



Appeal Decisions

Site visit made on 26 October 2020

by **Gareth Symons BSc(Hons) DipTP MRTPI**

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

Decision date: 20 November 2020

Appeal A: APP/X1118/X/20/3255146

Blackwells Lodge, Boode Road, Braunton, Devon EX33 2NW

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) 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 Mrs Margaret Ford against the decision of North Devon District Council.
 - The application Ref: 70855, dated 25 November 2019, was refused by notice dated 24 January 2020.
 - 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 domestic garden.
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Appeal B: APP/X1118/X/20/3251609

The Lookout, Boode Road, Braunton, Devon EX33 2NW

- 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.
 - The appeal is made by Mr Christopher Lane against the decision of North Devon District Council.
 - The application Ref: 70853, dated 25 November 2019, was refused by notice dated 23 January 2020.
 - 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 domestic garden ground.
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Decisions

Appeal A: APP/X1118/X/20/3255146

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Appeal B: APP/X1118/X/20/3251609

2. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Appeal B - Application for Costs

3. An application for costs made by Mr Christopher Lane against North Devon Council is the subject of a separate Decision.

Procedural Matters

4. These are separate appeals and I have considered the evidence under each on that basis. However, there are matters such as the history of the land, the reasons for refusal of the LDC applications, the arguments made, the sites adjoin, and the agent is the same for both appeals that are common ground thus making it appropriate to consider the appeals together.
5. Each application refers to the existing use of each site as "domestic garden". While I understand what that is meant to mean based on the evidence submitted, I have considered each appeal as the use of land as domestic gardens in connection with the residential use of each house having changed from a former agricultural use. Both refusal notices issued by the Council refer to each area of land not being within the curtilage of the relevant dwellinghouse and that there is insufficient evidence to show that there has been a material change of use to domestic garden.

Main Issue

6. These are both applications made under s191(1)(a) of the 1990 Act. For the purposes of the Act uses are lawful at any time if, under s192(a) no enforcement action may be taken in respect of them whether because did not involve development or require planning permission or because the time for enforcement action has expired for any other reason. Under S55(2)(d) of the 1990 Act, 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, does not involve the development of land. On this issue I have had regard to the comments made by the Council and the appellants relating to the judgement of *O'Flynn v SSCLG & Warwick DC [2016] EWHC 2984 (Admin)*.
7. In view of the above, and what I set out in the procedural matters section, the main issue in both appeals is whether, at the date of the LDC application on 25 November 2019, each area of land was, as a matter of fact and degree, in use for purposes incidental to the enjoyment of the dwellinghouse and was therefore within the curtilage of the dwellinghouse. If not, whether, having regard to the time limit under S171B(3) of the 1990 Act, the use of the land as domestic garden has subsisted since before a date ten years before the date of the applications, 25 November 2009.
8. The onus of proof in an LDC application is on the appellant and, whilst their evidence does not need to be corroborated by independent evidence in order to be accepted, they must provide sufficient precise and unambiguous evidence to justify, on the balance of probability, the grant of a certificate.

Reasons

9. The land, comprising around 2 acres, at the rear (south and east) of Blackwells Lodge was purchased by Mr and Mrs Ford on 27 March 2009. There was an agreement that the east half of the land to the rear of a proposed new house, now called The Lookout, would at some stage be sold back to the original owner, or successors in title, when the purchase could be afforded. On 20 May 2011 the east half, about 1 acre, was sold to Mr and Mrs Lane who occupy The Lookout. There is a fence that divides the land into two halves that reflects the different ownerships and relationship with each property. The land, as a whole,

risers steeply in a southerly direction from the backs of each house towards Ash Lane at the top of the site.

10. Whilst it was the case that relevant case law had established that curtilage was defined, amongst other criteria, as a small area about a building, in the case of *Skerritts of Nottingham Limited vs SSETR* [2000] the Court of Appeal held that previous authorities had gone further than necessary in expressing the view that the curtilage of a building must always be small, or the notion of smallness is inherent in the expression. The case of *Sutcliffe v Calderdale BC* [1982] (more recently affirmed in *Adrian Burford vs SSCLG and Test Valley BC* [2017] EWHC 1493 (Admin)), laid down now well established criteria for identifying curtilage as being (i) the physical layout of the building and structures; (ii) their ownership past and present; (iii) their use or function past or present.
11. Upon purchase of the land in 2009, which up until then had been used for agricultural purposes, the occupiers of Blackwell Lodge had a fence and hedge removed that divided the rising ground behind their house and immediate rear garden. Following that they have undertaken a gradual process of tree planting and ground maintenance that has included repeated mowing and treatment of the grass. Whilst the land is largely open with only limited tree planting on the lower approximately third of the land behind Blackwells Lodge, many of the trees are domestic and ornamental varieties. Also, the appearance of the grass is much more like a domestic regularly maintained lawn that has taken time to establish rather than grazed rough pasture. The grass cutting is done by the occupiers of Blackwells Lodge for their half using a ride on mower of the type commonly used for tending large residential gardens as opposed to cutting a field. The land also does not have an agricultural function anymore and any work carried out on it is for domestic purposes.
12. The occupiers of Blackwell Lodge have owned the wider site for over 11 years and their half is discretely fenced off from the other part owned by the occupiers of The Lookout. Apart from a change in level where the earlier hedge and fence had been, there is now very little discernible difference between how the whole land has been used as one extended garden intimately associated with the dwellinghouse. It serves no other purpose and while there is disagreement about the extent of such maintenance, it has only been for the intention of domestic use. Although large, whether that is reasonably necessary for the domestic enjoyment of the house depends on how the occupiers wish to enjoy their time and the land that they own. To some, such a large area of grass and trees would not be reasonably necessary or serve some useful manner. However, in this case the appellants of Blackwell Lodge planned and set out turning the land into a domestic use just after purchasing it and it therefore has been useful to the occupation of the house.
13. Turning to the land at the rear of The Lookout, there is not any significant planting, but the grass again has the appearance of a treated domestic lawn maintained in a similar fashion to that of next door over the same time period. The appellant states that the land is used for exercising their dogs on and there is no barrier such as a fence or hedge that demarcates or separates the land from the immediate rear garden space. It is clear again that the land has no agricultural purpose and it is solely used by the occupiers of The Outlook in association with the residential enjoyment of their property. For the same reasons as the above, for what the occupiers want from the land it serves a reasonably necessary and useful purpose as one overall unit of occupation.

14. The land may not have the more planned appearance of the next door's land, particularly the area where ornamental trees have been planted. Nevertheless, in my view, a manicured or appearance of a fine garden is not necessarily needed to show an intimate association with the residential occupation of the house. The fact it is there and serves that purpose is enough. It has been held that the curtilage to a dwellinghouse may include stables and other outbuildings or other accommodation land such as a small paddock close to the house. In such examples, the land may not have the appearance of a garden or have a residential use, but depending on the facts of the case, the land might still fall within the curtilage due to the incidental way it is used. From the top of the land at the back of The Lookout where two chairs were sited, I could see sand dunes and the sea. Sitting and enjoying the surroundings for their own sake is part and parcel of an incidental residential use.
15. I appreciate that some nearby residents and the Parish Council have questioned whether the land has over ten years been used as gardens to each house and how it has looked over time. Nevertheless, assessing the evidence regarding curtilage in the context of relevant case law, showing purpose incidental to the enjoyment of the dwellinghouse as such does not necessarily hinge on how the land may have looked. Moreover, declarations made in the past about the use of the land when applying for other development does not mean that the land was not within the curtilage of the dwellinghouse concerned. Being outside the defined development boundary has no bearing on considering lawfulness. Nothing else raised outweigh my findings above.
16. Taking all the evidence in the round, I conclude as a matter of fact and degree, that when the applications were made the land in question in each appeal fell within curtilage of the dwellinghouse. The use of land within the curtilage of the dwellinghouse for purposes incidental to the enjoyment of the dwellinghouse does not, given the provisions of s55(2)(d), involve development of the land. Consequently, the use of land as domestic garden in each case is lawful. The appellants have provided sufficiently precise and unambiguous evidence to justify, on the balance of probability, the grant of certificates. Both appeals therefore succeed.

Conclusions

17. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of both applications was not well-founded and that the appeals should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Gareth Symons

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 25 November 2019 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The land is within the curtilage to the dwellinghouse. Under S55(2)(d) of the Town and Country Planning Act 1990, 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, does not involve the development of land. By virtue of s191(2)(a) of the 1990 Act, the use of land as domestic garden land is therefore lawful.

Signed

Gareth Symons

INSPECTOR

Date 20 November 2020

Reference: APP/X1118/X/20/3251609

First Schedule

Domestic garden land

Second Schedule

Land at The Lookout, Boode Road, Braunton, Devon EX33 2NW

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

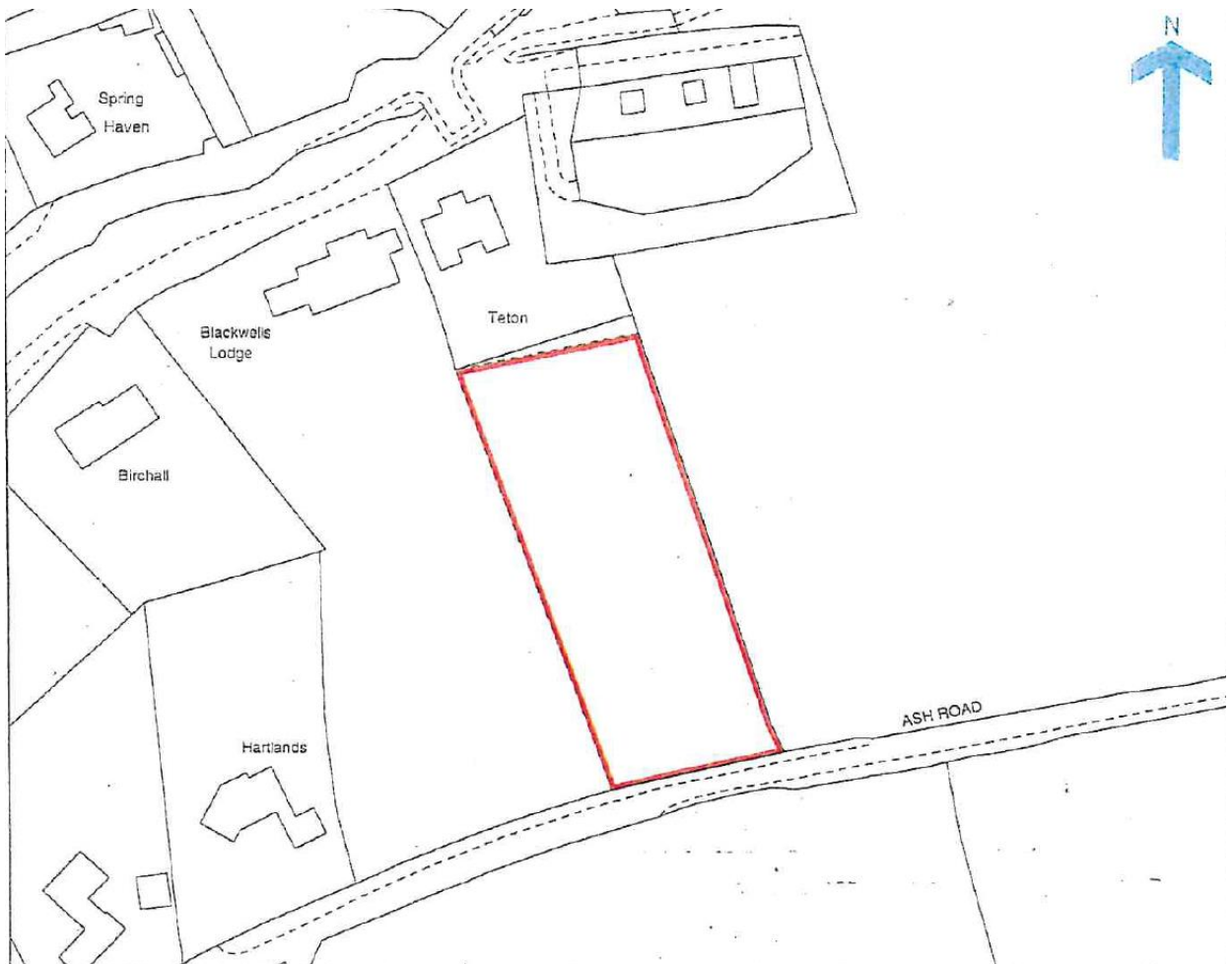
This is the plan referred to in the Lawful Development Certificate dated: 20 November 2020

by **Gareth Symons BSc(Hons) DipTP MRTPI**

Land at: The Lookout, Boode Road, Braunton, Devon EX33 2NW

Reference: APP/X1118/X/20/3251609

Scale: Do not scale.





Costs Decision

Site visit made on 26 October 2020

by Gareth Symons BSc(Hons) DipTP MRTPI

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

Decision date: 20 November 2020

Costs application in relation to Appeal Ref: APP/X1118/X/20/3251609 the Lookout, Boode Road, Braunton, Devon EX33 2NW

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Christopher Lane for a [partial] [full] award of costs against North Devon District Council.
 - The appeal was against the refusal of a certificate of lawful use or development for domestic garden ground.
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Decision

1. The application is refused.

Reasons

2. Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.
3. I note the applicants consider the Council officer responsible for preparing the delegated report did not carry out a proper site inspection. However, the Council officer did carry out a visit which appeared to be to next door where there was a very similar application which I have considered at the same time as the applicant's appeal. When I made my appeals site visit I only did so to the applicant's property because I was able to clearly see the land next door over and through a wire fence. It is a matter of judgement about the extent of a site visit and whether a property needs to be entered to make a visual inspection of the land concerned.
4. In the circumstances, the Council officer actions at the site visit were not unreasonable. In any event, PPG advises that costs cannot be claimed for the period during the determination of the planning application. Costs can only be awarded in relation to unnecessary or wasted expense at the appeal or other proceeding.

Conclusion

5. The Council did not behave unreasonably. An award of costs is not justified.

Gareth Symons

INSPECTOR