

Appeal Decision

Site visit made on 17 February 2025

by **John Whalley**

an Inspector appointed by the Secretary of State

Decision date: 25th February 2025

Appeal A - ref: APP/T3725/X/23/3317209

Leasowe House, Southam Road, Radford Semele, Leamington Spa CV31 1TY

- The appeal is made under section 195 of the Town and Country Planning Act 1990, (the Act), as amended by the Planning and Compensation Act 1991 against the refusal of Warwick District Council grant a certificate of lawful use or development.
- The appeal was made by Mr B Bains.
- The application, ref. W/22/1574, for a certificate of lawfulness, was submitted on 14 October 2022. It was refused on 2 December 2022.
- The application for a Certificate of Lawful Development, (LDC), was for confirmation that the land edged blue on Dwg. No. PF10589.01 Rev C is garden land in association with the domestic use of Leasowe House and Leasowe Cottage.

Summary of decision: The appeal is not allowed. A certificate of lawful use or development is not issued.

Appeal B - ref: APP/T3725/W/23/3320457

Leasowe, Southam Road, Radford Semele, Leamington Spa CV31 1TY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 by Mr and Mrs B Bains against the failure of Warwick District Council to decide on the application W/22/0471 dated 15 March 2022 within the prescribed period.
- The development proposed is: Replacement dwellings (upon demolition of two existing dwellings) within a redefined domestic curtilage, new internal access driveway, garage and plant room at The Leasowes, Southam Road, Radford Semele.

Summary of decision: The appeal is not allowed. Planning permission is not granted.

Appeal A - Appeal land and s.191(1)(a) certificate of lawfulness application

1. The schedule attached to the application to the Council for a Certificate of Lawfulness, (LDC), sought confirmation that the use of land edged blue on application Dwg No. PF10589.01 Rev C as a garden in association with the domestic use of Leasowe House and Leasowe Cottage was lawful. It also asked for determination that land edged red on the plan was the curtilage to Leasowe House and Leasowe Cottage. As 'curtilage' is not a use of land, I need not deal with that part of the application. It does appear, however, that the 'red' line encompasses the apparently long established domestic gardens to the those properties, not a contentious matter between the parties. I deal therefore with the asserted lawful use of the land edged blue on Dwg No. PF10589.01 Rev C as a garden in association with the domestic use of Leasowe House and Leasowe Cottage, (the appeal site).
2. The appeal site is a 2ha or thereabouts area of open grassland associated with the 2 dwellings Leasowe House and Leasowe Cottage about 1km east of the village of Radford Semele. It lies within an area characterised by small agricultural fields and wooded areas. It is in an area of open countryside outside the Green Belt.

3. It is understood that the dwellings Leasowe House and Leasowe Cottage were formed by the subdivision of the large brick 2 storey building at the eastern side of the site. There are 3 main garden areas for the 2 dwellings; a large area to the west of Leasowe House, one to the east of Leasow Cottage, another area to the rear of Leasowe Cottage. There is a swimming pool and surrounding hardstanding to the north. Application drawing No. *PF/10589.01 Rev C* delineates the grassland appeal site immediately to the west of the residential buildings. It is otherwise surrounded by a 20m wide or thereabouts belt of slender semi-mature woodland trees, said to have been formed by the planting of over 1,000 trees to provide an enclosure to the grounds. The tree belt is now a well-established and distinctive feature.
4. The LDC Application made by Mr Bains asserts that use of the appeal site grassland for domestic garden purposes to Leasowe House and Leasowe Cottage had become lawful by the passage of time. He said the former agricultural land had been used as private amenity space in association with the 2 dwellings for more than 10 years before the application was made.
5. Mr Bains needed to show, on the balance of probabilities, that a material change of use of the appeal grassland to use for domestic garden purposes started on or before 14 October 2012 and that it had continued thereafter for a period of 10 years to the extent that the Council could have taken enforcement action at any time in that period. The case of *Thurrock BC v SSETR & Holding* (COA 27.2.02, J 1080) is authority for that position; also see *Ravensdale Ltd v SSCLG* [2016] EWHC 2374 (Admin). That is unlike the situation, where, if, for example, a dwelling has a lawful residential use, the dwelling could be unoccupied for sometimes lengthy periods of time without losing that lawfulness, (*Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461). In the case of an unlawful use, if that use ceased at any time during that period, the time up to that point would not count towards immunity. The “clock” would restart if and when the unlawful use recommenced.
6. The Court in *Ravensdale* endorsed the Inspector’s conclusion in that case that the sparse nature of the declarations and ‘patchy’ evidence of lettings was insufficient to satisfy the onus of proof. It is for the decision-maker to rule on the evidence provided; there is no duty to explain what evidence might have been satisfactory.
7. Mr Bains said he and his wife acquired Leasowe House and Leasowe Cottage at the end of 2021. Kathryn Smith, daughter of the former owners of the site who had purchased the property in 1978, lived there until 1981. She moved back to Leasowe House in 1991, when the property was extended and converted into two dwellings. Mrs Smith said the appeal land had not been used for agriculture, either for cultivation or grazing, the grass having been cut for domestic use purposes of the land. The grounds were used for ‘*general family activities such as walking dogs, practicing golf, playing football and children’s parties.*’.
8. A declaration from John Ingall of Leasowe Farm, the immediate neighbour, said the land was used by the families of the former owners. A shared driveway meant he regularly had sight of the land. Mr Ingall said he saw grass cutting, the regularly walking of dogs and the practising of golf on the land outlined in blue on the appeal site plan. He said the land was not used for agriculture.
9. Mr Bains claimed it would be self-evident by the nature of grass cutting, kept short for the purpose of domestic activity, that the land was not in use for agriculture.
10. In my view, the open grassland appeal site may have shown little sign of active agricultural use for some time, as apparently confirmed by a series of Google aerial photographs over the years, even though the appearance might not be dissimilar if grass crops had been taken for hay, silage or haylage purposes. But when and whether any of the domestic use

of the land amounted to a material change of use of the land is difficult to show or determine. Not only was the evidence of when and what occurred vague, it was not shown if or when a change in the scale of a domestic use of the land amounted to a material change of use, or whether an incidental use became a primary use, either in a separate planning unit or as a new element in a mixed, dual or composite use of all of this large area of land in the period of ownership by Kathryn Smith's parents.

11. I am not persuaded that a material change of use of the appeal land from agricultural use of a domestic garden use has in fact occurred. There must also be doubt, even if on the balance of probabilities, there was such a material change of use, that there has been an ongoing uninterrupted breach of planning control. Although Mr Bains said it was unrealistic to expect, or indeed require continuous evidence of a residential or domestic garden use of the land, in this instance of the claimed addition of more than 2ha of land to the domestic garden of Leasowe House and Leasowe Cottage, it would indeed, in my view, have been necessary to show not only that a material change of use of the whole of land had taken place, but that it had continued uninterrupted for a period of at least 10 years up to the date of the application for an LDC over the entire area.
12. An interruption in the 10 year period can take the form of some cessation in activity or change to the character of the use or size of the planning unit. However, the break must be minor if it is not to be fatal to the possible issue of an LDC. A short suspension in activity during a change of ownership or period of illness, or non-material fluctuations in the scale of a use will not usually stop the clock. However, a break in the domestic use of the land during the winter, for example, would make it difficult for the Council to be aware of, notice or recognise an ongoing breach of planning control in the form of a new non-agricultural or domestic garden use of the land having taken place and, or was subsisting. Most of the time, it is likely that the appearance of the land would have been no different from that of an agricultural or unused field.
13. As was held in *Ravensdale* that an appellant seeking to make out a lawful use pursuant to ground (d), (s.174(2)(d); s.171B(3) of the Act), must provide sufficient evidence which shows on the balance of probabilities that there had been a material change of use of the land and that use had been continuous for the relevant immunity period. I consider that task was not accomplished on the basis of the evidence before me. The appeal fails.

Appeal B - ref: APP/T3725/W/23/3320457

Planning Application Project – Replacement dwellings - redefined domestic curtilage

14. The development proposed is: Replacement dwellings, (upon demolition of two existing dwellings), within a redefined domestic curtilage, new internal access driveway, garage and plant room at The Leasowes. It would involve the demolition of the 2 existing dwellings and erection of two replacement dwellings, one large imposing and wide 2 storey house with an attached single storey wing accommodating a swimming pool, (e.g. as shown on drg. No. 2212-006), the other much smaller, to the west towards the centre of the land the subject of the above LDC appeal but to also include the woodland belt that surrounds most of the LDC land. An additional length of driveway would be constructed using the existing access onto Southam Road. The proposed layout is shown on proposed site plan 2212-005.

Self-build

15. The Appellants, Mr and Mrs Bains, said the proposal was to replace the existing 2 dwellings at The Leasowes, to provide modern accommodation to meet their bespoke design requirements, repositioning the replacement dwellings partly within the residential

curtilage, and partly within the contended garden land to achieve their aspirations for a self-build dwelling, (the principal dwelling). The larger replacement dwelling was to be sited more centrally within the land for the greater enjoyment of the surrounding setting. The repositioning was said not to involve the loss of agricultural land. It was anticipated the smaller 2 bedroom single storey dwelling could be occupied by domestic staff, or be made available for a member of the Appellants' extended family. Mr Bains had a primary input in to the design and layout of the new principal dwelling, (Leasowe House), to be occupied by his household – *Self-build and Custom Housebuilding Act 2015*. For a person wishing to 'self-build' in a rural area outside a settlement, such opportunity was realistically confined to re-use of a redundant or disused building, or the replacement of an existing dwelling.

16. I note that Government advice on self-build and custom housebuilding, (at para 020 ID 57-020-20210508), says self-build and custom build can provide a route to affordable home ownership for those on low incomes. Clearly, Mr and Mrs Bains' project for a large 6 bedroom house with an indoor swimming pool and with a smaller house, perhaps to house supporting staff, does not fit that category. That does not disqualify, but nor do I see it as a supporting circumstance.

Local plan

17. Warwick District Local Plan 2011-2029 at policy H13 deals with Replacement Dwellings in the Open Countryside. For the purposes of policy H13, the open countryside is defined as areas other than the Urban Areas, the Growth Villages and the Limited Infill Villages. It is apposite here. Policy H13 states that *'any replacement dwelling must not be materially larger than the existing dwelling and have no greater impact on the character and openness of the rural area. The Council will consider whether it is necessary to remove permitted development rights by condition when determining these applications.'*
18. The Council noted that policy H13 does not provide guidance on what might be "materially larger" but held a maximum increase of 5% over existing development appropriate. They compared the existing and proposed floorspaces. The gross internal area of the existing buildings was said to be 908.3m²; the proposed floorspace 1350.7m²; an increase of 48.7%. That would clearly be materially larger than the existing dwellings, well above a 5% increase. They recognised that existing planning permission W/22/0493 for extensions to Leasowe House and Leasowe Cottage which would result in their combined floor area being 1272.9m², could be compared with the appeal project, despite doubting their prospect. They said if built, the new dwellings' project would be 6.1% larger than the extended houses, again more than 5% larger. Another Council comparison made was that the volume of the existing buildings was some 2,737m³, the proposed buildings would be much larger, measuring 6,589m³, a volume increase of 140.7%. The replacement houses would have a volume 63% larger than that of the existing dwellings if they were to be extended by the W/22/0493 permission.
19. Although Local Plan policy H13 allows for the replacement of dwellings in the open countryside, the larger house of the appeal project here would, in my view, be materially larger than that existing, contrary to H13 policy guidance. Even comparing the W/22/0493 permission layout with the proposed dwellings and assuming General Permitted Development Order permitted development rights for the new houses were withheld by condition, the enclosed volume of the new houses would be considerably larger than those existing, by 63% according to the Council's figures.
20. The Appellants suggested that policy H13 should be read in the context of Policy H14, implying that its guidance that extensions of up to 40% at sites outside of the Green Belt could have some relevance here. I consider it to offer scant support to this appeal project. Notwithstanding that policy H14 applies to the enlargement of existing homes not replacement houses, the purpose of policy H14 is to ensure that extensions to dwellings do

not have an adverse impact on the surrounding open countryside and are of an appropriate design and scale for their location. I consider that the replacement Leasowe House would unacceptably conflict with Local Plan Policy H13.

Countryside

21. The Appellants said the replacement dwellings would not have an adverse impact on the surrounding countryside. I do not agree. Whilst the surrounding planted woodland belts would limit views into the site, the new houses would extend built development westwards noticeably into the open grassland area. Screening unjustified build development by trees or perhaps by landscaping may assuage some visual harm, but would not justify otherwise unfitting building in the rural countryside. The fact that this open land is not currently used for agricultural purposes does not lessen what would be an avoidable loss of, and intrusion into, this part of the open countryside. Local Plan para. 4.87 says '*The purpose of this policy is to ensure that replacement dwellings do not have an adverse impact on the surrounding open countryside and are of an appropriate design and scale for their location. The policy applies with equal measure within and outside of land designated as Green Belt.*'. I consider that the large 6 bedroom house part of the appeal project, in particular, would fail that test.
22. The replacement large dwelling would be taller than the existing Leasowe House. The maximum height of the existing dwellings was said to be 6.80m, 3.70m at the eaves. The new house would have a ridge height of 10.60m, being 7.80m to the top of the parapet. The larger, main house would be some 44m wide. In all, this would be a large wide house sited towards the centre of a 3ha field purporting to be its extensive residential grounds. It would be a substantial and imposing building, dominating what is now an attractive field in open countryside.

Conclusion

23. Whilst there are some elements this large appeal project that would be acceptable, for instance the proposed small dwelling replacement for Leasowe Cottage, the new section of driveway and other parts including the garage, it would be inappropriate to consider providing a split decision allowing the supporting elements of the scheme, but not permitting the main and essential part, the proposed replacement Leasowe House and its extensive residential grounds.
24. Planning permission is not granted on application ref: W/22/0471 dated 15 March 2022.

FORMAL DECISIONS

Appeal A - ref: APP/T3725/X/23/3317209

25. For the reasons given above, I conclude that the Council's refusal to grant a lawful development certificate on the application dated 30 September 2022 for use of the land edged blue on Dwg. No. PF10589.01 Rev C as garden land in association with the domestic use of Leasowe House and Leasowe Cottage was well founded and that the appeal should fail. I exercise accordingly the powers transferred to me by s.195(3) of the 1990 Act, (as amended).

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26. The appeal is dismissed.

John Whalley

INSPECTOR