



Appeal Decision

Site visit made on 26 January 2024

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 April 2024

Appeal Ref: APP/M1005/X/23/3326331

**Twenty Acres Farm, The Farmhouse, Riddings Lane, Dalbury Lees,
Derbyshire, Ashbourne DE6 5BG**

- 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 D Shepherd against the decision of Amber Valley Borough Council.
 - The application ref AVA/2023/0206, dated 13 March 2023, was refused by notice dated 26 June 2023.
 - The application was made under section 191(1)(a) 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 'to establish the lawful use of land associated with the residential dwelling known as 'The Farmhouse' as its residential curtilage'.
-

Decision

1. The appeal is allowed in part and attached to this decision is a certificate of lawful use or development describing the extent of the existing use which is found to be lawful.

Applications for costs

2. An application for costs was made by Mr D Shepherd against Amber Valley Borough Council. This application is the subject of a separate decision.

Preliminary Matters

3. Section 191(1) of the Act provides that if any person wishes to ascertain whether (a) any existing use of buildings or other land is lawful; (b) any operations which have been carried out in, on, over or under land are lawful; or (c) any other matter constituting a failure to comply with any condition or limitation subject to which Planning Permission has been granted is lawful – they may make an application for the purpose to the LPA, specifying the land and describing the use, operations or other matter.
4. The application form describes the application as having been submitted to establish the lawful use of land associated with the residential dwelling known as 'The Farmhouse' as its residential curtilage. Although the Council appears to have dealt with the application on this basis, curtilage is not a use of land. The appellant describes the use as 'a residential use' on their appeal form and within their Statement of Case. I raised with the appellant exactly what use it is they are seeking to determine the lawfulness of. The appellant advised they are seeking to establish that their property, inclusive of the house and its garden as shown on the red line drawings, is a single planning unit within the C3 Use

Class. Such a use of land would be for residential purposes and so I shall consider the appeal on this basis.

Main Issue

5. The main issue of the appeal is whether the Council's decision to refuse the certificate of lawfulness was well-founded.

Reasons

6. An application under S191(1)(a) of the Act seeks to establish whether any existing use of buildings or other land was lawful at the time of the application. S191(2)(a) and (b) sets out that uses and operations are lawful at any time if:
i) No enforcement action may 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); and ii) They do not constitute a contravention of any enforcement notice then in force.
7. In an LDC appeal, the onus is firmly on the appellant to make out their case, on the balance of probabilities. Their evidence should not be rejected simply because it is not corroborated. If there is no evidence to contradict their version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted. Planning merits form no part of the assessment of an application for a LDC under S191 of the Act, which must be considered in the light of the facts and the law.
8. The application site comprises a substantial area, which comprises two access roads, a dwellinghouse and outbuildings to the rear of the dwellinghouse. To the front of the dwellinghouse is a substantial grassed area, with a number of large trees, bound by vegetation and fencing. The access roads appear to provide access to buildings and land which are located outside the red line boundary of the appeal site.

What is the Planning Unit?

9. In *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207, 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.
10. Three broad categories of distinction were suggested in *Burdle*: 1) a single planning unit, where the unit of occupation is used for one main purpose and any secondary activities are incidental or ancillary; 2) a single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and 3) the unit of occupation comprises two or more physically separate areas that are occupied for different and unrelated purposes. In this scenario, each area ought to be considered as a separate planning unit.
11. The appeal site comprises a substantial dwellinghouse, with two separate accesses leading to the property. It is not disputed the dwellinghouse is in C3 use and from the evidence before me and my inspection of the site, I have no reason to conclude otherwise. Mature hedgerows and fencing bound the site and the land to the rear of the property, which is mostly laid to lawn, with a number of mature trees. Although not dated, photographs provided by the

appellant, taken prior to the date of the LDC application, are broadly consistent with what I saw on site.

12. The appellant has provided a Title Plan, which shows the entirety of the appeal site, including access roads. The appellant advises the access roads remain within their ownership and are used by others under a separate legal agreement. The access roads afford access to a number of other properties outside the appeal site and outside the ownership of the appellant.
13. While the access roads are within the ownership of the appellant, they are physically distinct and used by various properties to access their own properties. As held in *Westminster City Council v British Waterways Board* [1984] 3 All ER 737, it is a misapplication of the single planning unit concept to treat the use or uses of a single planning unit as ancillary to activities carried on outside the unit altogether.
14. In my view, the sections of access road, beyond the physical boundaries delineating the site and as shown shaded light grey on the site plan, do not form part of the planning unit. The appellant advises this matter does not warrant further debate and suggests revising the drawings to show the red line around the boundary of the garden, with a blue line covering the access driveways. However, since the sections of access road outside the planning unit are clearly distinguishable from the remainder of the application site, I consider it unnecessary to require the drawings are revised in this way.
15. The remaining area of dispute is how the land adjoining the dwellinghouse, shaded in green on the location plan, has been used. In particular the grassed area which is planted with trees and bound by hedging. The appellant advises the land comprises a garden. The Oxford English Dictionary defines a garden as 'a piece of ground adjoining a building (esp. a private property), often with grass, flowers, trees etc., and generally used for recreation.
16. The land adjoins the dwellinghouse, and is grassed, with landscaped hedges bordering the site and a number of trees across the site. The land appears well maintained and is clearly tended to by the occupants of the dwelling-house. A goal post, footballs and seating suggest the land is used for recreation. From my inspection of the site, which appears consistent with photographs provided of the site taken prior to the submission of the application, I would agree the land comprises a garden.
17. In my view, gardening and recreational activities, such as sitting out and playing games, constitute an incidental residential use. The garden is within the ownership of the appellant and has no apparent physical or functional separation from the dwellinghouse. From the evidence before me and from my inspection of the site, I find on the balance of probabilities that the remainder of the appeal site, shown shaded green on the location plan, comprises a single planning unit.
18. While I have found the area of land shaded green comprised a single residential planning unit at the date of the LDC application, this does not mean that the residential use of the land is lawful. If it is found that part of the site was previously outside of the residential planning unit, for example, and there has been a material change of use of the land from agriculture to use as residential garden, the question will be whether the use is immune from enforcement action under section 171B(3) of the Act.

Has the planning unit changed over time?

19. The appellant suggests, given the name of the site, that it once comprised a farmhouse with 20 acres of farmland. An OS map, published in 1886, shows a number of buildings, with a parcel of land attached, which, it is suggested, given its size and proximity to The Farmhouse, is most likely to have served 'domestic purposes'.
20. However, although The Farmhouse would have been in residential use, while it formed part of an agricultural unit, it is likely the adjoining land would have been used for both residential and agricultural purposes. Indeed, tracks either side of a grouping of mature trees/vegetation on an aerial photograph dated 1999 point towards heavy machinery, such as a tractor and trailer, using the site around that time, suggesting it was used for the purposes of agriculture.
21. The appellant suggests that around 1999 the farm was split and by 2006, aerial photography shows the layout of the appeal site had changed, with a driveway now constructed along the northeastern boundary of the appeal site. The grouping of mature trees/vegetation is still evident within the site, however, dirt tracks are no longer visible within the site, suggesting it was no longer used by farm vehicles.
22. Although there is dense vegetation around parts of the site, there are also clear gaps in the hedgerow at the southern most point of the site and the grouping of trees and eastern boundary hedge. There does not appear to be a hedgerow bounding the north eastern driveway at this point, leaving a triangular section of land apparently open, only enclosed by virtue of the access road itself. Given the dense vegetation dividing parts of the site, I consider it unlikely the whole of the area shaded in green would have been used for residential purposes at that time.
23. In 2010, an area of hardstanding next to the dwelling is visible, though the remainder of the site appears largely unchanged, save for some additional planting. An aerial photograph shows that by 2016, there is a hedge around much of the site. Fencing is also evident within the site, which appears to delineate an area of land closest to the dwelling and the remaining land to the south east. Dirt tracks are again evident within the site, running from the south eastern corner of the site, up towards the dwelling. This points towards the occupants of the dwelling using the entirety of the site, however, for what purpose is not clear. Aerial photographs dated 2017, 2019 and 2021 show limited change in terms of the layout of the site. By the time of the LDC application, the site appears quite different, with fencing no longer evident within the site and many of the trees removed.
24. The Council advise representations were received from two local residents, who suggest the land was separated into 2 paddocks, one an orchard and one is suggested to have had cattle on it in the last 10 years, including sheep and horses up until the sale in 2021. While animals are not evident within the site in aerial photographs provided by the appellant, these provide a snapshot in time and do not show the site has not been used by animals. Indeed, fencing within the site is suggested to have been stockproof fencing, which is generally used to enclose livestock or other animals.
25. While the appellant makes suggestions as to why the land would not have been used for the keeping of animals (a gap in boundary vegetation, a gate left

open), no firsthand account of the use of the site at that time is provided. The appellant suggests if any animals were grazing within the site, the owner of the dwellinghouse either saw an opportunity to increase his returns on the rental of the site by temporarily allowing use of some of the garden, or temporarily and informally allowed the site to be used by a neighbouring farmer in a quid pro quo for the trimming of mature hedgerows surrounding the site. However, even if only used temporarily, such use of the land may have resulted in a change to the planning unit or a material change in the use of the land, whether payment was received or not.

26. From the aerial photographs provided and the representations received by the Council, it seems unlikely the land was used solely for residential purposes. Rather, it appears likely that the planning unit has changed over time, with parts of the land used for agriculture, whether as part of a mixed use or a single primary use. Where the land was in agricultural use, its use as residential garden land would have resulted in a material change in the use of the land.

Section 171B(3) of the Act

27. Where there has been a material change in the use of the land, section 171B(3) of the Act provides that no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. However, as set out above, the character of the land and the way in which it is used appears to have changed since 2021. It seems unlikely, therefore, that the use of the land as residential garden commenced at least 10 years prior to the LDC application, i.e. on or before 13 May 2013 and continued without significant interruption for at least 10 years thereafter, and so the use would not have been immune from enforcement action on this basis.

Section 55(2)(d) of the Act

28. While I have found the residential use of land is not lawful by virtue of the passage of time, it is not disputed that The Farmhouse is in residential use and as such, section 55(2)(d) of the Act will apply, which is 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 for the purposes of the Act.
29. It may therefore be possible for the appellant to show that no enforcement action could be taken in respect of an existing incidental residential use within the curtilage of the dwelling-house because, by virtue of the exception in section 55(2)(d), it did not constitute "development".

Whether the land is within the curtilage of the dwellinghouse

30. The Act does not define the term 'curtilage'. The Permitted development rights for householders: Technical Guidance (2019) advises 'curtilage' is land which forms part and parcel with the house. Usually it is the area of land within which the house sits, or to which it is attached, such as the garden, but for some houses, especially in the case of properties with large grounds, it may be a smaller area.
31. In *Sinclair-Lockhart's Trustees v Central Land Board* (1950) 1 P&CR 195 it was held that the ground used for the comfortable enjoyment of a house or other building may be regarded as being within the curtilage of the house or building.

It is enough that it serves the purpose of the house or building in some necessary or reasonably useful way. It was held in *Methuen-Campbell v Walters* [1979] 1 QB 525¹, for land to fall within the curtilage of a building, it must be intimately associated with the building to support the conclusion that it forms part and parcel of the building.

32. The Council suggests it is necessary for the appellant to provide evidence that the stated activities have taken place for the required time period set out in Section 171B of the Act². However, curtilage may change over time. As held in *R (oao Sumption) v Greenwich LBC* [2007] EWHC 2276 (Admin) it is necessary to determine the status of the land from the factual situation existing at the date of the application.
33. *Sumption* concerned a case where the land in question comprised 'recently expanded garden' which was in separate ownership in 2004. In that case, it was held not to be relevant that the garden use had not been formally approved, what mattered was the use being made of the land, with the situation at the date of the application, November 2006, being material.
34. The plot of land within which the dwelling is located is substantial. However, size is not a conclusive test of curtilage and curtilage does not need to be confined to a small area. The lawned area forms one enclosure with the dwelling and, despite its substantial size, as a result of its physical and visual relationship with the dwelling, forms an intimate association with the dwelling. The driveways³, conversely, are separated from the rest of the appeal site by gates and fencing, such that they do not appear to form part and parcel of the building.
35. As set out above, the appellant describes the land to the rear of the dwelling as their garden and, given its layout, proximity to the dwelling and manicured appearance, I would agree it is likely to be used as such. The manicured state of the garden is evident in the photographs submitted by the appellant as part of the LDC application and appears consistent with what I saw during my site visit.
36. The appellant states they purchased the site in March 2021. In response to the Council's consultation on the LDC application, a member of the public suggests the new owner systematically removed the historic boundaries 'since occupancy'. The date of the LDC application was some 2 years after the appellant states they purchased the site. Achieving such a manicured appearance is likely to have taken considerable time and effort, given the size of the site and the extent of vegetation previously and so it seems likely the garden had been used as such for some time prior submission of the LDC.
37. The Council makes reference to a location plan submitted in support of an application, reference AVA/2021/0505, which is asserted to have shown a smaller defined curtilage. However, while I do not have any details of the submission made, the submission of a plan is not a determination as to the use of the land and cannot be interpreted as such.
38. Drawing everything together, although the rear garden is substantial, in my view an intimate relationship exists between the use of the dwelling and the

¹ Referred to in *Sumption*

² Namely 10 years

³ The extent shaded grey on the location plan.

use of the land and is likely to have existed for some time by the date of the LDC application. The garden as a whole comprises part of the land attached to the dwellinghouse and forms one enclosure with it. I therefore find that as a matter of fact and degree, the land shaded in green comprised curtilage on the date of the LDC application, and so the use of this land for any purpose incidental to the enjoyment of the dwellinghouse would have been lawful by virtue of section 55(2)(d) of the Act.

Conclusion

39. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant an LDC in respect of the residential use of land associated with the residential dwelling known as 'The Farmhouse' was not well-founded and that the appeal should succeed in respect of the land shaded in green.
40. I will exercise the powers transferred to me under section 195(2) of the 1990 Act (as amended).

M Savage

INSPECTOR



The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 13 March 2023 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and shaded in green on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

At the date of the LDC application, the land shaded in green was within the curtilage of the existing dwellinghouse and so its use for any purpose incidental to the enjoyment of the dwellinghouse as such would not have been development by virtue of section 55(2)(d) of the Act.

Signed

M Savage

INSPECTOR

Date: 22 April 2024

Reference: APP/M1005/X/23/3326331

First Schedule

The use of the land shaded in green for any purpose incidental to the enjoyment of the dwellinghouse known as The Farmhouse.

Second Schedule

Twenty Acres Farm, The Farmhouse, Riddings Lane, Dalbury Lees, Derbyshire,
Ashbourne DE6 5BG

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 22 April 2024

by M Savage BSc (Hons) MCD MRTPI

**Land at: Twenty Acres Farm, The Farmhouse, Riddings Lane, Dalbury Lees,
Derbyshire, Ashbourne DE6 5BG**

Reference: APP/M1005/X/23/3326331

Scale: Not to Scale

