



Appeal Decision

Site visit made on 6 October 2020

by Stephen Brown MA(Cantab) DipArch RIBA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 03 December 2020

Appeal Ref: APP/J1915/X/19/3228488

Warrengate Farmhouse, Money Hole Lane, Tewin AL6 0JD

- 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 by John Hesler against the decision of East Hertfordshire District Council.
 - The application ref. 3/18/1875/CLE, dated 15 August 2018, was refused by notice dated 11 February 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 sought is use of the appeal site as residential garden.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Preliminary matters

3. For the avoidance of doubt, I should explain that the planning merits of the existing development are not relevant, and they are not therefore an issue for me to consider in the context of an appeal under section 195 of the Town and Country Planning Act 1990 as amended, which relates to an application for a lawful development certificate (LDC). My decision rests on the facts of the case, and on relevant planning law and judicial authority.
4. For the purposes of my decision I have adopted the definition of the claimed existing use adopted by the Inspector in a 2017 appeal on this same site¹. That is, use of the appeal site for '*residential purposes incidental to the residential use of the dwellinghouse*'. I have also adopted the shorthand he used for this - that is, the '*incidental residential use*'.

Background matters

5. Warrengate Farmhouse is a substantial detached dwelling on the southern side of Money Hole Lane. The application site – which I refer to as the appeal site – is a roughly rectangular piece of land to the east of the house, having a rather irregularly shaped boundary with the land immediately surrounding the house, and including a detached plant and utility building to its south.

¹ Appeal decision ref. APP/J1915/X/16/3153082, dated 24 April 2017.

6. I understand this is the third LDC application for use of the application site for incidental residential use². The 2017 appeal was against the second of these refusals.
7. From my reading of the previous appeal decision it is apparent that since 2017 the appellant has gone to some lengths to change the appearance of the appeal site. It was previously described as generally unmanaged with an open and empty appearance as compared with the land in the immediate surroundings of the house. It is now landscaped with features such as areas of paving near the house, and decorative brick retaining walls, it is predominantly laid with newly seeded grass and has a well-maintained appearance. As before, the application land and the surroundings of the house are not defined by any barrier, and the land appears within the same field of view as the building.

Reasons

8. The main issue for me to determine is whether the Council's decision to refuse the grant of a LDC was well-founded. In that regard the principal question is whether a change of use of the site has taken place from a mixed residential and agricultural use to a use for residential purposes incidental to the use of the dwellinghouse, and whether as a matter of fact and degree that change is material. In a case of this sort the burden of proof is upon the appellant to show that on the balance of probabilities this is the case.
9. As recited in the 2017 appeal decision, government guidance advises that if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make an appellant's version of events less than probable, there is no good reason to refuse the application, provided the appellant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability³.
10. The Inspector in the 2017 appeal analysed the nature of the planning unit in the light of the court case of *Burdle*⁴. He determined that all of the land under one occupation – that is, the house with its immediate surroundings and the appeal site – constitute the planning unit, which is in a mixed residential and agricultural use. I endorse this analysis and note that the appellant is in agreement with it.
11. The appellant maintains that this mixture of uses may fluctuate in intensity, and that in line with the judgment in the High Court case of *Wipperman*⁵ the cessation of one principal use altogether is not a material change of use and does not constitute development.
12. In *Wipperman* the judgement was made that where there are two components in the use of a piece of land there can be a material change of use if one component is allowed to absorb the entire site to the exclusion of the other, but whether or not there is a material change of use is a matter of fact and degree. The Judge also came to the view that if nothing had occurred following the appellant's entry (onto the site) except the suspension of one component, with the other being maintained at its former intensity, that no question of a material change of use could be said to have arisen. He went on to say that

² Previous decision notice refs: 3/15/1072/CLE, dated 17 July 2015 & 3/15/1738/CLE, dated 13 October 2015.

³ Planning Practice Guidance – 'Lawful Development Certificates' Paragraph 006 Reference ID: 17c-006-20140306.

⁴ *Burdle & Williams v SSE New Forest Rural District Council* [1972] 24 P. & C.R. 174.

⁵ *Wipperman and Buckingham v SSE and Barking LBC* [1965] 17 P & CR 225.

merely to cease one of the component activities in a composite use of the land would not by itself ever amount to a material change of use.

13. It is submitted that the site is unlikely to be used agriculturally, and it is claimed that use has ceased altogether. However, the appellant cannot simply elect to say that the agricultural component has ceased and been supplanted by the incidental residential use. Such a claim should be supported by objective evidence. In LDC cases relating to changes of use this is most usually on the basis that the supplanting use has subsisted continuously for at least 10 years before the date of the LDC application and become immune from enforcement action. Evidence on this matter was examined in the 2017 appeal but found to be too ambiguous and unspecific to meet the relevant test and the appeal was dismissed. Although the Inspector suggested that a further application might be made if better evidence became available, no such evidence has been submitted in this case, and I cannot come to any different view on this.
14. The Inspector in the 2017 appeal found that the appeal site was primarily used for agriculture, and it was suggested that it was part of wider agricultural land. The appellant has put forward no substantial evidence to show that this is no longer the case, and that there has been an actual change from agriculture to incidental residential use.
15. It is not enough to state that the activities on the appeal site may fluctuate between different use components without providing evidence that this fluctuation has caused one component to effectively cease, and the other to take over the use of the entire site. In line with the *Wipperman* judgement it must be shown that the use has fluctuated to the extent that the agricultural component has become so trifling as to be almost *de minimis*, and that there has been no change in the intensity of the incidental residential use.
16. Even if the agricultural component of use has ceased, there is virtually nothing before me to indicate the intensity, extent or scale of the incidental residential use that is claimed to have supplanted it, apart from clues such as the presence of a few items of children's play equipment. If the incidental residential use is extended to cover the entire planning unit it appears to me that the overall intensity of this use will probably have increased, rather than being maintained at its former intensity. If cessation of agricultural use has occurred this would be in tandem with a likely increase in the intensity of incidental residential use, rather than simply a cessation of agricultural use. As a matter of fact and degree I consider this amounts to a material change of use.
17. I accept there have been changes made to the appearance of the appeal site, but that does not make a significant difference to the character of the site as a piece of generally open land. While it may be unlikely for the site to be used agriculturally, it is not inconceivable for a piece of land of this size, and there is no substantial evidence before me to show that the situation has significantly changed since the 2017 appeal. The changes made to appearance are essentially cosmetic and do not show that on the balance of probabilities the entire planning unit has been subsumed into a single residential use.
18. Overall I find that the appellant's evidence of use is sparse and not sufficiently precise to show on the balance of probabilities that use of the appeal site has changed from its mixed residential and agricultural use to an incidental residential use, or that this change would not be material.

Conclusions

19. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of is use of the appeal site as residential garden at Warrengate Farmhouse, Money Hole Lane, Tewin AL6 0JD 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.

Stephen Brown

INSPECTOR