



Appeal Decisions

Site visit made on 30 August 2023

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 December 2023

Appeal A Ref: APP/F0114/X/22/3308287

Land at Papermill Cottage, Leigh Lane, St Catherine, Bath and North East Somerset, Bath BA1 8HG

- 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 Janice Hemms against the decision of Bath and North East Somerset Council.
- The application ref 22/00896/CLEU, dated 24 February 2022, was refused by notice dated 20 April 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 property as residential curtilage.

Summary decision: the appeal is dismissed.

Appeal B Ref: APP/F0114/W/22/3303157

Land at Papermill Cottage, Leigh Lane, St Catherine, Bath, BA1 8HG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mrs Janice Hemms against the decision of Bath and North East Somerset Council.
- The application Ref 21/04650/FUL, dated 14 October 2021, was refused by notice dated 22 April 2022.
- The development proposed is a new vehicular entrance and car parking spaces in the garden of Papermill Cottage.

Summary decision: the appeal is dismissed.

Applications for costs

1. An application for costs was made by Mrs Janice Hemms against Bath and North East Somerset Council. This application is the subject of a separate decision.

General Preliminary Matters

2. The site visit had been arranged as an accompanied visit, where a representative of both the Council and appellant would be in attendance. I received correspondence to the effect that both parties had agreed that the visit could be undertaken as an access only site visit. I undertook the visit on this basis, satisfied that no prejudice would be caused to either party in this case.

APPEAL A

Preliminary Matters relevant to Appeal A

3. I sought the views of the parties on a number of matters relevant to Appeal A. I have had regard to the responses I received in determining this appeal.

Description of Development and the Appeal Site

4. The description of the development given in the header above has been taken from the LDC application form, which also refers to a statement supporting the application. In that statement the appellant says that the LDC is sought to 'confirm that the building and land occupied together by Mrs Hemms is one single planning unit and that the residential curtilage of the dwelling extends to include the whole of the property'.
5. The plan submitted with the LDC application shows a linear site running alongside the adjoining highway. This is an OS plan on which there is an indication of a boundary running across the site, north to south. Having regard to the aerial photographs and my observations on site, this line corresponds to the position of the yew hedge within the site, which marks the land referred to by the appellant as 'the big garden' from the remainder of the site. Whilst the majority of the parties' evidence relates to the land to the west of the yew hedge (i.e. the big garden), the red line boundary has also been drawn around the land to the east of the hedge, including that occupied by the dwellinghouse known as Papermill Cottage.
6. In view of the site location plan submitted with the LDC application and the description of development used by the appellant, I must consider the lawfulness of the use of the entirety of the appeal site, not just the land falling to the west of the yew hedge.
7. As for the use for which the LDC is sought, I can understand why the appellant has referred to the term 'curtilage' in the description. Whilst the matter of curtilage is relevant in this case (for reasons I will come to), the Council have rightly pointed out that curtilage is not a use of land. It does not fall within the meaning of development provided at section 55(1) of The Town and Country Planning Act 1990 as amended (the 1990 Act). As it is not development, it is not something for which an LDC can be granted. Similarly, whilst the matter of the planning unit is relevant to establishing what the use of land might be, it alone cannot be the subject of a LDC.
8. The appellant refers to a use of the land outlined in red for a residential purpose and says that the residential use is associated with the dwellinghouse at Papermill Cottage. The Council has referred to the use as domestic garden. On this basis, the most appropriate description of the development in this case is the use of the land for a purpose incidental to the enjoyment of the dwellinghouse occupying the land, known as Papermill Cottage. Such a use would comprise use as a garden associated with Papermill Cottage. Having sought the views of the parties on this matter, I am satisfied that in determining the appeal on this basis, no injustice would be caused.

Main Issue

9. Section 191(4) of the 1990 Act indicates that if, on an application under this section, the local planning authority are provided with information satisfying

them that the use or operations described in the application was lawful at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application. My decision is, therefore, based on the facts of the case and judicial authority. The main issue in this case is whether the Council's decision to refuse to grant a LDC was well founded.

Main Considerations

10. I can see that the parties have referred to the continuity of the use of the land over a 10 year period. This comes from the provisions of section 171B(3) of the 1990 Act. However, the appellant has drawn my attention to the case of *O'Flynn v SSCLG & Warwick DC* [2016] EWHC 2984 (Admin), in which it was held that under section 191(2)(a) of the 1990 Act, there were two alternative routes by which it is possible to establish that an incidental residential use of land is lawful.
11. The first route is to establish that, at the time of the LDC application, no enforcement action could be taken because, by reason of section 55(2)(d) of the 1990 Act, it did not constitute development. Section 55(2)(d) informs that the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such shall not be taken to involve the development of the land. The second route is to establish that no enforcement action could be taken because, having regard to section 171B(3) of the 1990 Act, the time for taking enforcement action had expired.
12. It is the appellant's case that the use for which the LDC is sought was lawful at the time the LDC application was made. She says that the use commenced prior to her purchase of Papermill Cottage in August 2009. She also suggests that, since her purchase of the site, she has continued to use the entirety of the appeal site for a residential garden use, incidental to the dwellinghouse at Papermill Cottage. It is the appellant's case that this use of the site has been continuous, that it has not been interrupted, and that the land was used for this purpose on the date the LDC application was made.
13. In response, the Council say, amongst other matters, that the activities carried out by the appellant on the part of the site referred to as 'the big garden' do not demonstrate a residential garden use, rather this part of the site remains in a use for the purposes of agriculture.
14. In addition to the above, the parties refer to a shepherd's hut that was brought onto the site in 2020. The appellant says that this does not change how the land has always been used. The Council suggests that it was right to refuse the LDC application as the use of the shepherd's hut as a holiday let would 'rule out the use of the land as a residential garden'. In addition to this, I have noted the planning permission, reference 14/02339/FUL, granted for the 'conversion of lodge/ancillary accommodation to form holiday let'. I will also consider the implications of these matters for the lawfulness of the use for which the LDC is sought.
15. Having regard to all of the above, I intend to determine the appeal following the chronology of events, starting with the use of the site prior to the appellant taking ownership of the land in August 2009 and ending with the more recent events, including the siting of the shepherd's hut on the land in 2020. In doing so, I will consider each of the following matters:

- Whether or not there has been a material change of use of the appeal site to a purpose incidental to the enjoyment of the dwellinghouse known as Papermill Cottage and, if so, when this use commenced;
- If an incidental residential use is found to have occurred, either:
 - whether the land in question was within the curtilage of the dwellinghouse when this use commenced and, therefore, whether the material change of use can be regarded as not involving development; or
 - whether the use of the land for a purpose incidental to the enjoyment of the dwellinghouse had been continuous for a period of ten years or more beginning with the date of the breach (i.e. the date the material change of use took place);

And finally:

- If found to be lawful, whether the lawful incidental residential use of the appeal site was extant or had been lost by the time the LDC application had been made.

16. The test of the evidence in this case is the balance of probability and the burden of proof is on the appellant. Paragraph 006 of the Planning Practice Guidance document on Lawful development certificates advises that, 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 probability.

Reasons

Has there been a use of the appeal site for a purpose incidental to the enjoyment of the dwellinghouse known as Papermill Cottage and, if so, when did this use commence?

17. My attention has been drawn to the settled caselaw of *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207, which assists in the determination of the planning unit and its use. As I note above, the appellant says that the incidental residential use of the appeal site (as a whole) commenced prior to her ownership of it. I will, therefore, consider this as follows, applying the approach established in *Burdle* to answer the above question.
18. The HM land registry plan provided by the appellant shows that she purchased the site as a single title of ownership in 2009. The evidence before me, including that of interested parties, indicates that the entirety of the appeal site was used by the former owners of Papermill Cottage. Historically (i.e. prior to the more recent owners of the site), there may have been separate occupiers of the appeal site. There is, however, nothing before me to suggest that the land to which the LDC relates was not a single unit of occupation at the time of the appellant's purchase of it in August 2009.
19. As for the activities that have taken place within the site, little is said about the land to the east of the yew hedge. This part of the site is occupied by the dwellinghouse, an outbuilding, a parking area, patio areas and garden

landscaping. There appears to be no dispute that the land and buildings in this eastern parcel were used as a dwellinghouse and for a purpose incidental to the enjoyment of the dwellinghouse when the appellant took ownership of the site. There is also no dispute that this use commenced before the appellant was the landowner.

20. Notwithstanding the above, I have had regard to the representations from interested parties, which includes historical maps and aerial photographs. The oldest maps provided show the dwellinghouse and the outbuildings occupying a thin parcel of identified land, which does not extend as far west as the line of the yew hedge. This suggests that, historically, the land use as garden associated with Papermill Cottage might have been confined to this narrow parcel of land.
21. The later HM Land Registry title plan¹ also shows the thin parcel, as well as a middle parcel which appears to extend up to the location of the yew hedge. The aerial photographs, including that from 1999, indicate a garden area that includes this middle parcel, which is occupied by the parking area suggested as having been constructed by a former owner, Mr Tate, after he took ownership in 1985.
22. Historically, the incidental residential use may have only taken place on part of the land to the east of the yew hedge. However, having regard to the representations of Mr Tate and Ms Chubb, this use is more likely than not to have extended into the whole of the parcel to the east of the yew hedge shortly after Mr Tate's purchase of the site in 1985. Furthermore, there is nothing before me to indicate that the incidental residential use of the eastern parcel did not continue after Mr Tate's ownership of the site, that it was not extant at the time the appellant took ownership in 2009, and that it was not the single primary use of the eastern parcel.
23. Turning to the remainder of the site, the parties' evidence concentrates on this and here lies the main area of dispute. There is evidence from local residents indicating that the land to the west of the yew hedge was a garden prior to the appellant's purchase of the site. Whilst this evidence is briefly stated, it is supported by the appellant. However, the appellant's account of the use of the site prior to August 2009 is not taken from her own observations or from any connection she had with the land prior to 2009. This evidence is also contradicted by the representations of a former owner and other of the interested parties.
24. Applying the relevant test, I cannot conclude that the evidence is sufficient to demonstrate that, on the balance of probability, a material change of use of the western land to an incidental residential use had occurred prior to August 2009.
25. As for the events after August 2009, the appellant has referred to the planting within the western part of the site as including ornamental planting, as well as vegetables and fruit trees. She describes maintaining all planting, save for topiary. In addition, the appellant has described the recreational use of the land by her and her family since her ownership of it commenced. This includes family parties, playing games, sitting out and exercising her dog. I also saw the washing line, referred to by the appellant in her evidence, as well as a storage shed.

¹ Provided by both the appellant and Kate Chubb.

26. Other than the introduction of the shepherd's hut in 2020, the appellant's evidence is that the activities on the western parcel, as listed above, have continued since her purchase of Papermill Cottage in 2009. I acknowledge that some of these activities, such as family parties, might be infrequent. However, other of the activities, such as the use of the washing line and exercising the dog, are likely to be a daily occurrence. Indeed, the appellant describes her use of the land for the various purposes listed several times a day.
27. It is right to attribute significant weight to the appellant's claims as they are made in a statutory declaration. This carries with it sanctions that could be imposed, should it contain false or misleading evidence. Furthermore, the appellant's claims with regard to the activities that have taken place on the land are corroborated by the representations of interested parties who live near the site and/or have observed how the site is used.
28. The Council does not dispute that the appellant has carried out the activities she describes on the land. It has also acknowledged that some of the activities are typical within a domestic garden. However, it suggests that other of the appellant's activities could also be a use of 'non-domestic land'. Other than a use for agriculture, the Council has not suggested what the other 'non-domestic' use might be.
29. I acknowledge that the growing of plants for consumption can be regarded as agriculture. Added to this is an area of the site I saw used for the keeping of chickens, which the appellant says have been kept on the site for some time. However, such activities are also common place within a domestic garden. Furthermore, the planting and maintenance of ornamental planting and the lawn are indicative of a use incidental to a dwellinghouse. In addition, exercising a dog and children playing are not activities typical of agricultural land. Considered all together, the activities are indicative of a residential garden use.
30. I have had regard to the representations of the former owner and other of the interested parties, who suggest that there has only recently been a change to the use of the land. They describe the land as a wilderness area and suggest that the land has only been maintained as a formal garden in recent years. Whilst I have noted their reference to the aerial photographs taken since 2009, I cannot be satisfied that these demonstrate a use other than that suggested by the appellant.
31. Bringing all of the above together, I am not persuaded that the activities described above demonstrate that from 2009 the use of the western parcel was for agriculture, or for some other non-domestic purpose. When considered as a whole, the activities described by the appellant have the character of a residential use, that being the single primary use of this land the commenced in August 2009. I have had regard to the contradictory evidence, but balanced against the evidence of the appellant, and being mindful of the weight that should be attributed to it, I am not satisfied that this makes the appellant's version of events less than probable.
32. To conclude on this first main consideration, it is more likely than not that the use of the land to the east of the yew hedge for a purpose incidental to the enjoyment of the dwellinghouse occupying that part of the site commenced shortly after 1985 and that this use continued when the appellant first took ownership of the land in 2009. As for the western parcel, I find the appellant's

evidence to be sufficiently precise and unambiguous in demonstrating that, on the balance of probability, a use of this land for a purpose incidental to the enjoyment of the dwellinghouse at Papermill Cottage commenced in August 2009. As both parcels were used for the same primary purpose in 2009, and in view of the connection between the two parcels, I conclude that the appeal site became a single planning unit in 2009, used for a purpose incidental to the dwellinghouse occupying the land.

Was the land within the curtilage of the dwellinghouse when the use commenced?

33. As I have identified above, one route to establishing the lawfulness of an incidental residential use is to determine whether or not, having regard to section 55(2)(d) of the 1990 Act, the land in question was within the curtilage of the dwellinghouse when the use commenced and can, therefore, be regarded as not involving development. Whether or not land is within the curtilage of a building (in this case a dwellinghouse) is a matter of fact and degree. The curtilage of a building must form part and parcel with the building and should, therefore, be intimately associated with the building. Important to my consideration of this matter is the physical layout of the building and the land said to be curtilage; ownership of the land; and the use or function of the land.
34. With regard to the land to the east of the yew hedge, it might well be easy to reach a conclusion on the matter of curtilage as it exists at present, or even as it existed when the appellant took ownership of the site in 2009. However, I have concluded that the incidental residential use of the whole of the eastern parcel commenced some time shortly after 1985. Accordingly, for me to conclude that this did not involve the development of the land, I must find that the land was within the curtilage of Papermill Cottage at that time.
35. With the above in mind, there is evidence from interested parties to indicate that the matter of the curtilage of Papermill Cottage might not have been so clear when the incidental residential use of the whole of the eastern parcel commenced. Furthermore, it is clear that neither of the main parties have considered this matter. As I have very little of the necessary evidence about the eastern parcel relating to the time when the use commenced, I am unable to reach an informed conclusion on this matter. I will, therefore, consider the lawfulness of the use of the eastern parcel via the second route; i.e. having regard to section 171B(3) of the 1990 Act.
36. Turning to the land to the west of the yew hedge, I consider first the layout of the site, within which there are two distinct areas separated by the yew hedge that runs north to south across the site. As I note above, the hedge was in place in August 2009 and the evidence indicates that this was an established feature at this time. Indeed, its presence in the earlier aerial photographs demonstrates this. Accordingly, it is more likely than not that the hedge formed a prominent feature in 2009 and that it separated the two parcels within the appeal site, as it does today.
37. To the east of the hedge is the dwellinghouse and an outbuilding. The land adjoining these two buildings has been landscaped and tiered to create a parking area adjacent to the site entrance, and terraces at the lower level, closer to the dwellinghouse. Although not a small parcel, this part of the site is well contained by the yew hedge, boundary walls and other established landscaping and boundary features. I have no reason to conclude that this was

not the case in 2009. These features give this part of the site a sense of enclosure where the land within it is open to the dwellinghouse. By this I mean that there is no physical separation, or sense of separation, between the dwellinghouse and the other parts of this enclosed eastern part of the site. The sitting out areas and patios on this land could be easily accessed from the dwellinghouse. This indicates an intimacy of this part of the site with the dwellinghouse, which is likely to have existed in 2009, if not before.

38. Whilst I describe the yew hedge as enclosing the land to the east, I acknowledge that there is a gap in the hedge, providing access from the dwellinghouse and the land enclosed with it into the land to the west. This gap is present in the earlier aerial photographs. Whilst there is no evidence that there was ever a gate or other means of restriction across the gap, this gap does form a short passageway from one part of the site to the other.
39. The land to the west of the hedge is the larger of the two parcels and has an open character. However, the yew hedge is a prominent feature across the site, separating this larger parcel from the remainder of the site to the east. Again, I have no reason to find that the land was not laid out in this way in 2009 and that at this time the hedge did not provide the same sense of separation of the two parcels. In finding as I have, I have compared the series of aerial photographs, starting with that dated 2009, that all show a substantially similar picture. For this reason, I cannot regard any part of the western parcel as ever having had an intimate relationship with the dwellinghouse.
40. The appellant suggests that the yew hedge was planted by the previous owner of the land in order to enclose the space in front of the cottage. However, this evidence is silent on the date of this planting and whether or not the hedge replaced any feature or boundary enclosure. The earlier plans of the site from the mid 1980's² show some form of feature at this time in the location of the hedge, suggesting the presence of two parcels prior to the planting of the hedge.
41. Turning to the ownership of the land, as I note above, the HM land registry details demonstrate that in 2009 the appellant purchased the whole of the appeal site which was registered under a single title. The evidence also indicates that the previous owners of Papermill Cottage also owned both parts of the appeal site, i.e. the parcels either side of the yew hedge. I have been given no reason to doubt this.
42. I turn now to the use or function of the land both at the time the use commenced and prior to its commencement. There is an account from an interested party who purchased the property in the mid 1980s. They describe rough pasture and a paddock, although they have not specified the land used for this purpose. Nevertheless, they say that they only maintained the land immediately to the west of the dwelling as a formal garden. They also say that they sold the land to a Mr and Mrs Pumfrey (the owners of the site prior to the appellant) and suggest that these owners used the site in much the same manner.
43. This account of Mr and Mrs Pumfrey's use of the western land is not entirely consistent with other accounts of how the land was used by these previous

² Documents 4, 5 and 6 of the supporting statement submitted with the LDC application.

owners. This indicates that the previous owners planted the yew hedge, and that a vegetable garden and trees, including fruit trees, were also planted. Indeed, the appellant suggests that on her purchase of the site these were established.

44. I acknowledge that, prior to 2009, there is likely to have been some connection between the activities taking place on the western parcel and those taking place on the remainder of the site. However, the growing of fruit trees and a vegetable garden are not activities that I can regard as being intimate with the dwellinghouse. Rather, these activities are more likely to occupy land that is enclosed away and separate from a dwellinghouse. I have no evidence to persuade me otherwise.
45. Bringing all of the above together, I find it more likely than not that when the incidental residential use of the land to the west of the hedge commenced, the land was not within the curtilage of Papermill Cottage. Whilst at this time there may have been an established connection with the use of this land and the remainder of the site, the land did not form part and parcel with the dwellinghouse at Papermill Cottage and did not share an intimate association with that building. The evidence leads me to find that, as a matter of fact and degree, the curtilage of Papermill Cottage in 2009 was confined to the land within the appeal site that falls to the east of the yew hedge. For this reason, the change of use of the western parcel in 2009 to a purpose incidental to the enjoyment of the dwellinghouse at Papermill Cottage did not benefit from the provisions of section 55(2)(d) of the 1990 Act. As such, the material change of use of the western parcel to an incidental residential use in 2009 involved the development of the land.

Has the use of the land been continuous for a period of ten years or more beginning with the date of the breach?

46. I have concluded above that the material change of use of the land to the east of the yew hedge to an incidental residential use is more likely than not to have taken place shortly after 1985. This is, therefore, the date of the breach for this part of the site for the purposes of section 171B(3) of the 1990 Act. As for the land to the west of the yew hedge, the date of the breach is August 2009.
47. I acknowledge that the evidence I have of the use of the land to the east of the yew hedge following Mr Tate's purchase of it in 1985 is limited. However, there is nothing before me to suggest that the incidental residential use of the eastern parcel did not continue substantially uninterrupted for a period of 10 years after 1985. Indeed, I do not think I would be in conflict with the case made by any party in concluding that, on the balance of probability, the use of the eastern parcel for an incidental residential use was lawful within the meaning of section 171B(3) by the time the appellant took ownership of it in August 2009.
48. As for the land to the west of the yew hedge, as already noted, I have detailed evidence from the appellant with regard to her use of the land and the activities that took place on it, starting in August 2009. I have already considered the evidence of the activities described by the appellant (excluding the shepherd's hut), finding it sufficient to demonstrate that these activities have taken place on the western parcel since 2009. I have noted that some of these activities are infrequent. However, the evidence indicates that the vast

majority are frequent, and that they have continued substantially uninterrupted since they commenced in 2009.

49. Notwithstanding the Council's case that the activities described by the appellant do not amount to an incidental residential use (a matter which I have already considered), it does not dispute that the activities have taken place on the land. Neither does it suggest that, in the ten years following her purchase of the site, there has been any substantial break in the use, or any change in its character.
50. I have already mentioned the representations of the former owner, who suggests that there has only recently been a change to the use of the land. Whether or not this suggested change coincides with the shepherd's hut having been brought onto the site is not entirely clear. Nevertheless, as I note above, any suggestion that the land was, until recently, a wilderness is not entirely consistent with the aerial photographic evidence.
51. Having regard to the above, I find the appellant's evidence to be precise and unambiguous in demonstrating that, on the balance of probability, her use of the land to the west of the hedge for a purpose incidental to the enjoyment of the dwellinghouse continued substantially uninterrupted for a period of 10 years starting with the date of the breach. I conclude as such, mindful of the weight that should be attributed to the appellant's evidence, having regard to how it has been given. This evidence is also corroborated by most of the interested parties. I have had regard to the contradictory evidence, but I am not satisfied that this makes the appellant's version of events less than probable.
52. My conclusion above means that the use of the western parcel for an incidental residential use became lawful within the meaning of section 171B(3) of the 1990 Act on the date ten years after the breach commenced, which would have been August 2019.

Is the lawful use extant or has it been lost?

53. Having regard to my conclusions above, I now move on to consider whether, at the time the LDC application was made in February 2022, the lawful use of the appeal site as a whole can be regarded as extant or whether it had been lost.
54. A lawful use of land might be lost if a material change of use of the land to some other use has occurred. It might also be extinguished by the creation of a new planning unit. With this in mind, I now consider the implications of the shepherd's hut for the lawful use of the appeal site.
55. There is no dispute that the shepherd's hut was brought on to the western parcel in 2020, following the incidental residential use of the land becoming lawful. The appellant says that the shepherd's hut is let out to holiday makers for around 110 days a year. She also says that it is used by the 'appellants and their family and friends as ancillary accommodation to Papermill Cottage'. The appellant claims that her use of the wider western parcel 'as a garden ancillary to the main dwelling' continues, even when the shepherd's hut is let. In short, the appellant's claim is that the use of the shepherd's hut has not resulted in any change to how the land is used. Whether or not the whole of the appeal site remains in use for a purpose incidental to Papermill Cottage is,

however, a matter of fact and degree. The Caselaw established in *Burdle* is, again, relevant to this matter.

56. Turning first to the occupation of the land, the appellant says her use of the western parcel, and therefore her occupation of it, continues even when the unit is let. The land would, however, also be occupied by persons other than the appellant (i.e. the holiday makers) when the hut is let. Nevertheless, their presence on the site would be for short periods and the land would continue to be managed and owned by the appellant during these periods.
57. With regard to the activities that take place on the land, I have already noted the appellant's claim that the activities she carries out on the wider western parcel continue, even at times when the hut is let. As for the activities resulting from the use of the hut, I note that the hut has a w.c. and shower, as well as a small kitchen, a sitting area and a bed. Accordingly, the hut provides accommodation for visiting holiday makers and the facilities it contains allows for this accommodation to be self-contained.
58. The appellant suggests that the use of the shepherd's hut falls within Class C3 of Part C (dwellinghouse), Schedule 1 of The Town and Country Planning (Use Classes) Order 1987 as amended. Her suggestion is that this use is the same as the use of the remainder of the appeal site. The appellant's evidence does not, however, support this.
59. The appellant says that the shepherd's hut falls within the definition of a caravan provided at section 29 of the Caravan Sites and Control of Development Act 1960 (the 1960 Act). The appellant has also provided a series of certificates of exemption covering the last 3 years from the Freedom Camping Club, granted under paragraph 5 of schedule 1 of the 1960 Act. Furthermore, she refers to Class A, Part 5, Article 3, Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (the 2015 Order), which permits the use of land as a caravan site. All of this evidence, which is from the appellant herself, points to the letting of the shepherd's hut as having resulted in a use of the site as a caravan site, rather than a use as a dwellinghouse.
60. I find such a use to be materially different to the example given by the appellant of a spare en-suite bedroom in a dwellinghouse being used to provide holiday accommodation on a bed and breakfast basis. This is not least because the use associated with the letting of the shepherd's hut does not take place within the dwellinghouse and, unlike an en-suite bedroom, the hut has the facilities that allow it to be used in a self-contained manner. There is no evidence to suggest that the activity associated with the letting of the shepherd's hut is connected to the dwellinghouse at Papermill Cottage in the same way as the other activities that are carried out on the land. Indeed, other than the appellant's management of the holiday let from Papermill Cottage, there is little evidence before me demonstrating a connection between this use and the use of the remainder of the appeal site. The use is also frequent, taking place for almost a third of the year. What is more, the separate nature of the caravan site use leads me to find a material difference between it and the incidental residential use.
61. Having regard to the above, I am satisfied that the activities that have taken place on the site since the bringing of the shepherd's hut onto the land in 2020 and it having been frequently let to holiday makers since that time has resulted

in two primary uses of the appeal site. These comprise a use for a purpose incidental to the dwellinghouse within the appeal site and a use as a caravan site. The evidence is not sufficient to demonstrate that the caravan site use is in any way incidental or ancillary to the incidental residential use. There is also a material difference between the character of these uses.

62. In other circumstances, I would move on to consider whether or not these two primary uses of the site are physically or functionally separate. In doing so I would have considered all of the principles of caselaw established in *Burdle*. However, I have insufficient evidence to be able to conclude on this final step in this case. Whilst I note the appellant's evidence on the extent of guests' use of the hut and surrounding land, the evidence does not indicate how holiday makers come and go to the hut, and where guests might park their vehicles. Furthermore, much of the appellant's evidence on this was given either in final comments or in response to my questions. The Council has not, therefore, had the opportunity to respond to the evidence regarding the nature of the caravan site use and comment on the implications of this for the use of the wider site. I do not, therefore, have sufficient evidence before me to reach a conclusion on whether the caravan site use is a single use occupying its own planning unit or, in the alternative, whether it takes place as part of a mixed use on all or part of the wider appeal site.
63. Notwithstanding this, I am able to conclude on the matter of whether or not the Council's decision to refuse the LDC application was well founded. I say this because, if I were to find that the caravan site use takes place within its own planning unit, this would mean that there has been a material change of use of part of the appeal site. Indeed, it might be said that the creation of a new planning unit has extinguished any lawful use rights that have been accrued on all, if not the part of the appeal site on which the caravan site use takes place. In these circumstances, I could not conclude that the use of the whole of the appeal site for a purpose incidental to the enjoyment of the dwellinghouse occupying the land remained lawful at the time the LDC application was made.
64. In the alternative, if I were to conclude that the caravan site use takes place as part of a mixed use of all, if not part, of the appeal site, I would conclude that a material change of use of the land in question to the mixed use would have occurred. Again, in these circumstances lawful use rights of the land in question would be regarded as having been lost.
65. Even if I were to find that the caravan site use does not continue (either as a single use or part of a mixed use) when the shepherd's hut is not let, this would not alter my conclusion that the lawful use rights of the appeal site have been lost in some form. This is because the letting of the shepherd's hut has brought about a material change of use in some form of all, if not part, of the appeal site. Even if the use is regarded as having been interrupted by periods when the hut is not let, this does not change that the material change of use had occurred in the first instance.
66. On a separate matter, earlier in this decision I noted the planning permission³, referred to in the evidence of both parties, granted for the 'conversion of lodge/ancillary accommodation to form holiday let'. The appellant says that the lodge is used as a holiday let, but does not say when this use commenced.

³ Reference 14/02339/FUL and subsequent 15/02551/NMA.

Furthermore, I have not been given any details regarding the accommodation comprised within the lodge and how it is used. For example, I do not know whether or not this is self-contained, whether or not guests use of the lodge is confined to the building alone, how often it is let, and how it is used when it is not let. However, as planning permission has been obtained for its use, this indicates that the use of the lodge is not incidental to the use of the remainder of the appeal site, and that there has been a material change of use of the building. Indeed, the description of the development proposes a change from 'ancillary accommodation' to a 'holiday let'.

67. In addition to the above, the appellant indicates that the land to which this permission relates comprises the whole of the eastern parcel. As such, the permitted holiday let use might extend beyond the footprint of the building.
68. If it were the case that, despite the planning permission that has been obtained, the use of the lodge is for a purpose incidental to the enjoyment of the dwellinghouse at Papermill Cottage, this would not alter my conclusions above with regard to the implications of the shepherd's hut for the lawfulness of the appeal site when considered as a whole. If, however, there has been a material change of use of the land resulting from the use of the lodge as a holiday let, this would provide a further reason for concluding that any lawful use rights of the appeal site have been lost in some form, and that the use of the appeal site as a whole for an incidental residential use was not lawful at the time the LDC application was made.
69. To conclude on this final main consideration, it may well be the case that the use of the appeal site for a purpose incidental to the enjoyment of the dwellinghouse had become lawful prior to the LDC application having been made. I have, however, found that, as a matter of fact and degree, the bringing of a shepherd's hut onto the land in 2020 and its use as a holiday let has resulted in a material change of use of all, if not part, of the appeal site. This material change of use has resulted in the loss of lawful use rights of part, if not all, of the appeal site by the time the LDC application was made. The use of the lodge within the appeal site as a holiday let may have also resulted in a material change of use of the land providing a further reason for me to conclude that the lawful use rights of the appeal site have been lost in some form. For these reasons, I cannot grant an LDC for the use of the appeal site for the purpose for which the LDC was sought.
70. I am mindful of the provisions of section 191(4) of the 1990 Act, that would allow me to grant a certificate for a modified description of development and/or for part of the land to which the LDC application relates. However, I have insufficient evidence to determine whether or not part of the appeal site retains the lawful use rights that had been accrued. Neither do I have evidence sufficient for me to determine whether or not the caravan site use (either as a single use of a planning unit or part of a mixed use) is permitted or is otherwise lawful. Similarly, I do not have evidence sufficient to determine whether the use of the lodge is permitted by the planning permission that has been granted for the site or that it is otherwise lawful.

Conclusion

71. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the property as residential curtilage 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.

Formal Decision

72. The appeal is dismissed.

APPEAL B

Preliminary Matters relevant to Appeal B

73. The officer report indicates that the development would be located within the Green Belt. However, it suggests that the development would not amount to inappropriate development and that it would not be harmful to the openness or the purposes of including land within the Green Belt. I have been given no reason to disagree with this.

Main Issues

74. There is a single reason for refusal of the application subject of this appeal. From this, there appears to be a single main issue in this case, which is the effect of the proposed development on the character and appearance of the site and surrounding area, with particular regard to the site's location within the Cotswolds Area of Outstanding Natural Beauty, now referred to as a National Landscape.

Reasons

75. As I have already noted, the appeal site is linear, running west to east. Its southern and western boundary is shared with the adjoining highway. It comprises two distinct parcels of land that are separated by the yew hedge. There is an existing, and fairly wide means of access to the appeal site onto a driveway and parking area within the eastern parcel. This access is enclosed with two, five bar timber gates. I also noted a more narrow means of access into the western field parcel. This also has a five bar timber gate. The evidence suggests that this is wide enough for a vehicle to pass through.
76. Although there is a substantial hedge along part of the boundary of the site with the highway, there are some views from the highway into the appeal site, over the existing gates and hedge. The eastern parcel is occupied by Papermill Cottage. This part of the site has the typical character of a rural cottage and cottage garden. Although the western parcel is occupied by small buildings, a shepherd's hut, a vegetable garden, sitting out areas, etc., the character of this land is not out of keeping with the rural landscape within which the appeal site sits, or the wider National Landscape.
77. The plan submitted with the application⁴⁴ shows a new access gate, a new bound surface finish from the edge of the carriageway into the site and a parking space for two vehicles within the site. The plan also shows the cutting back, removal and replacing of hedgerow along the southern boundary. I deal with each of these elements of the scheme as follows.
78. The proposed gate would be in the approximate location of the existing means of access into the western parcel, but positioned slightly further into the site. It appears, therefore, that little, if any, of the existing hedgerow would need to

⁴⁴ Drawing number 1037-10A.

be removed in order to provide the gap sufficient for the new gate and gate posts. Furthermore, the proposed gate would have the appearance of a typical agricultural gate, much the same as the existing.

79. I note that both parties refer to the existing access and gate, and that the appellant says that this was installed in 2020. Whilst I am mindful of the permission granted by the 2015 Order for a means of access to a highway, the evidence is fairly silent on whether the existing access had the benefit of the permission granted by the 2015 Order when constructed, or whether it is otherwise lawful. The Council does not, however, make the case that this is an unauthorised means of access and that this should not be taken into account when considering the appropriateness of the proposed development. Accordingly, it is right that, when I consider the effect of the proposed development, I compare this with the existing situation. In doing so, I can only conclude that there would be little change to the appearance of the site in terms of the location of the point of access (i.e. the gap in the boundary hedgerow that would result from the installation of the new gate) and the provision of a new gate.
80. Moving on, the submitted plans⁵ shows the provision of a vision splay of some 2 metres by 25 metres in both directions from the point of access. To achieve this, one plan shows the repositioning of the existing hedge to the west of the access and a reduction in the depth of the existing hedge to the east. The other shows the cutting down of a substantial length of the existing hedge to below a height of 900mm.
81. As I note above, the hedge along this boundary of the site is well established and it is characteristic of the rural lanes within the vicinity of the appeal site. Accordingly, the existing hedgerow makes a positive contribution to the rural character of the site and its surroundings, as well as being of benefit to local biodiversity. The removal or substantial cutting back of the hedgerow to provide the vision splay shown would, therefore, cause detriment to the character of the site and its surroundings.
82. The works to the hedge shown on either plan would be substantial and effect a significant length of the hedge. It would also take a considerable period for new planting to establish and existing planting to recover. Furthermore, it has not been demonstrated that such extensive works are likely to succeed, such that they would mitigate the harm that would be caused.
83. Notwithstanding the above, whilst I can see that a vision splay is shown on the submitted plans, the Council's evidence does not make it clear that a vision splay is necessary to make the use of the development safe. Neither has it requested a condition requiring the retention of the vision splay free from obstruction. Indeed, although the Council's evidence deals briefly with some highway matters, it has not provided any consultation responses received from the Highway Authority, which are referred to in the officer report.
84. Notwithstanding this, I noted the location of the existing boundary hedge close to the edge of the carriageway. Its location either side of the existing access is consistent with that shown on the proposed plan. It is, therefore, likely that the hedge currently obstructs the views of drivers in both directions when leaving the site from the existing access and that, without the removal of

⁵ Drawings numbered 1037-11 and 1037-10A.

sections of the hedge either side of the access, it would continue to do so with the proposed access and gate arrangements.

85. Despite this, if it were the case that the traffic using the proposed development would remain as existing, I might well conclude that the proposed development would not cause any further detriment to highway safety when compared with the existing arrangement, such that a requirement to improve visibility at the point of access would be necessary in the interests of highway safety. However, the scheme of development before me includes parking space for guests staying in the shepherd's hut. Accordingly, traffic using the development would include that from guests, as well as the appellant herself. As there is no suggestion that this is the same arrangement as existing, it is likely that traffic movements to and from the site via the access would increase as a result of the development.
86. In view of the above, I can only conclude that improvements to the vision splay for drivers leaving the site would be necessary in this case, and that such improvements would be in the interests of highway safety. As I have concluded that the improvements shown on the submitted plans would cause harm, this weighs against the grant of permission in this case.
87. The remaining element of the scheme proposes a bound surfaced finish that would extend into the site by some 6 metres. The submitted plan shows a 'Gridforce IR30 matting' surface further into the site and covering the two parking spaces. Where the bound surfacing is proposed, the site, including at the edge of the carriageway, is covered in vegetation. It is, therefore, likely that the bound surfacing would contrast with the grass verge and cut grass area within the site. The bound surfacing would also be visible from the adjoining carriageway and would look at odds with the otherwise rural character of the site.
88. I note the suggestion that all hard surfacing could be substituted with matting. However, I can only agree with the Council, that the use of the matting would not be suitable for the land between the gate and the edge of the carriageway and the area close to the means of access. It has not been demonstrated that such surfacing is likely to withstand regular use, particularly that associated with both activity at the shepherd's hut as well as the wider appeal site.
89. As for the use of matting for the parking spaces and further into the site, although it is not likely to be invisible, I acknowledge that it would result in less of a contrast with the existing appearance of the site. Nevertheless, the matting would facilitate the parking of vehicles associated with the letting of the shepherd's hut. The appellant does not suggest that such parking takes place in the western parcel at present. Indeed, there are no obvious parking areas within the western parcel; the existing parking areas are close to Papermill Cottage, adjacent to the main access to the appeal site. The development would, therefore, introduce and facilitate activity that would be out of keeping with the existing character of the site.
90. Whilst the boundary treatment might screen the parking spaces to a degree, these would still be visible from the access gates. Furthermore, the appellant indicates that the hut is let for around 110 days of the year. Even if the parking is only used by guests staying at the hut, I cannot regard this as a 'very low-level parking use'.

91. Having regard to all of the above, I conclude that the development would fail to conserve or enhance the landscape and scenic beauty of the National Landscape. The development would cause harm to the character and appearance of the site, the surrounding area, and the National Landscape. For these reasons the development would conflict with Policies D1 (General Urban Design Principles), D2 (Local Character and Distinctiveness), and NE2 (Conserving and Enhancing the Landscape and Landscape Character) of the Bath and North East Somerset Local Plan 2011-2029 Core Strategy & Placemaking Plan Volume 1 District-wide Strategy and Policies adopted July 2014 (the local plan). These Policies require, amongst other matters, that new development contributes to local distinctiveness, and that it conserves or enhances local landscape character and landscape features. I also find the parking provision to be in conflict with Policy D4 (Streets and Spaces) of the local plan, which states that parking provision should not dominate the design of the development.
92. The development would also conflict with the guidance provided in the National Planning Policy Framework which advises, amongst other matters, that great weight should be given to conserving and enhancing the landscape and scenic beauty of National Landscapes.
93. I note that the reason for refusal refers to Policies D5 (Building Design) and D3 (Urban Fabric) of the local plan. The Council has not, however, pointed to any particular part of these Policies as being relevant. As these Policies relate more to new buildings, their relevance is not obvious to me.

Other Matters

94. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise.
95. I acknowledge that the development would be of benefit in terms of providing an easier means by which deliveries can be taken at the site. The proposal would also provide parking for guests at the shepherd's hut. However, in view of my conclusions on Appeal A, I cannot say that the development would be of benefit to a use that I have found to be lawful. Even if the current use were found to be lawful, it has not been demonstrated that the existing site layout could not be reconfigured in order to facilitate easier or safer access for deliveries and for guests to the western parcel, whilst causing less harm than the proposed scheme.
96. The lack of any objection to the development on the grounds of its effect on ecology or the living conditions of nearby residents does not justify development found to be harmful in other respects.

Planning Balance and Conclusion

97. I have concluded that the proposed development would cause harm to the character and appearance of the site and surrounding area, in particular the National Landscape. For these reasons the development would conflict with the development plan. I have had regard to all material considerations, including the suggested benefits of the scheme, but find these of insufficient weight to indicate that determination should be made otherwise than in accordance with

the development plan. Neither can I be satisfied from the evidence before me that the imposition of conditions could overcome the harm I have identified. Accordingly, I conclude that planning permission ought not to be granted.

98. Having regard to my findings above and all matters raised, I conclude that the appeal should be dismissed.

Formal Decision

99. The appeal is dismissed.

J Moss

INSPECTOR