



Appeal Decision

Inquiry held on 28 & 29 January and 3 February 2025

Site visit made on 29 January 2025

by R Hitchcock BSc DipCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21st February 2025

Appeal Ref: APP/L1765/X/24/3336411

Cupressus, Durley Brook Road, Durley, SO32 2AR

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) (the Act) against a refusal to grant a certificate of lawful use (LDC).
- The appeal is made by Mr Mark Hepburn against the decision of Winchester City Council.
- The application ref 23/01081/LDC, dated 2 May 2023, was refused by notice dated 31 July 2023.
- The application was made under section 191(1)(a) of the Act.
- The use for which a certificate of lawful use is sought is use of land as residential curtilage.

Decision

1. The appeal is dismissed.

Preliminary and Procedural Matters

2. The description of the development in the banner heading for which the LDC was sought is taken from the application form. However, as 'curtilage' is not a use of land, the Council determined the application using the description 'the use as residential garden to the dwellinghouse known as Cupressus'. The appellant agreed to that revised description for the purposes of the application and the appeal, and I have proceeded on that basis.
3. The land identified on plan ref. 39.47/A.1.0, which accompanied the LDC application, coincides with Land Registry plan ref. HP382734 reflecting the full extent of the appellant's ownership. A plan attached to the Council's Decision Notice, however, shows a reduced area which excludes some land closer to the dwelling. I have had regard to the whole of the land as originally identified (the Land).
4. The provisions of s191(2) of the Act include (a) that a use is lawful at any time if no enforcement action can 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, or for any other reason, and (b) it does not constitute a contravention of any of the requirements of any enforcement notice then in force. Since the Authority have confirmed that no enforcement notice was in force at the date of the application, s191(2)(b) does not apply in the case circumstances.
5. The burden of proof in satisfying the requirement of s191(2)(a) falls to the appellant to establish that the consistent use of the Land as a garden in association with the residential occupation of Cupressus commenced at least 10 years before the date of the application, hence on or before 2 May 2013 ("the relevant date"), and continued without any significant interruption thereafter. The

appropriate standard for testing the evidence is the balance of probabilities, that is to say whether something is more likely than not.

6. The Planning Practice Guidance (PPG) reflects prior Court judgments. It sets out that an appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, 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.

Main Issue

7. The main issue is whether or not the Authority's decision to refuse the LDC was well founded.

Reasons

8. The site includes a residential dwelling set behind a front garden and parking area in a ribbon of predominantly residential properties of regular plot widths fronting the southern side of Durley Brook Road. The land extends to the rear of the enlarged dwelling and behind neighbouring residential plots down to Durley Brook to the east and a field boundary to the south.
9. The land registry details show the entirety of the appeal site to be in single ownership since 1988 when it was bought by a Mr & Mrs Spencer. It was subsequently sold as a single title to the appellant in late 2017.
10. Prior to the Spencer's ownership, the evidence to the Inquiry indicated that a larger unit of occupation accommodated the dwelling Cupressus, the adjacent land to the east (now a residential property known as 'Little Lions'), the wider area of land behind neighbouring residential plots (including some now incorporated as extended gardens) and fields elsewhere. The main parties agreed that the Land was previously used for residential and agricultural uses.
11. As relevant caselaw, the appellant referred me to *Burdle*¹ where, in consideration of an alleged material change of use of land, Bridge J highlighted 3 broad categories of distinction in considering the relevant planning unit. These are:
 - 1) a single PU where the unit of occupation is used for one main purpose and any secondary activities are incidental or ancillary;
 - 2) a single PU that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and
 - 3) the unit of occupation comprises two or more physically separate areas that are occupied for different and unrelated purposes.
12. Bridge J went on to state that 'It may be a useful working rule to assume 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'.
13. Whether the pre-1988 site uses fell with *Burdle* category 2 or 3 was inconclusive from the historic deeds, mapping and aerial photographs presented at the Inquiry.

¹ *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

This is largely unclear due to apparent absence of any delineation on the ground at any time throughout, or since.

14. At the Inquiry, the starting point for the appellant was that on the purchase of the Land in 1988 and the cessation of the commercial agricultural use, a material change of use occurred due to the Spencer's having only a domestic interest in the Land. However, that is not the correct test. Whether or not a material change of use occurs relies on some significant difference in the character of the activities taking place on the land compared to what had gone on previously.
15. Due to his more limited term of ownership, the appellant substantially relies on the establishment, or part establishment, of the claimed garden use within the period of the former owners' tenure of the site. Between 1988 and the acquisition by the appellant, the primary evidence in support of the appeal is a sworn statement made by Mrs Spencer. Additionally, a series of site photographs, including aerial images from 2000 onwards, deeds, Council documentation, and a recollection by the appellant of comments made by Mr Spencer, as vendor to him, comprise the bulk of the appellant's evidence for that period.
16. The sworn statement clarifies the extent of the Land and the approximate date of purchase. It goes on to make the claim that: *'During my period of ownership we have used the entire Property, including the 'paddock' as our family garden. We have grown vegetables on the land, had barbecues and used it as a playground for our children. It has also, at times, had a static caravan parked on the land and also a railway carriage, both of which have contained garden implements and leisure sundries'*.
17. The statement made by Mrs Spencer is specific to a 'garden' use and claims that it extended over the entire site. However, there is little detail within it to substantiate that claim. Although it provides a general statement, it does not elucidate on the where, when or for how long the said uses consistently took place.
18. The statement refers to the growing of vegetables. Indeed, between the former owner's sworn statement and Council records, there is consistent reference to vegetable growing. I heard that there was little dispute that an area had been present behind the rear boundary of Little Lions during times of the Spencer's occupation.
19. Circa June 2005, the former owner advised the Council that growing of vegetables on a portion of the land had been taking place for some 18 years (ref.PE01537). Additionally, Council records and the recollection of neighbours suggested that chickens had been kept at times about the site. While the vegetable patch is unclear in the limited aerial photographs pre-2005, by 2005 the aerial images seem to show a distinct parcel of land with a 'stepping-stone' path leading directly to it from the rear of the dwelling.
20. However, just as a change between uses within a single Use Class² are deemed not to be material, activity within the wide definition of 'agriculture' may appear different on the ground to some degree, be more or less intensive, for example, but remain in 'agricultural' use. If horticulture, fruit growing, the keeping/breeding of animals or fowl, or meadowland continue to take place on the land, such uses fall within the s336 definition of 'agriculture'.

² as defined by The Town and Country Planning (Use Classes) Order 1987 (as amended)

21. Contrary to the main parties' views that this needs to have a commercial element, that definition may include hobby farming, subsistence/smallholding farming, or be akin to allotment production where no commercial element exists. There is no requirement within that definition for those uses to be carried out on a commercial basis.
22. At the Inquiry, the Council seemingly accepted the use of the vegetable growing area as a domestic use based on it being non-commercial. However, without more, there is little evidence before me to distinguish the growing of vegetables as materially different to the former market garden use. As with the appellant's current keeping of 6 alpacas, the character of that use would not necessarily be materially different from one falling within the wide scope of agricultural activities.
23. Furthermore, agricultural use during the former owner's residency is reflected in enquiry correspondence between Mr Spencer and the Council in March 2011 (ref. PE18294). It sought confirmation as to whether planning permission was required for an agricultural building to house a tractor somewhere on the land. The exchange also referred to ground management sufficient to allow for ploughing with some analysis of how deep the soil would need to be. It clarifies that an 'arable' use was taking place as the growing of vegetables and that there were also aspirations for the wider growing of fruit, vegetables and keeping of chickens for self-sufficiency, including on otherwise 'unusable ground'. Notwithstanding that the owner considered the land as part of a 'garden' use, the character of those existing and proposed activities would all fall within the s336 definition.
24. The appellant referred to the above correspondence and the fact that an officer concluded that the site was not 'agricultural'. However, this was explicitly stated in the context of consideration of Part 6 of the Town and Country Planning (General Permitted Development) Order 1995. In contrast to the definition in the 1990 Act, that provision *does* require qualifying agricultural operations to be commercial. That line of enquiry by the Council is clear in the string of correspondence.
25. The statement that the former owners had barbecues on the land is unqualified. Third party evidence to the Inquiry suggested that during a neighbour's residency after 2010, these mostly took place in close proximity to the dwelling. As part of the Land within the appeal site where there is little dispute about any garden status, if the claim was intended to be wider, the absence of further detail in evidence is ambiguous.
26. Claims of use by the previous owners' children as a playground are unspecific. I have little doubt that the Land would have been used by their children for some recreational purposes. However, notwithstanding my finding that uses of an agricultural character continued, there is insufficient detail of over what years active recreational use of the Land may have occurred, or whether it caused a 10-year consistent period to accrue across the whole site as a garden use.
27. The appellant explained that Mr Spencer referred to rope swings and camping on the rear part of the site, however, there is little more detail in that reported claim. Notwithstanding the anecdotal nature of that evidence, there is simply insufficient information of the frequency, duration and consistency of use.
28. Some aerial images and photographs of the site shown large areas unkept. At the Inquiry, I heard the appellant's view that breaks of a year or more might be typical of use of a garden of the size of the Land. However, in contrast to dormant periods

once a lawful use has been ascertained³, for the purposes of a s171B assessment, I do not agree. To meet that test, it is well established that there must be consistent use. Accepting that for domestic use of garden land one might expect more limited use in the cooler months, that is distinct from non-use. If parts of the site lay dormant or overgrown since earlier agricultural use and are not actively supplanted for 10-years, then their lawful use status is unchanged.

29. Throughout his correspondence with the Council, it is clear that Mr Spencer called the wider area his 'garden', but it is unclear how he, or Mrs Spencer, might have defined that. Having also variously described it as a field, arable land, unusable (in part), and later derelict, it seems probable that this is primarily a reference to his ownership and the activity of growing produce for own consumption. Whilst I have little doubt that mown parts of the land visible in the sequence of aerial images would have been walked on occasions, without more, this and any visible extent of maintenance (not a use of land) does not construe it as garden.
30. The Council's records indicate numerous invitations to demonstrate the former owners' claim of the use of the Land. That action was not pursued by them. I recognise the appellant's position that this may have been a concession or resignation by the Council given the Spencer's claims. However, to become lawful, the claimed use must actively take place throughout the ten-year period prior to any theoretical relevant date to the extent that enforcement could have been taken at any time during that period⁴.
31. On those occasions when the Council visited the site the larger section of the land is variously described as a 'field', 'open land' and a 'meadow'. A distinction is made between what officers considered to be garden and the land to the rear. Furthermore, unlike other investigations of alleged breaches of planning control on the site, there is little evidence of any consideration of expediency until the recent definitive changes made by the appellant on parts of the Land. In the absence of first-hand evidence to the Inquiry as to why the former owners didn't seek an LDC, it is not possible to give the appellant's suggestion of any resignation on the Council's part credible weight.
32. Mrs Spencer's sworn statement refers to a railway carriage and a caravan having, 'at times', been used for garden implements and unspecified leisure sundries. The railway wagon remains on site. At the Inquiry, I heard that, in addition to domestic storage, it had been used as a workshop housing engineering equipment such as a lathe and other metal-working equipment just prior to the point of sale to the appellant. I also heard that this was probably a hobby use by Mr Spencer, a retired engineer. However, the statement is silent on that, or any duration or consistency of the stated use throughout the former ownership to establish continuity in isolation (or across the successive ownerships) for use of that structure.
33. The statement does not confirm when the caravan was brought on to the land. Nor does it specify or mention the use in 2004 when it was investigated by the Council as being in use for residential purposes. The absence of clarity on this matter is significant insofar as it is plausible that a temporary use of the caravan for residential purposes may have interrupted the planning status of the land.

³ As per *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461

⁴ See *Thurrock v SSE & Holding* [2002] EWCA Civ 226

34. Noting that the Council considered it a breach of planning control but were satisfied that it was not expedient to pursue enforcement action at that time, it strongly suggests that the caravan was sited on land that was not deemed to be in residential use such that a different mixed use of the planning unit had then occurred. It may have supplanted any earlier mixed or single use of the planning unit and potentially re-started the clock on any s171B claim. A claim that the use of the caravan was, then, permitted development was not substantiated in the appellant's evidence. Notwithstanding, even then, a change to the mix of uses taking place on the unit of occupation likely took place.
35. Another enforcement investigation in May 2014 found that the dwelling at Cupressus had been subdivided. Section 55(3)(a) of the Act clarifies that 'the use as two or separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it so used'. The Council's evidence highlights that a former owner agreed that the extended dwelling was 2 separate units. Although only an extract of a public record, there is little reason to doubt the status of that evidence.
36. At the Inquiry, the appellant suggested that there was no evidence of occupation of the second unit to trigger the formation of a new planning unit on the land and begin a new chapter in the planning history of the site. However, on the appellant's burden, there is little to suggest that the isolated extension with a fitted kitchen was not occupied. In contrast to the appellant's first-hand evidence of his own use of the site since late 2017, the absence of detail or mention in the sworn statement lacks sufficient precision to clarify whether interruption of any use/s occurred.
37. Taking all of the above together, I find that there is insufficient evidence of a precise and unambiguous nature to conclude on the balance of probability that a residential garden use of the Land has supplanted all agricultural use and has done so on a consistent basis for a period of 10 years or more without interruption across the site. Moreover, there is contrary evidence to show that uses falling within the s336 definition of agriculture persisted on the Land (and still do) such that the change of use to a single residential use has not occurred.
38. The appellant has indicated that, under the provisions of s191(4) of the Act it is open to me to consider whether an LDC for the claimed use may apply to a smaller part of the land. However, where the use of the planning unit has not been demonstrated to have changed to a single garden use or formed a consistently clear functionally and physically separate planning unit, it is not open to me to either arbitrarily define one or attempt to decouple elements of an otherwise mixed use⁵.

Conclusion

39. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful 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.

R Hitchcock

INSPECTOR

⁵ See *R (oao East Sussex CC) v SSCLG & Robins & Robins* [2009] EWHC 3841

APPEARANCES:

FOR THE APPELLANT

Hugh Richards	Counsel
Mark Hepburn	Appellant
Michael Conroy	Planning Consultant, Stantec

FOR THE COUNCIL

Daniel Lucas	Senior Planning & Litigation Lawyer Winchester City Council
Liz Young	Principal Planning Officer, Winchester City Council

THIRD PARTIES

David Bushby	Neighbouring Resident
Dawn Castell	Neighbouring Resident

DOCUMENTS SUBMITTED TO THE INQUIRY:

1. Appellant's Opening Statement
2. Council's Opening Statement
3. Location Plan for Decision Ref. 02/02996/OUT
4. Council's Closing Statement
5. Appellant's Closing Statement.