



Appeal Decision

Site visit made on 19 February 2024

by A Walker MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 April 2024

Appeal Ref: APP/A0665/X/23/3328829

Pear Tree Cottage, Barnhouse Lane, Barrow, Chester CH3 7JY

- 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 Drs Sion and Kate Crabtree against the decision of Cheshire West and Chester Council.
 - The application ref 23/00461/LDC, dated 14 February 2023, was refused by notice dated 11 July 2023.
 - 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 garden land ancillary to the main dwelling known as Pear Tree Cottage.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description given above of the use for which an LDC is sought is that used by the Council in its refusal notice. The description given on the application form was 'curtilage land for residential purposes'. Curtilage is an area of land associated with a building, not a use of land. The appeal is therefore determined on the basis that the use for which an LDC is sought is 'garden land ancillary to the main dwelling known as Pear Tree Cottage'.

Application for costs

3. An application for costs is made by Drs Sion and Kate Crabtree against Cheshire West and Chester Council. This application is the subject of a separate Decision.

Main Issue

4. The main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development (LDC) is well-founded.

Reasons

5. The onus is on the appellant to demonstrate that, on the balance of probabilities, the use was lawful at the time of the LDC application. A development is lawful under the provisions of section 191(2)(a) and (b) of the Act if no enforcement action may be taken because it did not involve development requiring planning permission, or because the time for enforcement action against the use has expired; and, providing it does not constitute contravention of any requirement of any enforcement notice then in

force. 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 his evidence alone is sufficiently precise and unambiguous.

6. There are two possible routes to establish whether, at the time the LDC application was made, an incidental residential use of land is lawful. The first route is, by reason of section 55(2)(d) of the Town and County Planning Act 1990 (the Act), it did not constitute development. Section 55(2)(d) states the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse is not development. The second route is to establish that no enforcement action could be taken because the time for taking enforcement action had expired.
7. The appeal property comprises a detached barn conversion with a driveway to the front accessed off Barnhouse Lane and a garden to the side. The land that is the subject of the appeal has a gated access off the driveway with a hardstanding area in the gate entrance. The land wraps around the north and eastern side of the dwelling and currently contains various domestic paraphernalia such as a garden shed, a moveable goal post, a moveable play house and children's seating. Beyond the eastern boundary of the appeal land is a larger area of open, overgrown land. There was no physical boundary between this area and the appeal site at the time of my site visit, with the exception of a line of fence posts located on the eastern boundary of the appeal site. Also, at the time of my site visit, there was no physical boundary between the rear elevation of the dwelling and the appeal site.

Curtilage

8. For the appeal to be successful on the first route, it must be established that the land is curtilage and the uses taking place within it are incidental to the enjoyment of the dwellinghouse.
9. I have been referred to various case law on the matter of curtilage¹. In the most recent case of *Hiley*, Mr Justice Knowles reaffirmed Lord Justice Andrews' confirmation in the case of *Blackbushe Airport*² that the test set out in *Methuen*³ was the correct one, namely whether the land was so intimately associated with a building that the land formed part and parcel of the building.
10. The appellant's purchased the appeal property in 2021. Prior to that, the previous owners purchased the property in 2005. One of these owners, Dianne Davies, and her son, John Davies, have provided statutory declarations in support of the appeal.
11. The declarations state the appeal site was known as The Paddock. It was turned over, levelled and reseeded in approximately 2007-2008, 18 months after they moved into Pear Tree Cottage so they could use it for a variety of recreational uses. It is stated that the land was used recreationally up until the point of sale to the appellants.

¹ *Burford v Secretary of State for Communities and Local Government & Anor* [2017] EWHC 1490; *Dyer v Dorset County Council* [1988]; *Collins v Secretary of State for the Environment* [1989] E.G.C.S. 15; and *Hiley v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 1289 (Admin)

² *R (Hampshire County Council) v Secretary of State for Environment, Food and Rural Affairs* [2022] QB 103.

³ *Methuen-Campbell v Walters* [1979] 1 QB 525

12. The grass has been regularly mown and children would use the land to run around in and play games. It was also used for gardening activities for planting and maintaining flowers around the border of The Paddock near to the house. Two small conifers were planted next to the septic tank. Vegetables were also planted.
13. Dianne Davies also confirms tables and chairs were permanently left in The Paddock and they sat out there frequently, particularly to enjoy the evening sun and with visitors. They also confirm that they used The Paddock for running laps and walking around it. In addition, it was used by a family member for training her dog a couple of times a week, which occurred for the last three years prior to the sale of the property.
14. John Davies also states that The Paddock as well, as the larger area of land to the east, was used as a pitch and putt golf course, which was regularly maintained. A fence was erected in 2014 separating The Paddock from the larger area of land.
15. Based on these declarations, it is evident that the land has not been used for agricultural purposes since around 2007/2008. It is also evident that parts of the site have been used for ancillary residential purposes by the appellants, the previous occupants and their family. However, many of the activities referred to appear to have occurred on a sporadic basis and/or for temporary periods. Similarly, some of the activities referred to are not typically restricted to a residential use, such as the pitch and putt golf course and dog training.
16. Moreover, as the site area is very large, it is unlikely, based on the evidence, that all of the land was used for residential purposes. Indeed, the aerial photographs submitted in support of the appeal show very little evidence of the activities stated to have taken place on the land, other than the grass being regularly mown. Similarly, although the 2009 photographs show borders planted adjacent to the boundary fence with the dwelling and the grass being mown, there is no evidence of any other activities taking place at that time.
17. I have also had regard to the statutory declarations submitted by the appellants. However, given they have only lived in the property for less than two years prior to the submission of the LDC application, their evidence in support of the appeal is very limited,
18. Consequently, despite the appeal site having some residential garden characteristics, notably it is regularly mown and contains some domestic paraphernalia, it is nevertheless read as being a distinctly separate area to the dwelling. At the time the application was made, this separation would have been reinforced by the post and rail fence, which has since been removed, physically separating it from the narrow garden area to the rear of the dwelling. Consequently, the land is not so intimately associated with the dwelling that it forms part and parcel of it. Therefore, at the time the LDC application was made, it was not part of the curtilage of Pear Tree Cottage and therefore did not benefit from the provisions of section 55(2)(d) of the 1990 Act.

Material change of use - Continuous for a period of ten years or more

19. For the appeal to be successful on the second route, ie through the passage of time, it must be established that the use of the appeal site materially changed to a use for garden land ancillary to the main dwelling known as Pear Tree Cottage at least 10 years prior to the date of the application, namely 14 February 2013, and the use then continued for at least 10 years thereafter, without significant interruption.
20. In order to establish whether there has been a material change of use, it is necessary to ascertain the correct planning unit. In *Burdle*⁴, 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.
21. The evidence indicates the alleged material change of use of the land to residential garden took place from 2007-2008 and has been in continuous use since. Although the land has been used for residential activities over the years, as I have found above, these activities appear to be on a sporadic basis, eg sitting out enjoying the evening sun or with visitors; or of a temporary nature, eg the pitch and putt golf course and dog training.
22. Moreover, many of the activities are not typically of a residential nature and could equally have been seen taking place in a field/paddock as much as they could in a garden, eg children playing, running, dog training and a pitch and putt golf course. Whilst this is not determinative in itself, it is when considered along with the sporadic and temporary nature of some of the uses and the scale of these uses relative to the size of the land in question, ie many of these uses would likely have taken place on very small sections of the land.
23. Although garden furniture has been left on the land, it does not result in a material change in the use of the land. Similarly, nor does the siting of a garden shed. I note the appellant states that the gravelled area in the gated entrance to the north of the driveway is used for parking and is clearly evident on the aerial photographs dating from 2010 onwards. However, there is no mention of this in the declarations from Diane Davies and John Davies, in particular that it has always been used for parking.
24. Despite the appellant's argument that residential activities, such as social gatherings, have taken place on a regular basis since 2007-2008, it is unusual that there are no photographs evidencing such occasions. Indeed, the photographs that have been submitted, including those in the sales particulars, and the aerial photographs show very little evidence of any residential activity on the appeal site, other than flower borders planted along the previous post and rail fence, a dovecote similarly positioned and the grass being mown.
25. The sales particulars for the property refer to the appeal site as garden. However, this has no bearing on the lawful planning use of the land.
26. Overall, based on the evidence before me, given the sporadic, temporary and limited nature of the residential activities that have taken place on the land, I do not consider that they have resulted in a material change of use of the land to a residential garden and therefore no development has occurred.

⁴ *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207

27. I acknowledge the land need not be used everyday and it is expected that a garden would not be used as much in the winter months. Nevertheless, it has not been demonstrated that the land was used for residential garden use on a regular basis, even in the summer months, to such an extent that a material change in the use of the land has occurred.
28. The land was physically separate from Pear Tree Cottage at the time the LDC application was made due to the post and rail fence. Considered in conjunction with there not having been a material change of use of the land from its previous agricultural use, albeit it has not been used for agriculture since at least approximately 2007/08, it does not fall to be within the same planning unit as Pear Tree Cottage.
29. I have had regard to the appeal decision⁵ referred to me by the appellant. Notwithstanding the lack of detail I have before me of the evidence the Inspector had before them in making their decision, such cases as this are determined on a fact and degree basis which is very much specific to the individual circumstances of the case.
30. The appellant also refers to a planning application for a change of use of land resulting in the extension of a residential garden⁶ and a planning application for the use of land as private garden and the erection of a shed⁷. However, these cases sought planning permission whereas the appeal before me seeks a lawful development certificate. The two types of applications are determined under different criteria. Consequently, I draw no direct comparison between the two that weighs in the appeal's favour.
31. In addition, the appellant refers to 'Enforcement Notice ENF/14/00124/UDRU'. However, the document referred to in Appendix 5 of the appellant's statement appears to be a Council Officer's report considering whether enforcement action should be taken. Although grass was regularly mown, the Council were not satisfied sufficient evidence was available to demonstrate a change from agriculture to garden has been undertaken. The conclusion was no breach of planning control has taken place. There is no evidence that an enforcement notice was issued. Therefore, there does not appear to be any inconsistency in the Council's decision making regarding this case and the appeal before me; both involved the mowing of grass and no material change of use of the land.
32. I find therefore, the evidence before me is not sufficiently precise and unambiguous to demonstrate, on the balance of probabilities, that there has been a material change of use of the land to a residential garden.

Conclusion

33. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development is 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.

A Walker

INSPECTOR

⁵ Appeal reference APP/B3438/X/09/2109874

⁶ Council reference 19/01141/FUL

⁷ Council reference 14/01346/FUL