



Appeal Decision

Site visit made on 23 March 2021

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 April 2021

Appeal Ref: APP/G4240/X/20/3262764

Land at Easterly side of Bury Street, adjacent to 66a

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mrs Denise Bainbridge against Tameside Metropolitan Borough Council.
 - The application Ref 16/00896/CLUD is dated 29 September 2016.
 - 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 curtilage".
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. S191(1) provides that if any person wishes to ascertain whether any existing use of buildings or other land is lawful, they may make an application for the purpose to the local planning authority, specifying the land and describing the use.
3. From the appellant's statement and application documents it is clear that she is seeking an LDC for the continued use of the land as part of the domestic curtilage of 66a Bury Street. However "curtilage" is not actually a use of land and, notwithstanding that the Council has made reference to curtilage in documents relating to previous action that it has taken against the appellant¹, it would not be appropriate to make my decision on this basis.
4. Having regard to the appellant's application, I consider that the description of the proposal can be changed to "the use of the land for purposes incidental to use as a dwelling and whether that land forms part of the curtilage of the dwelling" without resulting in injustice to the parties.
5. It is evident from the documents before me that there is an ongoing dispute between residents as to the ownership of and rights of access over land making up the appeal site. However this issue does not have a bearing on my

¹ See Temporary Stop Notice dated 29 January 2009 and Planning Contravention Notice dated 27 May 2016

consideration of the use of the land and is not critical in this case to my findings with regard to curtilage.

6. I am also aware that the appellant has raised concerns regarding the Council's handling of this case. However, again this does not influence the outcome of my decision.

Reasons

7. Uses and operations are lawful at any time if no enforcement action may 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 (s191(2)). In this case, the appellant seeks to rely on the period of time over which the use has continued. There appears to be no dispute that the use of the land for purposes incidental to the use as a dwelling would have required planning permission.
8. It is important to have regard to the concept of the planning unit, as it is the planning unit against which the question of a material change of use would need to be judged. 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/or occupied for different and unrelated purposes; the concept of physical and functional separation is key.
9. No 66a Bury Street consists of a detached dwelling with an extensive adjoining rear garden, to the south and east, which slopes down towards the adjacent River Tame. This garden is set out as a series of terraces, with tended lawns and plants, supported by retaining walls. The appeal site comprises a further extensive trapezium-shaped area, which adjoins the southern boundary of the garden, the two areas being separated by a substantial wall and tall mature tree planting. This land is also steeply sloping, before levelling out somewhat, towards its eastern boundary with the river. There is access between the garden and a majority of land within the appeal site via a pedestrian gate. It was also apparent from my visit that there is a relatively small compound in the north-west part of the site, accessed via a separate gate.
10. Aside from being physically separated from the formal rear garden of the dwelling, the present appearance and use of the appeal site is also distinct. Essentially it consists of rough grass and uncultivated soil, enclosed by a variety of walls and fencing. Situated on the land are a number of randomly sited small outbuildings and other features, including an ornamental stone wall and well head and some loosely stored rubble. Chickens and geese roam freely across the site and there is also a large bonfire under construction. The aforementioned compound is used to store a variety of building materials and equipment.
11. In terms of the unit of occupation it would appear that the dwelling and appeal site are 'occupied' by the appellant, notwithstanding that ownership of and access rights over the appeal site are contested. However, aside from the fact that it is possible to gain access to a majority of the appeal site directly from the appellant's garden, the respective parcels of land form physically distinct character areas and the sense of the appeal site being physically separated from the appellant's dwelling and its immediate surroundings is very strong.

12. In terms of the use of the land, it is apparent that the appellant's husband has previously confirmed in correspondence that he has not used nor has any intention of using the land for garden purposes and does not consider the land to be garden area². It would appear that the land is being used for miscellaneous and not necessarily connected purposes, which include the storage of building materials and equipment, the management of waste through burning and the keeping of birds.
13. 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 that there are various informal activities taking place on the appeal site which, although low-key in nature, are akin to a mixture of smallholding, hobby, and business-related uses.
14. I consider that these uses could operate independently of the dwelling itself, such that theoretically they might continue even if the house itself was not there. The current use of the land, forming the appeal site, does not necessarily depend on residents being in close proximity to it. 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. It therefore seems to me, from the information provided and my visit, that there is only at best a very tenuous, and not a dependent, functional relationship between the appeal site and the dwelling in this case.
15. Therefore, even if within the same area of occupation I consider, on balance and as a matter of fact and degree, that the appeal site 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. It follows that the uses of the appeal site cannot be regarded as being lawful uses of the land for residential purposes, irrespective of the length of time the land has been put to its present uses.
16. Rather than being uses incidental or ancillary to residential use, the uses should therefore be regarded as primary uses of the land in question. I have had regard to the appellant's points regarding the removal of significant quantities of unsightly waste from the site and communication from the Council about this; the felling of some trees and the planting of new ones and rebuilding part of the river wall. This however does not alter the above findings. I have also had regard to comments, including the 'statement of truth' provided by a local resident, in support of the LDC application. This statement is however vague as to the actual use of the land over time. It also refers to the creation of an ordered well-kept garden area, the provision of which is contradicted by the appellant's own statement.
17. I have found, on the balance of probability, that the appeal site and the dwelling associated with 66a Bury Street are situated within separate planning units. In terms of determining the curtilage of the dwelling, the Council has referred to the legal principles set out in a relevant High Court case³. The judgement in that case referred to three relevant factors, namely i) the physical layout; ii) ownership past and present and iii) use or function past and

² See letters dated 1 February 2009 and 21 April 2019

³ *Burford v Secretary of State for Communities and Local Government* [2017] EWHC 1493 (Admin)

present. The judgement noted that whether something falls within the curtilage is a question of fact and degree.

18. Even if the subject land was in the appellant's ownership, which does not appear to be proven, when considering the physical and functional separation between the appeal site and the dwelling, as set out above, and the absence of any persuasive information to the contrary, I also find that the appeal site cannot form part of the curtilage of that dwelling.
19. The appellant has referred to the Council having accepted the appeal site as residential curtilage within the context of previous formal notices issued in relation to the land. However I am not persuaded that this, or any lack of subsequent action from the Council pursuant to this, weighs in favour of the current application because the Council, when considering these various matters, was not formally determining the lawfulness of the land use subject to this appeal.
20. Had I concluded that the land was being used for purposes incidental to the use as a dwelling it would then have been necessary to consider whether, on the balance of probability, the use of the land for such purposes had continued for a period of ten years or more prior to the date of the application, that is from at least 29 September 2006, so as to be immune from enforcement. The onus is on the appellant to demonstrate that, on the balance of probability, the use has continued for the aforementioned ten-year period.
21. Notwithstanding that I have found that the use of the land should not be regarded as incidental to the use of the dwelling, had I found otherwise I would nevertheless still not have been persuaded that sufficient information and evidence had been provided by the appellant to satisfactorily demonstrate, on the balance of probability, that the appeal site has been in continuous use incidental to that of the dwelling for the entire ten-year immunity period. The date of the aforementioned formal documentation received by the appellant from the Council does not serve to bolster the appellant's case in this regard. The fact that the appellant has disputed the payment of the application fee and requested that the Council regard the application as having been re-submitted at a later date are matters between the parties and are not relevant to my consideration of this specific case.
22. I am mindful that planning practice guidance states "*In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.*" I am not persuaded that the appellant's evidence is sufficiently precise and unambiguous when considering the area of land in question.

23. For the reasons given above I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of "the use of the land for purposes incidental to use as a dwelling and whether that land forms part of the curtilage of the dwelling" at Land at Easterly side of Bury Street, adjacent to 66a would have been 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.

Roy Merrett

INSPECTOR