



Appeal Decision

by **G Robbie BA(Hons) BPI MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 10th September 2024.

Appeal Ref: APP/Y9507/X/23/3321900

Hazelnut Cottage, The Street, Lodsworth, West Sussex GU28 9BZ

- 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 and Mrs Gardner against the decision of South Downs National Park Authority.
- The application ref SDNP/23/00540/LDE, dated 7 February 2023, was refused by notice dated 12 April 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 was initially described as *'The lawful certificate relates to an area of land north-east of Hazelnut Cottage, and seeks to confirm that the land in question has been in use as part of the domestic curtilage (C3 use) associated with Hazelnut Cottage for at least the past 10 years continuously'*.

Formal Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use namely "the use of the land described formerly as 'paddock' to the north-east of Hazelnut Cottage as garden land in connection with Hazelnut Cottage" which is found to be lawful.

Preliminary Matters

2. The application for a certificate of lawful use of development (LDC) was initially described in the terms set out in the banner heading, above, whilst the Council adopted a different description in their decision notice. However, I have adopted a revised description in my formal decision as this more concisely and accurately describes the existing use for which the LDC is sought, as follows:

Use of the land described formerly as 'paddock' to the north-east of Hazelnut Cottage as garden land in connection with Hazelnut Cottage.

In so doing, I am satisfied that neither party would be disadvantaged.

3. Both parties have indicated on their respective appeal forms that the area of land to which the LDC application relates is at the rear of the property and that it cannot be seen from publicly accessible vantage points. As such, the appeal forms indicate that it is considered essential that the Inspector visit the site to view the use. However, the purpose of the LDC application seeks to demonstrate the lawfulness of the use and, specifically, that it has been used as such for at least 10 years at the time of the application. Despite the indications of both parties regarding the need for a site visit, I am satisfied that a visit to the site is not necessary for the purposes of determining whether or not, at the point at which the LDC application was made, the use in question had been in existence for a period of at least 10 years. I have determined the appeal accordingly.

Main Issue

4. The main issue is whether or not the Council's decision to refuse to grant a certificate of lawful use or development for the use of paddock to the north-east of Hazelnut Cottage as garden land in connection with Hazelnut Cottage was well-founded.

Reasons

5. This application is made under s191(1)(a) of the 1990 Act. For the purposes of the Act uses are lawful at any time if, under s191(2)(a) 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. Under s55(2)(d) of the 1990 Act, 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, does not involve the development of land.
6. For the appellant's case to succeed, in accordance with section 171B(3) of the Act, it would be necessary to show, on the balance of probabilities, that the use of the land as domestic garden in connection with Hazelnut Cottage has continued for at least a 10 year period since prior to the LDC application being made, that being 7 February 2023 and thus 7 February 2013.
7. The onus of proof in an LDC application is on the appellant. Planning Practice Guidance¹ states that *'in the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability'*.
8. The appeal property, Hazelnut Cottage, was granted planning permission in November 1994² (the 1994 permission). The appellant's extract of the approved site layout plan³ shows the L-shaped building with a broadly square area of land to its east, largely enclosed and annotated as 'garden'. Beyond, and wrapped around this area on its northern and eastern edges, a larger area is annotated as 'paddock'.
9. The Council has provided further commentary on the 1994 permission stating that there was an informative included within the decision notice, advising the applicant that *'the residential curtilage is limited to the site shown edged red on the submitted plan'* and that *'the adjacent land (edged blue on the submitted plan and annotated 'Paddock') may not lawfully be used for residential domestic purposes'*. However, the approved site layout plan presented with the appeal does not indicate areas of land edged in either red or blue. Instead, the plan, reproduced in black and white, does not allow any previously coloured line to be clearly discerned, with the areas annotated as 'garden' and 'paddock' being partially separated by an unexplained feature on the plan. Neither party has been able to provide a coloured version of the plan, whilst the Council has subsequently confirmed that no such plan now exists in its possession.

¹ Paragraph: 006 Reference ID: 17c-006-20140306

² LPA Ref No: 94/01380/FUL

³ Page 6 - appellant's 'Appeal Statement' and also Appendix B - LPA 'Appeal Statement'

10. However, aerial photos submitted by both parties show what appears to be either a hedgerow or row of shrubs in a position and alignment that broadly corresponds with what is shown on the approved 1994 plan. There is broad agreement between the two main parties that the site was laid out in the manner shown on the 1994 permission drawings, and I am satisfied that the aerial imagery over time confirms as much, and also the retention thereof for a considerable period of time since.
11. Notwithstanding that neither 'curtilage' nor 'paddock' are land use terms and that residential curtilage does not necessarily imply a domestic residential garden use, the Council appear not to disagree with the appellant's contention that the areas shown on the 1994 permission plan as 'garden' and 'paddock' have been within the domestic residential curtilage of Hazelnut Cottage continuously since the implementation of that permission. That does not necessarily however equate to the domestic residential garden use of the area of land in question associated with that of the appeal property.
12. The appellant has submitted two statutory declarations in support of the appeal scheme, one of which is from the previous owner and occupier of the appeal property. Whilst neither cover the period immediately following the grant and subsequent implementation of the 1994 permission, the declaration of the property owner between 1998 and 2020⁴ (the Simons declaration) states that the whole of the land edged in red on the declaration's accompanying plan was used as garden land associated with the residential property, including for the use of recreational and leisure activities, the playing of ball games and the installation of a swing and climbing frame. It also states that the area in question was regularly maintained by way of lawn mowing and the planting of flowers. Furthermore, the declaration refers to the land being in continuous use as garden land for the entirety of the ownership.
13. The second of the declarations, from the current owner and appellant⁵ (the Gardner declaration), confirms that the area of land in question has been used as domestic garden associated with Hazelnut Cottage for the duration of the current ownership. In addition, within this period of ownership and timeframe further domestic paraphernalia has been sited within the land in question⁶, including a children's trampoline, rope swing and swinging net.
14. Taken together with the Simons declaration, I find these declarations to be persuasive. Given the status ascribed to statutory declarations and their content, any lies about the information contained therein could be prosecuted for the crime of perjury, and if convicted may have to pay significant fines or be sentenced accordingly. Thus, I give these documents and their content significant weight.
15. Whilst the Council question the worth of the photographs submitted to accompany the Simons declaration as not being definitive, those images nevertheless provide snapshots of the use, nature and character of the area of land in question across an extended period of time. Whilst perhaps not, as the Council seeks to suggest, determinative in themselves, when taken together with the range of aerial imagery that covers a period in excess of ten years from the date of submission of the LDC application, and which also shows some

⁴ Statutory Declaration: Deborah Joyce Simons – dated 25 January 2023

⁵ Statutory Declaration: Helen Gardner – dated 25 January 2023

⁶ Exhibit 2 to the Gardner declaration

of the elements and features referred to in both of the statutory declarations, and the content of the statutory declarations themselves, this creates a strong narrative as to the nature of use of the area of land in question.

16. The Council have suggested that the land may have been used from time to time for recreation or amenity purposes over the years and have sought to argue that its use in that manner for not more than 28 days a year would not amount to a material change of use. Such a use would not, it is suggested, be uncommon for a plot of land like the appeal site in a semi-rural area. There has not however been any real attempt to substantiate this suggestion. Nor has there been to explain the Council's further contention that the introduction of a pergola to this area in approximately 2022 brought about the change of use of the land to garden area, when the statutory declarations and aerial imagery suggest that the nature of use of this area, and the range of structures on it prior to that, was not materially different prior to the installation of the pergola.
17. The timing of the receipt of the enforcement complaint by the Council is not, in my judgement, as definitive as the Council suggests, following, as it is implied, the introduction of a pergola-like structure to the area of land in question in 2022. However, from the available evidence the pergola is just the latest in a range of domestic structures placed within this area of land and there is very little difference, in terms of seeking to demonstrate the subsisting use of the land, between a pergola and climbing frames or a swing frame structure.
18. In LDC applications and appeals, the onus is upon the appellant to make out their case to the standard of the balance of probabilities. No one part of the evidence submitted by either party is determinative by itself. However, taken together, that submitted by the appellant is sufficiently compelling, precise and unambiguous, and creates an acceptably persuasive narrative as to the nature of the use of the land in question and its relationship to the main house, such that, on the balance of probabilities, I conclude that the appellants' case should succeed. As such, on the balance of probabilities it is more likely than not that the land in question has been used without substantial interruption as domestic residential garden associated with Hazelnut Cottage since at least 7 February 2013.

Conclusion

19. 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 use of the land described formerly as 'paddock' to the north-east of Hazelnut Cottage as garden land in connection with Hazelnut Cottage was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act (as amended).

G Robbie

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 7 February 2023 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red 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:

When taken together, the evidence submitted by the appellant is sufficiently compelling, precise and unambiguous, and creates an acceptably strong narrative as to the nature of the use of the land in question and its relationship to the main house, such that, on the balance of probabilities it is more likely than not that the appeal site has been used without substantial interruption as domestic residential garden associated with Hazelnut Cottage since at least 7 February 2013.

Signed

G Robbie

Inspector

Date: 10th September 2024.

Reference: APP/Y9507/X/23/3321900

First Schedule

Use of the land described formerly as 'paddock' to the north-east of Hazelnut Cottage as garden land in connection with Hazelnut Cottage.

Second Schedule

Hazelnut Cottage, The Street, Lodsworth, West Sussex GU28 9BZ

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 described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was 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 described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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: 10th September 2024.

by G Robbie BA(Hons) BPI MRTPI

Land at: Hazelnut Cottage, The Street, Lodsworth, West Sussex GU28 9BZ

Reference: APP/Y9507/X/23/3321900

Scale: Not to Scale

SITE LOCATION PLAN

Hazelnut Cottage, The Street, Lodsworth, West Sussex, GU28 9BZ

