



Appeal Decision

Site visit made on 26 March 2026

by **David Jones BSc (Hons) MPlan MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 18 May 2026

Appeal Ref: APP/K3415/X/24/3356093

Brookhay Cottage, Brookhay Lane, Lichfield, Staffordshire WS13 8RQ

- 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 Linton Shaw against the decision of Lichfield District Council.
 - The application ref 24/00933/CLE, dated 21 August 2024, was refused by notice dated 17 October 2024.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 (as amended).
 - The use for which a certificate of lawful use or development is sought is residential garden.
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Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development (LDC) was well founded.

Reasons

3. The onus is on the appellant to demonstrate that, on the balance of probabilities, the use was lawful at the time of the LDC application. A development is lawful under the provisions of section 191(2)(a) and (b) of the Town and Country Planning Act 1990 ("the 1990 Act") if no enforcement action may be taken because it did not involve development requiring planning permission, or because the time for enforcement action against the use has expired; and, providing it does not constitute contravention of any requirement of any enforcement notice then in force.
4. 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 evidence alone is sufficiently precise and unambiguous.
5. There are two possible routes to establish whether, at the time the LDC application was made, any residential use of the land was lawful. The first route is, by reason of section 55(2)(d) of the 1990 Act, it did not constitute development. Section 55(2)(d) 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 is not development. Alternatively, the second route is to establish that no enforcement action could be taken because the time for taking such action under section 171B(3) of the 1990 Act had expired.

6. Brookhay Cottage is a detached dwelling that benefits from an extensive amount of private garden land to the side and rear. The appeal relates to a broadly triangular piece of land situated on the opposite side of Brookhay Lane to the dwelling itself. The land is bordered by a well-established hedge and contains a greenhouse, with access provided via pedestrian gates.
7. The concepts of curtilage and planning units are distinct and separate, and they should not be confused. The latter is a concept evolved as a means of determining the most appropriate physical area against which to assess the materiality of a change in the use of land. Curtilage defines an area of land in relation to a building and is not a use of land.
8. For land to fall within the curtilage of a building, it must be intimately associated with the building, namely that 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. There is no dispute that the triangular piece of land subject of this appeal and Brookhay Cottage are under the same ownership. However, the land does not have an intimate association with the dwelling. This is primarily because of its location and the degree of separation from the dwelling, caused by it being fully enclosed by a tall mature hedge and being physically separated from the remainder of the appellant's land by the road. Consequently, there is a strong sense of separation between the land, and the dwelling and its immediately adjoining garden areas.
10. When compared to the land that is around the dwelling itself, the appearance of the appeal land is markedly different. The triangular parcel of land appears rather unkempt and without maintained lawns or residential paraphernalia commonly found on land intimately associated with a dwelling, such as washing lines, domestic sheds, or sitting areas. In terms of its function or use, from the available evidence it appears that it has been used by the occupants of Brookhay Cottage for the growing of vegetables. Such a use could be incidental to the enjoyment of the dwellinghouse. However, as noted in *Burford*¹, the use of land as incidental to the enjoyment of the dwellinghouse does not necessarily make it curtilage.
11. Accordingly, in my judgement, the land does not have an intimate association with the dwellinghouse. As such, I find as a matter of fact and degree that this land cannot reasonably be treated as forming part and parcel of the dwellinghouse and it is not therefore within its curtilage.
12. Where the use of land is in dispute, it is necessary to identify the extent of the planning unit or units. The leading case relating to planning units is *Burdle*². It was held in *Burdle* that the planning unit is normally 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. Three broad categories are identified for planning units, which are:
 - a) A single unit of occupation with a single primary use with ancillary and incidental activities;

¹ *Burford v SSCLG & Test Valley BC* [2017] EWHC 1493 (Admin)

² *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207

- b) A single unit of occupation with two or more separate primary uses that are not incidental to one another (mixed use); and
 - c) A unit of occupation with two or more physically separate areas which are occupied for different and unrelated purposes. Each area in this scenario forms a separate planning unit.
13. In terms of the unit of occupation, there is no dispute that both the dwelling and appeal site are under the same ownership and are “occupied” by the appellant. Nevertheless, for the reasons I have already set out above, the respective areas form physically distinct character areas and the sense of the triangular parcel of land being physically separate from the dwelling and its immediate surroundings is very strong.
14. With regard to demonstrating the use of the land, the appellant has provided an array of Google Earth and Google Street images ranging from between 2009 and 2022, photos of the appeal site from July 2024, a letter dated 25 June 2024 from the previous owner of the site Mr Smith, an Estate Agents brochure, and land registry details.
15. It is apparent from the submitted evidence that a greenhouse has existed on the land for a significant number of years, and that the land has been used for the growing of vegetables. Whilst it is clear from the various Google images that this has been the case since at least 2009, they do not demonstrate any other activity or use taking place on the land.
16. The letter from the previous owner Mr Smith is not a sworn declaration which limits the weight I can give to it. The appellant has also not provided a sworn statement. In any event, the written evidence suggests that the land was previously owned by a waterway company. Although no specific dates are given, Mr Smith goes on to state that the land was used by the “*waterways lengthsman*” as a “*vegetable garden*”, and that he himself erected a small greenhouse on the land.
17. No compelling evidence has been provided to demonstrate that the land has been used for anything other than growing vegetables, both before and during the appellant’s ownership of the land. Whilst edible produce grown on the land may be consumed by the landowners who live in Brookhay Cottage opposite, section 336(1) of the 1990 Act interprets agriculture as including horticulture and fruit growing. Under section 55(2)(e) of the 1990 Act, the use of any land for the purposes of agriculture and the use for any purposes of any building occupied together with the land so used, shall not be taken to involve development of the land.
18. I acknowledge that it is not uncommon for residential gardens to include a greenhouse or vegetable patch. However, in those circumstances the greenhouse and the growing of vegetables is inherently intertwined with the overall residential use of the land. In this instance though, the parcel of land concerned is not within the curtilage of the dwellinghouse, is a physically separate area, and appears to have been solely used for growing vegetables.
19. The appellant argues that the land has been cultivated and used as domestic garden for in excess of ten years. An incidental use is one that is functionally related to and owes its existence to a primary use. In other words, it is only there

because of the primary use. The question is the extent to which the use of the appeal site can be taken to be incidental to the primary residential use of the dwelling. It seems from the available evidence that the only activity taking place on the land is vegetable growing which is low-key in nature and appears more akin to a small allotment.

20. I consider that this use could operate independently of the dwelling itself, such that theoretically it might continue even if the house itself was not there. The current use of the triangular parcel of land, does not necessarily depend on residents being in close proximity to it. This is further demonstrated by the appellant's admission that a group of pensioners from the locality regularly visit the land to engage in vegetable cultivation, which could continue regardless of whether Brookhay Cottage was in existence. This is in contrast to, for example, garden land which would no longer be expected to be maintained for use and enjoyment, in the absence of any residents on the site.
21. In my judgement, it seems to me from the information provided, and my visit, that there is only a tenuous and not a dependant functional relationship between the area of land concerned and the dwelling. Therefore, even if within the same area of occupation, I consider, on balance and as a matter of fact and degree, that the area of land concerned forms a physically and functionally separate parcel of land to the dwelling and its immediate surroundings. I am not persuaded that the two areas fall within the same planning unit.
22. Rather than being a use incidental or ancillary to the residential use of Brookhay Cottage, any use should therefore be regarded as the primary use of the land in question. As I have already set out, I find that the evidence provided does little more than demonstrate that the land has been used for vegetable growing and a horticultural use.
23. Overall, I consider that the quantum of evidence presented does not show a residential use of the land concerned. The appellant has failed to show precisely when the residential use of the land is considered to have begun and the frequency of any such use, and has failed to document any specific events or activities taking place on the land except for vegetable growing and the existence of a greenhouse. Given the lack of specificity in the information provided, I am not satisfied that the evidence sufficiently shows that the agricultural or horticultural use of the land materially changed to a residential use on or before the relevant date.
24. The Estate Agents brochure refers to the appeal site as a "kitchen garden". However, this has no bearing on the lawful planning use of the land. Equally, the land registry details provided does no more than demonstrate that the entirety of the land is under the same ownership.
25. I find therefore, the evidence before me is not sufficiently precise and unambiguous to demonstrate, on the balance of probabilities, that there has been a material change of use of the land to residential garden and that the use had continued without significant interruption for a period of at least ten years. Consequently, I find that at the date of the LDC application, the existing use claimed has not become lawful for the purposes of section 191(2) of the 1990 Act, due to the passage of time.

Conclusion

26. 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.

David Jones

INSPECTOR