



Appeal Decision

Site visit made on 16 September 2020

by E Griffin LLB Hons

an Inspector appointed by the Secretary of State

Decision date: 11 November 2020

Appeal Ref: APP/J3720/X/20/3252908

Claybank Farm, Tamworth Lane, Beoley, Redditch B98 9EH

- 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 Andrew Harrison against the decision of Stratford-on-Avon Council
 - The application Ref 19/01973/LDE dated 17 June 2019 was refused by notice dated 20 December 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 or development is described on the application form as follows: 'The land indicated on attached plan is and always has been garden to the existing house. However, when an Application was approved for replacement dwelling, this land was omitted from the Site Plan'
-

Decision

1. The appeal is dismissed.

Main Issue

2. Under Section 191(1)(a) of the 1990 Act, any person who wishes to ascertain whether any existing use of buildings or other land is lawful may make an application for the purpose to the local planning authority specifying the land and describing the use. Section 191(2)(a) of the 1990 Act specifies that for the purposes of the Act, uses and operations are lawful at any time if no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason).
3. The relevant time limit for taking enforcement action under Section 171B(3) of the 1990 Act regarding the use of buildings or other land is the end of 10 years beginning with the date of the breach.
4. The appellant therefore needs to show, on the balance of probability, that the use of the land as a garden had existed on a substantially uninterrupted basis for at least 10 years by the date of the application for the LDC, which was 17 June 2019 as there is no planning permission for garden use for the land. Consequently, the evidence to support that claim needs to date back to at least 17 June 2009. The burden to make out the case rests with the appellant.

5. The application description relates to the fact that the plan approved when planning permission¹ (the 2010 permission) was granted in 2010 for the existing replacement dwelling at Claybank Farm, it did not include the two areas of land that are the subject of the LDC. The appellant states that he was not aware until he applied for planning permission to build a garage in December 2018 that the Council did not consider the two areas of land to be garden land.

Reasons

6. The evidence provided by the appellant includes background information relating to the 1960s and events surrounding the 2010 permission. However, as the appellant needs to show continuous use over a ten year period, any period of use would need to pre-date the 2010 planning permission. The two areas of land are roughly rectangular with one area to the eastern side of the existing dwelling (the eastern land) and the other beyond the dwelling to the south (the southern land). The appellant is of the view that the southern and eastern land are in garden use in connection with the existing house at Claybank Farm and were domestic areas being vegetable gardens as far back as the 1960s.
7. Claybank Bungalow was bought by the appellants parents in 1958 who farmed the agricultural holding attached to it. In the 1960s, the family moved into a new house which is now known as Claybank House and Claybank Bungalow was used as farm workers accommodation for a few years. The current dwelling at Claybank Farm was constructed as a result of the 2010 planning permission and replaced Claybank Bungalow.
8. There are five photographs of the 1960s with two aerial views and three family photographs in the appellant's statement. The second aerial photograph includes Claybank House which the appellant states was built in the late 1960s. The first family photograph predates the construction of Claybank House and the second family photograph is of a similar view. The last family photograph shows the southern land with the Dutch barn that still exists in the background. Whilst this photograph does show a vegetable plot and lawn in front of the Dutch barn, this contrast with the aerial image which shows Claybank House. In that aerial image, the vegetable plot to the eastern land has expanded and it is not possible to make out a vegetable plot or lawned area on the southern land. The increase in size and more defined character of the vegetable plot on the eastern land in the second aerial photograph may account for the comment of Mr Smith who states that part of the lawn was converted to a vegetable plot but later turned back. A distinct boundary between the lawned area and the eastern land is a feature that can be seen in later aerial photographs. The appellant also indicates that when his family moved into the newly built Claybank House in the late 1960's, the original bungalow was used as farm workers accommodation for few years. There is no evidence before me as to what arrangements were put in place for the land and its use when the family moved out following the construction of Claybank House.
9. The photographs do provide some information as to how the original agricultural holding evolved with the subsequent construction of Claybank House and the replacement dwelling at Claybank Farm. However, given the expansion of the vegetable garden, there is limited evidence as to whether the

¹ Planning permission Ref 10/1522/FUL

original vegetable plots formed part of the farming enterprise when occupied by a farm worker or how the land was used in subsequent years after the appellant moved out of Claybank Bungalow prior to the appellant buying the bungalow with other land from his parents in 1994.

The 2010 application

10. The appellant considers that the circumstances surrounding the 2010 planning permission are key to his case. The Council advised at the time of the original application that either the land be removed from the original plan or a Certificate of Lawful Use be submitted to establish that the use of the two areas was as garden land. Whether or not the appellant and his agent at that time were aware of the implications of amending the plan prior to determination of the application to remove the two areas marked 'garden land' from the application, there is no dispute that the areas were removed from the plan and the dwelling as approved was constructed.
11. The appellant believes that the exclusion of the two areas of land from the plan is at the heart of the CLU application but that the exclusion does not remove the original use of the land. However, it is not simply a matter of realigning a boundary to what the appellant understood it to be. Similarly, with regard to the original use, there was no agreement between the parties as the time as to what the use of the areas of land was and the Council's position has not subsequently changed. In forming the view that the use was not garden land, a Council officer visited Claybank Farm in order to assess the planning application and took photographs.
12. The Council has provided 3 photographs taken in April 2010, one of which shows some cows on the southern land, the second shows a hedge boundary and tree screening between the bungalow and the eastern land and the third shows the dense vegetation on the eastern land from a different angle. The Council refers to the eastern land as being unkempt and half of the area being covered in mature conifer trees in its assessment of the disputed land in 2010.
13. Photographs taken in September and October 2010 include the dense hedge boundary to the side of the original dwelling on the eastern boundary. The photographs include a view across the southern land. The only access to the land at this point appears to be farm style gates to the access tracks either side of the southern land close to the access to the Dutch barn to the one side and the end of the access track that leads to be farm buildings to the rear at the other.
14. The appellant had previously referred to a path running through the southern land which is visible in the first photograph of the appellant's statement taken in the late 1960s when the original bungalow was still present. The appellant states that the path remains to this day. However, the path is not visible in any later photographs. It may however remain underground, as modest sections either end were visible at my site visit. Whilst the presence of a path is not conclusive in assessing garden use, the absence of the original path does show how the use of the land has not remained the same over the years. There is no evidence provided of any domestic paraphernalia or any items that would suggest garden use in the 2010 photographs and the presence of the animals with farm style gates does support the Council's view that the land was in use as a paddock and had the appearance of a field in contrast to the lawned garden area between the dwelling and the road.

15. The appellant subsequently stated that occasionally he placed calves in the area to keep the grass down. He stated that there would not be sufficient grass to support anything further and that the calves were not placed there from a profitable farming of point of view. I note that the appellant as a working farmer has not claimed farming subsidies for the disputed land but that does not in itself show that land is in use as garden land.
16. The southern land does have a vertical pipe within the land which is fenced off and which is the septic tank for the original and replacement dwelling. The appellant says that such installation would not be placed in actively used farming land. The installation would have been present when the Council's photograph showing cows on the land was taken in 2010 if the installation predates the existing dwelling as suggested by the appellant. The feature can be seen in the google image of 2013 as a fenced structure. However, it is unclear as to why the installation is not suitable for farming land but is suitable for garden land and does not appear to have prevented use of the land by animals.
17. The Council's current evidence also refers to a series of Google Earth images taken in 1999, 2006, 2007 and 2013. The 1999 colour google earth image does show dense vegetation separating the bungalow from the eastern land with the northern part of that land closest to the road having a dense cover of trees. The aerial images all show a boundary between the two areas of land and the dwelling with its original lawn.
18. The 2013 image shows the replacement dwelling permitted in 2010 and significant changes to the eastern land in terms of clearance as the bulk of the previous tree coverage has been cleared. It therefore appears likely that the incorporation of the eastern land into the existing lawned garden that exists today took place after 2013 when the trees had been cleared.

Other Evidence

19. The appellant has provided letters from Mr Peter Smith and Mr Martin Fourt. Mr Fourt states that the land around the house has always been garden, the land to the side has always been a grassed lawn and the land behind has always been a vegetable garden. He adds that as far as he is aware the land has not changed over the last 40 years. However, Mr Fourt's letter is lacking in detail. He refers to a period of 40 years although it is unclear why that period is chosen and when that 40 year period begins and ends. Mr Fourt states that he knows the appellant well and knew his father before him. However, he does not refer to any specific occasions or celebrations when he visited Claybank Farm or whether he visited regularly. There is no indication of when he last visited the land in order to form his assessment that the use of the areas of land has not changed. I am therefore unable to attach anything other than limited weight to Mr Fourt's evidence.
20. Mr Smith has known the appellant for many years and knew his father for over fifty years. He says he has visited Claybank Farm on many occasions. He refers to the land to the left of the house and to the rear as being private garden and maintained as such. He refers to his children playing on the lawn and having tea which suggests that he is referring to a period around the late 1960s given that there are photographs of the appellant as a child dated around that time. He does state that the lawn was turned over to grow more vegetables but has been reinstated as lawn. Although no dates are provided, that statement may

refer to the extension of the vegetable plot on the eastern land that can be seen on the early aerial photographs.

21. Mr Smith refers to the land to the rear, the southern land as always being a vegetable garden. He refers to being supplied with vegetables, he also refers to the path between the vegetable plot. He states that there was a low fence between the vegetable garden and the main house which he believes is still there. Mr Smith then refers to land being farmed by the appellant and not knowing the extent of the agricultural land. The information he provides does appear to relate to the earlier photographs provided by the appellant and the presence of vegetable plots on both areas of land. He refers to receiving vegetables but doesn't state whether the vegetable plots were for the benefit of family and friends or for any wider purpose. He also refers to the boundary fence between the dwelling and the southern land. He also refers to the area to the rear, the southern area "was always a vegetable plot" but it is unclear up to what point Mr Smith is referring to. Mr Smith appears to be commenting upon the earlier years when his children were young. However, there is no reference to the appellant's family moving into Claybank House which the appellant states was built in the late 1960's or how the subsequent renting out of Claybank Bungalow to a farm worker affected the visits to Claybank Farm or the use of the land in question. The letter does provide some information with regard to the 1960s but is of limited weight when assessing any period beyond the occupation of Claybank Farm for the reasons stated.
22. Support from a local councillor who considers that the application relates to simply correcting an error made in 2010/2011 is not a statement to which I can attach any weight. The Councillor is expressing an opinion based upon what he has read but an LDC is an evidenced based assessment only.

Conclusions on the evidence

23. The appellant's view is that the two pieces of land are and always have been garden land to the domestic dwelling. However, the appellant's evidence relates to the early years when the appellant occupied the original bungalow as child and then the circumstances surrounding the 2010 planning application. Whilst there was a vegetable plot on the eastern land in the 1960s, it was clearly fenced off from the lawned area and there is limited evidence as to how the land was used particularly when the appellant and his family moved out of the bungalow and it was occupied by a farm worker. There is no evidence from the appellant as to when the vegetable plot use ceased and the original lawn was extended to include the single larger lawn that exists now. Similarly, there is no evidence as to how the land was used when the appellant came to live in the original bungalow after first renting it out. With regard to the southern land, the use taking place in 2010 as shown in the photographs was very different to the use shown in the family photographs and there is no evidence of how the land was used in the intervening years. Whilst, the appellant believes that the two areas of land should have been included in the 2010 planning permission, on the evidence before me, the Council clearly indicated at the time why they could not support the land being included.
24. The Council in its evidence has referred to the observations made at the time of the 2010 application and also google earth images over the years. In particular, the boundary treatments for the southern land and the use of the land for grazing of animals does not support the use of land as domestic

garden. The appellant does not dispute that animals used the land and even if that use was not frequent, it is not a use associated with a domestic garden. Similarly, the Council's evidence in relation to the eastern land refers to the dense vegetation on the eastern land as shown in the google images with only the later image of 2013 showing the land clearance.

25. Having considered all of the evidence, the appellant has not demonstrated on the balance of probabilities, that the two areas of land were continuously used as residential garden land for a period of at least 10 years prior to the date of the application.
26. For the reasons given above, I conclude that the Council's refusal to grant a CLU in respect of the use of the land as a garden was well- founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in Section 195(3) of the 1990 Act as amended.

E. Griffin

INSPECTOR