
Appeal Decision

Site visit made on 19 August 2024

by A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 November 2024

Appeal Ref: APP/D0840/X/23/3321884

The Cottage, Trevenen Bal, Helston, Cornwall, TR13 0PP

- 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 "Act".
- The appeal is made by Mr Clive King against the decision of Cornwall Council.
- The application ref PA22/06268, dated 5 July 2022, was refused by notice dated 1 September 2022.
- The application was made under section 191(1)(a) of the Act.
- The use for which a LDC is sought is for an existing use described in the application form as "incidental to the associated dwelling house".
- An application is made by the appellant against the Council. I will address this at the end of this decision.

Decision

1. The appeal is dismissed.

Inspector's Reasons

2. The burden is upon the appellant and the standard of proof is on the balance of probabilities. The bundle of evidence includes statements and documents described as "declarations" made by the appellant and previous owner. The declarations are statements and are not formal statutory declarations or affidavits. I understand the reasons why the previous owner could not physically attend a solicitor's office, but these statements are not properly executed statutory declarations. This affects the weight I can attach to them.
3. The appeal relates to a parcel of land that is outlined in red on the site plan submitted with the application. It is roughly west and north-west of the existing dwelling, but the Council refer to the land as the southern and northern parcels. The agent confirms the latter is a better description and I shall adopt it. For convenience shorthand, I will refer to the appeal site as the "LDC land".
4. The existing use is described by the agent as "incidental to the associated dwelling house"¹. Essentially, the claim is that the existing use of the LDC land is incidental to the residential use of The Cottage as a dwellinghouse: otherwise, it would make no logical sense. I will therefore refer to the existing use as "incidental residential use".
5. The evidence is that the LDC land was purchased in 2020. The claim is that prior to the appellant's ownership the land was in an incidental residential use. The argument is a simple one, namely, at the date of the LDC

¹ Reason for the LDC but the section "description of existing use, building works or activity" states "see supporting statement".

application, the existing use of the LDC land is lawful due to the passage of time. The claim is that existing use commenced on or before 5 July 2012 and has continued thereafter without significant interruption.

6. There are two alternative routes by which it is possible to establish that the existing use is lawful assuming that the evidence presented establishes the claimed incidental residential use was in existence on or before the relevant date. The first route is through the operation of law. At the date of the application no enforcement action could be taken, because the LDC land falls within the curtilage of the dwelling house. That being so, the exception in s55(2)(d) of the Act applies and such a use does not fall within the meaning of "development". The second route is to establish that no enforcement action could be taken in respect of the existing use, because the 10-year time limit for enforcement action has expired: the evidence presented falls into the last category.
7. The concepts of curtilage and planning unit are distinct and separate; they should not be confused. The latter is a concept evolved as a means of determining the most appropriate physical area against which to assess the materiality of change in the use of land. The mere fact that the LDC land physically adjoins the curtilage to the dwelling, does not automatically mean that it is now curtilage land. Curtilage defines an area of land in relation to a building and not a use of land.
8. The arguments advanced by the agent in favour do not confirm to me that the LDC land is part of the curtilage to the dwelling. Apart from different ownership, the LDC land does not have an intimate or close association with the dwelling. This is because of its location and positioning, especially when compared with land that is around and about the dwelling.
9. The leading authority on planning unit is the case of *Burdle*². Starting with the unit of occupation, the assessment turns on the concept of physical and functional separation. The Courts have consistently applied three broad tests for determining the appropriate planning unit when assessing materiality in the change in the use of land. The assessment is a matter of fact and degree, and as a useful working rule, it should be assumed that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.
10. The LDC land was incorporated into a single unit of occupation in residential use. However, although the LDC land can be accessed from the grounds of the existing property, it was physically separate, due to its location and the existence of barriers. The degree of separation has changed over time but the physical layout suggests separate parcels of land.
11. The appellant heavily relies upon the previous owner's written statement to prove the land's incidental residential use, but there are some internal inconsistencies. For example, the previous owner states that the LDC land had been regularly mowed and used for social gatherings like picnics or barbeques between 1999 and 2020. These activities can be regarded as incidental, but the statement refers to a portion of the LDC land - the western part, and it does not relate to the entirety of the LDC land. In contrast, the appellant maintains that the incidental residential use continued after his acquisition, but the intensity and frequency of that use is unknown as there is a lack of specificity. There is ambiguity because it is unclear as to the extent of the incidental residential use of the LDC land.

² *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.

12. I find the aerial imagery particularly instructive. Although a snapshot in time, the evidence casts doubt on the veracity of the appellant's claim. Between 2009 and July 2020, the images clearly show the northern part of the LDC land covered by dense foliage. The land is totally covered by solid tree canopies. That was the condition until around July 2021. The appellant's own evidence is that the trees were removed, and the logs were either given away or stored for future use by the family.
13. The aerial images indicate that the LDC land had been used for a different purpose before it was acquired by the appellant. It is plausible that the northern part of the LDC land was in a forestry use albeit the previous owner did not harvest trees. I consider that the LDC land's use can be characterised as agriculture or forestry. Apart from vague assertions that the aerial imagery does not show residential activity beneath the canopy cover, there is nothing from the appellant to make less than credible this evidence.
14. Even if the appellant's evidence is taken at its highest, a very small portion of the LDC land, roughly located to the west of the dwelling, was intermittently used for incidental residential purposes. However, once the appellant purchased the LDC land in about 2020 it was incorporated into a single ownership. The trees to the north were removed, and the entire land cultivated and maintained as a garden to the dwellinghouse. The quantum of evidence points in the likelihood that the nature and scale of the incidental activity has resulted in a change in the definable character of the LDC land.
15. For consistency's sake, there is nothing in the Blaby District Council³ that suggests I should allow this appeal decision. I too have applied the case law cited by that Inspector, but that case is not on all-fours with this appeal. The material facts are different because in this case the appellant's evidence does not sufficiently establish the claimed incidental residential use was in existence on or before the relevant date. There is nothing to show the use continued for the requisite period. In a similar vein, Sandridge Park⁴ is also distinguishable because the LDC land was included into the planning unit after 2020 when the appellant purchased the land. The primary use of that land was agriculture or forestry. At risk of repetition, the appellant has failed to show that the existing incidental residential use is lawful by reason of immunity.

Conclusions

16. Drawing all the above threads together, on the balance of probabilities, I find that the appellant has not discharged the burden of proof because the evidence presented is too ambiguous, imprecise, incomplete, and vague to show that the incidental residential use of the LDC land commenced on or before 7 July 2012 and has continued thereafter without significant interruption.
17. For all the reasons given above and having regard to all other matters, I conclude that the appeal should be dismissed in accordance with the powers transferred to me in section 195(3) of the Act.

A U Ghafoor

Inspector

³ APP/T2405/X/19/3232820.

⁴ APP/Y3940/X/15/3033313.

Costs Decision in relation to APP/D0840/X/23/3321884

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Clive King for a full award of costs against Cornwall Council.
 - The appeal was against the refusal of a certificate of lawful use or development for incidental to the associated dwelling house.
-

Decision

1. The application for an award of costs is refused.

Reasons

2. In appeal proceedings the parties bear their own costs. Costs can only be awarded if unreasonable behaviour resulting in wasted or unnecessary expense is demonstrated. A costs decision does not follow the outcome. The Planning Practice Guidance explains the kind of behaviour which can be regarded as procedural or substantive unreasonableness.
3. The applicant complains that the respondent Council's decision notice refusing the LDC refers to the existing use as "use of land as residential garden" whereas the application was for use "incidental to the associated dwelling house". There is some difference in the phraseology but the change in the description of the existing use does not suggest the respondent misdirected itself. The delegated report combined with the evidence submitted at appeal clearly shows the respondent understood the nature of the existing use for which a certificate was sought – incidental residential use. The respondent refused the LDC, and the reasons given are intelligible and clear.
4. The respondent defended its approach at appeal and submitted sufficient evidence. The applicant disagrees with the aerial imagery. However, my decision explains why I have found weakness in the evidence presented by the applicant. I am not persuaded the respondent acted unreasonably in amending the description neither has it failed to substantiate its reasons for refusing the LDC.
5. I conclude that the respondent Council did not behave unreasonably in terms of the PPG and so did not cause the appellant to incur or waste expense unnecessarily. In this case, I find that an award of costs is unjustified.

A U Ghafoor

Inspector