



Appeal Decision

Site visit made on 23 December 2024

by Grahame Kean BA (Hons) Solicitor MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 January 2025

Appeal Ref: APP/B1930/X/23/3326993

Maison Rose, The Common, Kinsbourne Green, Harpenden, AL5 3PE

- 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 A Lababedi against the decision of St Albans City Council.
 - The application ref 5/23/0249, dated 5 February 2023, was refused by notice dated 28 July 2023.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is: erection of fence.
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Decision

1. The appeal is dismissed.

Main Issue

2. In an appeal under s195 of the 1990 Act the planning merits of the matter applied for do not fall to be considered. The decision is based strictly on the facts and on relevant planning law.
3. The main issue is whether the Council's decision to refuse to grant a lawful development certificate was well-founded, irrespective of the reasons for that decision. The development the subject of the application must be lawful development at the date of the application. The planning merits of the development are not relevant.
4. The onus of proof is firmly on the appellant to make their case on the balance of probabilities. The appellant's own evidence does not need to be corroborated by independent evidence. If the Council has no evidence of its own to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided the appellant's evidence alone is sufficiently precise and unambiguous.
5. In this appeal the description of the development said to be lawful is the erection of a fence. It is also said that the fence is development permitted under Class A of Part 2 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO).

Reasons

6. The appellant's case is that the contract he entered into to acquire his property included a clause requiring him to erect and maintain as necessary an "*ordinary household close board wooden fencing and posts*" as he, the buyer should consider appropriate. He bought the land intending to "*preserve the open setting*

of” his property and erected the fence to comply with the requirements of the contract.

7. In fact, as I found when I inspected the site, it would be a contradiction in terms to assert that the effect of the close boarded fence 1.8m high, entirely surrounding and separating the additional land from the open fields beyond as it does, preserves the open setting of the land as was supposed to have been intended.
8. I note the statutory declaration referring to the fencing being a condition of the contract of sale. However, a landowner’s obligations under private contract or property law do not provide a valid reason to override the provisions that set out when an LDC may be granted. Nor is the question of need or lack of need for extra amenity space relevant.
9. The clause referred to was changed by a supplemental agreement whereas the original clause only required a stock proof fence along the borders. I note also that the clause in question, even if it were relied on as a basis for inferring what had occurred as a matter of fact, only operated until January 2024.
10. Planning permission was applied for to retain the fence and create additional amenity space for the land being enclosed. The application was refused as being inappropriate development in the green belt. The appellant now states that he never intended to apply to change the use of the enclosed land. The appellant’s evidence is ambiguous given that he clearly applied for permission to change the use of the land to residential curtilage, notwithstanding that he now states that was not his intention and blames the Council officer for poor advice.
11. The fence in question is 1.8m high. Under Class A of Part 2 of Schedule 2 to the GPDO the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is permitted development. The fence, not being adjacent to a highway, is under the maximum permitted tolerance height of 2m.
12. In Schedule 2, Part 1 is concerned with development within the curtilage of a dwellinghouse, however in Part 2 which is subtitled “Minor Operations”, Class A – “gates, fences, walls etc” development is not restricted to being within the curtilage of a dwellinghouse (save where it involves a listed building).
13. An open timber post and rail fence now separates the existing garden from this additional land, but the separation is relatively superficial in character. It is referred to by the Council as the ranch fence and the appellant’s agent says it was there for 40 plus years¹. The existing garden land is “manicured” and has residential paraphernalia within it, including a tennis court and a covered swimming pool. The additional land has rough grass on it which when inspected, was free of domestic paraphernalia. However, as noted, the land in question is enclosed at the rear and sides with a residential type of fencing 1.8m high.
14. According to the Council, the ranch fence was not in situ on a site visit carried out on 19 December 2022. Indeed, photographs show domestic paraphernalia such as plant plots and ornamental birds located within the additional land. The images were taken in 2020 and 2022 by Council officers. The fact that they do not show the timber ranch fence or indeed any kind of fence separating the original garden

¹ Letter from Contour Planning, 27 June 2023.

area from the additional land, directly contradicts what has been said on behalf of the appellant in the letter of 27.6.2023. Also, in that letter reference is made to “ensuring that the land is left to become rough grass with the orchard” thus implying, although this is not explicitly stated, that the use has an horticultural aspect to it, and is therefore, having regard to the definition of agriculture in the 1990 Act, an agricultural use.

15. I do not accept this argument. Within the additional land fruit trees have been planted, there is a simple wooden plank at one end of the ranch fencing, which ones lifts to afford access from the formal garden area, the ranch fence itself being low with a simple open appearance in marked contrast to the 1.8m high close boarded fence which encloses the rear and sides of the plot. I saw that small domestic items and a bench were placed along the ranch fence just inside the pre-existing garden area, clearly an attempt to present a functional separation from the additional land. Whilst an agricultural use does not have to be by way of a trade or business, conversely there is no evidence that the fruit trees or bushes are there for purposes other than those connected with the residential use of the property.
16. The appellant’s statutory declaration states that the erection of the fence has “*the added bonus [of] providing privacy and screening to their garden*”, thus implying that such a benefit is incidental or ancillary to the use of the dwellinghouse. He also declares that the fence “*prevents wildlife from entering my property from the adjacent farmland*”. These statements suggest to me that whatever he may or may not have been obliged to do pursuant to the contract of sale, the appellant has annexed the appeal site for purposes more akin to the residential purposes of the dwellinghouse than retained it for other purposes.
17. Land may adjoin a garden and retain its definable character as use for agricultural as opposed to residential purposes, or for example areas may be closed off for use as a paddock, distinct not only from garden use but in a wider sense from the main residential use of a dwelling plot. The issue is not whether a “garden” per se is created here, or whether the curtilage of the dwellinghouse has been extended. Curtilage and land used for purposes incidental to the primary residential use of a property are two different things. The issue is whether in all the circumstances the additional land has become part of the residential use of the adjoining property.
18. The existence of fruit bushes planted in an enclosed area abutting the pre-existing curtilage/garden area might, but would not necessarily, denote an horticultural or agricultural use. Even with the recent installation of the post and rail fence with certain domestic items lined up just behind it, there is a stark contrast with the 1.8m high close boarded fence at the rear and sides of the plot, such that the whole area has the character of enclosing activities that are associated with the use of the dwelling, among which are the raised covered swimming pool and the tennis court which itself is entirely enclosed by very high fencing.
19. It is well known that the extent to which a particular use fulfils a legitimate or recognised planning purpose is relevant in deciding whether there has been a material change in use. However, a planning purpose is one which relates to the character of the use of land. Saying that the land has an horticultural or an agricultural use does not make it so. Considering the character of the use and its attendant physical characteristics, and making an objective planning judgment is the correct test, not the application of any subjective “purpose” test.

20. When considering the effect that the close boarded fence has in enclosing the property from the fields beyond, the physical layout, ownership, and the use and function of the plot as a whole, including the low post and rail fence between the original garden area and the additional land with a simple access into it, the additional land now appears to have a use incidental to the main residential use.
21. Whether or not there was a contractual obligation to do or to refrain from doing anything on the land, as a matter of fact and degree in my opinion the circumstances of the use of the additional land have resulted in a such a change in the definable character of the pre-existing use that it amounts to a material change of use for which planning permission is required. Furthermore, the 1.8m high fencing has formed an enclosure to extend the curtilage of the dwellinghouse and to facilitate a use for residential purposes ancillary to the main dwellinghouse.
22. Article 3(5) of the GDPO states, in respect of the permission granted by Schedule 2, that it does not apply if— (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful.
23. The fencing clearly forms part and parcel of the change of use and is therefore unlawful. The Council framed its reason for refusal in terms of a change to residential curtilage which is a narrower concept than residential use and used the terms interchangeably in its statement. However, its overall assessment is in my view correct. Section 191(2) sets out where uses and operations are lawful at any time. As there is no enforcement notice, sub-paragraph (a) is relevant. Uses and operations are lawful:
- “if no enforcement action may then 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)”.*
24. Here, because the fencing is part and parcel of an unlawful change of use, enforcement action might be taken against it, applying the well-established rule in Murfitt and successive authorities², that an enforcement notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or they would be permitted development or immune from enforcement.

Conclusion

25. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development 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 (as amended).

Grahame Kean

INSPECTOR

² *Murfitt v SSE* [1980] JPL 598, *Somak Travel v SSE* [1987] JPL 630, *Kestrel Hydro v SSCLG & Spelthorne BC* [2016] EWCA Civ 784.