



Appeal Decision

Site visit made on 21 November 2017

by **D H Brier BA MA MRTPI**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 05 December 2017

Appeal Ref: APP/A0665/X/17/3169145

Home Farm, The Ridgeway, Frodsham WA6 6XQ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr M Laws against the decision of Cheshire West & Chester Council.
 - The application Ref 16/05256/LDC, dated 24 November 2016, was refused by notice dated 30 January 2017.
 - 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 use of former agricultural land as residential garden and curtilage of a dwelling.
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Decision

1. The appeal is dismissed.

Preamble

2. The description of the use on the LDC application form, which is repeated on the Council's notice of refusal, includes the word "curtilage". "Curtilage" is not a use of land - it is a term used to describe the relationship of land to a building. In the light of this, I shall deal with the appeal on the basis of the use of the land as a residential garden.
3. In order for the appeal to succeed it has to be shown that the use in question commenced more than 10 years before the date of the LDC application and has continued actively throughout the subsequent 10 year period. I note that the LDC application form is dated 24 November 2016, whereas the notice of refusal gives the date as 25 November. My view is that the former date, i.e. 24 November 2016, is the appropriate one for assessing lawfulness in this instance so the relevant date in this respect is 24 November 2006. The test for the evidence is the balance of probability, and the Courts have held that in cases such as this, the onus on proving it lies with the appellant.

The Appeal Site

4. The appeal site is a large rectangular area. In its midst is a house, 'Home Farm', together with some associated outbuildings, all set well back from The Ridgeway. Although the actual size of the site has not been given, the previous name of the property, 'Five Acres' offers a clue.

5. Access to 'Home Farm' is gained by a driveway that splits into 2 to form a loop that goes around the house. Immediately alongside the house are flower beds and a sitting out area. The southern part of the site has the appearance of a large lawn, punctuated in places by shrubs and trees. In the north-west part of this area is what appeared to be a small orchard.
6. Heading in a northerly direction, beyond the outbuildings, there is a marked change in level. Here the land slopes markedly downwards towards a lake which is reached by a curving path set into the slope. The north-western corner of the site beyond the lake is wooded, part of a larger wood which extends beyond the bounds of the appeal site.

Reasons

7. According to the appellant, the land has been used as a garden since 2004/5. Evidence supporting this includes: 6 'witness statements'; an invoice for a rotary 'ride on' mower dated 24 May 2005; another invoice for 8 fruit trees dated 3 January 2005; and 4 recent photographs of trees. In addition, express reference is made to a 'Google Earth' photograph marked '4/2005' on the slide bar inset on it.
8. The 'witness statements', said to confirm that the land has been used as a garden since 2005, are actually items of email correspondence, seemingly from family members and acquaintances; they are not formal sworn documents. The emails all refer to there having been a garden at 'Home Farm', and various dates – Boxing Day 2004, Spring 2005, Summer 2005, July 2005, and June 2006 – are given. These dates all precede the relevant date, and 2 of them are cross-referenced to specific events, namely the Boxing Day tsunami in 2004 and a 21st birthday celebration in July 2005. In addition, one of the correspondents refers to borrowing a cement mixer in June 2006.
9. On the face of it, the emails appear to support to the appellant's case. However, they are expressed in fairly general terms, and lack specificity. In particular, the information contained in the emails does not provide a clear insight into precisely what happened on the land, where, and to what extent. Nor do the emails shed much light on just how the land was used or what activities took place on it. The email that refers to the 2004 tsunami merely mentions some work having been done on the garden in 2004, but does not go on to say what this amounted to. Likewise, while the 21st birthday celebration in July 2005 is referred to as a 'garden party' and the author of the email mentions using "*all 5 acres of it*", the actual state of the land is not described.
10. As some of the emails seem to have been prompted by approaches from the appellant, they appear to have been written well after the dates referred to in them. It is possible therefore that the passage of time may have dimmed the memory somewhat. Indeed, I note that although the appellant's daughter indicates that some work was done in the autumn of 2004, his son states that the land has been used as a domestic garden since 2006. I acknowledge that both these dates are prior to the relevant one, but this divergence tends to make the degree to which this evidence can be relied upon somewhat questionable.
11. As the appellant has opted to have the appeal determined by written representations, none of the evidence provided by the individuals purporting to

- have some knowledge of the land can be tested by cross-examination. As a result, I am rather reluctant to attach great weight to it.
12. Often an appellant will be best placed to provide information about activities on land, but in this case very little has been put forward in this respect. For instance, the appellant's case is more or less silent insofar as the process of transforming what is described as 'former agricultural land' into 'a residential garden' is concerned. Nor has a clear indication of just when the land assumed the character of a residential garden been given.
 13. The purchase of a drive-on mower could be indicative of the need to mow a large area of grass. Similarly, the purchase of fruit trees would be consistent with someone seeking to create an orchard. And, the dates of the documents appertaining to these matters are both before the relevant date. However, I am not satisfied that the documents are sufficient to demonstrate that all the land in question was in use as a garden at the time. The planting of a few fruit trees and the cutting of grass may constitute gardening, but not necessarily. And, despite the email reference to a 'garden party' and another to a barbeque - which may or may not have been the same event - the appellant's own evidence is largely silent about the activities carried out on the land, when the domestic use started in earnest, and whether it was actively continued throughout the relevant period.
 14. A further concern is that it is far from clear just what the authors of the emails mean by garden, in particular whether their comments apply to all the land for which an LDC was sought, as opposed to part or parts of it. I say this because, on the basis of what I saw, I have reservations as to whether all the land included in the appeal site actually constitutes a garden. In this respect, I note that The Cambridge Dictionary defines "garden" as "*a piece of land next to and belonging to a house, where flowers and other plants are grown, and often containing an area of grass*". Similarly, in The Chambers Twentieth Century Dictionary, the definition is, "*a piece of land on which plants are cultivated adjoining a house*".
 15. Mindful that common to both these definitions is the process of the growing or cultivation of plants and the like, my view is that the northern part of the site does not display these characteristics. Not only does the marked change in level distinguish this area physically from the rest of the site, but, as I perceived it, there was not much sign of plant husbandry or cultivation here. Even if some planting has taken place at the edges of the lake as the Council indicate, and accepting that my site inspection took place at the onset of winter, the impression I gained was one of a distinct lack of cultivation here.
 16. The unkempt nature of the grass, together with the abundance of weeds and bracken in evidence, and the patch of woodland, combine to give this part of the appeal site a very different character from the rest of it. The winding path suggests that some use of the land may be made for leisure purposes, and I was advised that the lake has been stocked with carp. Nevertheless, on the basis of what I saw, as a matter of fact and degree, I do not consider this part of the appeal site can reasonably be regarded as an area of garden land.
 17. Turning to the information derived from 'Google Earth', I acknowledge that this material offers a wholly independent source of evidence. From what is indicated on the '4/2005' photograph which I note also has an 'imagery date' of 4/27/2005, which I take to mean 27 April 2005, the house, the associated

outbuildings and driveway, together with the lake and the curved path, can all be identified with relative ease. But, the precise state of the rest of the land, and whether it shows 'mowed lawn', as the annotation on the photograph – presumably added by the appellant – indicates, is far less easy to discern. I am not satisfied that the resolution of the pictures is sufficiently sharp to allow for the features such as planting to be identified clearly, or to enable a distinction between a grass lawn, as opposed to pasture or a paddock, to be drawn with any degree of confidence. Moreover, I was unable to make out any trees in the area where the small orchard now is.

18. It is just possible to make out a series of linear features on the land, including the northern part. These could have been made by a mowing device, but this is by no means clear. A sizeable dun coloured rectangular feature just to the west of the drive can also be seen. This looks very different from the green hue of the majority of the land, and that of the fields seemingly down to grass in the area too, so whether or not this part of the appeal site was covered in grass at the time is far from clear. To my mind, the evidence derived from 'Google Earth' lacks sufficient clarity to enable firm conclusions to be drawn from it, even when the balance of probability 'test' is applied to it.
19. My concern about the reliability of this source of evidence is fuelled further by the anomalies highlighted by the Council on the photograph with '12/2005' on its slide bar. The current driveway arrangement is indicated on the '4/2005' photograph, but it is not shown on this photograph which also appears to show trees in leaf – a highly improbable occurrence if '12' equates to December. That said, the 'imagery date' on this photograph is 1/1/2005. This might explain the driveway conundrum, but even if this date is the 'correct' one, the leaves on the trees strongly suggest that it is erroneous and so cannot be relied upon.
20. It may be that the apparent discrepancy stems from an isolated error, but no explanation for this has been given. As the precise dates of events are key to establishing lawfulness in a case such as this, I find the degree of uncertainty inherent in this evidence is such that I am reluctant to attach a great degree of weight to it.
21. Nor am I inclined to attach much weight to the recent photographs of trees. As the trees shown are not in leaf, and no clear reference points that would help show where they actually are can be discerned, whether they are some of the fruit trees currently in situ on the land is somewhat uncertain. Furthermore, while it is said that the photographs show 12 years' growth, it is not readily apparent how this conclusion has been arrived at. The absence of a robust means of verifying how old the trees are adds a further layer of uncertainty.
22. My attention has also been drawn to a newspaper report said to describe the case law on which the appellant depends. The case reported is *Richard O'Flynn v SSCLG and Warwick District Council [2016] EWHC 2984 (Admin)*. But, while I can understand why the appellant draws some support from this judgement, each case falls to be considered on its own merits and it seems to me that the particular circumstances involved in this case are rather different from those that appertained in *O'Flynn*.
23. I have taken into account all the other matters raised, but none are sufficient to outweigh the considerations that have led me to my conclusions.

Overall Conclusion

24. The circumstances of this case are such that I am not satisfied that the evidence is sufficiently precise and unambiguous to justify the grant of a LDC on the basis of the balance of probability. The burden of proof that lies with the appellant has not been discharged.
25. For the reasons given above, and having regard to all the other matters raised, I am satisfied that the Council's refusal to issue a LDC in respect of the use of former agricultural land as residential garden and curtilage of a dwelling at Home Farm, The Ridgeway, Frodsham WA6 6XQ was well-founded. I shall therefore exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

D H Brier

Inspector