The Planning Inspectorate

Appeal Decision

Site visit made on 7 November 2023

by D Hartley BA(Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17TH NOVEMBER 2023

Appeal Ref: APP/C4615/X/22/3303711
55 Blewitt Steet, Pensnett, Brierley Hill DY5 4AN

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mrs Tina Watton against the decision of Dudley Metropolitan Borough Council.
- The application Ref P21/2187, dated 2 December 2021, was refused by notice dated 8 February 2022.
- The application was made under section 191(1)(a)&(b) of the Town and Country Planning Act 1990 as amended (the Act).
- The use for which a certificate of lawful use or development is sought is described as *'use of land as domestic curtilage'.*

Decision

1. The appeal is dismissed.

Procedural Matter

2. The description of proposed development in the banner heading above is taken from the LDC application form. However, curtilage is not a use of land. The appellant has referred to *'use of land for residential purposes'* in the LDC appeal form. In its refusal notice, the Council has referred to it as *'lawful development certificate for the existing use as residential garden land and associated fencing'*. It is clear from the evidence submitted that the appellant is seeking confirmation that the land edged red on the submitted site plan can lawfully be used as a residential garden. There is nothing before me to suggest that the fencing around this land has not been erected to facilitate such a use of land. I shall therefore proceed to determine this appeal based on the description of development as contained within the Council's LDC refusal notice.

Application for costs

3. An application for costs was made by Mrs Tina Watton against Dudley Metropolitan Borough Council. This application is the subject of a separate Decision.

Main Issue

4. For an LDC to be granted under section 191 of the 1990 Act, the burden of proving relevant facts in this appeal rests on the appellant, and the test of the evidence is the balance of probabilities.

5. Paragraph 006 of the *Lawful Development Certificates* section of the national Planning Practice Guidance advises in the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the 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 to justify the grant of a certificate on the balance of probabilities.

6. The main issue is whether the Council's refusal to issue a certificate of lawfulness was well-founded. That turns on whether the appellant can demonstrate, on the balance of probabilities, that the land can lawfully be used as a residential garden land with associated fencing.

Reasons

7. In respect of demonstrating lawfulness in terms of use of the land as residential garden land, it is necessary that the appellant can demonstrate, with sufficient precision and without ambiguity, at least ten years continuous use of the land having regard to s.171B(3) of the Act. In respect of the fence, the appellant would need to demonstrate that it had been erected for more than four years given s.171B(1) of the Act.

8. I have reviewed the appellant's evidence which includes a planning statement, photographs of the appeal site attached to WhatsApp messages and sworn declarations from Mr Bradley Watton and Mrs Tina Watton. The appellant states that a residential garden use started in 1996. However, the photographs are undated. Some show the land enclosed with fencing and some show the land unenclosed. The photos do not in themselves demonstrate unambiguous and conclusive proof of at least ten years continuous use of the land as a residential garden.

9. The declarations of Mr Bradley Watton and Mrs Tina Watton are sworn, and, in that regard, I attribute the comments contained therein significant weight. However, the declarations include generalised assertions about use of the land such as camping, washing vehicles, playing with friends, bonfire night activities, keeping it rubbish free, planting sunflowers and *'even growing vegetables one year'.* Reference is made by the appellant to *'my neighbour at 53 used the land to access his garage right up until he was no longer able to drive but the garage and gate are still there and not obstructed'* and *'my neighbours at 59 still use the access to their driveway at the rear of their property'*. Given the existence of gates and garages, I do not doubt that the land has historically been used in association with the rear access to existing properties in the locality.

10. A number of the above assertions are not supported with any objective evidence such as unambiguous and dated photographs and a very detailed historic chronology to demonstrate a continued ten-year use. In any event, the comments made by the appellant, her son and the occupiers of neighbouring properties indicate use of the land on an ad-hoc and intermittent basis for a range of shared recreational and access uses and separated from the other garden land associated with residential properties on Blewitt Street.

11. In my judgement, the evidence indicates occasional or infrequent use of the land for a range of activities, in the same way that for example a road outside houses or public open space might be used by those that live in the immediate

area. On the balance of probabilities, and, in my judgement, I conclude that it has not been proven with sufficient precision that the land has been used continuously for ten years or more as a residential garden.

12. It is not clear from the evidence when the fence that exists on the site now was erected. However, the appellant states that *'when we had an opportunity to purchase the land, we did so which was around the time of lockdown we quickly made a play area as the children were not at school for the next six months.'* I acknowledge that the land appears to be currently used for residential garden purposes. While the appellant does not provide a precise date for putting in place the play area, national lockdowns started in about 2020 and so ten years continuous use of the land on this basis cannot be proven.

13. The Council has submitted an aerial photograph dated 2016. This does not appear show a fence around the appeal land and casts doubt about the land always being enclosed from other surrounding land. I was able to see on my site visit that a fence does now enclose the appeal site. It is possible that this took place when the play area was formed, although on the evidence before me I cannot be certain. If that is the case, then the appellant would not be able to demonstrate that it was lawful by virtue of it being in situ for more than four years since it was substantially completed. I conclude, on the balance of probabilities, that the evidence does not unambiguously and precisely demonstrate that the fence was constructed more than four years ago.

14. As I have not been able to conclude that the appeal land is lawfully a residential garden, it is also the case that I cannot conclude that the fence is permitted development by virtue of Class A of Part 2 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO). This is because paragraph 5(b) of section 3 of the GPDO states that *'the permission granted by Schedule 2 does not apply if (b) in the case of permission granted in connection with an existing use, that use is unlawful'.*

Conclusion

15. For the collective reasons given above, I conclude, on the balance of probabilities, that the Council's refusal to grant a certificate of lawful use or development in respect of use of the land as residential garden land and associated fencing 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.

D Hartley

INSPECTOR