



Appeal Decision

by Jessica Graham BA(Hons) PgDipL

an Inspector appointed by the Secretary of State

Decision date: 29 March 2021

Appeal Ref: APP/F9498/X/20/3257446

The Bungalow, Avill Nurseries, Knowle Lane, Timberscombe, Somerset TA24 6TX

- 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 Mrs P Disney against the decision of Exmoor National Park Authority.
 - The application Ref 6/34/19/108, dated 1 July 2019, was refused by notice dated 20 February 2020.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is the continued occupation of The Bungalow by a non-agricultural worker and their family.
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Decision

1. The appeal is dismissed.

Procedural matter

2. The supporting statement which accompanied the application form asserted that the application was for a LDC "for the discharge of condition 3", and that the applicants were entitled to a LDC "in respect of getting condition 3 lifted for The Bungalow." However, it is important to be clear that in cases such as this, where the use in question is in breach of an extant condition, the grant of a LDC does not bring about the discharge or lifting of that condition. The LDC simply certifies that the use in question was lawful at the date on which the application for it was made: the condition remains in place. If the removal or variation of the condition is sought, an application to that effect can be made to the local planning authority.

Main issue

3. Planning permission for the erection of a bungalow to provide on-site accommodation at Avill Nurseries ("The Bungalow") was granted in 1982,¹ subject to a number of conditions. Condition 3 was that "The occupation of the dwelling shall be limited to persons employed or last employed full-time locally in agriculture as defined in Section 290 of the Town and Country Planning Act 1971, or in forestry, and the dependants of such persons."

¹ Ref 6/34/82/001

4. The relevant provisions of the Town and Country Planning Act 1990 (as amended) provide that a use is lawful if no enforcement action may be taken against it,² and that the time limit for taking enforcement action against the type of planning breach here at issue is ten years.³
5. The main issue in this appeal is whether the use of The Bungalow in breach of the agricultural occupancy condition commenced at least ten years prior to the date of the LDC application; that is, before 1 July 2009. The burden of proof is on the Appellant, and the standard of proof is the balance of probability. If there is no evidence to contradict or otherwise make the Appellant's version of events less than probable, and if the Appellant's evidence alone is sufficiently precise and unambiguous, a LDC should be granted.

Assessment

6. The Appellant's case is that she and her husband purchased Avill Nurseries on 15 July 1987, and from that date forward have lived in the Bungalow in breach of the agricultural occupancy condition. Mrs Disney was employed full-time as Practice Manager at a doctor's surgery in Minehead until she retired in 1998, and Mr Disney was employed full-time in the Police Service until he retired in 1994.
7. After their retirement, Mr and Mrs Disney worked at Avill Nurseries growing camellias and rhododendrons for sale. The business was seasonal, such that most of the work took place in the spring and summer months. I am told that the remote location of, and poor access to, Avill Nurseries restricted their ability to grow the business as it was not possible for lorries to enter the site, and difficult for customers to visit, so all the plants they produced were sold wholesale. They closed the nursery in 2005, but kept its business account open until 2007. A copy of the accounts for the year 2007 has been provided, but those for the previous years have been destroyed.
8. There is no dispute that the use of land for the nursery business falls within the definition of "agriculture", such that Mrs Disney was "last employed" in agriculture. The position concerning Mr Disney's "last employment" is less clear cut, as following his retirement, in addition to working at the nursery he was also employed in local pheasant shoots taking place between September and the end of January, working as a loader. While this would coincide with the off-season of the nursery business, I have not been provided with any information as to whether this employment ceased prior to, or continued after, the closure of the business. In any event, where a married couple occupies a dwelling restricted by condition to "persons employed or last employed in agriculture... and their dependants" it would not be necessary for both of them to be employed, or last employed, in agriculture: it would be sufficient, for the purposes of compliance with the condition, for only one of them to meet that test – as Mrs Disney does here.
9. However, it is important to note that the relevant condition in this particular case also requires that the employment in agriculture be (or have been) "full-time".

² S.191(2)(a)

³ S.171B(3)

10. The difficulty with the term “employed full-time...” in agriculture (and possibly the reason why agricultural occupancy conditions more usually adopt the wording “solely or mainly working in...”) is that agricultural work tends, by its very nature, to be seasonal. Working patterns, and working hours, are likely to vary considerably across the year; for example, a self-employed sheep farmer may work twelve-hour days or longer during lambing season, balanced by shorter working days at other times. This can present difficulties in assessing whether such employment might reasonably be described as “full time” throughout the year. At busy times of the year, the hours put in by agricultural workers may greatly exceed the hours worked by (for example) those in office-based employment, but at other times, the hours worked may be difficult to distinguish from “part time” employment.
11. In order to take proper account of seasonality when assessing whether or not employment in agriculture is “full time” it is therefore necessary to establish a clear picture of how that particular business operates, including seasonal variations and any other cyclical fluctuations. The pattern of working hours throughout the year will be relevant, as will the number of employees, the number of hours worked by each, and any other work that the employees may undertake during the off-season. Information about the extent and value of the outputs of the agricultural business, including its assets and expenditure, is also helpful in distinguishing between work that is “full time”, “part time”, or more akin to a profitable “hobby”; so too are the contents of initial and subsequent Business Plans, and the intentions and circumstances of the owners and operators.
12. In this case, the Statutory Declarations made by Mr and Mrs Disney do not include any information at all about the nature or extent of their former nursery business. Supporting comments submitted on their behalf alongside the application and appeal indicate that the hours they worked at the nursery were limited and variable, but no indication of working hours, seasonal fluctuation, profitability or any other information is provided in the Statutory Declarations. These simply contain confirmation of the date of purchase of Avill Nurseries, the fact that Mr and Mrs Disney have resided continuously at The Bungalow ever since, and the statement “We have never worked in full time agricultural employment”.
13. While I certainly do not doubt that this is their sincerely held view, it is not on its own sufficient to establish that an objective analysis of their employment at the nursery would necessarily lead to the same conclusion. It may be that on retirement from their former professions Mr and Mrs Disney, supported by their pensions, devoted significant time and energy to trying to build up a commercially viable nursery business; only to find after a few years that locational and logistical difficulties precluded this. Equally, it may be that in their eyes, the nursery business was never more than a hobby, and the question of making money from it was largely irrelevant. From the information provided, it is not possible to tell. But in either case, it would be perfectly reasonable for them to regard the time they spent working at the nursery as a labour of love, rather than “employment”, full-time or otherwise. In other words, in the context of this application for a LDC a declaration which simply states “we have never worked in full time agricultural employment” is, without further detail, insufficiently precise and unambiguous.

14. In summary I do not have enough evidence, as to the nature and extent of the business operated by Mr and Mrs Disney at Avill Nurseries, to draw any firm and objective conclusion as to whether or not they might reasonably be considered to have been employed full-time at that agricultural business. Consequently, I find that the Appellant has not demonstrated that, on the balance of probabilities, the occupation of The Bungalow was in breach of condition 3 at the relevant date. It is important to be clear that this is not a definitive finding that Mr and Mrs Disney must have been employed full-time at the nursery business: it is simply a finding that they have not here discharged the evidential burden of proving, on the balance of probabilities, that they were not.

Conclusion

15. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the continued occupation of The Bungalow by a non-agricultural worker and their family 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.

Jessica Graham

INSPECTOR