



Appeal Decision

Site visit made on 1 February 2022

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 March 2022

Appeal Ref: APP/N4720/X/21/3286837

Land opposite Ivy House Farm, Main Street, Walton, Wetherby LS23 7DJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mrs S Cheesbrough against the decision of Leeds City Council.
- The application ref 21/06369/CLE, dated 22 July 2021, was refused by notice dated 1 October 2021.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the Act).
- The use for which an LDC is sought is use of land for domestic purposes.

Summary 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. The address on the application form did not include the words 'land opposite'. The more accurate address above follows the wording of the appeal form.
2. The declaration on the application form is dated 22 July 2021, but the Council's decision notice records a location plan was subsequently provided. I have therefore used the date of 11 August 2021, confirmed in the decision notice, as the date the application was made valid.

Main issue

3. The main issue is whether the Council's decision to refuse to issue an LDC was well-founded. This turns on whether the appellant can show, on the balance of probability, that the use is lawful due to the passage of time.

Reasons

4. The responsibility for providing sufficient information to support an LDC application or appeal primarily rests with the applicant. However, if no other evidence contradicts or otherwise makes her version of events less than probable, and provided her evidence is sufficiently precise and unambiguous, there is no good reason to refuse the appeal.

The description of the use

5. The description of the use set out above is taken from the application form. The Council's decision notice altered the description to 'use as domestic garden' and the appeal form re-phrased this as 'domestic garden use'. In refusing to grant an LDC, the Council took the view that use as domestic garden had not occurred due to the land's lack of association with any residential property.

6. While I have not been directed to any precedent for this view, 3 dictionary definitions of the word 'garden' have been produced. One states that a garden is "next to or around your house" and another that it is "adjoining a building (esp. a private property)". However, the third definition avoids reference to anything other than the garden itself, which is simply described as "a piece of ground, usually enclosed, where flowers, fruit, or vegetables are cultivated". Reference has been made to 2 pieces of case law¹ but neither transcripts nor summaries have been provided. Although this information is helpful, I do not find any of it definitive.
7. The Council considers the appellant's suggested removal of either of the words 'domestic' or 'garden' from the description would fundamentally change the nature of the use for which the LDC is sought. While the Council refers to Annexe M of the Procedural Guide: Planning appeals – England in support of its case, that guidance does not apply to LDC appeals and there is no equivalent text in the LDC guidance².
8. In this regard, I am referred to the principles established in the *Wheatcroft* case³ but I do not find them helpful in this appeal. That is because the case, which pre-dated the introduction of LDCs, concerned whether a significant change to the content of a planning application, constituting a major evolution of the scheme, could be made at the appeal stage⁴.
9. In *Wheatcroft*, the main, but not the only, criterion was whether consultees would be deprived of the opportunity to comment on the revised proposal. In contrast, there is no statutory requirement to undertake consultation in respect of LDC applications and, as the Council confirms, it does not actively do so. While the application was publicised, and local people and the Parish Council commented on it, there is no evidence to suggest a change in the wording of the description would alter what they know, or might say, about the past use of the land. Furthermore, the appellant's evidence is unaltered.
10. Section 191(4) of the Act allows for the modification of the description of an existing use, or the substitution of a different description when considering whether to grant or refuse an LDC. The suggested removal of the word 'garden' could be in favour of the words 'private amenity space', which have a similar meaning in everyday terms, so that would not be a fundamental change. Alternatively, removing the word 'domestic' from the amended description in the Council's decision and the appeal form, to read 'use as garden', would be unlikely to alter most people's understanding of the use.
11. Nevertheless, I am obliged to issue an LDC for any use that is shown to be lawful on the facts and evidence. Should the grant of an LDC be justified, it would be important to be precise in terms of what is certified as lawful. Without prejudice to my findings on the question of lawfulness, I canvassed the parties on whether the appeal should be determined using an alternative description.
12. Having considered the submitted comments, I am satisfied that 'use as a private garden not incidental to any dwelling' would be a reasonable description of what the appellant's evidence seeks to demonstrate.

¹ Rockall v Department for Environment, Food & Rural Affairs (2008) and McInerney v Portland Port Limited (2001)

² Procedural Guide: Certificate of lawful use or development appeals – England, updated 13 October 2021

³ Bernard Wheatcroft Ltd v SSE & Harborough DC [1982] JPL 37

⁴ Reported as a change from 420 dwellings on a 14 ha (35-acre) site to 250 dwellings on a 10 ha (25-acre) site

The evidence

13. The appellant needs to demonstrate, on the balance of probability, that the use of the land as a private garden not incidental to any dwelling was instituted on or before 11 August 2011 (the Relevant Date) and continued for not less than 10 years thereafter without significant interruption.
14. The 10-year period required for a use to gain immunity from enforcement action, and thus be capable of being certified lawful, must end prior to the date of an LDC application, but need not be the 10 years immediately preceding it. Once a right has been accrued upon the expiry of a time limit for enforcement action in section 171B of the Act, that right is not lost if it has not been exercised for a period of time, provided there has been no abandonment or new use introduced⁵.
15. The appellant's mother planted over 100 plants on the land in 1999 and a further 82 in December 2016. A neighbour's statement confirms he maintained the land for her, including mowing grass and managing borders, for 20 years and, after she died, the appellant and her husband maintained the land. In addition, the executors engaged a garden maintenance company between June and November 2018.
16. The invoices from 2018 are "for work carried out at Ivy House Farm" and include 2 instances of weedkiller being sprayed on a driveway or pathways, but there are none on the land. One also includes "trim ivy around front windows and door", which must relate to other land, and all 3 refer to mowing "all lawns" or "front and middle lawns". It is therefore clear that this evidence relates, at least in part, to other land, although that does not mean none of the work was undertaken on the appeal site. Nevertheless, the evidence of the neighbour indicates maintenance consistent with a private garden had previously been undertaken for a period of more than 10 years.
17. Maintaining land is not, of itself, a use of land. It is therefore necessary to show that the land was used continuously, without significant interruption, as a private garden for a period of not less than 10 years that began on or before the Relevant Date.
18. The appellant's statement indicates that her family began using the land as a garden in 1998, although the application form gives a precise date of 22 July 2000. Nevertheless, in both cases, the period over which it is claimed the family undertook recreational activities, including football, tennis and trampolining on the land began significantly before the Relevant Date. Aerial images from between 2006 and 2017 show a layout of lawns and beds typical of a private garden and a trampoline in various positions on the land. Its movement over time indicates that efforts were made to allow grass to recover as part of the maintenance of the land. Borders and other planting typical of a private garden are visible in photographs provided by the appellant. While these are not dated, one shows a 2-year-old child who was 12 when the application was made, suggesting that photograph, showing the trampoline in use, was taken circa 2011.
19. It has not been confirmed how frequently the appellant's family visited the land and used it as a garden, although the evidence of the trampoline in the aerial

⁵ Ocado Retail Ltd v Islington LBC [2021] EWHC 1509 (Admin)

images is consistent with a continuing use. Nevertheless, it seems unlikely that the land would have been maintained continuously, as the neighbour confirms, for no purpose or for any other use. Furthermore, the claimed use would be subject to seasonal variations and, having no commercial aspect or transactional characteristics, may not be expected to generate much documentary evidence, if any. It is also reasonable to assume that people living some distance from a garden would use it less frequently than they might if it were within the curtilage of their dwelling.

20. There is nothing to suggest the land was put to any other use at any time during the period it was maintained with the appearance of a garden. In this regard, the Parish Council's reference to pheasant rearing would appear to pre-date any garden use. Further, although the evidence of use as a garden is limited, there is, on the other hand, nothing to indicate cessation of that use in such a way and for such a time that an objective onlooker would think it would not resume. There was a decline in maintenance after the appellant's mother died, visible in aerial images from 2020, which is understandable in the circumstances. However, earlier images of the land with all the appearance of a private garden show a higher standard of maintenance for well over 10 years, from 2002 to 2018.
21. Accordingly, and on the balance of probability, the use of the land as a private garden not incidental to any dwelling began prior to the Relevant Date and continued thereafter for not less than 10 years without significant interruption.

Conclusion

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

Formal Decision

23. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Mark Harbottle

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(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 11 August 2021 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reasons:

The use was initiated more than 10 years before the date the application was validly made and continued for 10 years thereafter without significant interruption.

The use does not contravene the requirements of any enforcement notice in force and no enforcement action may be taken in respect of any breach of planning control it may constitute.

Signed

Mark Harbottle

Inspector

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First Schedule

Use of the land as a private garden not incidental to any dwelling

Second Schedule

Land opposite Ivy House Farm, Main Street, Walton, Wetherby LS23 7DJ

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

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



Plan

This is the plan referred to in the Lawful Development Certificate dated: 01 March 2022

by **Mark Harbottle BSc MRTPI**

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Not to Scale

