



Appeal Decision

by Andrew McGlone BSc MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28th November 2025

Appeal Ref: APP/K3605/X/24/3339252

35 Hollingworth Close, West Molesey, Surrey KT8 2TW

- 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 or development (LDC).
 - The appeal is made by Liane Wesson against the decision of Elmbridge Borough Council.
 - The application ref 2023/1131, dated 14 April 2023, was refused by notice dated 22 August 2023.
 - The application was made under section 191(1)(a) of the Act.
 - The use for which a certificate of lawful use or development is sought is to regularise the change of use from amenity land to residential garden land.
-

Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is whether the Council's decision to refuse the application was well founded. This turns on whether the appellant can show, on the balance of probability, that the appeal site has been used as a residential garden for a continuous period of ten years, and as such, the time for enforcement action has expired or for any other reason. The relevant time period for assessing this is 14 April 2013 to 14 April 2023.

Reasons

3. An LDC is not an application for planning permission. Its purpose is to enable the appellant and others to ascertain whether specific operations or activities would be lawful. The burden of proof is upon the appellant. The test of the evidence is one of balance of probability. The appeal concerns only the lawfulness of the matter for which the LDC is sought, not its planning merits. The decision is based on the facts of the case and on relevant planning law and judicial authority.
4. The LDC seeks to establish whether any existing use of buildings or other land are lawful. S191(2)(a) confirms that a use is lawful at any time 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) and they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
5. S191(4) of the Act sets out that if, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect.
6. S55(2)(d) of the Act states that the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such shall not be taken for the purposes of the Act to involve the development of the land.

7. To make an assessment against s55(2)(d) of the Act, it is first necessary to identify the relevant 'planning unit' at the start of the relevant period. This is a matter of fact and degree. The planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct and occupied for different and unrelated purposes; the concept of physical and functional separation is key.
8. It is also essential to determine what the curtilage is, as it is not necessarily the same as the 'planning unit', though they can often cover the same area of ground, albeit 'curtilage' is not a use of land. For land to fall within the curtilage of a building, it must be intimately associated with the building, i.e. it forms part and parcel of the building. Other factors to consider are the physical layout of the building, land ownership and the use or function of the land. Physical enclosure is not necessary, but the degree to which the building and claimed curtilage fall within one enclosure is relevant as part of the test of physical layout.
9. 35 Hollingworth Close is a detached dwellinghouse purchased by the appellant in November 2012. The appeal site lies to the northeastern side of the dwelling.
10. The aerial images from 1999 to 2010 provide historical context and show that the land to the rear and side of 2, 4, 12 and 35 Hollingworth Close originally formed part of the open space landscaping within the wider residential development of Bishops Fox. There is an area of trees and shrubs broadly parallel to the flank elevation of No 35 and its rear garden that extends to the rear of the appeal site. There is also an open grassed area to the side/rear of Nos 2, 4 and 12 which extends northwards and between the area of trees and shrubs and the flank elevation of No 35 and the side boundary fence.
11. Shortly after the appellant moved in, photographs show a football goal was sited next to No 35's flank elevation on the appeal site, and a child playing football with worn patches of grass due to the land being used to play football. The appellant says that football continued to be played on the land for the next two and a half years. On 30 October 2014 the appellant purchased the appeal site.
12. On 14 April 2013, the dwelling, its rear garden and off-street parking were physically separate from the appeal site by either a brick wall or boundary fencing. The gate in the fence allowed people to move between No 35's rear garden and the appeal site, but they are still physically distinct and had different functions in 2013. The appeal site was part of the landscaped open space function of the land to the side/rear of Nos 2, 4, 12 and 35, despite any variation in local topography. Its function is to soften the residential built form. Placing a football goal on the land and using it to play football does not necessarily change that function. Anyone could theoretically have done so. Trees and shrubs did partially enclose the land, screen it from view, and reduce its accessibility, but the land was still accessible to anyone, not just the appellant and her family, even if no one did, because there was no distinction between or barrier to the remaining open space land. As such, the planning unit was the dwellinghouse of No 35, its parking provision and its rear garden directly to the rear of the house. Its primary use was as a dwellinghouse.
13. In 2013 the appeal site was not within the same ownership as No 35. That only occurred afterwards. A tall boundary fence separated the rear garden of No 35 and the appeal site, forming a physical barrier despite the gate and the accessibility afforded for the appellant and her family. The barrier prevented the appeal site from having an intimate association with No 35 unlike its rear garden. Added to

this, the appeal site was publicly accessible and part of the wider parcel of open space land and the function it performs, notwithstanding the trees and shrubs that provided a degree of enclosure alongside local topography. Therefore, I consider the curtilage of No 35 to reflect that of the planning unit at this point in time.

14. After the appeal site was purchased in October 2014, the appellant cleared vegetation prior to the erection of a 1.8-metre-high boundary fence on the remaining three sides of the land. Shortly before the fence was erected on 8 May 2015, a football goal was on the land. The fencing physically separated the appeal site from the wider parcel of open space land.
15. An aerial image from 2015 shows the boundary fence in situ and a strip of hardstanding next to No 35's flank elevation, not the original boundary fence. There is no barrier between the appeal site and the original rear garden of No 35. The grass within the appeal site also seems to be in a better condition and mown based on the colour variation. The land is now intimately associated with the dwelling of No 35 and thus part of its curtilage and in use as a residential garden, which means that it is now within the planning unit of No 35. Hence, the land now has a different character, and the activities taking place within the land edged red are of a different character. Thus, it is 'development' as per s55 of the Act.
16. For the reasons set out, I consider that the appellant has shown, on the balance of probabilities, a material change of use of the appeal site took place on or around 8 May 2015, and the land has been used continuously as a residential garden since then, albeit this falls short of the requisite ten-year period.
17. The area of land owned by the appellant is larger than that edged red on the site location plan. A portion labelled area 'A' in Exhibit CJ2 is said to be part of the land subject of this appeal, but this land is outside of the planning unit and curtilage of No 35 at the start of the relevant period and remains outside of both because it lies outside of the fenced area and it has a character and function consistent with the open space land. Hence, no material change of use has occurred here.
18. Although the appellant has demonstrated a period of continuous period of residential garden use for the land edged red, I conclude, on the balance of probabilities, that this period falls shy of the ten-year period required.

Other Matters

19. I have determined the appeal based on the submitted evidence having regard to the relevant period. This is specific to the appeal site and No 35, and not any other property. The planning merits of the claimed use are not for me to consider as part of this appeal. This includes the consideration of whether a precedent would be set, the purpose of open space land, its appearance, community benefit and land ownership. Planning policy is also irrelevant to my determination. I am, however, mindful that the LDC was submitted some time ago, and time has since elapsed. It is therefore open to the appellant to submit another LDC should they wish to.

Conclusion

20. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development for the change of use from amenity land to residential garden land is well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the Act.

Andrew McGlone

INSPECTOR