



Appeal Decision

by P N Jarratt BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 March 2023

Appeal Ref: APP/V1260/X/22/3306239

Land at Fripps Cottage, 98A Ashington Lane, Wimborne, BH21 3DG

- 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 Mrs H Edbrooke against the decision of Bournemouth Christchurch and Poole Council.
 - The application ref APP/21/01788/J, dated 13 December 2021, was refused by notice dated 25 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 use of land for recreation and leisure activities.
-

Decision

1. The appeal is dismissed.

Preliminary Matters

2. As I visited the site in connection with appeal APP/V1260/X/21/3276044, it was not necessary to revisit the site as circumstances have not changed. That appeal was for the use of land as domestic garden land associated with Fripps Cottage whereas the current appeal is for the use of land for recreation and leisure activities.
3. For the avoidance of doubt, the planning merits of the existing use are not relevant, and they are not therefore an issue for me to consider, in the context of an appeal under section 195 of the Town and Country Planning Act 1990 as amended, which relates to an application for an LDC. My decision rests on the facts of the case and on relevant planning law on judicial authority.
4. In LDC applications and appeals, the onus of proof rests with the appellant and the level of proof is on the balance of probability.

Main Issue

5. I consider that the main issue is whether the Council's decision to refuse to grant an LDC was well-founded.

The site and relevant planning history

6. The appeal site outlined in red on the application plan includes Fripps Cottage and its garden, an area of hardstanding, an L-shaped stable block, and an adjoining field within which is a pond. The appellant has not sought to exclude the cottage and garden from the field, despite recognising at paragraph 1.19 of his statement that the appeal does not rely on any residential use. It is

assumed that the LDC relates only to the field and pond but if I am minded to allow the appeal, I could amend the plan accordingly.

7. The appellant's land holding extends north of the appeal site along Ashington Lane to Willet Road and an LDC was issued for existing stables on this land in 2017 (APP/17/01814/J). The current appeal site excludes this land to the north which had been included in the earlier LDC applications in 2018 and 2019, both of which were withdrawn.
8. The 2018 application was for use of land as residential curtilage associated with Fripps Cottage (APP/18/01623/J) and the 2019 application was for use of land as domestic garden associated with Fripps Cottage.
9. Permission was refused and an appeal dismissed for the use of land as domestic garden land associated with Fripps Cottage in October 2021 (APP/V1260/X/21/3276044).

Reasons

10. Section 191(2) indicates that uses and operations are lawful if the time for taking enforcement action has expired. Section 171B sets out the time limit for the taking of enforcement action. In respect of changes of use of land, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach. Furthermore, to satisfactorily demonstrate immunity from enforcement action, a breach can only become lawful if it continues throughout the relevant immunity period, such that the Council could have taken enforcement action at any time.

Description of development

11. The Council is concerned that 'leisure plot' is not a defined term and queries what the application would be permitting if approved. They say that the terms 'recreation' and 'leisure' are not a clear and distinguishable use, or sui generis use as defined in the Use Classes Order. They consider that the use would be difficult to control. I find this approach of the Council does not reflect uses of land that are relatively commonplace as evidenced by such uses referred to by the appellant in an appeal in Derbyshire¹, the policy statement by Eastleigh Borough Council, by the NHS in Leeds and in a Scottish Court of Sessions judgement².
12. Section 191(1)(a) states that 'If any person wishes to ascertain whether any existing use of buildings or other land is lawful,he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.' There is no requirement for the use to be defined in terms of the Use Classes Order although s191(5)(b) states that a certificate 'shall describe the use, operation or other matter in question (in a case of any use falling within one of the classes specified in an order under s55(2)(f), identifying it by reference to that class.)'
13. Accordingly, I attach little weight to the Council's first reason for refusing the application.

¹ APP/M9496/C/3250054

² Hallam Land Management Ltd v Scottish Ministers, Outer House, Court of Session [2007] CSOH 69

The leisure and recreation use

14. No new evidence, including the statutory declarations, has been provided by the appellant to that submitted and considered as part of my earlier appeal decision of October 2021.
15. The appellant relies on paragraph 22 of that decision to infer that 'the leisure use' was originally only at a casual level and at paragraph 26 highlights my view that 'the appeal site has been used for a considerable period of time for recreational and leisure activities.'
16. There is nothing in the re-submitted evidence that shows on the balance of probability when a material change of use may have occurred. Indeed, it is of value to consider the comments in paragraph 22 in full, which apply in a similar manner to the claimed leisure and recreation use as they did to the previously claimed domestic garden use, even allowing for the relevant date for claiming immunity from enforcement action being December 2011.
17. "22. The key issue is whether a material change of use from agriculture has occurred and when it occurred. It is very unclear from the evidence when the land ceased to be used for agricultural purposes and at the point at which the scale of the new use amounted to a material change of use or whether an incidental use became a primary use, either in a separate planning unit or as a new element in a mixed-use. It seems to me that the leisure used was originally only of a casual intermittent or insignificant nature that initially might have been at a *de minimis* level that did not amount to a material change of use or a significant change in the character and appearance of the land."
18. The appellant is drawing conclusions from these paragraphs that cannot be made. Additionally, the fact that the site may not have been actively used for agriculture for more than the last 10 years does not demonstrate that it has been used for alternative purposes that have become lawful.
19. I note third party representations that have been submitted in respect of the appeal and introduce some matters that are not relevant to an LDC. These representations do not change the conclusions I have drawn.

Conclusion

20. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use of land for recreation and leisure activities 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.

P N Jarratt

INSPECTOR