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## Appeal Decision

Inquiry Held on 6 & 7 October 2020

Site visit made on 7 October 2020

**by A A Phillips BA(Hons) DipTP MTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 26 October 2020**

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**Appeal Ref: APP/R0660/X/19/3233242**

**Baddiley Lane Farmhouse, Baddiley Lane, Baddiley CW5 8BP**

- 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 Mrs Sally Budden against Cheshire East Council.
- The application (Ref. 18/5952N) is dated 28 November 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 purposes ancillary to the use of the dwellinghouse.

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

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### Application for costs

1. An application for costs was made by Mrs Sally Budden against Cheshire East Council. This application is the subject of a separate Decision.

### Preliminary Matter

2. It was confirmed at the Inquiry that the correct address of the property is Baddiley Lane Farm House and therefore I have used that in this decision.
3. It is evident that the Council did not receive the Council's document entitled 'Response to LPA Statement of Case' until after it had delivered the closing submission. Consequently, the Council considers that prejudice has resulted as a result of the document not having been disclosed earlier. The document advances arguments regarding the Council's approach to the description of the claimed use. The Council accepts that it was able to address the matter of the description of the use in its closing submissions but contends that it was severely prejudiced in having to deal with it in this way.
4. Therefore, in dealing with this appeal I am mindful of the Council's position and the approach that should be taken with respect to the appellant's evidence on this matter.

### Main Issue

5. The main issues is whether the appellant has proved on the balance of probability that the use of the property has changed to use ancillary to the use

of the dwellinghouse on or before 28 November 2008 and that the use then continued for 10 years after the date of the change.

## Reasons

### *Legal Basis for Determination*

6. When dealing with a case such as this, the burden of proof is on the appellant and the standard of proof is the balance of probabilities. Following the judgement of *Gabbitas*<sup>1</sup> the evidence of an appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, the appeal should be allowed.
7. It is not sufficient that something may have occurred or is capable of having occurred or even that it could be assumed that something has occurred. It must clearly be demonstrated that it was more likely than not that the use actually occurred. In addition, in accordance with case law<sup>2</sup> the Council states that the question is whether the site has been used throughout the ten year material period so that the Council could have taken enforcement action in respect of that use at any time and furthermore, it is insufficient to start the use, but the use must have taken place over the whole period.
8. These represent the legal principles against which I have determined this appeal.

### *Description of the use*

9. The description of the existing use used on the application form is '*purposes ancillary to the use of the dwellinghouse*' – that dwellinghouse plainly being Baddiley Lane Farm House. In my opinion this is a clear description of use using suitable planning terms. The primary use of the site is residential and the use for which the certificate is sought is ancillary to that primary use.
10. The application is accompanied by a plan which shows the application site edged in red with the dwellinghouse being located outside the red area and within the blue edged area. This clarifies to me that the application is only concerned with the land where she claims that the lawful use relates and consequently, in cases like this, there is no need to include the dwellinghouse in the application red line boundary.
11. To my mind, the Council's concern that the site does not contain any of the primary residential use would only be relevant in a case where there is a clear argument that the use claimed is not considered to be functionally connected to the primary use of a dwellinghouse. This argument has not been run in this case. It is clear to me that, in accordance with case law<sup>3</sup> ancillary means a variety of purposes or activities which are functionally connected to the use of the dwellinghouse and are subservient to it. That is the consistent claim put forward by the appellant in the evidence submitted to the Inquiry.
12. Those ancillary uses set out by the appellant include car parking, leisure, cultivation, keeping pets, children's play and storage, each having a functional

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<sup>1</sup> *Gabbitas v SSE & Newham LBC* [1985] JPL 630

<sup>2</sup> *LB Islington v SSHCLG* [2019] EWHC 2691 (Admin), *Thurrock BC v SSE* [2002] EWCA Civ 226, [2002] JPL 1278 and *Swale BC v FFS & Lee* [2005] EWCA Civ 1568; [2006] JPL 886

<sup>3</sup> *Harrods Ltd v SSETR* [2002] JPL 1321

link to the primary dwellinghouse use. Indeed, the Council accepts that those uses can all be uses which may be considered to be ancillary to a dwellinghouse.

13. The Council states that as a matter of law a change in ancillary uses (so long as those uses remain ancillary at all times) does not give rise to a change of use – there can only be a change of use if the primary use changes materially. This argument is not entirely clear and, in any case, it is my opinion that the appellant is not seeking to establish that there has been a change in ancillary uses. Instead she is seeking to establish that the use of the land has changed from its former primary use as agricultural to uses ancillary to the residential use of Baddiley Lane Farm House. This is a material change in use for which planning permission would be required.
14. Consequently, I find that the appellant's description is quite clear and preferable to the Council's interpretation of the use as a garden which is a rather loose term that may be the subject to a narrow interpretation and exclude some of those uses which the appellant claims to be ancillary to the use of the dwellinghouse. The uncertainty that may arise from the description of a garden is clearly and rightly avoided by the appellant's own description as set out on the application form. I see no justification to amend the description.

#### *Planning Units*

15. Clarification on the relationship between the dwellinghouse and the appeal site as separate planning units is important in understanding the cases presented by the main parties. The appellant contends that the dwellinghouse, Baddiley Lane Farm House, and the appeal site were part and parcel of a farm. At around 2000/2001 the farm was converted into a residential property and the site was separated from the agricultural land in the vicinity. At that time the site was separated from the house by a hedge as shown in photographic evidence. Consequently, it is clear that in 2000/2001 there were two separate planning units; one in residential use and the other in agricultural use. There is no dispute between the main parties on this matter.
16. The first occupants of Baddiley Lane Farm House kept a horse on the land but by 2005 most of the hedge separating the land from the dwellinghouse had been removed and an area of hardstanding had been extended into it as an area for car parking associated with the residential use. In my mind that is the point at which the unlawful ancillary residential use of the land started. The use became materially different and as such would have required planning permission. The continuation of that unlawful use is the use for which the certificate is being sought.
17. It is clear to me that the appellant is not claiming that the site and the dwellinghouse were always the same single planning unit, but rather that development has unlawfully occurred for such a period so as to be immune from requiring planning permission. The appellant is not presenting the case that development has not occurred at all because the dwellinghouse and the appeal site are all one planning unit.
18. This point is important because it assists in understanding the reason why the application only covers the application site and not the dwellinghouse and also explains the Council's misunderstanding of the evidence presented with respect to site plans submitted with applications in 2012 and 2017.

19. The material period with respect to the use claimed started on 28 November 2008 (ten years before the application was submitted) and therefore the site plans are four and nine years into that material period, at a time when the use claimed was unlawful because the material period of ten years had not yet been reached. The plans in question relate to previous planning applications and correctly show that at the time of the submissions the dwellinghouse and the appeal site were two separate planning units. Therefore, there is no conflict with the case presented by the appellant that at those times the unlawful use of the land was for purposes ancillary to the use of the dwellinghouse. If the respective plans had shown a single planning unit, they would have been inaccurate and may, quite correctly, have been challenged by the Council. I am satisfied that those plans are not evidence of the use that was actually occurring on the site at the time. The key question is was there continual use of the land in question for the use claimed for a continuous period between 28 November 2008 and 28 November 2018
20. I accept that case law<sup>4</sup> confirms that an alteration in the extent of a planning unit is not development without more and therefore, in order to succeed the appellant needs to show a change in use of the site has occurred for the material period.

#### *Use of the Land*

21. At the Inquiry both main parties agreed that six purposes may all be considered to be part of the claimed use – these are parking, leisure, cultivation, pets, children's' play and storage. So long as at least one of those uses was taking place on the appeal site throughout the duration of the ten year material period and that use or uses is shown to have taken place as activity ancillary to the use of the dwellinghouse, then a certificate may be granted.
22. There are a number of areas of common ground that that are particularly relevant to the appellant's case. Firstly, it is agreed that the site was separated from the surrounding agricultural fields around 2000/2001. Secondly, a hedge that formerly separated the appeal site from the dwellinghouse known as Baddiley Lane Farm House was mostly removed around 2005, leaving there no physical separation between the dwellinghouse and the site; a situation which has not changed since that time. The site has not been used for keeping horses since 2005 and also that the site has been mowed regularly since 2005. Finally, it is accepted, in part, that the area of hardstanding has been present on site since 2005.
23. In my mind, these agreed matters show that the site has not been in agricultural use since around 2000/2001 and that since around 2005 the house and appeal site have been used together. In addition, since its cessation for keeping horses, the site has been kept and maintained for the occupants of the dwellinghouse for their own use. The key point of contention with reference to the hardstanding area is that the appellant considers this constitutes evidence that the site is being used for parking cars associated with the dwellinghouse whereas the Council does not. I turn to this matter, next.
24. Although not entirely clear, it seems to me that the Council is arguing that the hardstanding area is not used for parking. The area in question has the

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<sup>4</sup> Winton v Secretary of State for the Environment [1978] JPL 769

- appearance of a car parking area, is shown in various aerial photographs to be used for the purposes of car parking, is described as a car parking area in sales particulars and is described by the Council's witness as being a parking area. Therefore, the evidence presented shows that, on the balance of probabilities, the area of hardstanding has been used for car parking. That being the case, I agree that the appellant can demonstrate at least one ancillary use of the appeal site throughout the material period of ten years.
25. Similarly there is a suggestion that the trampoline, which is clearly visible on some aerial photographs, is not evidence of actual use of the land. However, when combined with other evidence such as children living in the dwellinghouse, it is reasonable to assume that the trampoline was being used for purposes ancillary to the residential use of Baddiley Lane Farm House.
26. In terms of the facts of the case, there are three witnesses, two of whom gave evidence to the Inquiry under oath and the other in the form of a statutory declaration. The Council criticises the submitted declarations on the grounds that they were not drafted by the witnesses who subsequently signed them. Nonetheless, I do not find that to be uncommon practice in dealing with cases such as certificates of lawfulness and it does not mean that significant weight should not be given. One of the witnesses, Ms Haystead chose not to give evidence under oath, which does lessen the weight I give to the evidence in her statutory declaration.
27. Although the witness accounts do lack in some detail and are in places rather unclear about timescales and chronology, I find that the three witness accounts are consistent with each other and provide evidence that is consistent with the case presented by the appellant. Furthermore, their evidence is corroborated by aerial photographs and sales particulars. It is my understanding that Baddiley Lane Farm House and the appeal site have been in the ownership of three different families since the residential conversion took place and it is a fair assumption that the use of the appeal site would have remained generally the same during the periods of their ownerships. I believe that the evidence presented allows this assumption to be made on the balance of probabilities.
28. The Groom family owned the dwellinghouse and appeal site from around 2002/2003 until around 2011. Evidence including google imagery, Google Street View, sales particulars and associated photographs and other photographs shows that during the period of their ownership cars were parked on the site from around 2005, there was children's play equipment in 2005, 2009 and 2010, a dog pen in 2005, a pathway into the site to what appears to be garden furniture and/or children's play equipment 2005-2011, furniture, a vegetable patch and a well-maintained lawn area.
29. On the basis of this evidence I conclude that on the balance of probabilities from the period 2005 to 2011 the family used the site for purposes ancillary to their use of the dwellinghouse. Part of this period from 2005 to October 2008 is before the commencement of the material period, but the evidence from that period is helpful in understanding the family's actual use from the start of the material period of November 2008.
30. The Clarke family then owned the dwellinghouse and appeal site from 2011 to 2016. Evidence from this period shows car parking, a trampoline, chicken coop or rabbit hutch, domestic storage, fruit trees and a well-maintained lawn. Taken together, this evidence shows that during that part of the material

- period, on the balance of probabilities, the appeal site was used for purposes ancillary to the use of the dwellinghouse.
31. The appellant has owned the dwellinghouse and appeal site since 2016 and during that period there is evidence of use of the land for car parking, fruit tree planting, a maintained lawn area, garden sheds/outbuildings and domestic storage use. Consequently, I conclude that on the balance of probabilities the appellant and her family have used the site for purposes ancillary to the use of the dwellinghouse.
  32. The Council has noted that the appellant nor previous users of the site during the relevant material period, has provided evidence to the Inquiry. However, this is not critical to her case since a representative has clearly presented her case on her behalf and he has given his evidence under oath. Furthermore, irrespective of who provides evidence on the appellant's behalf, the appeal should be determined on the balance of probabilities and the onus of proof is on the appellant.
  33. The Council also argues that the appellant's case is based on a series of snapshot observations by witnesses and evidence that have been stitched together to cover the material period. However, rather than being guesswork, I find that the evidence is compelling in establishing the continuous use of the site for uses ancillary to the dwellinghouse during the material period. To argue that her case is based on inference and assumption is not reasonable in this case given the body of consistent evidence presented. There may have been some chopping and changing in the actual range of activities that have taken place on the appeal site during the material period but that does not mean that the use or uses on the land during that continual period have not been for purposes ancillary to the dwellinghouse.
  34. The Council has pointed to evidence that the site has not been used as garden land. Firstly, I would reiterate that garden land is not the use for which the certificate is sought. Putting that aside, the Council's reliance on the descriptive elements of sales particulars is not compelling since it seems to me that those are documents aimed at selling the property, rather than representing an accurate assessment of planning use.
  35. A further concern of the Council is that whilst there may have been some ancillary uses on the appeal site the whole site has not been covered by such uses. This is not a reasonable test of the claimed use in this case, but rather the key question is whether the site as a whole has been used for ancillary purposes. If in this case the evidence presented proves on the balance of probabilities that the site as a whole has been used for the purposes sought that is sufficient for a certificate to be issued.
  36. The Council suggests that the use of the land is as a paddock. However, case law<sup>5</sup> has been found to not be a planning use. The word lacks clarity in planning use terms and a paddock is not a concept of use at all, but more like a concept of enclosure. Consequently, it is fair to say that the site cannot have been *used* as a paddock. Although there were numerous attempts by the Council to define the precise use of the appeal site during the material period, no clear or convincing one was presented. This is not in itself fatal to the Council's case but it more illustrative of the difficulty the Council has in

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<sup>5</sup> Sykes v SSE [1981] 42 P.C.R.19

persuading me that the appellant has not discharged the relevant burden of proof.

### **Conclusion**

37. The appellant has presented a range of evidence as set out above and witnesses have provided oral evidence under oath to corroborate the evidence provided. I have also taken account of the Council's concerns and the evidence they have presented to support their case.
38. However, the evidence submitted by the Council is insufficient to contradict the appellant's evidence or make her version of events less than probable. Consequently, I conclude overall that the appellant's is sufficiently precise and unambiguous evidence that on the balance of probabilities the land has been continuously used for purposes ancillary to the use of the dwellinghouse for a period of ten years or more prior to the date of the application which is 28 November 2018.
39. For the reasons given above I conclude that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the Act as amended.

### **Formal Decision**

40. The appeal is allowed and attached to this decision is a certificate of lawful use describing the existing use which is considered to be lawful.

*A A Phillips*

INSPECTOR



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## 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

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**IT IS HEREBY CERTIFIED** that on 28 November 2018 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black 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:

*The land has been in continuous use for purposes ancillary to the use of the dwellinghouse for a period in excess of ten years prior to 28 November 2018 so as to be immune from enforcement action.*

Signed

*A A Phillips*

INSPECTOR

Date: 26 October 2020

Reference: APP/R0660/X/19/3233242

### ***First Schedule***

Purposes ancillary to the use of the dwellinghouse.

### ***Second Schedule***

Land at Baddiley Lane Farm House, Baddiley Lane, Baddiley CW5 8BP

## 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 /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were 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 /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation 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: 26 October 2020

**by A A Phillips BA(Hons) DipTP MTP MRTPI**

**Land at: Baddiley Lane Farm House, Baddiley Lane, Baddiley CW5 8BP**

**Reference: APP/R0660/X/19/3233242**

Scale: Do not scale

