
Appeal Decision

Site visit made on 8 February 2022

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 23 February 2022

Appeal Ref: APP/X1355/X/21/3287347

Land adjacent to 56 Briardene Way, Easington Colliery, Peterlee, Co Durham SR8 3NR

- 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 Mr William Nicholson against the decision of Durham County Council.
 - The application Ref DM/21/01884/CEU, dated 24 May 2021, was refused by notice dated 3 August 2021.
 - 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 described as 'the land is being used as a private garden, from previous open space'.
-

Decision

1. The appeal is dismissed.

Preliminary Matters

2. On 5 May 2021, the Council issued an enforcement notice attacking the 'material change of use of land from open space to private garden and erection of boundary enclosures' at land to the east of 56 Briardene Way. The notice was to take effect on 2 June 2021. The appellant made an LDC application seeking to establish the lawful use of the land as a private garden, dated 24 May 2021, prior to the notice taking effect.
3. The Council confirm that the LDC application was submitted on 25 May 2021, and that they did not make the application valid until 10 June 2021. Because of this, they argue that the notice had taken effect, meaning that the development applied for could not be found lawful under the provisions of section 191(2) of the Act.
4. Although the LDC application was not a direct appeal against the enforcement notice, it equates to a ground (d) enforcement appeal, which is that, at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice. The appellant has a statutory right to have his appeal determined. To deny him that right on the grounds that the Council delayed the validation of his application for some 16 days would not, in my view, satisfy the interests of natural justice. I have therefore found no sound basis on which to turn away the appeal.

5. The issue of an LDC depends entirely on factual evidence about the history and planning status of the building or land in question and the interpretation of any relevant planning law or judicial authority. The burden of proof regarding decisive matters of fact rests on the appellant. The relevant test of the evidence is 'the balance of probabilities'.

Main Issue

6. The main issue is whether the Council's decision to refuse to grant an LDC was well-founded.

Reasons

7. The appeal site comprises a strip of land adjacent to the dwelling at 56 Briardene Way. It extends back to the same line as the boundary of the rear garden plot at No 56.
8. For lawfulness to accrue, the appeal site must have been used continuously for the relevant period for such purposes with an intensity, regularity and frequency that is more than de minimis, so as to have triggered a material change of use. The appellant therefore needs to demonstrate on the balance of probabilities that it has been used continuously for purposes ancillary to the enjoyment of the dwellinghouse at No 56 for ten years or more prior to 24 May 2021, which is the LDC application date.
9. The judgment in *Gabbitts v SSE & Newham LBC [1985] JPL 630* makes it clear that if the local planning authority has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason not to grant an LDC, provided the appellant's evidence alone is sufficiently precise and unambiguous.
10. The appellant bought the house in 2004 from Alexander Homes. He states that he has used and maintained the appeal site with the verbal agreement of Alexander Homes, who were grateful that they did not need to maintain the area themselves. He has previously tried to purchase the land and states that he now has an agreement to purchase in place.
11. The appellant goes on to say that he laid the area in question to lawn, installed timber-barrelled planters and planted the entire external area, as shown in photographs taken in 2009. Two photographs have been submitted which do not appear to be dated or annotated. However, they show two planters, one close to the corner of the house and one more clearly within the red lined area. The only other visible planting is some greenery running along the outside of the fence to No 56.
12. Due to anti-social behaviour, the appellant installed metal fencing in 2015. He also started to build walling along the site but planning permission for this work was refused. A further undated photograph within the application plans document shows the fence with some planting adjacent to it, and the partially constructed brick wall.
13. A number of letters have been sent from neighbours and other residents in support of the appellant's case. Ms Sharon Bowman states that the appellant has, since 2006, cut the grass, planted flowers, watered and fed the land and cleared litter on a daily or weekly basis. The Browns of Hillview Grove and Mr and Mrs Peace of Briardene Way state that the appellant has maintained and

looked after the land for around 15 to 16 years. Similar information is given in letters from Joanne Hague and Ian Foster, Parish Councillor.

14. However, even if carried out every day for 10 years, the activities of maintenance and some limited planting do not in themselves constitute use ancillary to the enjoyment of a dwellinghouse as such. In the absence of evidence to the contrary, the land remains in separate ownership, and these activities could equally be associated with land in use as public open space. There is little evidence of any other ancillary domestic use of the land within the relevant timeframe.
15. I therefore conclude on the limited evidence before me and the balance of probabilities that the appeal site has never been used for purposes ancillary to the enjoyment of the dwellinghouse to such an extent as to trigger a material change of use. The activities of maintenance and some planting are not sufficient to secure lawfulness of the site as a private garden.

Other Matters

16. I have taken into account the appreciation of the supporters for the appearance of the land and the efforts and expense of the appellant in maintaining it. I also acknowledge the concerns over the anti-social behaviour in the area. However, these matters go more to the planning merits of the case, which I cannot consider in relation to an LDC appeal.

Conclusion

17. For those reasons, I conclude on the evidence now available that the Council's refusal to grant an LDC 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.

Elaine Gray

INSPECTOR