

Appeal Decision

Site Inspection on 23 May 2022

by Graham Self MA MSc FRTPI

Inspector appointed by the Secretary of State

Decision date: 25 May 2022

Appeal Reference: APP/W0340/X/22/3290914

Site at: Field View, Kiff Green, Upper Woolhampton, Reading RG7 5TN

- The appeal is made by Mr Steve Collins under Section 195 of the Town and Country Planning Act 1990 as amended against the refusal by West Berkshire District Council to grant a certificate of lawfulness.
- The application (Reference No. 21/02873/CERTE) dated 13 November 2021 was refused on 10 January 2022.
- The application was made under Section 191 of the Town and Country Planning Act 1990 as amended.
- The application sought a certificate of lawfulness for: "The use of land forming part of Field View, Kiff Green, Upper Woolhampton RG7 5TH as residential garden, Use Class C3".

Summary of Decision: The appeal partly succeeds, to the extent that a certificate of lawfulness is issued for residential use of the land. This does not mean that the land is within the curtilage of the dwelling at Field View.

Procedural Matters

1. Mr Collins has criticised several aspects of the way the council handled administrative aspects of the appeal. For example, the council apparently issued notification to some local bodies or newspapers with an incorrect site address and description of the application, referring to it as seeking planning permission (instead of a certificate of lawfulness). He also alleged that a site notice invited factual information by a specified date which was two days after the application was decided, that the council appeared to suggest he should employ a professional agent to advise on the evidence required, and that the pre-application advice from the council was unnecessarily negative.
2. I have noted the criticisms, but I refrain from saying whether they are justified. It is not for me to investigate or adjudicate on matters which might more appropriately be pursued by a person or body such as an ombudsman, and those points do not affect my assessment of the cases for either side on the key issues raised by the appeal.

Reasons (1) - Legal Issues Relating to Application and Appeal

3. Both sides in this case have used terms which are incorrect in the way they have been applied to this case and have led to confusion. This problem stems from the application and its wording "residential garden, Use Class C3". For the purposes of planning law, this is a muddled and incorrect description. The council have then compounded the muddle by interpreting the application as referring to "curtilage", at least in most of their initial response statement, and the officer's report on the application stated: "We require evidence to demonstrate the land is

used continuously as residential curtilage from 15.11.2011 for Field View"¹. Both sides have then become involved in arguments about curtilage. So I shall first attempt to sort out these issues.

4. Use Class C3 of the Town and Country Planning (Use Classes Order) 1987 refers to dwellinghouses, and in particular to use as a dwellinghouse by a specified number of people living together as a single household. A "dwellinghouse" involves both physical structure and use. Class C3 of the UCO does not refer to the use of land attached by ownership or occupation to a dwelling. Taking a typical suburban type of situation where a house stands in a plot or garden, the plot or garden would normally be in *residential* use as part of the same planning unit as the house. ("Planning unit" is yet another term which has a specific meaning for the purposes of planning law, and usually refers to the unit of occupation.) But in this type of situation the plot or garden would not be used as a dwellinghouse within Class C3 of the GPDO - it is the house which is the Class C3 dwellinghouse.
5. "Curtilage" is a different concept. It is not defined in primary legislation, but has been the subject of court judgments going back decades to the case of *Sinclair-Lockhart's Trustees v Central Land Board* [1950] and including numerous other judgements such as *Dyer v Dorset County Council* [1988], *McAlpine v Secretary of State for the Environment* [1995], and *Skerritts of Nottingham Ltd v Secretary of State for Environment, Transport and the Regions* [2000]. In general, the curtilage of a building is an area immediately around a building which serves the purpose of that building in some necessary or useful way. As a general principle derived from court judgments, the curtilage of a building is usually fairly small (possibly depending on the scale or size of the building) and within the same enclosure as the building. Although the way an area of land is used may be relevant to considering whether it is within a building's curtilage, the term "curtilage" does not properly define the use of land.²
6. The council say that the application was interpreted as referring to curtilage because Mr Collins had mentioned his intention to carry out development using permitted development rights applying to curtilages. I think I can see why the council interpreted the application in that way, perhaps to try to make sense of an application for "residential garden Use Class C3". But the change was as misguided as the original application.
7. The concept of "abandonment" is also a factor in this case. This refers to the abandonment of use rights which may have become established but can be lost or abandoned in certain circumstances. This concept has also been the subject of numerous legal judgments. Points which are usually relevant include the length of time during which a use has not been carried on and whether there is implied or actual evidence of intention either to abandon or to resume a use.
8. Under Sections 191(4) and 193(4)(b) of the 1990 Act, I have powers to consider issuing a certificate of lawfulness in terms different from the application, and to substitute a different description of a use of land where that would be

¹ It is not clear why the date of 15th November was quoted here, since the application was dated 11 November - I suspect the council wrongly regarded the date of receipt as applicable, but the discrepancy is minor.

² I am aware that certificates of lawfulness incorrectly referring to the use of land as "curtilage" do sometimes get issued. The same applies to "residential garden", although for the purposes of planning law this is an inappropriate description.

appropriate.³ I have also noted the appellant's comment that "a statement regarding curtilage....could help to avoid additional delay". I return to these points later.

Reasons (2) - Assessment

9. The dispute in this case apparently has origins in a "pre-planning enquiry" in 2021 when Mr Collins sought advice from the council about a proposed garage/workshop. According to the appellant, the council's response to a pre-purchase search stated that the use of what is now the appeal site was residential and had been used as a "residential garden" for more than 20 years. The basis of the appellant's case is that residential use has not been abandoned as claimed by the council, and that the land has been used as a residential garden for more than 10 years.
10. The council's assessment of the application refers to the application as seeking a lawful development certificate for "confirmation that the land to the east of Field View formed part of the residential curtilage (Use Class C3) of Field View for a period greater than 10 years prior to the date of the application".
11. As far as I can see, both the appellant and the council were imprecise in the way they dealt with the application, and as a result they both got themselves into the muddle I referred to above. A further complication arose from the site history. The disputed area of land was evidently occupied in the past by cottages which were demolished, and for a long period until about 2001 was separated from Field View and its immediate plot. The council was not satisfied about how the land was used following the demolition of the cottages and also considered that the evidence about more recent use was ambiguous and not sufficiently precise to show that all the land within the red line had been "used as residential curtilage for Field View".
12. Other points of dispute concern the existence of parts of a vegetated boundary and the degree of separation between the land immediately next to Field View and the appeal site. The appellant contends that focusing on a short length of hedge reflects "confirmation bias", looking at current appearance and residual boundary marking rather than evidence of use and supporting contextual information. As I saw during my inspection, the boundary in question is actually more than a minor remnant and far more than the *de minimis* claimed by the appellant - there is mature hedge and tree vegetation along much of its length, and some chain link fencing in part.
13. A potentially key matter in this case is the date when the cottages which once stood on the site were pulled down. In his description of the site history, the appellant has stated that this happened "at some time after 1961". The evidence about this aspect of history is vague, but as far as I can tell, the cottages were probably demolished in the early 1960s and the land was not in any active use for a period of at least 20 years afterwards. The appellant, or at least "the current owners" (plural), to use the appellant's term, evidently bought Field View in 1985 and shortly after moving in, erected a chain link fence along the boundary between the then plot of Field View and the appeal land. The appeal land was purchased by the appellant in 2001 and has evidently been used for purposes in association with the residential use of Field View since about then.

³ Section 191(4) refers to the local planning authority, but the court judgment in *Panton & Farmer v SSETR and Vale of Horse DC* [1999] confirmed that the Secretary of State or an inspector can exercise the same power.

14. Although the appellant has supplied a lot of historical detail, some key points are missing or are vague. For example, I have not been able to find anything more precise than the year 2001 for the date of purchase of the appeal land (no actual date or even a month is specified). Photographs showing some activities on the site do not cover the period before 13 November 2001, this being an important date because it was 10 years before the date of the certificate application. However, a prior-to-purchase search document is dated December 2000, and on the balance of probability I am prepared to believe that the land was purchased and used for some purposes in association with the residential occupation of Field View starting at some point between January 2001 and 13 November 2001.
15. The conclusions I draw from the evidence summarised above are as follows. First, the residential use of the land which was extant when the cottages were last occupied was abandoned. I make that judgment taking into account the length of time - apparently around 40 years from approximately the early 1960s to 2001 during which no dwellings existed on the land and no residential use appears to have been carried on there, combined with the fact that demolition of the cottages indicates an intention at the time to abandon residential use. I give only limited weight to the fact that a council department dealing with land searches classified the land as residential, as this would probably have been based on old records without proper consideration of planning law.
16. Second, I think there is just enough evidence to show that on the balance of probability the use of the land for purposes ancillary or incidental to the dwelling at Field View - which purposes count as "residential use" - started in 1991 ten years or slightly more before 13 November 2001 and has continued more or less continuously since then. I say "more or less continuously" because even if there were some breaks when activities on the land in association with the residential occupation of Field View were not actively carried on, this would not necessarily mean that the "use" ceased for planning purposes. The residential use during this period would have been unauthorised, but it was not subject to enforcement action. An unauthorised use of land which is carried on for that length of time gains immunity from enforcement and so becomes lawful.
17. I agree with the council that there are gaps in the evidence. The decision is close and there is room for doubt, particularly because of imprecise evidence about the start date of the residential use (which may not have been immediately after the start of ownership); but on the balance of probability and having regard to all the points explained above, I judge that the residential use of the land had become lawful at the date of the application.
18. The curtilage issue is a different matter. I find that the disputed area is quite clearly not part of the curtilage of the dwelling at Field View and has not been part of its curtilage in the past. I make this finding taking into account the layout of the whole of the land attached to Field View, the area of the land in relation to the size of the dwelling, the past and present physical features along the boundary, and having regard to relevant court judgments.
19. To avoid any possible doubt I should perhaps add here that it is fairly common for land to be in residential use (and within the same "planning unit" or unit of occupation as a dwelling), but not within the curtilage of the dwelling. To put this another way, where land within the grounds or plot or garden of a dwelling is in residential use, it does not follow that rights for what is sometimes termed "curtilage development" arise under the Town and Country Planning (General Permitted Development) Order 2015 as amended.

20. Referring back to paragraph 8 above, court judgments have indicated that inspectors not only have the powers I have mentioned, but have a duty to issue a certificate in terms different to the application where the evidence shows that a different use is or would be lawful. I consider that it would be right for me to apply that flexibility in this case - the alternative would be to dismiss the appeal on what could be regarded as technical grounds, making a fresh application likely and possibly an appeal with resultant cost and delay for all involved.⁴ Having regard to the flaws in the application and to the legal points discussed above, it also seems to me that what the appellant would be seeking if he had understood the law or been properly advised is a certificate of lawfulness for *residential use* of the land. There is certainly no way that a certificate could be granted for "residential garden, Use Class C3".
21. In reaching my decision I have had regard to all the other matters raised in the written representations, though many of the appellant's comments are irrelevant. For example, planning policies do not apply to certificates of lawfulness, and most of the appellant's evidence about other sites in the locality apparently concerns applications for planning permission, not for certificates of lawfulness; these are different things with different decision-making criteria.

Conclusion and Formal Decision

22. For the reasons given above I conclude that the council's refusal to grant a certificate of lawfulness was not well-founded and that the appeal succeeds to the extent that I am issuing a certificate of lawfulness in terms which I consider appropriate. Accordingly I am exercising the powers transferred to me under section 195(2) of the 1990 Act as amended to issue the certificate attached to this decision.

G F Self

Inspector

⁴ Moreover, if in those circumstances a fresh application were to be made seeking a certificate for *residential* use, its date would be well over 10 years since 13 November 2001 during which period the council has not taken enforcement action against *residential* use.

Certificate of Lawfulness

APPEAL REFERENCE APP/W0340/X/22/3290914
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 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 13 November 2021 the use described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 as amended, for the following reason:

The land had been in residential use for 10 years or more before the date of the application.

G F Self

Inspector

Date 25 May 2022

First Schedule

Residential use in association with the residential use of Field View, Kiff Green, Upper Woolhampton, Reading RG7 5TN

Second Schedule

Land at Field View, Kiff Green, Upper Woolhampton, Reading RG7 5TN as shown edged red on the plan submitted with application reference 21/02873/CERTE dated 13 November 2021.

NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 as amended.
2. 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 would not have been liable to enforcement action, under section 172 of the 1990 Act, on that date.
3. This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule. Any 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.
4. The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness. This certificate does not certify that the land is within the curtilage of the dwelling at Field View.

[These notes must go on the back of the lawful development certificate itself]