
Appeal Decision

Hearing held on 13 October 2020

Site visit made on 13 October 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 09 November 2020

Appeal Ref: APP/T2405/X/19/3232820

New Holme, Stanton Road, Elmhurst LE9 7SH

- 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 (the LDC).
 - The appeal is made by Mr and Mrs Hatson against the decision of Blaby District Council.
 - The application Ref 18/0487/CLE, dated 20 March 2018, was refused on 16 July 2018.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
 - The use for which a certificate of lawful use or development is sought is the existing incidental residential use of land to the rear of New Holme.
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Decision

1. 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.

Procedural Matters

2. In this type of appeal, the onus of proof is firmly upon the appellants. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The appellants' evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellants' version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous.
3. The appellants and their sons and daughter have submitted statutory declarations which are witnessed and signed by a solicitor. The Council does not argue that the declarations were not properly made, and so they carry significant weight as sworn evidence.
4. A number of the third parties have raised concerns in relation to potential future planning applications, the appellants motives for submitting the LDC application and the planning merits of the use. Nevertheless, these matters including the planning merits of the existing use or a future development are not relevant in this appeal which relates to an application for an LDC. My decision rests on the facts of the case, on relevant planning law and judicial authority. The test of evidence is made on the balance of probability.

Background

5. The area of land bought by the appellants in 1993 is outlined in red on the submitted site location plan. There is no dispute that the area unhatched within the area edged red on that plan has a lawful use associated with the residential use of New Holme.
6. The appellants consider that the area of land, hatched red within the area edged red (the land hatched red) forms part of the domestic curtilage of New Holme and has been in use for a purpose incidental to the enjoyment of that dwelling house (incidental residential use). As such, they consider that in accordance with section 55(2)(d) of the 1990 Act the incidental residential use does not constitute 'development' and as such is a lawful use of the land in question. Alternatively they consider that if the land is deemed to be outside the curtilage of the dwelling, then the land has been used as residential amenity space by them for a period in excess of ten years, and as such the time limit for taking enforcement action under section 171B (3) of the 1990 Act has expired.
7. The Council considers that the area of land hatched red is not within the curtilage of New Holme. Within its submitted evidence the Council stated that it considered that there had been a material change in use of the land from agriculture to a use for residential purposes. However, at the hearing the Council confirmed that that finding had been included by mistake and that it did not consider that there had been a material change in use of the land. It stated that the lawful use of the land was considered to be agriculture. The Council also considers that the appellants evidence does not indicate that the land has been in continuous use for a 10-year period as a garden area associated with New Holme.
8. In 1995 a hedgerow between the rear garden area of New Holme and the land hatched red was removed. In 2007 planning permission¹ (the 2007 permission) was granted by the Council for the change of use of part of the field r/o New Holme to domestic garden and retention of wooden shed. The shed is within the land hatched red and a small part of that land formed the application site of the 2007 permission.
9. Condition 2 of that permission states that '*unless otherwise agreed in writing by the local Planning Authority, within 56 days of the date of this permission a post and rail stock proof fence of a minimum height of 1.0 metre and a maximum height of 1.5 metres, to include a gate of a maximum width of 2.0 metres, shall be erected on the application site boundary as shown on drawing number 07/0997X/1/PYCS and shall thereafter be retained*'. It was confirmed at the hearing that the boundary treatment required by this condition had never been erected and that no enforcement action had ever been taken by the Council in relation to the breach of this condition.
10. Also, in 2007 an LDC application² in respect of the continued use of land as extended garden was refused. In 2014 applications for planning permission³ for the change of use of land to domestic garden and an LDC⁴ for the existing

¹ Application No: 07/0997/1/PYCS

² Application No: 07/0047/1/UY

³ Application No: 14/0366/1/PY

⁴ Application No: 14/1038/1/UTY

use as a domestic garden were refused. In 2015 2 further LDC applications⁵ for the existing use as domestic garden were refused. It would appear that the previous LDC applications were refused on the grounds that there was insufficient evidence -on the balance of probability- that the alleged use as an extended garden had been on-going for a continuous 10-year period.

Main Issue

11. The main issue is whether the Council's decision to refuse to grant an LDC was well-founded.

Reasons

12. In the recent case of *O'Flynn*⁶ it was held that under section 191(2)(a) of the 1990 Act, there were two alternative routes by which it is possible to establish that an incidental residential use of a site was lawful (assuming that a claimant was able to establish that an incidental residential use was in existence at the relevant time). The first route was to establish that, at the date of the application, no enforcement action could be taken in respect of an existing incidental residential use within the curtilage of the dwelling house because, by virtue of the exception in section 55(2)(d) of the 1990 Act, it did not constitute "development". The second route was to establish that no enforcement action could be taken in respect of an existing incidental residential use because the 10-year time limit for enforcement action had expired. The *O'Flynn* case also established that, while maintenance and/or recreational use do not necessarily denote incidental residential use, it will depend on the facts of the case. These activities are quintessentially carried out by householders on land as incidental to their use of a dwelling and ought to be taken into account.
13. The Council considers that the facts of the *O'Flynn* case are different to the case before me. In *O'Flynn*, following grants of planning permission in the 1980's and 1990's, the dwelling-house had been extended significantly and so had the curtilage of the dwelling-house. In that case it appears that extensive landscaping, planting and maintenance had been undertaken on the site.
14. Nevertheless, although the facts of this case differ from those of *O'Flynn*, I do not believe that those differences are such that they undermine the matters of principle which can be derived from the obiter comments set out in that judgment. Both cases relate to an LDC application submitted under section 191(1)(a) of the 1990 Act for the incidental residential use of land.
15. Consequently, it is necessary to consider; whether an incidental residential use was in existence at the date of application, 20 March 2018 (date of the LDC); whether the land hatched red is within the curtilage of the dwelling house, New Holme and whether the development is immune from enforcement action and thereby lawful by virtue of section 191(2)(a) of the 1990 Act.

Incidental residential use

16. The Council confirmed at the hearing that it considers that there is evidence that an incidental residential use of the land hatched red has occurred. However, it does not consider that a material change in the use of that land has been made and that the lawful use of it is agriculture. There is no statutory

⁵ Application Nos: 15/0330/CLE and 15/1166/CLE

⁶ *O'Flynn v SSCLG & Warwick DC* [2016] EWHC 2984 (Admin).

definition of what constitutes a 'material change in use'. It is a question of fact and degree in each case. The *Burdle*⁷ case held that the concept of the planning unit is a means of determining the most appropriate physical area against which to assess the materiality of a change of use. As a general rule and starting point the planning unit is the area in the same occupation or ownership because that is normally the unit in which a set of functionally and physically interdependent activities are carried out.

17. The whole of the area edged red has been owned by the appellants since 1993. Based on the evidence before me, it is clear that before 1995 the rear garden of New Holme extended to the hedgerow that formed the boundary with the land hatched red. At that time, it appears on the balance of probability that the land hatched red had previously been in agricultural use, more likely than not that agricultural use comprised the use of the land hatched red as grazing land. Since 1995 there has been no physical boundary between the land hatched red and that unhatched within the red line. Therefore, even though the whole of the area edged red appears to have been within the same ownership in 1993 the area hatched red was physically separate until 1995. As such, I consider that in applying *Burdle* to the situation that existed prior to the hedgerow being removed that the whole of the land edged red comprised 2 physically separate areas that were occupied for different and unrelated purposes. Consequently, at that time there were 2 planning units one in residential use and one agricultural use.
18. Since 1995 the land hatched red has not been physically separated from the remainder of the land owned by the appellants. The majority of the land hatched red is not formally landscaped in the same way as the land adjoining New Holme. Nevertheless, the grass is cut, and there are a number of relatively established trees, a goal post, a shed and a trampoline within it. The grassed area is relatively weed free and even though the grass is longer it has a similar appearance to the grass in the more formal landscaped area and in the main the land hatched red appears well maintained.
19. The statutory declarations, submitted by the appellants and their sons and daughter, indicate that since 1995 the land hatched red has been used by the appellants and their family for activities including bonfires, parties, camping, quad biking, football and other sports, trampolining, general amenity and cutting the grass/planting. The Council does not dispute that the land has been used for these activities, but it considers that they have occurred on a sporadic and infrequent basis. Consequently, it considers that the character of the use of the land hatched red has not materially altered from an agricultural use.
20. Third-party responses to the LDC application/this appeal state that the land has been used for bonfires and for very little else except for 2 days where the appellants sat in chairs on the land hatched red. They also state that the grass is cut a few times a year, the trampoline and goal posts have not been used for at least 6 years and that the land hatched red has always been used as a paddock for horses/ponies. I acknowledge that similar responses were submitted for a number of the previous LDC applications. However, these third-party responses have not been submitted as statutory declarations and

⁷ *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

- no interested parties attended the hearing. There is no specific evidence before me to indicate that animals have been grazed on the land since 1995.
21. Mr Anthony Hatson's second statutory declaration includes specific dates and the activities that occurred on the land hatched red between January 2016 and April 2018. In that period, I acknowledge that the activities mainly occurred in the summer months and that they only occurred on a few days in each month. This could explain why the third parties have not witnessed them even though one of the neighbours overlooks the site and works from home. Moreover, there is little evidence to specifically dispute that the activities occurred on those dates.
22. Furthermore, there is no dispute that as Mr and Mrs Hatson's children have grown older the level of recreational activity on the land hatched red has fallen. However, it appears that whilst the children were growing up the land was used by them and their friends for recreational activity and sports. The statutory declarations are corroborated by some of the third-party responses to the earlier LDC applications. These state that the land was used by the children for playing on in the summer months including playing football and quad biking. The enforcement officer's report from 2007 states that the grass near the goal post was trampled down indicating that it had been used for football practice/shooting. The google image at CD21 dated 2009 shows 2 goal posts on the land and the grass is discoloured where it appears to have used as a track – more likely than not by the quad bikes cited in the statutory declarations. Moreover, even though many of the photographs are not dated they show different events and activities being undertaken on the land.
23. The specific recreational activities, sports and events cited within the evidence before me have occurred on a sporadic basis and appear to have mainly been undertaken in the summer months when the appellants children were younger. The sporadic nature of the specific activities on the site would have made it more difficult for the Council to take enforcement action in relation to the use of the land. Nevertheless, the goal post and a trampoline appear to have been within the land hatched red since at least 2007. Additionally, in my experience the sporadic nature of the activities especially as children grow older describes how many gardens associated with dwellings are used. Furthermore, the grass has been cut and the land appears to have been maintained and improved by planting trees, removing mole hill soil and rolling.
24. Even though it is not formally landscaped with planting beds I observed, that when standing within the land hatched red there is little to visually differentiate between it and the remainder of the appellants land that has a lawful residential use. The appearance of the land hatched red is that of an informal area used for recreation rather than an area used to graze animals. Not every domestic garden is large enough to facilitate goal posts, a trampoline, an area to be used for quad bikes and family gatherings. Nevertheless, I consider that the use of the land hatched red for these recreational activities can reasonably be treated as being incidental to the enjoyment of the dwellinghouse.
25. In addition, it appears based on the evidence before me and on the balance of probability that the land has continued to be available for the family to use for amenity and recreational purposes and that there has been no other use of it. In *O'Flynn* the Honourable Mrs Justice Lang DBE states that '*I agree with the Claimant's submission that, if the Inspector accepted that the land was being*

used for these incidental residential activities for some of the time, the mere fact that the Claimant was not in his garden at a particular hour did not mean that the land ceased to be in use for incidental residential purposes for that hour’.

26. I consider that the evidence before me is sufficiently specific and precise, for the reasons given above, to indicate that on the balance of probability that the land hatched red has been used for a purpose incidental to the enjoyment of the dwellinghouse. Whilst the specific activities cited have been sporadic the overall character of the use of the land at the date of the LDC was materially different to the agricultural use. The use of the land at the date of the LDC was physically and functionally associated with New Holme. There is little to indicate that the agricultural use, that is animals grazing, has occurred on the land hatched red since 1995. As a result, at the date of the LDC the whole of the land edged red was one planning unit. The main purpose of the planning unit is the residential use of New Holme. As such, in my judgement a material change in the use of the land hatched red has been made and that on the date of the LDC an existing incidental residential use of that land has been demonstrated.

Curtilage

27. Curtilage defines an area of land in relation to a building and not a use of land. There is no all-encompassing, authoritative definition of the term curtilage. Usually it is the area of land within which the house sits, or to which it is attached, such as the garden, but for some houses, especially in the case of properties with large grounds, it may be a smaller area. Generally, to fall within the curtilage of a building, it is enough that land serves the purpose of a building in some reasonably necessary or useful manner, even though it need not be marked off or enclosed in any way⁸.
28. The land must be intimately associated with the building in order to support a conclusion that it forms part and parcel of that building⁹. However, other considerations, such as past and present relationships of ownership and function, must be taken into account. In the absence of any statutory or authoritative definition, it was held in *Dyer*¹⁰ that the term bears its restricted and established meaning connoting a small area forming part and parcel with the house or building which it contained or to which it was attached.
29. More recently the matter was considered in the context of listed building enforcement in *Skerritts*¹¹. While regarding the decision in *Dyer* as correct, it was felt that the Court in that case had gone further than necessary in expressing the view that the curtilage of a building must always be small, or the notion of smallness is inherent in the expression.
30. In the *Lowe*¹² case it was confirmed that the expression "curtilage" is a question of fact and degree. It connotes a building or piece of land attached to a dwelling house and forming one enclosure with it. It is not restricted in size, but it must fairly be described as being part of the enclosure of the house to which it refers. It may include stables and other outbuildings, and certainly

⁸ *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195.

⁹ *Methuen-Campbell v Walters* [1979] 1 QB 525.

¹⁰ *Dyer v Dorset CC* [1988] 3 WLR 213.

¹¹ *Skerritts of Nottingham Ltd v SSETR* [2000] EWCA Civ 60; [2000] JPL 789.

¹² *Lowe v First Secretary of State* [2003] EWHC 537 Admin

includes a garden, whether walled or not. It might include accommodation land such as a small paddock close to the house.

31. The recent case of *Burford*¹³ reaffirms the criteria laid down in *Sutcliffe*¹⁴ for identifying curtilage as being - a) physical layout; b) ownership past and present; c) use or function past or present. Within the *Burford* case it was noted that the use of land as incidental to the enjoyment of a dwelling house is not determinative of the land being curtilage.
32. Having regard to all the authorities it is apparent that whether something falls within a 'curtilage' is a question of fact and degree and, thus, primarily a matter for the decision maker. What also emerges from these authorities is that the relevant date on which to determine the extent of the curtilage is the date of the LDC, but this involves considering both the past history of the land and how it is laid out and used at the time of the application. It is also clear from *O'Flynn* that it is possible for the extent of curtilage to change over time.
33. As stated above, prior to 1995 there was a hedgerow on the boundary of the land hatched red and the remainder of the appellants land and historically the land in question appears to have been used for agricultural purposes. However, since 1995 there has been no physical boundary between the land hatched red and the remainder of the appellants land. A small part of the area hatched red has a lawful use for residential purposes through the 2007 permission. As part of that permission Condition 2 required the boundary treatment cited above to be erected within a set time period. The reason given for that condition was to prevent further extensions to the residential curtilage of New Holme. However, that boundary treatment was never erected, and no enforcement action was taken in relation to the breach of that condition.
34. At the date of the LDC the land hatched red formed one large enclosure, that is attached to New Holme, with the remainder of the appellants land associated with the dwelling house. That overall area is larger than the areas associated with nearby dwellings. However, the curtilage does not necessarily have to be small in order for land to be part and parcel of the building. As stated above, even though it is not formally landscaped with planting beds I observed, that when standing within the land hatched red there is little to visually differentiate between it and the remainder of the appellants land that has a lawful residential use. There is little evidence before me to indicate that the appearance of the landscaping on the land hatched red has significantly altered since the date of the LDC.
35. The historic function of the land hatched red does not appear to have been associated with New Holme. However, I have found that on the balance of probability that on the date of the LDC an existing incidental residential use of the land hatched red has been demonstrated. I have also found that the land hatched red forms part of the planning unit associated with New Holme. Whilst the purposes for which it was used at the time of the application were incidental to the use of the dwelling, that does not necessarily make it curtilage as confirmed in *Burford*.
36. Nonetheless, based on the evidence before me, the recreational and amenity use of the land hatched red at the date of the LDC was functionally related to

¹³ *Burford v SSCLG & Test Valley BC* [2017] EWHC 1493 (Admin).

¹⁴ *Sutcliffe v Calderdale BC* [1983] JPL 310.

the residential use of the dwelling and has been since at least 1995. That use appears to serve the purpose of the dwelling in a reasonably necessary or useful manner. The land hatched red at the date of the LDC was not a distinct area from that which formed the original garden area of New Holme. A functional and spatial relationship existed, at the date of the LDC, between the land hatched red and the dwelling and it forms one enclosure with New Holme. As such, there appears to be an intimate association between the land hatched red and the dwelling at the date of the LDC. Therefore, I am satisfied that, as a matter of fact and degree, the land hatched red can be treated as being within the curtilage of the dwellinghouse, New Holme at the date of the LDC.

37. Taking into account all of the above, on the balance of probability, I consider that at the date of the LDC application the existing incidental residential use of land to the rear of New Holme did not constitute "development" by virtue of the exception in section 55(2)(d) of the 1990 Act. As such, it is thereby lawful by virtue of section 191(2)(a) of the 1990 Act.

Other matters

38. I acknowledge that the Council does not consider that the appellant has demonstrated that the incidental residential use of the land hatched red has been continuous for 10 years prior to the date of the LDC application. Even if I concurred with the Council's view, in relation to the time limit for enforcement action as contained within section 171B (3) of the 1990 Act, given my findings above this matter would not alter whether the Council's decision to refuse the grant of an LDC was well-founded.
39. Reference has been made to restrictive covenants on the land but issues relating to the ownership of land and restrictive covenants related to that ownership are not within my jurisdiction.

Conclusion

40. For the reasons given above I conclude, on the evidence now available, that the Council's refusal in part to grant an LDC was not well founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act.

D. Boffin

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Paul Wakefield	Agent
Anthony Hatson	Appellant
Tracy Hatson	Appellant
Richard Hatson	
Matthew Hatson	
Sarah Hatson	

FOR THE LOCAL PLANNING AUTHORITY:

Ian Davies	Development Services Team Leader
Gemma Dennis	Legal Services Officer



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 20 March 2018 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched 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:

The available evidence demonstrates that, on the balance of probability, that an incidental residential use was in existence, that the land formed part of the curtilage of New Holme and therefore the use did not constitute "development" by virtue of the exception in section 55(2)(d) of the 1990 Act.

Signed

D. Boffin

Inspector

Date: 09 November 2020

Reference: APP/T2405/X/19/3232820

First Schedule

The existing incidental residential use of land to the rear of New Holme.

Second Schedule

Land at New Holme, Stanston Road, Elmesthorpe LE9 7SH

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: 09 November 2020

by **D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC**

Land at: New Holme, Stanston Road, Elmes Thorpe LE9 7SH

Reference: APP/T2405/X/19/3232820

Scale: Not to scale

