
Appeal Decisions

Site visit made on 30 June 2021

by Grahame Kean B.A. (Hons), Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 2nd December 2021

Appeal A Ref: APP/K2420/X/19/3238520

Appeal B Ref: APP/K2420/X/19/3278743

Appeal C Ref: APP/K2420/X/20/3246256

The Old House Farm, Sutton Lane, Cadeby, Nuneaton CV13 0AR

- The appeals are 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 appeals are made by Mr George Denny against the decisions of Hinckley and Bosworth Borough Council.
 - The Appeal A application, Ref 18/01255/CLUE dated 11 December 2018 was refused by notice dated 12 February 2019.
 - The Appeal B application, Ref 19/00391/CLUE dated 3 April 2019 was refused by notice dated 17 June 2019.
 - The Appeal C application, Ref 19/01164/CLUE dated 15 October 2019 was refused by notice dated 10 December 2019.
 - The applications were made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is, in respect of Appeals A and B: garden land being part of a curtilage of dwelling complete with all permitted development rights.
 - The development for which a certificate of lawful use or development is sought is, in respect of Appeal C: use of land as garden incidental to the enjoyment of the Old House Farm dwelling.
-

Formal Decisions

1. The appeals are dismissed.

Procedural matters

2. All cases must be determined on their own merits. However I have considered the evidence taken together across all appeals to put the appellant's case at its highest in relation to each appeal individually.

Preliminary matters

3. Use as residential curtilage is not a use in planning terms. Given the power to substitute the description of the use set out under s191(4) of the 1990 Act I shall treat the application in all 3 appeals as that described by the Council in its decisions, namely use of land as a domestic garden 'incidental to the use of the dwellinghouse at The Old House Farm, Sutton Lane, Cadeby'. This does not prejudice any party to the proceedings. The land is the same in all 3 appeals.
 4. The planning merits of the use are not relevant to determining an LDC appeal. The decision is made on the facts and on relevant law and judicial authority.
-

5. Advice in Planning Practice Guidance (PPG) is that if the Council has no evidence itself, or from others, to contradict or make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.
6. By s191(2) of the 1990 Act operational development is lawful at any time if no enforcement action may then be taken in respect of it, because it did not involve development, or it did not require planning permission, or the time for enforcement action has expired or for any other reason.
7. On appeal under s195 of the 1990 Act the overriding issue, taking into account but ultimately irrespective of the reasons of the Council, is whether the refusal of the application would have been well-founded under s195(2) and (3). The burden of proof is on the appellant on the balance of probability.
8. The appellant's case on the appeals is that the use has been established and continuous for longer than 10 years up to the respective application dates. The dates when the use was said (on the application forms) to be begun are, for Appeals A and B: 1 March 2008, and for Appeal C, 1 October 2009. He states he has used the land in excess of 10 years by fencing it off and using it for events and parties as well as for his own private/family use. The Council regards what has happened as an enlargement of the planning unit and a material change of use of the appeal site to use for residential purposes which required planning permission, and since no permission was sought or granted, 10 years continuous use must be evidenced under s191, which use the Council is not satisfied has occurred.
9. The plans submitted for the applications show the appeal site as an L-shaped area around the north and east boundaries of the dwelling and its more immediate environs. The outermost points of the appeal site are annotated A, B and C respectively. On the attached plan I have added for the elucidation of this Decision, points D, E and F corresponding to the site's innermost points.

Reasons

10. The appeal site and the grounds of the main dwelling currently appear as a very large garden to what is a substantially sized house. It contains several items associated with a domestic garden and although part is cordoned off to corral security dogs, it is owned and occupied as a single enclosure.
11. The original domestic curtilage and the appeal site may have been occupied for different purposes, respectively domestic and agricultural, however my view is that the current use of the appeal site is incidental to the use of the dwelling. It would appear that as a matter of fact and degree the appeal site was being used for domestic garden purposes when the applications were submitted.
12. The Council's reason for refusal is the same in all the appeals, namely that the evidence fails to show on the balance of probability that the land has been in use in its entirety as a domestic garden incidental to the use of the dwelling.
13. Consideration of the applications by the Council included statutory declarations from, in the case of Appeal A, DM, BB and BF, various Google Earth images and an aerial photograph. Also considered were further statutory declarations with additional photographs from CG, TW (HBBC officers), GD (applicant), J-P D (applicant's son) and SC (agent). The applicant declares he has used the site in

- excess of 10 years by fencing it off and using it for events and parties as well as for his own private and family use. Similar evidence was supplied in the other appeals, including declarations made by ALN, AL, DF, DDD, GRD, J-L N, JFMD, LA, ME, MLD, SC, and SKW and the appellant.
14. The main dwelling was built under a 1988 planning permission for an agricultural worker's dwelling associated with land to the north, east and south, with the land to the south partly occupied by poultry sheds. The plan attached to the permission showed a red line tight around the dwelling from which the Council infers it was then a separate planning unit. I think that the main function of the red line would have been to delineate the geographical scope of the permission although no evidence then showed domestic usage outside it.
 15. The Council correctly recognises that the planning unit may not coincide with the curtilage of a dwelling and has summarised the general purport of case law on the definition of "curtilage" in its officer report. It views the incorporation of the field "*outside the originally defined planning unit*" as a material change in the use of that land to use for domestic or residential purposes. Further it states that activity prior to 11 December 2008 may not be used as part of the 10 year period. This is not quite correct, the issue is whether a continuous period of ten years' use can be reasonably inferred from the evidence such that the use is established and not lost by the time of the LDC application in 2018.
 16. The Council states and I agree, that the line of the original garden is seen in the 1999/2000 images with the rest of the land appearing to be in agricultural use. The western fence line is clearly delineated with a tree on the north-west corner and a line of conifers abutting the southern boundary. In the 2006 image I agree the original garden is still recognisable. Fences are removed but the Council's commentary is a little unclear in pinpointing the various areas in question. I agree the 2011 image shows the appeal site, it is neatly fenced off. A summer house is said to have been built adjacent to the conifers that first appears on the Google images from 2011. As the Council states, the area looks well-kept and of one complete area in the 2011 image.
 17. The Council then emphasises the changes occurring as in the 2014 image. Again I found its commentary just a little unclear, for example where it refers to "the fence once across the western part of the land". I have taken both parties' commentaries into account but assessed the images myself.
 18. In my view the aerial images are helpful in determining the likelihood of use of the appeal site for residential purposes incidental to the main dwelling at particular times. Clearly the 2006 image shows the site still as part of the wider fields outwith any area that could be considered the curtilage of the dwelling, which latter area appears demarcated by sporadic trees and hedges along the line D-E-F. The 31 December 2010 image is wrongly labelled and appears to be the same as the 2006 image. At this time the appeal site was still part of the fields outside the area bounded by D-E-F, inside of which one can reasonably assume is more intimately connected to the main dwelling.
 19. The September 2011 image by contrast shows some of the vegetative boundary removed and continuous fencing now placed around the outermost boundaries of the appeal site C-B-A and continuing down to F, apart from a small gap on the northern boundary through to the rest of the wider field area. The grass appears to be mown within the appeal site. At that time it appeared to be subsumed as part of the more immediate environs of the house.

20. There are no Google images supplied of the site between 2006 and 2011 but an image, GD2, which I have no good reason to doubt was taken in 2008 is included in the applicant's declaration. He declares that early in 2008 he erected a fence enclosing a larger area for garden use, seen on GD2 and on image GD4. In fact only some part of the area can be seen on GD4 but it does clearly show the part of the appeal site behind the house bounded by the line C-B and with a swing in the middle. GD2 itself does show the whole appeal site minus a very small part in the corner where Point A would be, and this image also shows similar boundary arrangements to the 2011 image. A swing and a trampoline can be seen in the area behind the house. The wider field area includes what I understand the appellant declares is the paddock, also fenced off in 2008, part of which is seen in GD2, separating it from the appeal site.
21. However, the 2017 aerial image supplied by the Council (taken by Bluesky International Ltd and Appendix B1 to the Council's statement) shows that a large part of the appeal site has had its boundary fencing between it and the wider field area removed, and at that time there is no significant difference in appearance. A smaller area of the appeal site appears to have a new boundary leading perpendicularly from or near the central rear part of the dwelling across to, but not quite reaching the line C-B. Further, a Google image annotated as taken on 21 April 2015 (Appendix 18 to the Council's statement) shows a similar arrangement inasmuch as a large part of the appeal site clearly forms part of the wider field area. In particular I note there once again appears to be no boundary whatsoever along the northern section of the line C-B and the appeal site is once again indistinguishable from the wider field area.
22. The applicant has stated that the appeal site was used for parties and events over the years, and his interest in WW2 paraphernalia means that he hosts themed events on the land. Although I am prepared to accept that it is probable that when they occurred, such events could be incidental to the residential use of the dwelling, no evidence specifically as to the regularity of these activities is submitted. The appellant was heavily involved with new development on land owned or controlled by him adjacent to the main dwelling plot and states that for this reason he had "*no time than to do other than keep the extended garden curtilage tidy*" using a ride-on mower bought in 2006.
23. The other statutory declarations are patchy and vague throughout. In the case of SC and ALN for example, the land the subject of the declaration includes without differentiation the area between the appeal site and the house, making it impossible to discern what is quality information in respect of the appeal site and what is not. That from ALN identifies the appeal site as the garden used by the appellant and family but does not give any specific date or dates when she visited or when she observed various incidents of domestic use, even for the occasions when she stayed with them for "*several days*". AL does not give specific dates when she visited other than "*on and off between 2010 and 2013*". DF was invited to a party at the site in 2011, to camp overnight on the site, and attend a barbecue: "*this was on the Saturday night*". He attended events there connected to a WW2 historical society. No specific dates or detail of other garden use is given. DDD refers to garden and other parties, and barbeques held in the garden identified as the appeal site.
24. Other declarations are in a similar vein. The Council points to permitted development rights that include the holding of temporary events for up to 28 days in a year on land. That does not prevent evidence of such activity

contributing to an overall assessment of whether such a change has occurred, but I agree the evidence itself does not disclose an established pattern of regular and frequent use. Other activities illustrated through several images, for example children in a buggy-type vehicle exploring land which may well be included within the appeal site, would not be unusual on such a large plot within a single ownership. Such activities are not so prevalent over the appeal site that they should weigh significantly in favour of the appeals.

25. There also has been some subdivision of the appeal site in recent years but in my view this does not materially support or undermine the case for the wider area. The Council's view is that the images from 2014 suggest a smaller area was segregated including the summer house, that became a private garden whereas the larger part of the site was more loosely used for various events and parties deposed to, and it (the Council) finds no unambiguous evidence that such events were incidental to the residential use of the land.
26. I am struck by some of the images appended to the Council's statement. The 2017 and 2015 images described above demonstrate to me that it is likely that even if a larger area had been enclosed from in or around 2008 for a residential usage as attested to by the appellant, that was not a situation that continued judging by those images. Moreover, the Hinckley & Bosworth BC GIS Map 2014 (Council's statement appendix 19) shows that even back then the appeal site had no boundary at B-C between it and the wider field area north and north-east of the house.
27. I appreciate that there is no absolute requirement to mark land off or enclose it for it to be considered part of a residential curtilage. However I agree with the Council that the physical enclosure of the land has been ambiguous in that at various times within the last ten years the land has been enclosed in various forms and parcels. In my view the images taken together lead me to find it likely that the use of the appeal site over the last ten years has not been materially different from the wider agricultural field area. For the avoidance of doubt I have considered the supplementary statutory declaration from the appellant in which he wishes to explain the circumstances related to the fence line between A-B. I appreciate that fence may have been taken down and re-erected, but that does not explain the clear impression from the 2014, 2015 and 2017 images that no domestic usage of a very large part of the appeal site then obtained. The information in the declarations does not gainsay this impression or otherwise persuade me that the definable character of the appeal site remained other than part of a larger agricultural field.

Summary

28. The appeal site was agricultural land next to a dwelling built to support an agricultural worker. The curtilage was fairly tightly drawn around the house and clear at the time. Change of agricultural use to use as a domestic garden is development for which planning permission is required unless no enforcement action could be taken for certain reasons, the most relevant of which here is that the time limit for enforcement action has expired. Enclosure of the appeal site may well have taken place in or around 2008 with the intention to incorporate some or all of it into a garden use then or later. However any such intention was not manifest through evidence of use over the entire site and for a continuous period of ten years, at any time prior to the LDC applications. Several photographs taken in these intervening years, and the lack of precise

and unambiguous testimony within the statutory declarations, lead me to conclude that as a matter of fact and degree and on the balance of probabilities the appeal site itself has not been used for purposes incidental to the residential use of the main dwelling for a period of 10 years or more before each of the relevant dates in these appeals.

Conclusion

29. For the reasons given above I conclude that the Council's refusals to grant a certificate of lawful use or development in respect of each of the appeals were well-founded and that the appeals should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Grahame Kean

INSPECTOR

Annex

Plan referred to in Appeal Decisions APP/K2420/X/19/3238520, APP/K2420/X/19/3238520, APP/K2420/X/20/3246256

