
Appeal Decision

Site visit made on 30 June 2020

by Diane Lewis BA(Hons) MCD MA LL M MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 July 2020

Appeal Ref: APP/C1570/X/19/3241053

Land south of Oakhanger, Friars Lane, Hatfield Heath, Essex CM22 7BE

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr David Worrell against Uttlesford District Council.
 - The application (Ref. UTT/19/2173/CLP) is dated 30 August 2019.
 - The application was made under section 192(1)(a) and (b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is: Planting of a fruit orchard, erecting fencing and gates, restoring pond, maintaining and improving existing boundary trees and hedgerows. Forming hardened access.
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Decision

1. The appeal is dismissed.

A certificate of lawful use or development

2. The procedure under section 192 of the 1990 Act enables any person to ascertain whether (a) any proposed use of buildings or other land, or (b) any operations proposed to be carried out, would be lawful if instituted or begun at the time of the application. As explained in Planning Practice Guidance an applicant needs to describe the proposal with sufficient clarity and precision to enable the decision maker to understand exactly what is involved. I need to consider whether, on the facts of the case and relevant planning law, the specific proposal would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process. The burden of proof is on the appellant and the standard of proof is the balance of probabilities.
3. There is provision under section 193(4) to issue a certificate for all or part of the site and one or more of the uses or operations comprised in the application.

The application and appeal

4. The site is a roughly rectangular piece of land on the eastern side of Friars Lane. It is part of an area of land owned by the appellant that is adjacent to several residential properties, including Oakhanger, in different ownership. Arable land lies to the south. At the time of my visit the land was basically rough grassland enclosed by vegetation. The access from the highway was marked by a pair of five bar gates. The boundary to the adjacent 'blue land' owned by the appellant was not defined in any way.

5. To recap, an LDC is sought for the planting of a fruit orchard, the erection of fencing and gates, restoring a pond, maintaining and improving existing boundary trees and hedgerows and the formation of a hardened access. The proposals are indicated in a little more detail on the plan accompanying the application. On the application form the proposal is described as consisting of the carrying out of building or other operations and that the proposal would not involve a change of use. The application was made under section 192 of the 1990 Act regarding proposed operations or use. That being so, the appeal does not provide a means for determining the existing lawful use of the site¹.
6. The appeal was made before the local planning authority (LPA) had determined the application. The LPA has subsequently advised that it would have made a split decision in that:
 - the planting of an orchard, the restoration of a pond and the maintenance and improvement of existing boundary trees and hedgerows would amount to lawful works for which planning permission is not required, and
 - the erection of 2m high security fencing and gates and the formation of a hardened access would not be permitted development by reason of the land not forming part of a residential curtilage and by virtue of an Article 4 Direction which is currently in force.

However, because of the timing of the appeal, no certificate was issued and in the circumstances the appeal was made against a deemed refusal by the LPA.

7. At an early stage in the appeal process the appellant had questioned aspects of the Article 4 Direction and its relationship to an injunction. However, after receipt of the LPA's statement of case, the appellant acknowledged as a matter of common ground that the Article 4 Direction is in place and also put forward an amended plan. The amendments indicated on the plan are:
 - proposed security fencing is omitted (i) between the existing gates and the boundary with Oakhanger, and (ii) south of the existing gates at the back of the pond;
 - the existing field gates at the access to the land are to remain, together with the existing trees and hedgerow to the site frontage;
 - along the southern boundary the proposed chain link fencing would be temporary until the new planting became established and new hedgerow plants would be spaced alternatively either side of the fence.

The appellant also proposed that the hardened way be approved subject to a condition that the surface materials are agreed with the LPA prior to commencement. I will address these submitted amendments in more detail below.

8. The appellant in making his appeal described the Council's delay in determining the application for an LDC as unreasonable and indicated that an application for costs against the Council was under consideration². No formal costs application was made subsequently.

¹ Section 191 of the 1990 Act relates to an existing use of land or existing operational development.

² Letter dated 21 February 2020

Main Issue

9. The main issue, based on sections 195(2) and 192(1) of the 1990 Act, is if the LPA had refused the application would such a decision have been well-founded and more specifically, whether the proposed use/operations would have been lawful for planning purposes if instituted or begun on the application date.

Reasons

Planting an orchard

10. The letter accompanying the application and the appellant's appeal documents indicate that the primary element of the proposal is the planting of an orchard. The plan indicates 43 fruit trees would be planted. The stated purpose of the proposed fencing and hardened access is to protect and service the orchard.
11. The application form indicates that the appellant is seeking to confirm whether or not the use of the land as an orchard would be lawful³. In other words the tree planting is part and parcel of or integral to the proposed use of the land as an orchard. That being so, the proposal is not confined to the work involved in the planting of trees and is wider than the LPA's focus on the act of tree planting.
12. The use of land for the purposes of agriculture does not involve development (s55(2)(e)) and the meaning of agriculture includes fruit growing (s336). These statutory provisions of the 1990 Act set the context for assessing the lawfulness of this particular proposal.
13. Initially the appellant argued that the existing use of the land is garden land (Class C3), explaining that it was part of the garden to Pheasant's Roost before the land was sold to the Worrell family in 1994. The use as garden land was the reason given to justify why a certificate should be granted. However, when submitting the appeal the land was described to be in Nil use, garden land being the last known use. Clearly there is ambiguity in the appellant's submissions on the status of the land. As noted above, determining the existing lawful use of the land is not a matter for this current appeal. The appellant, when confirming that an appeal regarding residential development had been dismissed, drew attention to the fact that the Inspector found no fault with the proposed orchard. Such a conclusion, based on planning merits, has no relevance to the lawfulness of the proposed use of the land.
14. Furthermore, no precise information is given about the proposed orchard in the LDC application/appeal. In the information that is provided, the orchard was described as a 'community orchard' in a planning application for proposed development for housing on the appellant's land ownership. This reference by the appellant introduces a degree of ambiguity as to the intended primary purpose of the land. This description of the use suggests the land would have an open space function, rather than having a single primary use for agriculture. That being so, section 55(2)(e) of the 1990 Act would not apply.
15. In conclusion, on the basis of the available evidence it has not been demonstrated on the balance of probability that the proposed planting of an orchard would have been lawful on the relevant date.

³ Sections 7 and 8 of the application form

16. I will now turn to consider the other elements of the proposal because (i) they could be carried out independently of one another and of establishing an orchard, and (ii) there is the ability to issue a certificate for one or more of the proposed operations.

Erection of fencing and gates

17. The Town and Country Planning (General Permitted Development) (England) (Order) 2015 (the GPDO) through article 3(1) grants planning permission for the classes of development described as permitted development in Schedule 2. Part 2 of Schedule 2 covers Minor Operations. Class A permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. However, the Council took away permitted development rights for this type of development through an Article 4 Direction that was confirmed on 12 January 2012. This Direction remains in force even though it was made under an earlier development order. Therefore, without a planning permission in place, the erection of fencing and gates as detailed in the application would not be lawful.
18. The amendments put forward include the deletion of sections of security fencing on the site frontage and the erection of temporary chain link fencing, with associated unspecified hedge planting on the southern boundary. However, the restriction imposed by the Article 4 Direction would still mean that permitted development rights would not apply. Therefore all the fencing as indicated in the amended proposal would not be lawful.
19. As to other matters, the requirements arising out of the sale of land to erect 'good and sufficient fences' to the south and east boundaries of the site do not override the relevant planning considerations. Furthermore, the appellant's representations on the lawfulness of the existing gates are not relevant to the current appeal because of the separate process under section 191 of the 1990 Act to determine whether or not any operations which have been carried out are lawful.

Restoring a pond

20. The submitted plan shows the position of the pond within the site and the key refers to a restored and enlarged pond. No further details are included in the application, such as a specification of the works that would be carried out or whether any associated drainage works would be included. No arguments were presented by the appellant to explain why he considered the work either would not involve development or be permitted development under the GPDO or other development order.
21. On my visit I noted that the pond is small but is set down below the level of the surrounding land. Works to restore and enlarge the pond in all probability would involve an engineering or other operation and so fall within the meaning of development and require planning permission. There is nothing to show that planning permission has been obtained. Accordingly, in the absence of specific information or evidence to the contrary, I am unable to conclude that the work would be lawful.

Existing boundary trees and hedgerows

22. The proposal, in so far as indicated on the submitted plan, involves the management of existing vegetation along the southern boundary. This activity

is outside the scope of planning control and, on that basis, it is not a proposed operation for consideration under section 192. Consequently, it would be inappropriate to issue a certificate of lawfulness in connection with this element.

23. In view of the description provided by the appellant the proposed hedge planting in the amendment has been considered above in conjunction with the fencing.

Formation of access

24. The submitted plan indicates the route of a proposed access across the site to the edge of the blue land. In the key the only additional information is "rolled in type one on terram matting".
25. The hardened access described by the appellant is to enable provision of a firm means of access across the land. The probability is that it would be used by vehicles. No hard surface material was evident underlying the grass along the route of the proposed access way. The proposal would involve the importation and laying of hard surface materials, as indicated by the appellant's willingness for these to be subject to final approval by the LPA. An engineering operation and hence development within the meaning of section 55(1) of the 1990 Act would be carried out.
26. Class B of Part 2 of Schedule 2 to the GPDO permits development comprising "The formation, laying out and construction of a means of access to a highway which is not a trunk or a classified road, where that access is required in connection with development permitted by any Class in this Schedule (other than by Class A of this Part)".
27. In this case the access is not required in connection with any Class of permitted development and so the access would not be a minor operation falling within Class B. Having regard to the point raised by the LPA, the site is not part of a residential curtilage, having been split off from the original host dwelling back in 1994. Permitted development rights in Class A are not applicable. Even if the access fell within Class B, as a result of the Article 4 Direction the permission granted by article 3 of the GPDO does not apply to Class B of Part 2.
28. As to other possible permitted development rights, the appellant has confirmed that the land is not part of an agricultural holding and so no reliance is placed on Part 6 of Schedule 2 that applies to development on agricultural units. The proposed development is not related to forestry developments set out in Part 6 Class E.
29. In conclusion, the hardened access would constitute development and require planning permission under section 57 of the 1990 Act. The development would not benefit from planning permission granted through article 3 of the GPDO and no planning permission has been granted by the LPA or on appeal. The formation of a hardened access would not be lawful.

Conclusion

30. For the reasons given above, on the evidence available the proposed use/operations would not have been lawful for planning purposes if instituted or begun on the application date. The Council's deemed refusal to grant a certificate of lawful use or development in respect of land south of Oakhanger,

Friars Lane, Hatfield Heath was well-founded. The appeal should fail and I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Diane Lewis

Inspector