



Appeal Decision

Site visit made on 18 October 2022

By Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 November 2022

Appeal Ref: APP/K0425/X/22/3300613

7 Grayling Close, Marlow, Buckinghamshire SL7 2BA

- 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 Mr Ben Cottman against the decision of Buckinghamshire Council.
 - The application ref 21/08693/CLE, dated 18 December 2021, was refused by notice dated 12 May 2022.
 - 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 on the application form as "*residential garden*".
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. On 5 August 2021, the Council issued an enforcement notice (EN) alleging a material change of use of the appeal site to residential garden. The EN is the subject of a separate appeal¹. The use applied for does not constitute a contravention of any of the requirements of an EN then "in force" at the date of the LDC application. This is because an EN does not take effect until any appeal made against it has been upheld. "In force" has much the same meaning as "in effect". Therefore, the EN is not conclusive in respect of whether an LDC should be granted.
3. Consideration of whether an LDC should be granted is strictly a matter of fact and law. Therefore, matters concerning any unauthorised change of use of adjoining land to residential garden and the Council's responses thereto are not relevant to my decision.

Main Issue

4. The main issue in this appeal is whether the Council's refusal to grant an LDC in respect of the use of the site as residential garden was well-founded. This turns on whether the appellant has been able to show that, on the balance of probability, such use was lawful at the date of the application.

Reasons

5. The site consists of a relatively short, narrow strip of land which has been incorporated into the residential garden of the substantial detached dwelling at 7 Grayling Close (No 7). The surface of the site is largely covered by timber decking. As well as a barbecue shelter, other items including a table have been placed on the decking. Timber fencing and a post and rail fence on top of a

¹ Appeal Ref: APP/K0425/C/21/3283625.

timber sleeper faced retaining wall physically separates the site from adjoining open land.

6. An LDC is sought on the basis that at the application date, it was too late to take enforcement action in respect of the material change of use of the site to the use as residential garden. The Act at s171B(3) provides that where there has been a breach of planning control consisting of a material change of use of land (other than to use as a single dwelling), no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. The effect of the Act at s191(2)(a) is that the residential use would be lawful if no enforcement action can be taken because the time for taking such action has expired.
7. The onus is on the appellant to show that the residential use of the site is immune from enforcement action and consequently, lawful. This is qualified by the Planning Practice Guidance chapter 'Lawful Development Certificates', which advises that where a Council has no evidence itself, nor any from others, to contradict or otherwise make an 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 in order to justify the grant of a certificate on the balance of probability². Established case law confirms that an appellant's evidence should not be rejected simply because it is not corroborated³.
8. The appellant provided a Statutory Declaration (SD), in which they attested to the use of the site as part of their residential garden at the time they acquired No 7 and throughout the period that they have resided there. However, as the appellant acquired No 7 in 2017, that only supports the residential use of the site occurring for less than half of the required ten-year period. The appellant cannot personally attest to the site being used for residential purposes prior to 2017. They can only therefore speculate on what is shown in relation to the site on the Environment Agency's (EA) flood defence scheme drawing, which originated in 2009. The appellant referred to having a conversation with the former owner of No 7 regarding fencing off the site from adjoining land. However, as that event probably took place around five years ago, I cannot reasonably be assured that the appellant's recollection is accurate. In any event, no clear date for the erection of such fencing is given. Therefore, in terms of the entirety of the relevant period, the SD can only provide limited evidential support for what has been applied for.
9. Documentary evidence supplied included a copy of correspondence dated 14 July 2020, in which a firm of solicitors acting on behalf of a neighbour refer to their client recalling depositing soil at the site in mid-to-late 2011 to reduce the steep gradient, following which a contractor removed "*the existing boundary fence at the rear (of No 7) and installed a new post and wire fence... around the newly built up area...*". I have little doubt that the solicitors have faithfully conveyed the information they were provided with. However, in respect of the neighbour also I cannot reasonably be assured that their recollection of events which took place several years earlier is accurate. Moreover, simply depositing soil at the site does not mean that a material change to a use as residential garden occurred. Nothing in this correspondence refers to the works having been completed by the summer of 2011.
10. I have assumed that reference in the solicitor's correspondence to removing "*the existing boundary fence*" reflected the original boundary line of No 7. If so, together with erecting a new fence around the site, this might point towards a change to a use for residential purposes as having occurred.

² Paragraph: 006 Reference ID: 17c-006-20140306.

³ *Gabbitts v SSE & Newham LBC* [1985] JPL 630.

However, the date when the fencing works were undertaken is not made clear. "*Completed sometime later*" could equally refer to a few weeks or several months after the soil was deposited, in which case any change of use might not have occurred until less than ten years prior to the application date. In this regard, interested local residents dated erection of the fence to mid-2012. Such comments can only carry limited weight but nonetheless have some relevance in the absence of clear and compelling evidence which shows otherwise. In any event, based on what is before me I cannot reasonably be assured that the fence erected by the former owner enclosed all of the site. For this and the reasons set out in the preceding paragraph, the correspondence supplied also provides limited evidential support for the appellant's claim.

11. The EA's 2009 drawing only shows around half of the site. The drawing does not show the use of the site at that time. It does not indicate that the site exhibited a degree of annexation to adjoining residential property consistent with its use as part of a residential garden. Indeed, the part of the site shown on the drawing appears to be delineated not only from the adjoining open land but also from the residential garden of No 7. This suggests that the site could have been physically separate from No 7 at that time, making its use for residential purposes less likely. In any event, as the drawing seems to have been updated during 2017, its value as evidence of what was occurring at the site two years before the relevant period commenced is questionable. Therefore, this drawing too provides little evidential support for the appellant's claim.
12. Given the level of coverage by overgrown vegetation and the position from which photographs supplied by the appellant were taken, they do not obviously show that the site was being used as residential garden immediately prior to their acquisition of No 7 or indicate the presence of pathways and terracing. Therefore, those and other photographs supplied make limited contribution to the sum of evidence set out above. Little else by way of other evidence in support of the appellant's claim was supplied.
13. Accordingly, on the balance of probability, based on the available evidence I am not persuaded that the appellant's claim has been properly made out. Their evidence taken as a whole is not clear and compelling, being insufficiently precise and unambiguous to show that the material change of use of the site to residential garden commenced more than ten years prior to the application date and has continued throughout the required period so as to be immune from enforcement action.

Conclusion

14. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use in respect of the use as residential garden 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.

Stephen Hawkins

INSPECTOR