



Appeal Decision

Site visit made on 12 November 2024

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 30 January 2025

Appeal Ref: APP/T2405/X/23/3329168

The Mulberrys, Desford Road, Thurlaston, LEICESTERSHIRE, LE9 7TE

- 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 Loomes against the decision of Blaby District Council.
 - The application ref 23/0164/CLE, dated 28 February 2023, was refused by notice dated 4 August 2023.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described on the application form as "use of land associated with the residential dwelling known as 'The Mulberrys' as its residential curtilage".
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Mr Loomes against Blaby District Council. This application is the subject of a separate Decision.

Main Issue

3. The main issue is whether the appellant has proved on the balance of probability that the use of the property has changed to garden land under a C3 residential use on or before 28 February 2013 and that the use then continued for 10 years after the date of the change.

Reasons

Legal Basis for Determination

4. When dealing with a case such as this, the burden of proof is on the appellant and the standard of proof is the balance of probabilities. Following the judgement of Gabbitas¹ the evidence of an appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, the appeal should be allowed.
5. It is not sufficient that something may have occurred or is capable of having occurred or even that it could be assumed that something has occurred. It must clearly be demonstrated that it was more likely than not that the use

¹ Gabbitas v SSE & Newham LBC [1985] JPL 630

actually occurred. In addition, in accordance with case law² the question is whether the site has been used throughout the ten year material period so that the Council could have taken enforcement action in respect of that use at any time and furthermore, it is insufficient to start the use, but the use must have taken place over the whole period.

6. These represent the legal principles against which I have determined this appeal.

Planning Unit

7. The appellant states that typically, when a new dwelling is formed, its site is defined by a red line setting out the land to be used and occupied with the house forming a single planning unit. The drawing submitted with the original planning application for the dwellinghouse shows the application site and a separate area of land which does not form part of the application. Therefore, at the time the original planning permission was granted the land to the north which is the subject of the current appeal did not benefit from any material change of use associated with the residential consent. As such, that land formed a separate planning unit from the one on which the residential dwellinghouse was actually constructed and the land immediately surrounding that dwellinghouse as shown on the plan reference 94/0357B/1/MX in the appellant's Appeal Statement.
8. Although there is no statutory definition of "planning unit" case law³ has established that the planning unit should be determined by identifying the unit of occupation and whether there is physical separation and/or functional separation of primary uses as a matter of fact and degree. Bridge J suggested three broad categories of distinction being; a single planning unit where the whole unit of occupation is used for one main purpose and any secondary activities are incidental or ancillary; secondly, a single planning unit in a mixed use because the land is put to two or more activities and it is not possible to say whether one is incidental to another; and thirdly, the unit of occupation comprises two or more physically separate areas that are occupied for substantially different and unrelated purposes.
9. The appellant argues that in the case of a dwellinghouse, it follows that the whole of the land occupied and enjoyed with the house forms the single planning unit. Furthermore, it is argued that The Mulberrys planning unit has generally taken its current form since it was developed in the 1990s or at least since the late 1990s.
10. However, there is a hedge/boundary which separates the raised area of land immediately adjacent to the dwelling from the wider appeal site and in that way there is some form of physical separation, although there are steps down from the raised deck area onto the lower mowed grass area in question. Therefore, although the land falls within the same ownership as the dwellinghouse and land immediately adjacent to it, that does not automatically mean it forms part of the same planning unit.
11. It was clearly not originally envisaged that the larger parcel of land to the north of the dwelling would function the same as the residential land immediately

² LB Islington v SSHCLG [2019] EWHC 2691 (Admin), Thurrock BC v SSE [2002] EWCA Civ 226, [2002] JPL 1278 and Swale BC v FFS & Lee [2005] EWCA Civ 1568; [2006] JPL 886

³ Burdle & Williams v SSE & New Forest RDC [1972] 1 WLR 107

adjacent to the dwelling as is now used as a raised deck area with furniture, seating areas, hot tub and barbecue. In my judgement, the planning permission limited the residential curtilage to the area immediately surrounding the dwellinghouse itself. That area can be distinguished from the larger paddock area to the north by physical features. In these specific circumstances, land ownership alone does not automatically mean that the land the subject of this appeal is part of the same planning unit.

12. At this point it is important to note that the term curtilage should not be confused with the planning unit. The two will sometimes cover the same area of land, but as held in case law⁴ that may not always be the case and does not in any event mean they are the same thing. Curtilage should never be confused with a use of land. In addition, the matter of the planning unit should not be a diversion from the main issue here, which relates to the specific use of the parcel in question.

Description of the use

13. There is no all-encompassing, authoritative definition of the term 'curtilage'. However, it was established in *Sinclair-Lockhart's Trustees v Central Land Board* [1951] 1 P&CR 320 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 and...an integral part of the same even though it has not been marked off in any way...It is enough that it serves the purpose of the house or building in some necessary or reasonably useful way.'

14. Irrespective of the detailed and complex arguments regarding the definition of the word "curtilage", that should not take the decision-maker away from the key issue which is whether the land in question has lawful C3 residential use. The LDC sought to establish the lawful use of the land as a use associated with the residential dwelling known as 'The Mulberrys' as its residential curtilage. However, curtilage is not a use of land but rather refers to the area of land directly related to or immediately surrounding a dwellinghouse. Therefore, the Council did not determine the application on the basis of what was originally applied for. Instead, it was determined on the Council's understanding that the appellant was seeking to establish that the land in question was garden land under a C3 residential use. That is also the basis upon which I have determined this appeal.

Use of the Land

15. In support of his case, the appellant has submitted a range of evidence, including:
- Letter from a friend and former neighbour which states that their children played together on the site and that the land in question has always been part of the extended garden;
 - Letter from a neighbour stating that the land has only been used for domestic purposes, as a play area and for family and social events and garden parties;

⁴ *James v SSE* [1991] 1 PLR 58

- Google Earth aerial photographs from 2006, 2010 and 2011.
 - Four additional undated photographs showing various activities taking place on the appeal site such as grass mowing, a social event and a group of people erecting a gazebo.
 - A supplementary planning statement which provides additional plans and aerial views, including historic maps from 1886 and 1949 and satellite images from 1999, 2006, 2011, 2015, 2016, 2018, 2020 and 2021
16. Additional evidence has been submitted with this appeal which I have taken into account, including additional testimonies; one from the appellant. The letters submitted are not signed and verified in the presence of a solicitor and therefore carry only limited weight in the determination of this appeal. However, they do indicate that the land in question has been used for some domestic purposes and the appellant is quite clear that the large area at the rear of the property is and always has been a family garden and that this has taken place since the 1990s.
17. In my judgement the historic plans submitted showing the village in 1886 and 1949 are of limited value in determining this appeal. The aerial images from 2006, 2010 and 2011 show the land remained in the same condition during that period and a boundary is shown which is in the same location as the one which currently exists between the dwelling and the wider appeal site. Similarly, the outer boundary of the wider site comprising trees and hedges does not appear to change.
18. The existing rear garden area which has a range of domestic garden features is separated from the paddock to the north by a hedge. The appellant has provided some undated photographs which show the land being mowed or maintained, a social gathering taking place on the land where a tent, vehicles and a group of people are shown and another which shows a gazebo being erected. The photographs themselves provide a snapshot in time and show the land being maintained (which is not in itself an indication that the land is garden land or in C3 use) and used at unidentified dates.
19. There is little detailed evidence that the land has been used as an extended garden continuously for a period of 10 years. The aerial⁵ photographs show various snapshots over the years of a grass area with some trees and shrubs but do not provide a clear indication of how the land has actually been used. In addition, each of the aerial photographs show the boundary situated between the existing terrace garden area immediately adjacent to the bungalow; separating it to some degree from the wider paddock land. The letters and written evidence from friends, neighbours and the appellant have not been signed in the presence of a solicitor and therefore are not considered to be statutory declarations and therefore carry limited weight in this case. I acknowledge that they do provide some evidence of garden use over the years, but details are rather sketchy, lacking the level of detail required to demonstrate the continuous use of the land as is sought for the material ten year period.
20. The evidence does show that the paddock land has been managed and maintained by the appellant over the years, including mowing the grass as

shown in photographic evidence. Furthermore, the paddock appears to have been used to host some events and/or social gatherings over the years, but this may have been sporadic rather than as part of a continuous use. The land still appears to form a separate area of land rather than an extension to the applicant's domestic garden, especially given the hedge boundary which divides them. Furthermore, it is evident from my site visit that the existing rear garden/terrace area associated with the dwelling house is the main domestic garden area, given the large amount of garden paraphernalia present in this area.

21. The appellant's aerial photographs and commentary are speculative and largely based on what may be shown rather than what is actually shown. For example, it is contended that a very small white item on the 2006 image is likely to be a parasol or gazebo, but that is not at all clear. It is also argued that manicured lawns can be seen on the aerial imagery, but other than agreeing that the land is grassed, in my judgement that is not at all clear. In addition, there are various references to there being grazing animals in adjacent fields or paddocks, but that is not evident from what is clearly visible on the imagery and, in any case, that is not evidence of the use of the appeal site itself.
22. I understand that case law⁶ has established that the situation regarding any piece of land may change over time and specifically with regard to this case that over the years land may be acquired which serves to extend the garden, and it may be that at some point the appeal site has been used for different purposes, but there is a lack of clear evidence that the use for which the LDC is sought has been established for the required ten year period. Consequently, I find that the appellant's evidence is not sufficiently precise and unambiguous to clearly demonstrate on the balance of probabilities that the land in question has been used as garden land under a C3 residential use.

Conclusion

23. For the reasons given above and taking account of the full range of evidence submitted, I conclude that the Council's decision to refuse to grant a certificate of lawful use in respect of garden land under a C3 residential use 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).

A A Phillips

INSPECTOR

⁶ R(oao Sumption) v Greenwich LBC [2007] EWHC 2276 (Admin)