TOWN AND COUNTRY PLANNING ACT 1990: Section 191 (as amended)
Town and Country Planning (Development Management Procedure) (England) Order 2015
Article 39

REFUSAL OF APPLICATION FOR A LAWFUL DEVELOPMENT CERTIFICATE FOR AN EXISTING USE

TO: Mr. G. Atkinson

OF: 5 Hillside, Kitnocks Hill, Curdridge, SO32 2HJ

In pursuance of their powers under the above-mentioned Act and Order, Winchester City Council, as local planning authority **HEREBY REFUSE** your application for a Certificate of Lawfulness for the existing use under Section 191 of the Act, dated the 6th of August 2019 under reference number 19/01696/LDC in respect of the Land described in that application, namely Land to the Rear of 5 Hillside, Kitnocks Hill, Curdridge, SO32 2HJ shown edged red on the plan attached hereto.

The grounds for the Council's decision are as follows:

The Council is not satisfied that on a balance of probabilities the lawful use of the Land is residential garden.

There is evidence from the applicant in the form of statutory declarations which, on a balance of probability, demonstrates that the Land has been used as an extension to the residential garden at No. 5 Hillside, Kitnocks Hill for a period of time prior to 6 August 2019 when the application for a certificate of lawful existing use was made. The question for the purposes of this decision is whether the change of use from agriculture to residential garden has in fact been in existence for at least 10 years prior to 6 August 2019 in order to become immune from enforcement.

In order to become immune from enforcement action where a change of use has occurred, an application for a certificate of lawfulness needs to demonstrate on a balance of probability that the use has been carried out for at least ten years prior to the date that the application is received by the Council. Section 171B(3) of the Town and Country Planning Act 1990 (as amended) provides that an unlawful change of use which continues for a period of 10 years without any enforcement action being taken against it becomes immune from enforcement action and becomes lawful as a result thereof.

The burden of proof is on the applicant to demonstrate that, on the balance of probability, in accordance with his/her application each and every part of the Land has been used at some time in such a way as to constitute its use for extended domestic garden and that the use of each part has been uninterrupted for a period of 10 years prior to the date of the application. The assessment is one based on a matter of fact and degree as to whether the change of use has continued uninterrupted for the full 10 year period.

The applicant took transfer of the Land in July 2010 and, according to his statutory declaration, he immediately set out improving and enhancing the overall aspect of this small section of the ground. This is not definitive in any material respect as exact details of such improvements and enhancements are not specified on any given date. These improvements i.e. addition of a garden

room to the stable block, a greenhouse, a patio, a washing line and vegetable patch etc. do not appear to be evident in the photograph and statements contained in the statutory declarations provided by Steve and Georgia Wallin of No. 6 Hillside. This evidence states that the photograph of the Land and beyond into the extended field was taken on 11 March 2011, which would suggest that the improvements and enhancements described by the applicant were not as immediate as one would expect. This contradictory evidence tilts the balance of probability and casts doubt as to whether the Land has actually been used as a domestic garden for 10 full years prior to 6 August 2019. If the Land was a fallow field on 11 March 2011 then it was probably still fallow field prior to July 2010.

For the purposes of assessing whether immunity from enforcement has been attained under the 10 year rule, the character of the Land prior to 2010 is pertinent as the calculation of the immunity period would, for the purposes of this application, commence before 6 August 2009. The Land was owned and used by the previous owner, Mrs. Kathleen Allen, who has provided photographs and a statement of alleged facts regarding the use of the Land to her knowledge. It would appear that between 1993 and May 2010, when Mrs. Allen sold the Land to the applicant, the Land was used for the grazing of a pony or ponies. Mrs. Allen apparently allowed Mr. and Mrs. Penwell, the occupiers of No. 6 Hillside at the time, to graze their pony and part of this agreement included the right to cultivate the land. It would appear that the land was used for the grazing of ponies and when this was not happening, the Land lay fallow.

It seems improbable that the Land was in fact used to the degree required by law to be regarded as a residential garden associated with No. 5 Hillside on or before 6 August 2009 i.e. 10 years prior to the date of the application. The physical layout and location of the Land in relation to No. 5 Hillside is peculiar in the sense that the Land is actually more to the rear of No. 6 Hillside. In fact this is so much so, that the Owner of No. 5 Hillside, Mrs. Allen, even let the Owners of No.6 Hillside use the Land for grazing and cultivation. The use of the Land prior to 2010 would appear to have been more incidental to the associated dwelling house at No. 6 than it did to No. 5. The physical separation of the Land from the main dwelling at No. 5 Hillside and the past character of use of the Land would suggest, on a balance of probability, that the Land was not being used at residential garden incidental to the use and enjoyment of the associated dwelling house at No. 5 Hillside. The evidence would suggest that the Land was probably a grazing paddock for ponies and/or fallow field throughout many of the years prior to 2010 when the applicant acquired the property and began transforming, to some degree, the field into a residential garden to be used in association with the enjoyment of the associated dwelling house at No. 5.

Therefore, while the Land has undoubtedly undergone improvement in more recent years to make it more enjoyable as a residential garden for leisure activities associated with the use of the residential dwelling at No. 5 Hillside, on a balance of probabilities it has not been used as a residential garden for more than 10 years prior to 6 August 2019. Therefore, the unlawful change of use from agriculture to residential garden has not yet become immune from enforcement action under section 171B(3) of the 1990 Act and the certificate of lawfulness is therefore refused .

Signed:

Service Lead – Legal (Interim)
Winchester City Council

Dated: 15 October 2019

IT IS IMPORTANT THAT YOU READ THE NOTES

NOTES

1. If you are aggrieved by the decision of the Council to refuse an application for a Certificate under sections 191 or 192 of the Town and Country Planning Act 1990 (as amended) or to refuse it in part you may appeal to the Secretary of State under section 195 of the Act (as amended).

2. You can appeal online at https://www.gov.uk/appeal-planning-inspectorate or by post addressed to the Planning Inspectorate, Room 3/13, Temple Quay House, 2 The Square, Temple Quay, Bristol, BS1 6PN. Copies of all relevant documents, including the application, the notice of decision and all plans, drawings and correspondence must be supplied to the Planning Inspectorate.

3. You are advised to consult the brief official guide to applications and appeals, published by the Planning Inspectorate https://www.gov.uk/government/publications/certificate-of-lawful-use-or-development-appeals-procedural-guide

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