The Planning Inspectorate

# Appeal Decision

Site visit made on 18 May 2021

**by Thomas Shields DipURP MA MRTPI**

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

**Decision date: 21 June 2021**

**Appeal Ref: APP/P0240/X/20/3265631**
**The Orchard, Bedford Rd, Houghton Regis, Dunstable, LU5 6JJ**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 ("the Act") against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Alan Kavanagh against the decision of the Central Bedfordshire Council.
- The application Ref: CB/20/03686/LDCP, dated 27 October 2020, was refused by notice dated 7 December 2020.
- The application was made under section 192(1)(a) of the Act.
- The use for which a LDC is sought is use of an outbuilding as a cattery.

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

## Preliminary Matters

1. For the purposes of obtaining a LDC the burden of proof lies with the applicant/appellant, and the standard of proof is the balance of probabilities. The relevant date for ascertaining whether the proposed development would be lawful is the date of the application. No issues of planning merit are relevant.

## Main Issue

2. The main issue is whether the Council's decision to refuse the application was well-founded.

3. This turns on whether the proposed use of an existing outbuilding as a commercial cattery (located in the garden of the appellant's house and currently used as a store, gymnasium and home office) would amount to a material change of use constituting "development" as defined at s55 of the Act.

## Reasons

4. The parties have referred to a number of earlier appeal decisions relating to the keeping of cats, dogs, and other uses at residential properties. However, those decisions were fact-sensitive relative to the particular circumstances of each individual case. As such, they are useful only in so far as they illustrate the application of the principles involved.

5. As set out in PPG[1] there is no statutory definition of a "material change of use"; however, it is linked to the significance of a change and the resulting impact on the use of land and buildings. Whether a material change of use has taken

[1] Planning Practice Guidance: Paragraph: 011 Reference ID: 13-011-20140306

place is a matter of fact and degree and this will be determined on the facts and circumstances in any particular case.

6. Critically, a material change of use incorporates a significant difference in the character of the activity from what has taken place previously. Any off-site impacts of any new activity may also be relevant material considerations in making such a judgment[2], for example on the residential amenity of neighbours, but they are not determinative by themselves and should not be considered in isolation.

7. The Council accepts that a householder's own private use as a cattery for up to 10 cats would likely be an incidental use to a primary residential use, but not so in this case. The Council's reasoning relies in part on the fact that the use would be a commercial one, and that such use is defined as *sui generis* in the *Land Gazetteer* journal (LG).

8. However, while uses may or may not be commercial, and are ascribed land-use classifications in the LG, that does not define them as primary uses constituting s55 "development", nor does it determine that such listed land uses are incapable of being incidental uses in conjunction with other primary land uses. I also do not agree with the Council's view that a commercial incidental use at a residential property can only exist when the room or outbuilding occupied for such incidental use must fully return to being primary residential use at the end of a working day.

9. For the purposes of assessing whether a material change of use has taken place, it is helpful to determine the appropriate planning unit at the relevant point in time. In long established case law in *Burdle*[3] it was held that the planning unit should be determined with regard to the unit of occupation, and the concept of physical and functional separation. Three broad categories of distinction were identified:

   (1) a single planning unit where the whole unit of occupation is used for one main purpose and any secondary activities are incidental or ancillary; (The appellant's arguments are consistent with this category)

   (2) a single planning unit where the whole unit of occupation is in a mixed use because the land is put to two or more activities and it is not possible to say whether one is incidental to another, or, in the case of a composite use, where the component activities fluctuate in their intensity from time to time but the different activities are not confined within separate and physically distinct areas of land;
   (The Council's arguments are consistent with this category)

   (3) the unit of occupation comprises two or more physically separate areas that are occupied for substantially different and unrelated purposes, in which case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.

10. In reaching my decision I will follow the approach I have set out above and the principles as set out in *Burdle*.

[2] *Hertfordshire CC v SSCLG & Metal and Waste Recycling Limited* [2012] EWCA Civ 1473
[3] *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

11. In this case there is no dispute that the existing relevant planning unit, for comparing existing and proposed uses, is the appellant's large detached dwellinghouse together with its outbuildings and enclosed gardens, also identified by the red line on the site block plan submitted with the application.

12. The rectangular single storey outbuilding to be used as a cattery is located in the rear garden, to the side and rear of the main dwelling and detached double garage, close to the northern boundary of the property. It is relatively small in comparison to the main dwellinghouse and the remainder of the planning unit. It would be modified internally to create a total of 10 cat pens.

13. At the time of my visit to the appeal site there was no physical barrier or other visually separating demarcation of the cattery building from the rest of the property, and none is proposed. The appellant would operate the cattery obtaining direct access to it from the main house. No selling off or otherwise splitting the cattery use away from the residential use of the property is proposed and, other than the cattery building, the rest of the land and buildings would continue to be occupied and utilised by the appellant and his family as their permanent main residence. Taking these factors together I find that the cattery building would not be physically separated from the rest of the existing planning unit.

14. In terms of operation of the cattery it would be on a commercial basis, housing potentially up to a maximum of 10 cats at any one time, although the appellant considers a lower number would be present during most months of the year. It would be operated by the appellant only with no employees. The building would be internally insulated against noise and cats will remain inside at all times. There is ample parking area within the property for visitor parking. Customers would, by prior appointment, be able to deliver and collect their cats during the hours of 08:00 to 06:00 Monday to Friday and 08:00 to 13:00 on Saturdays. Although the appellant's expectation of one or two customers visiting the property per day, with a maximum of 10 per week, may be a loose estimation, I nonetheless accept that there would likely be on average over a whole year a low number of visitors, given the scale of the activity proposed.

15. New housing development is taking place in the area. However, I consider there would be no significant effect in terms of smells or disturbance to occupiers of nearby properties resulting from the use of the outbuilding as a cattery, or from noise associated with customer visits to the property in vehicles.

16. Having regard to the details provided of the proposed use, as described by the appellant and summarised above, I find that there would be no significant actual or perceived change in the character of the use of the land as a residential property. The cattery use would be a small scale incidental use, both functionally and physically linked to the occupation of the property as the appellant's main primary residential use, rather than being a mixed use of two primary uses as contended by the Council. As such, the proposed use of the land as a whole would continue to remain within the first category of planning units as set out in *Burdle*.

17. Consequently, I conclude overall that there would be no material change of use of the land and hence no "development" within s55 of the Act.

## Conclusion

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

19. My conclusion is based solely on the proposed use of the property as described by the appellant and as assessed above. It should not be taken to imply that any larger scale of cattery use, or any significant change in the relationship of the cattery operation with the primary residential use, would also be lawful. The LDC will therefore be worded to reflect these factors accordingly.

## Formal Decision

20. The appeal is allowed and attached to this Decision is a LDC describing the proposed use which is considered to be lawful.

*Thomas Shields*

INSPECTOR

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# Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(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 27 October 2020 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red, and outbuilding hatched in black, on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The use of the outbuilding as a commercial cattery for up to a maximum of 10 cats at any one time, with customer visits by appointment only limited to between the hours of 08:00 to 18:00 Monday to Friday, and 08:00 to 13:00 on Saturdays, and operated solely by the occupiers of the main residential dwellinghouse on the site with no other employees, would be incidental to the primary residential use of the site. As such, it would not result in a material change of use within the existing residential planning unit. As such, the use would not constitute development as defined at s55 Town and Country Planning Act 1990 (as amended).

Signed

*Thomas Shields*

INSPECTOR

Date: 21 June 2021
Reference: APP/P0240/X/20/3265631

***First Schedule***

Use of an outbuilding as a cattery.

***Second Schedule***

Land at The Orchard, Bedford Rd, Houghton Regis, Dunstable, LU5 6JJ

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was 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 described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

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# Plan

This is the plan referred to in the Lawful Development Certificate dated: 21 June 2021

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Not to Scale