



Appeal Decision

Site visit made on 2 March 2023

by S A Hanson BA(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 March 2023

Appeal Ref: APP/W2845/X/22/3290998

Land adjacent to 74 Furnace Lane, Nether Heyford, Northamptonshire NN7 3JX

- 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 David Williams against the decision of West Northamptonshire Council.
 - The application ref WNS/2021/0853/LDE, dated 17 June 2021, was refused by notice dated 28 September 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 described as affirmation of historic and current use as private garden – formerly part of the curtilage of 74 Furnace Lane, Nether Heyford.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. Section 191(2) of the Town and Country Planning Act 1990 (the Act) states that for the purposes of this Act, uses and operations are lawful at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason). Time limits are set out in Section 171B. The relevant time limit for a change of use is (3) the end of the period of 10 years beginning with the date of the breach.
3. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous.
4. The planning merits of the use are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.

5. The use for which the LDC is sought is described by the appellant in the banner heading above. The council modified the description in its decision notice, pursuant to s191(4) of the Act, to '*Certificate of Lawfulness for existing use to confirm use of this land as private garden*'.
6. Notwithstanding the appellant's own description and their submissions which reflect a lengthy history of the land, due to a fundamental change in 1986, as I will explain further on, I shall examine the use as private garden since that date and not before. Furthermore, as I consider the Council has more accurately described the existing use sought on the date of the application, that is upon which my decision shall be based.

Main Issue

7. This is whether the council's refusal to issue an LDC was well-founded. This will turn on whether the appellant can show that the use of the land as private garden was lawful on the date of the application. The onus of proof is on the appellant to show, on the balance of probabilities, that the use as private garden began on or before 17 June 2011, which is the material date. The use also must be shown to have continued without significant interruption for 10 or more years since 1986, so as to be immune from enforcement.

Reasons

8. The appeal concerns a rectangular parcel of land, about 0.3ha, to the rear of 74 Furnace Lane (No 74) with access from the northern end of Winston Close. It adjoins residential properties along two of its boundaries, including No 74, in different ownership. A site assessment document submitted by the Council describes the land as dense, overgrown scrubland and woodland which is made up of predominantly broadleaf trees such as Lime and Ash and deciduous shrubs with a thick undergrowth of ivy and bramble. Albeit undated, an aerial image and photographs of the site from Winston Close support the description and extent of ground cover. The photographs also show that the access to the site from Winston Close appeared to be completely overgrown with vegetation. At the time of my site visit, the land was internally devoid of trees and shrubs and the ground was overgrown and covered in scrub. The land was enclosed on all boundaries by vegetation and fencing, but accessible from Winston Close through metal security fencing.
9. The appeal site was formerly part of land belonging to No 74 which was built around 1870. During the years within the ownership of No 74, the land apparently comprised of lawn, kitchen and vegetable garden with an assortment of fruit trees and Elm trees, most of which were lost to disease and felled. In 1986, the land belonging to No 74 was divided into 3 plots: the original dwelling, No 74, and immediate surrounding land; a plot to the side where a new dwelling was constructed (76 Furnace Lane); and the appeal site.
10. While the appellant has provided historical documents relating to the appeal site's association with No 74, the gist of the appellant's case is that the use as private garden land has continued since 1986 and accordingly, there has been no material change in use of the land. The Council considered, on the balance of probabilities, that the land may have been used as private garden for ten continuous years prior to 1986. However, when the land was separated from the residential property in 1986, this use most likely ceased and as time passed the land became overgrown and unused. Therefore, it considers that

any previous established use as private garden has been lost and the land has a nil use. Thus, its use as private garden is not lawful.

11. Firstly, where the use of land is determinative, it is necessary to identify the extent of the planning unit. In *Burdle*¹ it was held that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes. The concept of physical and functional separation is key, and Bridge J suggested 3 broad categories of distinction:
 - i. Where it is possible to recognize a single main purpose of the occupier's use of his land to which activities are incidental or ancillary, the whole unit of occupation should be considered.
 - ii. Even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another, the entire unit of occupation should be considered.
 - iii. Where there are 2 or more physically separate and distinct uses, occupied as a single unit but for substantially different and unrelated purposes, each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered a separate planning unit.
12. There is no dispute between the parties that the land was used historically as land for domestic purposes in association with No 74, and it therefore comprised a single planning unit whose lawful primary use was residential. However, the land has since been subdivided both physically, with a post and rail fence, and functionally, by separate ownership from No 74. As a matter of fact and degree, with no physical/functional linkage to the adjacent house, this created a new planning unit for the appeal site and its use for residential/domestic purposes ceased at that point. Consequently, with the formation of a new planning unit around 1986, this fundamental change resulted in a new chapter in the planning history of the site. It is for this reason that, with the loss of a domestic association, the LDC appeal should focus on the non-residential use of the land which began around 1986.
13. It is not uncommon for land that is physically separate from a dwelling to be used as garden land. While there is no dwelling associated with the site to which the land could be said to serve an ancillary use or purpose, the land would not necessarily have lost its use as a garden. I consider that in these circumstances, it is for the appellant to demonstrate that use of the land as private garden, albeit non-residential, has subsisted on a largely uninterrupted basis for 10 or more years at some point since 1986.
14. The appellant provides that since 1986, the land use has largely remained consistent in its appearance, population of fruit trees, shrubs, recreational areas and grassland. They maintain that the entrance to Winston Close was allowed to grow over with ivy after the security gates were stolen. The natural vegetation and a mesh link fence proved equal to the job of keeping children out of the site and to stop fly tipping. There has been access to the land via a gate on the boundary of 41 Winston Gardens and in recent years the landowner has gained access to the land via a property in Robert's Field.

¹ *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207

15. The appellant submits that they “have been regular visitors to our garden land and made sure of its security on all 4 boundaries, and collectively as a plot. This has included walking the grounds many, many times as owners” and that they “continued an appropriate regime of tree surgery and groundwork maintenance since 1989.”
16. I acknowledge the documents that have been submitted by the appellant to substantiate their reason why they consider that the use has not changed. However, there is limited evidence of a ‘garden use’ of the site since 1986. While maintenance of the land may have taken place this would be likely short-lived and is not a land use. There are no details of the regularity or length of visits to the site and no such information concerning how the land has been used as a private garden. This could have been demonstrated with photographs, for example, of times spent on the site.
17. The appellant makes reference to HMRC guidance on gardens and grounds for tax purposes, and notes that under HMRC rules, a) there is no difference recognised between private garden and broader grounds comprising a full curtilage; b) there is no differentiation between garden or grounds that are cultivated and those which are overgrown; and c) an area of land comprising part of the original/former curtilage retains these privileges after the date of sale/segmentation from the full curtilage. Although these may be relevant for the purposes of land tax/residential relief, capital gains tax etc, this has no relevance to planning law.
18. While there is no legal precedent requiring landowners to cultivate or manicure their gardens, it is how the land is *used* that denotes its use as a garden by the owners, generally in a recreational or leisure way. Gardens can take on different appearances depending on what an individual requires. Some maybe manicured with elaborate flower borders and others may be given back to nature and left to re-wild. However, whatever the owner’s desire, there should be some evidence that the land is actually being *used* for private garden purposes. Bearing in mind what I saw at my visit, and the presented evidence, the site, which had fairly recently been mechanically cleared of trees and shrubs², has limited reference to its perceived use as a private garden use. In my view, the appeal site is a plot of disused land in a rural setting. With no evidence to the contrary, it seems that this has likely been the case for several years.
19. The burden of proof is on the appellant to demonstrate, on the balance of probabilities, that the use of the land is as a private garden. However, in the absence of sufficiently precise and unambiguous evidence before me, I am not persuaded that the use of the land as private garden had sustained for the requisite period to be immune from enforcement action and for the use to be lawful at the time of the application.

Other matters

20. I note that the appellant in their appeal submissions says that if the description of the existing use sought, ‘private garden’ is deemed too prescriptive, they suggest an amendment to ‘brownfield or previously developed land’ could be used to describe the use. However, those are not uses of land and it is not the purposes of an LDC to establish whether the land would be classed as such.

² Submissions from a neighbour

The description needs to be more than simply a title or label if future problems interpreting it are to be avoided. Furthermore, it is not open to an applicant/appellant to pose a general enquiry as to what is or might be lawful. The certificate needs to therefore spell out the characteristics of the matter so as to define it unambiguously and with precision.

Conclusion

21. For the reasons given above and having regard to all other matters raised, I conclude that the Council's refusal to grant an LDC was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act as amended.

S A Hanson

INSPECTOR