
Appeal Decision

Site visit made on 30 July 2024

by D Boffin BSc (Hons) DipTP MRTPI DipBldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 13 September 2024

Appeal Ref: APP/W0340/X/23/3331425

The Round Oak, Reading Road, Padworth Common, Reading RG7 4QG

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) (the 1990 Act) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Eric Howell against the decision of West Berkshire District Council.
 - The application ref 23/00615/CERTE, dated 10 March 2023, was refused by notice dated 2 August 2023.
 - The application was made under section 191(1)(a) of the 1990 Act.
 - The use for which a LDC is sought is ancillary residential use to the dwelling at The Round Oak.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of the existing use, in the banner heading above, is taken from the application form but I have deleted the wording '*change of use of the land under the 10-year rule to determine that it has been used as*' given that it is superfluous and relates to the reason for the application.
3. Several appeal decisions¹ have been cited within the evidence before me and I have taken the specific references cited by the appellant into account in my reasoning below.

Reasons

4. The main issue is whether the Council's decision to refuse to grant an LDC was well-founded. The burden of proof is with the appellant and the appropriate test of the evidence is the balance of probabilities. The onus is firmly on the appellant to show that the use of the appeal site for ancillary residential use to the dwelling, The Round Oak, was lawful at the time the application was made. A use is lawful under the provisions of section 191(2)(a) of the 1990 Act if no enforcement action may be taken in respect of it whether because it did not involve development or require planning permission or because the time for enforcement action has expired.

¹ APP/P2365/X/21/3280590; APP/V2255/X/20/3249583; APP/A4710/X/19/3242931; APP/T3725/X/15/3002141; APP/A2525/X/21/3272344

5. Paragraph 006² of the Lawful Development Certificates section of the Planning Practice Guidance (PPG) advises in the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probabilities.
6. In the *O'Flynn*³ judgment it was held that under section 191(2)(a) of the 1990 Act, 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 1990 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. The *O'Flynn* judgment also states that, *'tending the garden in which a dwelling-house is situated is quintessentially an activity carried out by home owners incidentally to the residential use of the dwelling-house'*. It goes on to state that *'an owner's recreational use and enjoyment of a plot of cultivated land in which his dwelling-house is situated can amount to a use of the land which is incidental to residential use.'*
7. The Round Oak is a relatively large, detached dwelling that was converted from a public house sometime before 2013. It has a landscaped garden area adjoining it and there is a gravel drive that loops around the house and garden area from 2 accesses off Reading Road. The land that is the subject of the appeal extends to the rear of the garden areas to 3 neighbouring dwellings and it is a relatively large area of mown grass. There are some containers stationed on the land adjacent to the gravel drive. Moreover, at the time of my visit there were some moveable football goal posts and a badminton net, a moveable gazebo with table and chairs under it and a timber stable building on part of the land. On the eastern boundary of the appeal site there are a few large trees and on the other side of those trees is another relatively large mown area of grass that is also owned by the appellant.

Curtilage

8. For the appeal to be successful on the first route, it must be established that the land is within the curtilage of the dwellinghouse, and it is used for any purpose incidental to the enjoyment of the dwellinghouse. Curtilage defines an area of land in relation to a building and there is no all-encompassing, authoritative definition of the term curtilage and it is not defined within the 1990 Act.
9. I have been referred to various judgments on the matter of curtilage⁴. The Courts have often addressed the meaning of 'curtilage', most frequently in

² Reference ID: 17c-006-20140306

³ *O'Flynn v SSCLG & Warwick DC* [2016] EWHC 2984 (Admin) (*O'Flynn*).

⁴ *Sinclair-Lockhart's Trustees v Central Land Board* (1950) 1 P&CR 195 (*Sinclair*); *Methuen-Campbell v Walters* [1979] 1 QB 525 (*Methuen-Campbell*); *HM Attorney-General ex rel Sutcliffe & Rouse & Hughes v Calderdale BC* [1983] JPL 310 (*Sutcliffe*); *R (oao Sumption) v Greenwich LBC* [2007] EWHC 2276 (Admin) (*Sumption*); *Challenge Fencing Ltd v SSHCLG & Elmbridge BC* [2019] EWHC 553 (Admin) (*Challenge Fencing*); *Hiley v*

relation to listed buildings. Two relatively recent cases include *Hiley* and *Blackbushe* and both of those judgments extensively review a number of previous judgments including that of *Sinclair*, *Methuen-Campbell*, *Sutcliffe*, *Sumption* and *Challenge Fencing*. The findings of the Court of Appeal in *Blackbushe* were cited within *Hiley*. At paragraph 61 of *Blackbushe* a passage from *Methuen-Campbell* is quoted and at paragraph 62 Andrews LJ states that '*this as good an expression of the concept of curtilage as one is likely to find*'. The test in *Methuen-Campbell* that these judgments refer to is that '*for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter*'. Andrews LJ goes on to state at paragraph 116 of *Blackbushe* that '*the conclusion to be drawn from the authorities is that they all illustrate different applications of the same test to the facts and circumstances of the specific cases. They demonstrate that the curtilage in a given case is a question of fact and degree....the approach of Buckley LJ in Methuen-Campbell has been adopted and followed in all the different statutory contexts in which the concept of "curtilage" has been considered...*'.

10. In *Sutcliffe* Stephenson LJ stated that '*three factors have to be taken into account in deciding whether a structure (or object) is within the curtilage of a listed building They are (1) the physical 'layout' of the listed building and the structure, (2) their ownership, past and present, (3) their use or function, past and present.*' These have become known as the "*Stephenson factors*".
11. *Hiley* also cites *Challenge Fencing* as being helpful and paragraph 18 of that judgment which sets out six propositions drawn from the authorities on curtilage is quoted. These include those cited above and can be summarised as:
 - The extent of the curtilage of a building is a question of fact and degree, and a matter for the decision-maker.
 - The three 'Stephenson factors' (taken from *Sutcliffe*) must be considered.
 - A curtilage does not have to be small, but that does not mean that the relative size of the building and its claimed curtilage is not a relevant consideration; *Skerritts*⁵.
 - Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration, but it is not a legal requirement that the claimed curtilage should be ancillary; *Skerritts*.
 - The degree to which the building and the claimed curtilage fall within one enclosure is relevant, *Sumption* and the quotation from the Oxford English Dictionary (OED) cited in *Dyer*⁶ – and this will be one aspect of physical layout (*Sutcliffe*).

Secretary of State for Levelling Up, Housing and Communities [2022] EWHC 1289 (Admin) (*Hiley*) and *Hampshire CC & the Open Spaces Society & Others v SSEFRA & Blackbushe Airport Ltd* [2020] EWHC 959 (Admin), [2021] EWCA 398, [2020] JPL 1359 (*Blackbushe*).

⁵ *Skerritts of Nottingham Ltd v SSETR* (No. 1) [2000] EWCA Civ 60; [2000] JPL 789

⁶ *Dyer v Dorset CC* [1988] 3 WLR 213

- The relevant date on which to determine the extent of the curtilage is the date of the application; but this will involve considering both the past history of the site, and how it is laid out and used at the time of the application itself; *Sumption*.
12. Paragraph 65 of *Blackbushe* is then quoted with regards to enclosure in which LJ Andrews states that '*...Nor is the test whether they fall within a single enclosure. The question whether, by reason of the association between them, the law would treat them as if they formed one parcel, or as an integral whole, depends on the application of the "part and parcel" test to the facts of the particular case.*'
 13. The appeal site, the dwellinghouse and the additional land to the east of the trees are all in the ownership of the appellant. The evidence before me indicates that all that land was owned by the public house prior to the building being converted to residential use.
 14. The dwellinghouse faces and is relatively close to Reading Road. The 2 access points that link the gravel drive are either side of the dwellinghouse and both are gated. The landscaped garden areas that adjoin the front and rear elevations of the dwellinghouse are enclosed by boundary treatments which include shrubs and hedges. These areas include decorative planting, garden structures and furniture in a very domestic arrangement. They have a very intimate association with that dwelling. This is due to their proximity to that dwelling as well as the enclosure which provides well-defined boundaries to other activity that may take place along the gravel drive.
 15. The appeal site is a relatively large mainly grassed area that extends to the rear of 3 neighbouring dwellings that front Reading Road. Therefore, most of the appeal site is not directly behind the dwellinghouse, The Round Oak. The grass is closely mown but there is little ornamental planting and garden furniture within this area. As a result, its character and appearance are appreciably different to that of the garden areas that adjoin the dwellinghouse. Part of the gravel drive is located between the garden areas and the appeal site, and another section of the gravel drive extends into the part of the appeal site adjoining the containers. As such there is vehicular and pedestrian access from the gravel drive into the appeal site.
 16. Nonetheless, in my view, the appeal site is more closely related visually and physically to the land to the east of the trees than to the dwellinghouse and the garden areas adjoining it. The land to the east and the appeal site are both closely mown, and they are physically linked. When viewed from the gravel driveway they have the appearance of one very large mown grassed area with a few trees within it. The above factors relating to physical layout serve to reinforce a strong sense of separation between the appeal site and the dwellinghouse and its adjoining garden areas.
 17. It appears that, based on the evidence before me, the appeal site or part of it was utilised as a beer garden associated with the public house prior to that public house closing in 2010. Since January 2013 the appellant has occupied the dwellinghouse and he submitted a statutory declaration with the LDC application. The declaration of the appellant is sworn, and, in that regard, I attribute the statements contained therein significant weight. However, the declaration only includes generalised assertions about the use of the land

referring to family parties and family leisure use. The use of the containers for the storage of household items and that the grass has been maintained by mowing is also cited.

18. At my site visit I noted that one of the storage containers appeared to be in use to store/utilise small pieces of machinery that may be used in the maintenance of a house and garden. On top of one of the containers and on shelving adjoining that container there were several scaffolding poles and planks stored. There were also various building materials including bricks, tiles and timber adjacent to that shelving. The stable building did not appear to be in use to keep horses/animals in. As stated above, there were also moveable items on the land which suggest it serves a necessary and reasonable purpose for the appellant and his family as it appears to provide, amongst other things, space for children to play, for sitting and general recreation and for holding parties and barbecues.
19. A third party has stated that they have attended garden parties on the lawns. Another third party, who has kept horses in a neighbouring paddock for 9 years, has stated that since they have been there the land has always been used by the owner and his family for playing in and for get-togethers. Several other third parties refer to the grass being mown and kept tidy.
20. Nonetheless, it is not clear how the use or function of the appeal site differs to that of the land to the east of the trees. In his statement of case the appellant's agent indicates that the land to the east of the trees is where community events were held, and football matches have been played. A marked-out football pitch is visible on that land in the aerial photographs dated 2020, 2018 and 2017. It is also stated that any community events could be carried out as permitted development as cited within the Council's Officer Report associated with the LDC application. In that Officer Report the Council cite Schedule 2 Part 4 Class B (Class B) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). Class B relates to the temporary use of land.
21. The submitted photographs in support of the LDC application are dated the 4 August 2017, 23 May and 14, 15 June 2018, 6 July 2019 and 2, 3 and 6 July 2021. The August 2017 photographs show a bouncy castle, a tent and vehicle and 2 quad bikes with what appears to be a track marked out with red and white tape. Due to the tight frame and angle of the photographs it is not entirely apparent where on the grassed areas the items are located.
22. The May and June 2018 photographs show the grass mown on the appeal site, the football goal posts on the land to the east and portable toilets being delivered or removed from a grassed area. The July 2019 photographs show marquees set up adjacent to the trees by the eastern boundary of the appeal site and numerous people standing and sitting by those marquees. The July 2021 photographs appear to relate to a wedding being held in marquees on grassed areas, but it is not clear which part of the grassed areas these photographs relate to. Moreover, there is no corroborating evidence to indicate whose wedding it is.
23. In any case, the photographs are not typically illustrative of events/activities related to a residential use, such as the wedding or the delivery/removal of portable toilets. All of the illustrated activities may have been happening as

part of a family event, but they could also have been happening as part of a temporary community event. They could also have occurred on the appeal site, the land to the east of the trees or all the grassed area. The photographs are therefore not determinative in relation to the function/use of the appeal site. Likewise, the garden parties and get togethers referred to by the third parties could have been family events or community events. I acknowledge that those temporary uses of the land may not have required planning permission. In addition, it is unusual to see the amount of building materials and scaffolding parts stored on land associated with a residential use especially when the works to create the dwellinghouse were carried out approximately 10 years ago.

24. The appeal site has been associated with The Round Oak in ownership terms for many years. The use or function of the appeal site appears to have been associated with The Round Oak when it was a public house. Its current use or function is not clearly apparent, it is mown and maintained by the appellant, it appears to provide, amongst other things, space for children to play, for sitting and general recreation. Nevertheless, there are building materials stored on the site and family or community events appear to have been held on it. It is not clear how its use or function is different to that of the land to the east of the trees which has been used for football matches and community events. Furthermore, I have found that factors relating to physical layout serve to reinforce a strong sense of separation between the appeal site and the dwellinghouse and its adjoining garden areas.
25. Therefore, in my judgement based on the evidence before me the appeal site does not have an intimate association with the dwellinghouse, The Round Oak. As such, I find as a matter of fact and degree, on the balance of probabilities that the appeal site cannot reasonably be treated as forming part and parcel of the dwellinghouse and it is therefore not within its curtilage. Therefore, at the time the LDC application was made, even if the use of the appeal site was for any purpose incidental to the enjoyment of the dwellinghouse that use did not benefit from the provisions of section 55(2)(d) of the 1990 Act.

Whether the time limit for enforcement action has expired

26. The appellant has indicated by the submission of their LDC application that a material change of use of the appeal site has occurred. There is scant evidence before me to justify why it is considered that a material change of use has occurred. Also, there is no detail of how the appeal site and the land to the east were used when the public house was open. It is not clear if all or part of the appeal site was utilised as a beer garden associated with the public house.
27. Nevertheless, as stated previously, the appellant has submitted a statutory declaration and, in that declaration, it is stated that the appeal site has been used as ancillary residential land since the occupation of The Round Oak began in January 2013 (2 different dates are quoted – 10 and 13 January 2013). It goes on to state that it has been used continuously for ancillary residential activities including family parties, family leisure and the siting of containers for storage of household items. It also states that the grass has been maintained by mowing.

28. Whilst the statements in the declaration have significant weight, they are generalised assertions with little detail attached to them. I acknowledge that due to the length of time that has lapsed that *'it may be unrealistic to expect absolute precision and a complete absence of any ambiguity'*⁷. However, there is no detail of what activities happened in January 2013 that may have constituted the commencement of the material change of use. As the appellant would have newly occupied the dwellinghouse I consider that what activities were first carried out on the appeal site would be easier to recollect. Moreover, given the time of year I would suggest that mowing of the grass, family leisure activities and family parties would not normally be carried out in the winter months.
29. In addition, no evidence has been provided of what family members moved into the dwelling in January 2013 and whether there were children in the household, pets such as dogs that needed exercise or other animals such as horses. No examples of the type of family leisure activities that have taken place on a regular basis on the appeal site have been provided. There is no supporting explanation as to how this relatively large, grassed area was utilised by the members of the household on a typical day.
30. As stated above, the photographs show events taking place on grassed areas, but it is not clear if that is within the appeal site. There is no supporting evidence to describe what the events were celebrating or whose wedding it was. Those types of details I consider would be relatively easy to recollect given that the photographs are dated. Moreover, those events may have been community events rather than specific family parties. I have found above that the photographs are not determinative in relation to the function/use of the appeal site. The garden parties and get-togethers cited by third parties may have been family celebrations, but they may also have been community events. The third party who has kept horses on the neighbouring land for 9 years, has stated that since they have been there the land has always been used by the owner and his family for playing in. But no detail of what activities that entailed or how often have been provided. In any case that only covers a 9-year period and not 10 years.
31. Whilst they are only a snapshot in time, the aerial photographs submitted in support of the appeal show very little evidence of the family leisure uses or parties stated to have taken place on the land, other than the grass being mown. The application form associated with the planning application for stables that was submitted in 2016 states that the current use of the site is residential (garden), that it is vacant and that its last use was as garden. However, the site plan within the evidence before me has a red line around the whole of the land in the ownership of the appellant.
32. There is no evidence before me to indicate why the containers are required to store household items given that the dwelling appears to be substantial in size itself. Furthermore, as the appeal site and the land to the east of the trees are both grassed areas maintained by mowing it is not clear how the use of these areas has differed. The trees are the only physical demarcation points between these areas of grass and there is/ has been very little

⁷ Appeal Ref: APP/A2525/X/21/3272344

restricting access between them. As such, there would be little restricting the use/s of them from occurring on and flowing onto both grassed areas.

33. In my judgement, the evidence indicates that the appeal site has been maintained by mowing for many years and that all or part of it has been used occasionally for a range of activities associated with specific events. It is also more likely than not that some of the appeal site has been used for sitting out in or playing games on or similar family leisure uses. Moreover, some or all the storage containers appear to have been used for ancillary domestic storage. However, on the balance of probabilities, I conclude that it has not been shown with sufficient precision and unambiguity that all the appeal site has been used continuously for ten years or more for an ancillary residential use to the dwelling at The Round Oak.

Conclusion

34. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of ancillary residential use to the dwelling at The Round Oak 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.

D Boffin

INSPECTOR