
Appeal Decision

Site visit made on 13 October 2021

by P N Jarratt BA DipTP MRTPI

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

Decision date: 18 October 2021

Appeal Ref: APP/V1260/X/21/3276044

Land at Fripps Cottage, Ashington Lane, Wimborne, Dorset, BH21 3DG

- 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 H Edbrooke against the decision of Bournemouth, Christchurch and Poole Council.
 - The application Ref APP/20/0557/J, dated 28 May 2020, was refused by notice dated 15 March 2021.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use development for which a certificate of lawful use or development is sought is the use of land as domestic garden land associated with the residential property known as Fripps Cottage.
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Decision

1. The appeal is dismissed.

Procedural matters

2. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.
3. For the avoidance of doubt, the planning merits of the existing use 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 an LDC. My decision rests on the facts of the case, and on relevant planning law and judicial authority.

Main issue

4. I consider that the main issue is whether the Council's decision to refuse to grant an LDC was well-founded.

The site and relevant planning history

5. The appeal site is bounded by a red line on the application plan and includes a modern domestic property known as Fripps Cottage and its garden, which is bounded by a hedge, and a gate provides access to the adjoining area of hardstanding and an 'L-shaped' stable block (granted planning permission in 2004). This is separated from the field by a post and rail fence. The stable block appears to be used for storage purposes and a large shipping container is

- situated on the hardstanding. At the time of my visit, the container was locked and its purpose unknown.
6. Access is provided from the hardstanding to an area of grassland which extends between Ashington Lane and a stream towards and beyond a pond. A former fence line, that is just distinguishable on the ground, marks the boundary of the appeal site with other land controlled by the appellant which has the appearance of rough pasture and contains a stable building.
 7. At the time of my site inspection, the grass had recently been mown with the broad fringe of the pond being a lighter colour suggesting that the fringe had previously had more vegetation surrounding it. The grassed area contained several staked fruit trees and a number of bee hives, a swing seat and a range of outdoor seats, benches, tables, a small boat, a small timber hut and a BBQ in the vicinity of the pond. What appeared to be a new games net has been placed on the grass beyond the pond. There appears to be more domestic/leisure paraphernalia within the site than as described by the case officer at his site visit in September 2020.
 8. The appellant's land holding extends north of the appeal site along Ashington Lane to Willet Road and an LDC was issued for existing stables on this land in 2017 (APP/17/01814/J). The current appeal site excludes land to the north which had been included in the earlier LDC applications in 2018 and 2019, both of which were withdrawn.
 9. The 2018 application was for use of land as residential curtilage associated with Fripps Cottage (APP/18/01623/J) and the 2019 application was for use of land as domestic garden associated with Fripps Cottage (APP/18/01623/J).

Reasons

10. Section 191(2) indicates that uses and operations are lawful if the time for taking enforcement action has expired. Section 171B sets out the time limit for the taking of enforcement action. In respect of changes of use of land, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach. Furthermore, in order to satisfactorily demonstrate immunity from enforcement action, a breach can only become lawful if it continues throughout the relevant immunity period, such that the Council could have taken enforcement action at any time.
11. The appellant considers that overwhelming evidence has been submitted to confirm that the land between Fripps Cottage and the pond has been used and enjoyed as garden land since at least 2010. It is stated that there have been no intervening uses and no agricultural use of the site for decades.
12. However, there is no clear evidence as to the date when the breach first took place from which to assess the materiality of the breach and the relevant date for the purposes of s171B. In the absence of this, I regard the relevant date to be 28 May 2010, which is 10 years before the date of the application for the LDC.
13. The appellant's statutory declaration dated 26 November 2019 indicates that she acquired Fripps Cottage and the adjoining land (the red land subject to this appeal and the adjoining blue land to the north) in October 2002 and has let the cottage as a self-contained holiday let since October 2003. Holiday makers are free to explore the whole of the red land and use it as they would their own

- garden. The whole of the appeal site has been maintained as domestic garden land for at least 10 years and a detailed table of such maintenance is included in the statutory declaration. This includes reference to creating a pond and holding pond maintenance parties, building maintenance of the stable block and planting fruit trees next to the apiary. Activities referred to include activities and games for children and for the East Dorset Bee Keeper's Association, chicken enclosure, parking of horse box and cars in the stable yard, dog walking and training, camping, driving practice and keeping of ponies. Many of these activities are supported by photographs.
14. A statutory declaration submitted by Lucilla Loveday Rowe dated 2 December 2019, sets out her years of friendship with the appellant and the use of the appeal site for gatherings, parties, BBQs, bee keeping, pond clearance and the use of the site for driving practice by their respective children.
 15. Land drainage of the appeal site and adjoining land to the north was carried out in 2003 and is supported by a copy invoice. However, this does not indicate the purpose for which the ground improvement was for and is of limited value to the appeal. Similarly, a plant hire invoice of December 2004 and an insurance policy renewal letter of September 2006 are of limited value as these does not expressly refer to the use of the appeal site. However, whilst these do indicate the appellant's investment in the property and possible future intentions, they do not unambiguously show the commencement of a breach of planning control necessary to support the LDC application.
 16. Submitted extracts from the guest book for 2009 - 2017 indicate how visitors have enjoyed their stays with particular comments highlighted by the appellant. As the Council has summarised, conclusions from these reviews indicate there were horses nearby, guests were invited to collect eggs, they refer to adjacent land as fields and they were able to walk in the fields. This does not show that the appeal site was used as domestic garden land but more as a facility for guests to enjoy more akin to a farmer allowing guests to roam a farm.
 17. It is claimed that should the appellant continue using the land in the same manner then the Council has no grounds to prevent her from doing so and is unable to serve an enforcement notice. It is further added that since the first application in 2018 there has been no hint of an enforcement investigation. However the relevance of such claim in this appeal is limited but in any event the taking of formal enforcement action is a discretionary power for the Council and issues of expediency are relevant in the exercise of this power.
 18. Although curtilage of the dwelling house has been mentioned in the context of the appeal, and was part of the description of the development in the withdrawn 2018 LDC application, this is not a use of land and I agree with the parties that it is not relevant. I note however that caselaw confirms that domestic garden land can be extraneous to the curtilage of a dwelling and that garden land can take a variety of different forms. Lack of domestic paraphernalia does not prevent land from being garden land and parcels of garden land can be separated from each other by fences.
 19. The planning unit is usually the unit of occupation unless a smaller area can be identified as a matter of fact and degree, is physically separate and distinct and occupied for different and unrelated purposes. A single planning unit is where the unit of occupation has one primary use and any other activities are

incidental or ancillary. The appellant regards the appeal site to be one planning unit based on the Burdle¹ tests but if this is the case then at some time the appeal site has changed from two separate planning units represented by the residential use of the dwelling and garden and that of the adjacent field, used for grazing animals and the stable block.

20. Third party representations have been submitted questioning the evidence submitted by the appellant, including comments from the Society for Poole. A Mr George Pittock rented Fripps Cottage for 6 months from 18/10/17 to 18/4/18 and states that at no time did he request, or was offered, use of the paddocks outside the garden of the cottage. At the time he lived at Fripps Cottage, the stables and fields were rented out for horse grazing. The appellant states that Mr Pittock was offered the right to use the appeal land as part of the enjoyment of the property of Fripps Cottage although states that no specific mention of access is contained in the tenancy agreement. Additionally the appellant refers to the horse grazing relating to land north of the appeal site.
21. Ms Louisa McNeill rented stables and paddocks from September 2013 and September 2016 for the grazing of her horses, although I note that this is for land to the north of the appeal site and is not relevant to this appeal other than indicating an inconsistency in the evidence as Miss McNeill's use of the land somewhat undermines the appellant's assertion in paragraph 5 of her statutory declaration that 'the red and the blue land together make up the extended garden of Fripps Cottage' and in her contradiction of Mr Pittock's assertion.
22. The key issue is whether a material change of use from agriculture has occurred and when it occurred. It is very unclear from the evidence when the land ceased to be used for agricultural purposes and at the point at which the scale of the new use amounted to a material change of use or whether an incidental use became a primary use, either in a separate planning unit or as a new element in a mixed use. It seems to me that the leisure use was originally only of a casual, intermittent or insignificant nature that initially might have been at a *de minimis* level that did not amount to a material change of use or a significant change in the character and appearance of the land.
23. The fact that the appellant claims the land has not been actively used for agriculture since June 2010 does not show that there has been a material change of use of the land. Nor does the manner in which the land is maintained or improved provide conclusive evidence. The appellant claims that the land has been manicured although this was not evident at my inspection, albeit that the site appeared well maintained. Whilst the grass had been recently mown, its quality and texture appeared more akin to that of a public playing field, rather than that of a garden, although my assessment of the evidence does not hinge on this point.
24. I have had regard to the appeal decisions referred to by the parties. They all make a useful contribution to the considerations of the issues in this appeal but they nevertheless deal with different sites with different evidence which distinguishes one case from the next.
25. I also note that the Council concluded from the aerial photos submitted with the LDC application for the stables on the land to the north of the appeal site

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

(APP/17/01814/J) that there is no difference in the appearance of the land between the images in 2009 and 2014, given the claims of the appellant that the use of the land had already changed from a field to residential garden land.

26. I am satisfied that the appellant has demonstrated that the appeal site has been used for a considerable period of time for recreational and leisure activities, including bee keeping and pony keeping but it is not logical to conclude that just because the land has not been used for agriculture, then it must be in use as domestic garden land. Certainly, the appellant, her family, friends and those using the holiday let have enjoyed the land for many different purposes but in a manner that many people would wish to make use of and enjoy an attractive field and pond in the open countryside. At best, the field could be described as a leisure plot. However there are no planning definitions of 'garden' or leisure plot', but as a matter of fact and degree, I consider that in this case there is a clear distinction in the use, character and appearance of the garden attached to the dwelling to that of the wider area of land external to it.
27. Because of the casual and intermittent use of the land for recreational and leisure purposes, it is possible that there would have been some difficulty in the Council being able to take enforcement action should they have considered it expedient to do so, unless their site visit coincided when one of these activities was actually taking place or that the land had sufficiently changed in its character and appearance to indicate a material change of use.
28. Although I attach weight to the statutory declarations, and I have looked at the totality of the evidence, I do not find that the appellant has shown on the balance of probability that a material change of use has taken place and continued uninterrupted for a period of 10 years. Contradictory evidence casts doubt on the veracity of the appellant's own evidence, and, despite the opinion to the contrary by the appellant, there is no conflict with *Gabbitas*².
29. The siting of the storage container raises issues over whether there has been a material change of use to a mixed use of land but I note that no reference has been made in the officer's report to the siting of a container. Consequently I assume that this post-dates the application for the LDC. It forms no part of this appeal which relates to the lawful use of the land at the date of the application.

Conclusion

30. 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 use of land as domestic garden land associated with the residential property known as Fripps Cottage, 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.

P N Jarratt

Inspector

² *Gabbitas v SSE & Newham LBC* [1985] JPL 630