bounded by trees and hedgerows and includes a small lake. The Council indicates that this area of land is identified as being within the open countryside in the Adopted Preston Local Plan 2012 -2026.

7. The OR for the LDC application sets out the relevant planning history of Albin House and its land. Various Listed Building Consents (LBCs) and Planning Permissions (PP) have been granted between 1997 and 2006 for, amongst other things, a double garage; alterations to an outbuilding; a two-storey extension and a first floor extension to the dwellinghouse.

8. A previous application (06/2018/0802), for a LDC for use of the appeal land (Land Areas A and B) as 'residential garden', was refused in September 2018. Neither that application, nor the appeal application stated that the change of use was from agricultural use to residential use. Both simply claimed that the change of use related to the garden use in conjunction with Albin House.

9. In August 2003, the house and was purchased by a Mr D Draper (see reference to Affidavit and Statutory Declaration below). It is indicated that the property comprised the Albin House and 2 acres of land (the second larger parcel of Land Area B, which lies outside of the curtilage of the dwelling house. This is the land set out in the Registered Title referred to above. The Appellant purchased the property and land in July 2014 and his Statutory Declaration is also referred to below.

Reasons

Introduction

10. An appeal relating to the refusal of a LDC application is confined to the narrow remit of reviewing a LPA's reason(s) for refusal. In this case it is necessary to consider the LPA's reasons for refusal and to decide whether or not the decision was sound. The planning merits of the case do not fall to be considered. This LDC was applied for in order to establish whether the use of the whole of application land, as residential land, was lawful for planning purposes on the date of the application, 14 January 2019. The onus is upon the appellant to demonstrate that this was the case and the relevant test, relating to submitted evidence, is '*the balance of probability*'.

11. Planning Practice Guidance (PPG) indicates that an applicant for a LDC is responsible for providing sufficient information to support an application and that, without sufficient or precise information, a LPA may be justified in refusing a LDC. However, PPG also indicates that if a LPA has no evidence itself, nor any from others to contradict or otherwise make the appellant's version of events less than probable there is no good reason to refuse the application, provided that the appellant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

The gist of the case for the Appellant

12. The appellant's case is that the appeal land has been used for a continuous ten-year period, as residential land ancillary to the use of the dwelling house, Albin House. The first part of the case relies on an Affidavit and a Statutory Declaration by Mr D Draper, the previous owner, and a Statutory Declaration made by the appellant, who purchased the property from Mr Draper.

13. Within his Affidavit, dated 25 February 2015, Mr Draper confirms that he purchased the property (Albin House and associated 2 acres of land) on 18 August 2003. He states that since that date the land had been used purely as garden land and that at no time during his occupation had it been used for agricultural purposes. In the 2018 Statutory Declaration Mr Draper referred to the use of the property and the land for residential purposes between August 2003 and July 2014.

14. The appellant indicates that he purchased the house and land on 25 July 2014 and that it had been purchased as a single lot as shown in the HM Land Registry Title. He declares that since the purchase of the property the land to the south-east of the dwelling and its associated garages have been used for residential purposes. A plan, together with photographic evidence is submitted and the uses include boating on a lake which had been formed during Mr Draper's ownership.

15. Mr Draper has provided photographs which show the land being used by his family for a wedding in 2012 with a football goal in the background; as a children's play area; for other family photographs in 2012 and by a group of children in 2009. The appellant's photographs include one of his family boating on the lake in 2015; the garden being used for leisure and other family photographs taken in April and June 2015.

16. It is indicated that the property had been marketed for sale on 22 May 2012 and 21 September 2016. A photograph of the 2012 marketing brochure shows the lake and the garden area, the subject of this LDC application. The description of the property included a description reading '*Externally the property is sat in approximately 2 acres of beautiful, well-maintained gardens and a lake.*'

17. It is contended that the affidavit, the declaration, the photographs, the marketing information demonstrate that the appeal land has been used for residential purposes since before 2003 and that this use has continued uninterrupted until the present day. The evidence is considered to be sufficiently precise and unambiguous to satisfy, on the 'balance of probability' test, that the appeal land is considered to benefit from rights to continue its use for residential purposes.

The gist of the case for the Council

18. The Council refers to the previous application for a LDC which was refused and indicates that this current application, like the previous one, did not state that the change of use (if it had occurred) was from agricultural to residential use. It is also indicated that the previous application provided no evidence from the appellant, the current owner.

19. The Council has concluded that it is still not possible to establish from the evidence submitted, on the balance of probability, that the appeal land has been in continuous use for residential purposes for a continuous ten-year period. During that time it is stressed that the house has been sold once and has also been marketed for sale and that it is unclear as to whether or not the property was unoccupied at any time. Thus, the question of any gaps in occupation had not been addressed.

20. It is further indicated that the submitted photographs only show the infrequency of use and some show the patio area which is within the curtilage of the house (Land Area A) as opposed to the larger area (Land Area B). It is contended that the photographs do not demonstrate a continuous use and that the difficulty of providing such evidence casts doubt on whether such a large area of land can be continually (ie. frequently) used for a ten-year period as a residential garden.

21. Due to the infrequency of use it is considered that the Council could have taken enforcement action for a breach of planning control at any time during the ten-year period. It is considered therefore that this case fails the test set out in section 191(2) of the Act, as applied in the case of *Thurrock v Secretary of State for the Environment*.

My assessment

22. Having assessed all of the submissions I acknowledge that there are gaps within the evidence and that the photographs can, literally, only provide a 'snapshot' of how the land had been used by the two families over the years. There could well have been periods when the house was unoccupied, but even if that had been the case there is nothing to suggest that the appeal land had been used for any other use.

23. The Affidavit and Statutory Declarations are clear about ownership and usage dating back to 2003 and the Council has not provided any contrary evidence to indicate that the land had not been used for anything other than residential use associated with the use of Albin House.

24. It is clear that neither of the families have farmed the land during their ownerships and on the basis of the evidence it is difficult to envisage any other use other than that of an extensive garden and recreational area to the south-east of Albin House. In my view, the formation of the small lake would have been carried out to enhance the views of this landscaped area from the house. In addition the photographs all show a somewhat manicured garden area, as opposed to farmland or open countryside. During my visit I could see most of the landscaped garden area from the lane.

25. I acknowledge the difficulty of proving that the land was used continuously for the ten-year period. However, this is not a situation whereby there would be any documentary evidence to show such a continuous use. For example, the situation is not akin to proving residential occupation of a property by way of tenancy agreements. In situations such as this the use of land for residential garden purposes is not normally logged or diarised. It is usually a case of extending a garden into agricultural land by forming a typically domestic landscape with garden plants, trees, shrubs and lawned areas.

26. It is clear that Land Area B has been transformed over the years from open agricultural land to an enclosed and structured landscaped garden area, complete with small lake. Although the appellant cannot show a day to day continuous use for the relevant period it seems unlikely, in my view that, the use of the garden area could have been intermittent. Once the previous owner had formed the garden and the appellant had purchased the house and land, there appears to be no sign of the land reverting back to agricultural use. It was also marketed on that basis with specific reference to the property being sat in approximately 2 acres of beautiful, well-maintained gardens and a lake.

27. A garden area to a dwelling, no matter how large or small, is not necessarily used on a daily basis. In particular over the winter months, apart from minimal maintenance, such large gardens or residential land may not be used at all for

lengthy periods. The only benefits or 'use' an owner might have from the garden during such periods would be the pleasure of viewing the landscape from within the house and its immediate curtilage.

28. In this case, I find no reason to question the matters covered by the Affidavit and the Statutory Declarations. The previous owner clearly states that the land had been used as garden land since 2003 and the appellant indicates that this has also been the case since he purchased the house and land in 2014. Since then it is further declared that the land continued to be used for residential purposes associated with Albin House.

29. In my view the declarations and the photographs, are sufficient in this case to indicate, on the balance of probability, that Land Areas A and B have been used continuously for residential purposes for the relevant ten-year period. That is, from 14 January 2009 to 14 January 2019. The LPA has not provided any contrary evidence of its own and nor is there any evidence from others to contradict or otherwise make the appellant's version of events less than probable.

30. In my view, therefore, there is no good reason to refuse the application. I consider that the appellant's sworn evidence, together with the photographic evidence is sufficiently precise and unambiguous to justify the grant of a certificate. This is attached below.

Other Matters

31. In reaching my decision I have taken into account all other matters raised by the Council and those made on behalf of the appellant. These include the full planning history of the house and land, the initial appeal submissions; the various statements and Council reports; the final comments and the matters set out in the costs application. However none of these carries sufficient weight to change my decision.

Formal Decision

32. The appeal is allowed and a Lawful Development Certificate is attached.

Anthony J Wharton

Inspector



The Planning Inspectorate

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 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 14 January 2019, the use described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto, was lawful within the meaning of section 191 (1) 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.

Signed

Anthony J Wharton

Inspector

Date: 26 November 2019

Appeal Reference: APP/N2345/X/19/3228308

First Schedule

The use of the land for residential purposes

Second Schedule

Land at Albin House, Cumeragh Lane, Whittington, Preston PR3 2AL

Notes:

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended) and relates only to the land in the Title Plan reference number LA619836 at Albin House.

It certifies that the use described in the First Schedule, 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. Any other use which is materially different from that referred to above may result in a breach of planning control which is liable to enforcement action by the local planning authority.