



Appeal Decision

Site visit made on 29 April 2022

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 May 2022

Appeal Ref: APP/V2255/X/20/3259288

Land to East of Courtenay House, London Road, Dunkirk, Kent ME13 9LF

- 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 Mrs Julie Datlen against the decision of Swale Borough Council.
- The application Ref 19/505953/LDCEX, dated 22 November 2019, was refused by notice dated 21 February 2020.
- 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 was described as "we use our land for recreational purposes for our use only. We have our garden equipment and furniture securely stored in two 20' containers. We have a mobile home parked on our land and a static caravan parked on our land. We have used our land continuously since our purchase in March 2012. We believe there has never been a change of use as our land has always been residential and brownfield having been part of Courtenay House estate."

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 appellant sought an LDC for the development set out in the header above. The decision of the Council sought to simplify that description to "the existing use of land as a residential garden in association with Flat A Courtenay House." Section 191(4) of the Act allows the local planning authority to modify the terms of the application, and to issue a certificate in somewhat different terms to those applied for, so that it accords with the facts and evidence. This power is also granted to the Secretary of State or an Inspector in the case of an appeal. I will take that into account in coming to my decision.
2. The description of development suggests that the application was to determine whether the land was in lawful residential use at the date of application, being 22 November 2019 (the relevant date).
3. The site plan supplied with the application for an LDC is based on the ownership plan from the Land Registry. There is a red line around the land, with a further red line around part of the access drive. The submissions of the parties indicate that the site does not include that part of the access drive. I have considered the appeal on the basis of another plan from the Land Registry that excludes the access drive and I will use that plan on any LDC.

4. The burden of proof on an application for an LDC is on the appellant, with the relevant test of the evidence being on the balance of probability.
5. The main issue is whether the decision of the Council to refuse the LDC was well-founded.

Reasons

6. Section 191(2) of the Act states that uses are lawful at any time if no enforcement action may then be taken in respect of them. This may be because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason. In this case, the evidence suggests that planning permission may have been granted for the use, or it has become lawful because the time for enforcement action has expired. Under section 171 of the Act, the use would become lawful after a period of ten years beginning with the date of the breach.
7. I will first consider whether planning permission has been granted for the use and, if so, whether the use remains lawful. If I conclude planning permission has not been granted or that the use has subsequently been abandoned I will return to whether the use has become lawful under section 171 of the Act.
8. The land subject of this appeal is located between the garden area associated with the flats at Courtenay House and the garden of the neighbouring residential bungalow, Dunkirk Farm. At the date of my site visit, it comprised an area laid to lawn with planted areas, access drive with parking and contained a structure that appears to be a caravan and a storage container. I note that the structures on the land differ from what was described on the application form. The appellant suggests the structures were used as part of the residential use of the land. That may be disputed by others although there is limited evidence for that so, on the balance of probability, I consider the use of the structures was part of the residential use of the land.
9. Courtenay House was used as an hotel. It was granted planning permission to be converted into flats in 1976¹. I understand that the plans showing the extent of the curtilage of the site are unclear, but that it appears that all the curtilage of the hotel was intended to provide outdoor amenity space for the residents of the flats. However, the site was included within the curtilage of Courtenay House identified on the plans when planning permission was granted for the conversion of the hotel annexe to two private self-contained flats in 1978². The submissions indicate that the change of use of the building to residential flats granted permission in 1976 had not then commenced. However, it was subsequently converted and continues to be occupied as flats. There is no suggestion that the building was converted other than in accordance with that planning permission. This indicates that planning permission was granted for the residential use of this land in association with the flats.
10. Subsequent planning applications in 1980³ and 1987⁴ related to development on this land for two flats and a bungalow. I understand the submissions with both applications stated the land was used as garden or lawn. Both applications

¹ Planning application reference SW/75/1093

² Planning application reference SW/78/0410

³ Planning application reference SW/80/849

⁴ Planning application reference SW/87/741

were refused. However, these applications would not appear to have affected the use of the land.

11. I understand that in 1983 ownership of this land was separated from the rest of the gardens around Courtenay House. A letter dated 29 January 1983 explains that this land would no longer be available for access by occupiers of the flats. This indicates that, until that point, the land had been used in association with the occupation of Courtenay House.
12. Given that planning permission had been granted for use of the land as outside amenity space for the flats at Courtenay House, that indicates the lawful use of the land at that time was residential.
13. It appears that the owners of the flats resisted the subdivision of use of the land from the flats. It is unclear how or whether the land was used following that subdivision. However, there is no suggestion that the land was put to an alternative use. The planning applications of 1980 and 1987 indicate that the owner intended for the land to be developed for residential purposes, in which case it was intended use the land residentially, albeit linked to a new development. A letter submitted in response to the 1987 application has been supplied suggesting that the occupiers of the flats still considered they had the right to enjoy this land in association with their property. It is unclear, therefore, how the land was used. Given the clear intention to develop the land residentially, it appears the owner did not intend to permanently cease the residential use, albeit not by the occupiers of the flats. It appears that the land may have lain dormant and became overgrown.
14. In 1997 I understand that the owner of Flat A, Courtenay House purchased the land. There was some correspondence with the Council at that stage about the need for planning permission for some pergolas between the flat and the land. The plans attached to that indicated an intention to use the land as garden, although the Council state that there was no discussion about the use of the site at that time.
15. I note that further planning applications were refused and appeals dismissed for residential development of the land in 2008⁵ and 2017⁶. That in 2008 indicated the land was then used as garden. The application in 2017 stated that the land was used as residential amenity land.
16. I note that the Council have consistently maintained that planning permission was required for the residential use of the land since at least 2014. However, the reasons for this are unclear.
17. Following its purchase by the owner of Flat A in 1997, they appear to have sought to provide a "butterfly garden". The manner in which it was managed is unclear; it appears to have been limited but provide habitat for butterflies and allow access by the owner to enjoy the land. That indicates a residential use, albeit not on an intensive basis. A garden, or part of a garden, could be maintained to encourage wildlife whilst retaining the residential use. That owner died in 2011 following a period of ill health during which time the maintenance of the land had become more limited, such that it appears to have become overgrown. However, that does not indicate that the use had ceased.

⁵ Planning application reference SW/07/0168

⁶ Planning application reference 16/507038/OUT

18. The owners at the relevant date purchased the land with the flat in 2012, having already been living in another flat at Courtenay House, so would have been well aware of the use of the land before that point. I understand that they gradually cleared trees and undergrowth and used the land as their garden.
19. I note that the land has changed from being accessible by all residents of the flats to being a private area for use by only the residents of Flat A. However, both comprise a residential use in planning terms. On that basis, I consider that the use should be described as residential garden.
20. Taking account of all the above, I conclude that the land was granted planning permission for residential use as part of the curtilage of Courtenay House in 1976 or 1978. That planning permission was implemented and the land provided residential amenity space as part of that development for a period. Although ownership was subsequently divided from the flats and, for a period, may not have been actively used and become overgrown, it was not used for any other purpose and the evidence demonstrates the owner intended to continue the use. Consequently, on the balance of probabilities I consider that the use was not abandoned. It was purchased for use in association with Flat A in 1997 and, although there was a period when it became overgrown due to illness and subsequent death of the owner, the use did not cease.
21. Given my conclusions that planning permission has been granted for residential use of the land and it remains lawful, I do not need consider the use in relation to section 171 of the Act.
22. For the reasons given above I conclude, on the evidence now available and on the balance of probability, that the Council's refusal to grant a certificate of lawful use or development in respect of the existing use of land as residential garden was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

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.

AJ Steen

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by section 10 of the Planning and Compensation Act 1991)

THE TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 22 November 2019 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 would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

It has been demonstrated, on the balance of probability, that the use of land as a residential garden as described in the First Schedule was granted planning permission in 1976 or 1978 and has continued in that use since without being abandoned.

Signed

AJ Steen

INSPECTOR

Date: 17 May 2022
Reference: APP/V2255/X/20/3259288

First Schedule

Use of land as a residential garden

Second Schedule

Land to East of Courtenay House, London Road, Dunkirk, Faversham ME13 9LF

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 described in the First Schedule taking place on the land specified in the Second Schedule was 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 operation or 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.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 17 May 2022

by **AJ Steen BA(Hons) DipTP MRTPI**

**Land at: Land to East of Courtenay House, London Road, Dunkirk, Faversham
ME13 9LF**

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Not to scale



