



Appeal Decision

Site visit made on 20 January 2020

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 13 February 2020

Appeal Ref: APP/P1615/X/19/3225622

Rose Villa, Main Road, Huntley, GL19 3DZ

- 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 Jeremy Rebbeck against the decision of Forest of Dean District Council.
 - The application Ref P1349/18/LD1, dated 23 August 2018, was refused by notice dated 25 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 described as 'confirmation that a parcel of garden land is residential curtilage used in conjunction with Rose Villa'. In their decision notice, the Council described the use for which the certificate was sought as 'use of land as residential curtilage'.
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Preliminary Matters

1. Both the appellant in the application and the Council in its decision notice refer to the use applied for as being 'residential curtilage'. 'Curtilage' is a legal term describing the relationship of land to a building. It is not a use of land for planning purposes.
2. However, it appears that both parties have understood the claimed existing use as a garden and for parking in connection with the residential use of Rose Villa. I determine the appeal on this basis and do not consider that any injustice would result from this.

Background/Main Issue

3. The purpose of an application under s191 of the Town and Country Planning Act 1990 as amended (1990 Act) is to determine whether an existing use of land is lawful. In seeking a LDC, the onus of proof is on the appellant to demonstrate that the use claimed is lawful at the date of the application. The standard of proof is on the balance of probabilities. If there is no evidence to contradict or make the applicant's version of events less than probable, and their evidence alone is sufficiently precise and unambiguous, a LDC should be granted.
4. The main issue here then is whether the decision of the Council to refuse a certificate of lawful use or development was well founded. This will turn on whether the use of the appeal site as a garden and parking area in connection with the residential use of Rose Villa is lawful.

Reasons

5. The land is a plot of some 25 square metres which is accessed via a private drive which separates the land from Rose Villa. The surrounding uses include gardens and residential properties, along with a commercial car garage owned by the appellant which is adjacent.
6. The Council does not dispute that the land was originally used as a garden. Both parties comment also that within the ten year period prior to the date of the application, the land has been used as car parking/car storage in connection with the appellant's commercial garage. The Council considers though that since 2014, the level of this parking/storage has moved beyond a level which could be considered incidental to the residential use.

Legal framework

7. The appellant has focussed their arguments around whether the residential garden/parking use has become immune from enforcement action by reason of the change of use having occurred more than ten years ago.
8. However, it is first necessary to consider whether the use of the land as garden/residential parking at the date of the application represents development requiring planning permission under s55 of 1990 Act, including consideration of whether (i) it represents a material change of use; and (ii) if so, whether it would represent land within the curtilage of a dwellinghouse used for any purpose incidental to the enjoyment of the dwellinghouse.

Whether a material change of use

9. Section 55(1) of the 1990 Act states, as regards uses of land, that a use will represent development requiring planning permission where it is a 'material change of use'. This term is not defined in statute and there is a good deal of case law expounding the meaning of this phrase.
10. Essentially, it means that there needs to be some significant difference in the character of the activities from what has gone on previously. It needs to be shown then that there has been a *change* of use in order for the present use to represent development requiring planning permission.
11. The Council appears to accept that the original use of the site was as a garden and there is no indication as to what any change of use might have been from i.e. the nature of any use prior to the claimed domestic garden/parking use.
12. However, this is not conclusive of itself that the use claimed as existing *at the date of the application* was lawful. As such, I need to consider what activities have been occurring on the land up to that date.
13. Third party evidence is contradictory as to the use for the period since the appellant's purchase in 2005. A letter from Ian Richards states that he knew the previous owners of Rose Villa who lived there since the 1970s and that he also knows the present owners. He states that the appeal site has always been used "as garden and parking associated with Rosevilla [*sic*]" for the "many years" that he has known it.
14. A letter from Allen Piddock and Jan Langford who own land adjoining the appeal site states that the land is "full of old (decaying) vehicles" and is used as part of the appellant's business and that it is "no longer used as garden".

15. However as referred to above, the appellant's statement appears to acknowledge use of the site for parking in connection with his commercial garage. It states that the "residential curtilage of Rose Villa" – presumably intended to mean the appeal site – "was used as a temporary measure as an overspill car park" whilst land at the commercial workshop premises was prepared for an extension. It goes on to say that the extension was "delayed for over a year due to the construction of a substantial foundation".
16. It may be that the extent and duration of this overspill parking was not enough to lead to a material change of use. However, the onus of proof is on the appellant.
17. Consequently, on the evidence currently available, and on the balance of probabilities, it appears that there was a change of use from the previous use as residential garden and parking, to either: a mixed use as residential garden and parking, *and* commercial car storage and parking; or to exclusively commercial car storage and parking.
18. The appellant has not made any case that this change did not represent a material change of use in terms of the character of activities and it seems probable, on the basis of the limited available evidence, that the nature of such a change would entail significant differences in the character of activities ongoing before and after the change. This is in view of the likely amount and type of comings and goings, and nature and number of vehicles on the land.
19. The appellant's statement indicates that the commercial garage extension work is now complete and that there is no reason for the appeal site to be used in connection with the workshop use. The claim thus is that the site is presently in domestic garden/parking use.
20. However, as it appears probable that there has been a material change of use since the period of the appellant's ownership as identified, it is not possible for the land to revert to the former seemingly lawful domestic garden/parking use as the right of reversion would be lost by the implementation of another unauthorised use.
21. The claimed existing use is therefore not lawful on this basis. I proceed therefore to assess the other means by which it can be demonstrated that the claimed existing use is lawful.

Whether immune from enforcement action

22. Section 191(2) of the 1990 Act states that a use is lawful at any time if no enforcement action may be taken in respect of that use. This can be shown by demonstrating that the time for enforcement action has expired.
23. As to the time for enforcement action to be taken, Section 171B of the 1990 Act states that in respect of a material change of use other than change of use of a building to use as a single dwelling house, no enforcement action may be taken after the end of the period of ten years *beginning with the date of the breach*.
24. My finding above was that, during the period of ten years prior to the date of the LDC application, there was most likely a material change of use of the land meaning that it was no longer used for only residential parking/garden use.

25. There is limited information to when this change of use might have occurred. Based on an aerial photograph obtained by the Council, its view is that this was around 2014. In the absence of any evidence from the appellant to the contrary, it seems probable that the change occurred around that time.
26. Consequently, a period of ten years' continuous use had not elapsed by the date of the application in respect of the claimed change *back* to residential/garden use.
27. Thus, on the evidence before me, the claimed existing use is not lawful on the basis that it is immune from enforcement action.

Land within curtilage/incidental to the enjoyment of the dwellinghouse

28. Section 55(2)(d) of the 1990 Act excludes from development requiring planning permission: the use of buildings or other land within the curtilage of a dwelling house for any purpose incidental to the enjoyment of the dwellinghouse as such.
29. The term 'curtilage' used in s55(2)(d) is not defined in statute and it is a matter of fact and degree for the decision maker as to the extent of a residential curtilage in any given case and at the relevant time. Case law has identified factors to be taken into account which can be broadly categorised as (i) physical: whether the land is attached to some land which is definitively within the curtilage of the house; it need not be a small or enclosed area; and (ii) functional: it serves the purpose of the house in some necessary or reasonably useful way.
30. Applying these principles to the appeal site, whilst the site has in the past and would still seem to be within the same ownership as Rose Villa, the land does not adjoin the building known as Rose Villa or land immediately surrounding it and within its ownership. It is instead separated by intervening land in the form of an access drive which does not appear to be solely in the use of Rose Villa.
31. It would seem that for the period prior to the appellant's ownership it served the purpose of Rose Villa in a useful manner by acting as a garden area, with occasional residential parking use.
32. However, as outlined above, during the period of the appellant's ownership, there appears to have been a change of use of the land to use including non-residential car parking/car storage. Third party evidence is contradictory as to whether at the date of the LDC application, there was a residential garden use of the appeal site. I do not have aerial photo evidence from the date of the application either to persuade me of a residential garden/parking use.
33. At my site visit, the site appeared in a fairly overgrown state. Various vehicle tracks were present on the ground and there were some 6 vehicles on site in varying states of repair. There was some evidence of what seemed most likely to be a past garden use in the form of a vegetable growing area, compost receptacle and part of a greenhouse - in a state of some disrepair. A storage container on site contained miscellaneous household items, along with some items which appeared to have a connection to the commercial garage use, such as car doors.

34. Drawing these matters together, the appellant has not discharged his burden of proof to persuade me on the balance of probabilities that, at the date of the application, the appeal site was in a residential garden/parking use.
35. I find then that both from a spatial/physical and functional/use perspective, the appeal site does not fall within the curtilage of Rose Villa. It follows that the s55(2)(d) exclusion cannot apply in respect of the claimed use.

Conclusion

36. For the reasons given above, I conclude that on the evidence before me, the use of the appeal site as a garden and parking area in connection with the residential use of Rose Villa is not lawful and so the decision of the Council to refuse a certificate of lawful use or development was well founded. The appeal should not therefore succeed, and I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Formal Decision

37. The appeal is dismissed.

V Bond

INSPECTOR