



Appeal Decision

Site visit made on 31 January 2023

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 March 2023

Appeal Ref: APP/Y3615/X/21/3278555

Land and buildings, Park Barn Farm, Wisley Common, Woking, Surrey GU23 6QS

- 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 and Mrs Ronald Alderson against the decision of Guildford Borough Council.
 - The application ref 20/P/01416, dated 18 August 2020, was refused by notice dated 13 January 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 use of the land and buildings for ancillary residential purposes (Use Class C3) in connection with the lawful use of the three dwellinghouses.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application has been made under s191(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act) and seeks to establish whether the use of land and buildings for ancillary residential purposes is lawful.
3. Planning merits form no part of the assessment of an application for a lawful development certificate (LDC), which must be considered in the light of the facts and the law. The burden of proof lies with the appellants and the relevant test is 'the balance of probabilities' (that it is more probable than not). If there is no evidence to contradict or make the appellants' version of events less than probable and their evidence alone is sufficiently precise and unambiguous, that is enough.
4. The appellants' grounds of appeal confirm that the application form described the LDC sought as the '*use of the land and buildings as residential curtilage in connection with the occupation of the three dwellings*'. The LDC description in the Council's decision notice is similarly worded. However, the description in the application form submitted with the appeal makes no reference to curtilage. In any case, for the purposes of the appeal the appellants' have confirmed that they requested that the description be amended. Various iterations are set out in the correspondence, the most recent of which is essentially that set out in the appeal form, which I have used in the banner heading above.

5. In addition to finding against the appellants on the use of the land and buildings, the Council's reason for refusal also refers to insufficient evidence to confirm that the chalet/ summerhouse and pole barn were constructed on site more than four years ago, pursuant to the assessments of Section 171B(1) of the 1990 Act. However, as noted, the application was made in terms of use, rather than operational development, for which s171B(3) of the 1990 Act states that '*no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach*'.
6. I note the appellants' concerns regarding the weight given to their purported statutory declaration (SD) submitted with the application. I understand that there were very good reasons why it wasn't sworn¹, nevertheless, if not witnessed by a solicitor, commissioner for oaths or notary public, it cannot be a SD and an unsworn, unsigned statement, to which no sanctions apply, generally carries less weight. In any case, that issue has now been addressed as the SD and associated exhibits have been witnessed. It is therefore capable of attracting significant weight, should its content be sufficiently precise and unambiguous.
7. The Council has highlighted that that the appellants have submitted further evidence with the appeal, including the sworn SD, which was not available to it at the time of determination. The Council requests that I do not take that evidence into account. However, the purpose of the LDC provisions is to enable an objective decision based on the best facts and evidence available when the decision is taken. Moreover, it would serve no public purpose for me to refuse a LDC strictly on the basis of the evidence submitted with the application, because it would always be open to the appellants to make a further LDC application on the basis of evidence that came to light after the Council's refusal.
8. I note the appellants raise concern over the manner in which the Council determined the application and associated communication issues. However, those are not matters for this appeal which I have dealt with afresh on the basis of all evidence submitted, as well as my own site visit.
9. I further note that the red line boundary of the submitted site plan encompasses a lesser area than the red line boundaries exhibited with the SD. For the avoidance of doubt, my consideration has been made on the basis of the former (the submitted site plan).

Main Issue

10. The main issue is whether the Council's decision to refuse to issue a LDC was well-founded. From the evidence before me, that turns on whether the use of the land and buildings materially changed to use for ancillary residential purposes in connection with the use of the three dwellinghouses at least ten years before the date of the application (18 August 2010) and then continued without material interruption for a period of at least ten years thereafter, so as to meet the immunity period from enforcement action under s171B(3) of the 1990 Act.

¹ Because of the need to self-isolate during the COVID-19 pandemic

Reasons

11. As noted, the LDC originally submitted was for the use of the land and buildings as residential curtilage. However, the term 'curtilage' simply describes an area of land that has an intimate association with a building; it does not describe what the use of the land might be. The appellants have subsequently accepted that curtilage is not a use of land for which a LDC can be granted and, as explained, have sought to amend the description accordingly.
12. Mr Alderson explains in the SD that he purchased the site in October 2001 and that he has lived there with Ms Varley and their extended family since that date. It is stated that they have used the land and outbuildings in a variety of different ways, including walking/ dog walking, fishing, animal safaris, treasure hunts, clay pigeon/ target shooting, parties, a wedding, tobogganing, annual Easter breakfasts, bonfire parties and the keeping of bees.
13. In cases where there is a dispute as to whether a material change of use has occurred, it is first necessary to ascertain the correct planning unit, and the present and previous primary (as opposed to incidental) uses of that unit.
14. Save for the residential properties, it does not appear to be a matter of dispute that the land and other buildings were previously used for agricultural and woodland purposes. The appellants' SD explains that when they first moved to the site they allowed a local farmer to graze his cows in the western field, but estimate that arrangement ended by 2005.
15. The SD refers to all of the land and buildings shown edged red on the plan attached at Exhibit RAJV1. That amounts to a significant area, which the SD explains as encompassing, three dwellings, a collection of outbuildings (former agricultural barns), a chalet/ summerhouse, a pole barn, two ornamental ponds, a lake, a large continuous area of grass and mature woodland. The area of grass essentially comprises three fields. Two in the northern part of the site, closer to the houses, and a larger field to the south.
16. It is unlikely that the appellants are seeking to confirm that all of the land be treated as a single planning unit for the purposes sought; otherwise an individual dwelling and its private garden could in principle be used for ancillary residential purposes in connection with the other dwellings. Moreover, as the three residential properties were presumably in residential use, there has not been a material change in their use.
17. For the purposes of this appeal, it is more likely than not, that the three individual properties, and their separate units of occupation, amount to three planning units. It is not suggested that the remaining wider area has been divided up and apportioned to individual dwellings. Therefore, all of the land outside of those properties should be identified as a separate, single planning unit, essentially amounting to a shared residential garden.
18. Mr Alderson states that when he purchased the site much of the land was run down and covered in brambles. He states that he immediately began work to bring the land into order and that it took about a year to get the area back to mown grass, which has been maintained since. He says he kept an extensive area of the grass mown short so that it appeared as one very large area of continuous lawn surrounding the dwellings, summerhouse and pole barn.

19. The aerial photograph from May 2005 clearly shows that the field closest to houses had been mown but similar indicative markings are not evident in the other two fields. The 2009 photograph does show mower markings on all of the fields, although parts of the larger field have been left unmown. Although markings are less clear in 2010, the fields do appear to be quite tightly cut. That is similarly so in 2011. In 2013 mower markings can be seen in one of the northern fields although all three appear to have been cut. The exhibited photographs (RAJV5) also show various mown parts of the site between 2008 and 2019.
20. The Council also accept that the fields in all the images look fairly consistently mown within their field boundaries. However, the mown areas do not comprise a single, unbroken block of land as stated. There are distinct areas formed by natural field boundaries. Moreover, it does not necessarily follow that by mowing the grass, the same area was used for residential purposes. Nevertheless, it appears to be common ground that the appearance of the site changed from 1998-1999 where the Council say farming activities were evident from the aerial photographs².
21. Mr Alderson explains that he dug out a lake near the northern boundary of the site around 2010. I appreciate that is some time ago but given that the material date is 18 August 2010, that lacks precision at a key time. Reference is made to the aerial photographs which appear to show work being carried out in 2009 and a completed lake by December 2010. However, December 2010 is later than the material date of 18 August 2010. I also have reservations regarding the date of the December 2010 image as the trees appear to be in leaf.
22. Mr Alderson states that he bought around 40 koi carp for the lake and enjoyed it for fishing. One photograph is exhibited from August 2019, although the lake is not shown. He further states that a chalet was erected overlooking the lake around 2014 but no further evidence is provided to that effect and it is difficult to make anything out from the aerial photographs.
23. It is not therefore shown, on the balance of probabilities, that the northern part of the site, which includes the lake, was used for ancillary residential purposes for a period of ten years prior to the date of the application.
24. Mr Alderson states that he had built a chalet/ summerhouse overlooking the two ponds by December 2010. It is explained that the area of the summerhouse was frequently used for barbeques parties, wedding reception and various events. Photographs of its use for incidental residential purposes are provided from 2015, 2016 and 2018. The 2016 photographs show it fitted out with household furniture such as chairs, dining table, drawers and photographs.
25. Mr Alderson further clarifies that the pole barn in the south west of the site was constructed by August 2011, for shelter for events as that area had been used in the years before 2011 for barbeques and bonfire nights. The pole barn was fitted out with tables, chairs, barbeque and hay bails for additional seating. The existence of the pole barn in August 2011 appears to be confirmed in the aerial photograph from that time and in the years up to 2020. Other photographs from 2015 and 2019 corroborate its use for the stated purposes.

² I have not been provided with those aerial photographs

26. The evidence does therefore point to both the pole barn and chalet/ summerhouse being substantially complete four years before the date of the application so that the buildings are likely to be immune from enforcement action through the passage of time³. However, the application is made in terms of their use, rather than operational development. On the basis of the timescales set out by the appellants, neither the pole barn nor the summerhouse/ chalet were in place on or before the material date of 18 August 2010. Consequently, they could not have been used for residential purposes for a period of more than ten years before the date of the application.
27. That does not preclude the lawful use of the land on which the buildings were constructed for those purposes but, as noted, the photographic evidence of use in and around the area of the chalet/ summerhouse and pole barn are also later than the material date.
28. The SD does state in the years from 2001 through to the construction of the chalet that the appellants frequently had barbecues on or around that spot. However, that is imprecise in terms of extent, particularly within the context of very large area of land.
29. As noted, the SD also states that the area of the pole barn was used in the years before 2011 for barbecues and bonfire nights. In that regard, the pole barn is situated towards one corner of a very large field and little evidence is provided for most of the land and, as per the area in and around the chalet/ summerhouse, it is not possible for me to identify and define with sufficient precision, the area of land concerned. That is similarly the case for any incidental residential use in and around the ponds.
30. To be able to do so is important because for a LDC to be granted for part of a site, it must be clear what that area is so that any later change may be subject to planning control.
31. Mr Alderley explains that he refurbished five barns, including that referred to as the workshop, which he says was used extensively for events and as a base for target/ clay pigeon shooting. However, corroborating evidence for the former is limited to a photograph from a birthday party in 2014, and for the latter, to 2018 photographs which show its use for shooting and for the storage of mowers and tractors. Further temporal information is limited and very little information is provided for the other former agricultural buildings.
32. It is not therefore shown, to the required standard of proof, that the workshop and the other former agricultural buildings were used for ancillary residential purposes for a period of 10 years prior to the date of the application.
33. The appellants refer to walking in the woodland and treasure hunts in the woods behind the chalet/ summerhouse. No further evidence is provided of the area and duration of use, other than the blanket statements which apply to the whole of the site. Given the extent of the woodland area within the site, that is not sufficient to demonstrate, on the balance of probabilities, that it has all been used for ancillary residential purposes for a period of 10 or more years prior to the date of the application. Moreover, the evidence is not sufficiently precise so as to be able to identify any smaller areas that have.

³ S171B(1) of the 1990 Act

34. For the spur of land to the west of the houses, reference of use appears to be largely restricted to fishing on the River Wey. Even if that were to be considered ancillary to the residential use of the houses, that activity would presumably have been largely restricted to the riverbank. Moreover, no dates or information on frequency are provided. The evidence does not therefore show that the whole of that part of the site was used for an ancillary residential use for 10 years prior to the date of the application.
35. For the easternmost top field, photographs are provided of parties in 2008, 2010, 2011 and of children playing on the land in 2014. Those point towards a limited use over a duration of less than 10 years prior to the date of the application.
36. Although the photographs of the land closest to the residential dwellings, including the field on the other side of the access track, show use for various ancillary residential purposes, they are all taken later than the material date.
37. Reference is made to increasing the size of the orchard but that is essentially an agricultural use, as is beekeeping.
38. Bringing the above together, it is evident that the grassed areas have not been used for agricultural purposes since around 2005. It is also evident that parts of the site have been used for ancillary residential purposes by the appellants and their family. However, many of the activities appear to have occurred on a sporadic basis and/ or for temporary periods.
39. Moreover, as the site area is very large, it is unlikely, based on the evidence, that all of the land was used for ancillary residential purposes. Rather, it is likely that the use has been focussed in a number of areas. That is reflected in exhibit RAJV3 which highlights 'key locations' as referred to in the SD. I have considered all of those locations above and have either found that the land cannot be sufficiently identified for the purposes of granting a LDC, within the context of a very large area of land, or that the use has not occurred for at least ten years before the date of the application, so as to meet the immunity period from enforcement action under s171B(3) of the 1990 Act.

Conclusion

40. For the reasons given above I conclude that the Council's refusal to grant a 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.

Richard S Jones

INSPECTOR