DELEGATED REPORT

Application reference: PL/2023/09307
Application type: Certificate of lawfulness of existing use or development
Case officer: David Millinship
Site address: Rose Farm, Manningford Abbots, Pewsey, Wilts, SN9 6JA
Proposal: Certificate of lawfulness for the continued use of land as residential gardens
Recommendation: Refused

SITE AND DEVELOPMENT

The application site comprises approximately 0.84ha of land adjacent to an existing domestic property known as Rose Farm. Public footpath MANN17 bisects the land into two compartments (one roughly square shaped to the north of the house and the other triangular to the north-east of the footpath).

The application seeks to establish whether the use of the land for residential purposes is lawful.

RELEVANT PLANNING HISTORY

Reference No.	Description of developmemt	Decision
K/47367	Retrospective application for erection of trellis panelling on top of garden wall.	Approved (17-May-2004)
K/38418	The erection of two detached dwellings and garages with associated works.	Allowed at appeal (15-Feb- 2000)
K/37865	The erection of two detached dwellings and garages with associated works.	Allowed at appeal (15-Feb- 2000)

PLANNING LEGISLATION

Section 191 of the Town and Country Planning Act 1990 (TCPA) provides that:

> *1. If any person wishes to ascertain whether—*
>
> *(a)any existing use of buildings or other land is lawful;*
> *(b)any operations which have been carried out in, on, over or under land are lawful; or*
> *(c)any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter…*
>
> *…(3) For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—*
>
> *(a)the time for taking enforcement action in respect of the failure has then expired; and*
> *(b)it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force…*
>
> *…(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the*

application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

Section 171 defines the time limits for enforcement action as four years (for development comprising building works or change of use of any building to use as a single dwellinghouse) and in the case of any other breach of planning control (including breach of condition), the end of the period of ten years beginning with the date of the breach. Section 115 of the Levelling-up and Regeneration Act 2023 has increased the time limits for enforcement on all breeches of planning control from four to ten years, but some transitional provisions are in place. In any case the time limit before the 2023 Act was 10 years in this instance as a claimed change of use of land, and remains as such (10 years) under the new provisions.

National Planning Policy

National Planning Policy Framework (2023);
National Planning Practice Guidance.

ISSUES

The main issues in the consideration of this application are:

- Whether the evidence submitted by the applicant demonstrates that the land has been within a residential use for a period of over ten years; and
- Whether any other evidence available to the local planning authority would confirm or dispute the applicant's submission.

CONSULTATIONS

No responses were received.

REPRESENTATIONS

No responses to the public consultation were received.

ASSESSMENT

ONUS OF PROOF

The onus of proof in a Lawful Development Certificate (LDC) application is firmly on the applicant. While the Local Planning Authority (LPA) should always co-operate with an applicant seeking information they may hold about the planning status of land, by making records available, they need not go to great lengths to show that the use or operations failure to comply with a condition, specified in the application, is or is not lawful. While LPA's are statutorily required to maintain the planning register, this is not a complete record of the planning status of all land in their area. In many cases, the applicant for a certificate will be best placed to produce information about the present, and any previous, activities taking place on the land, including a copy of any planning permission they may hold. Some information, especially about the history of any unauthorised activity on the land, will be peculiarly within the Applicant's knowledge.

The fact that a LDC may be refused because the onus of proof is not discharged by the applicant does not preclude the submission of a further application if better evidence is subsequently available. A refusal to issue a LDC is therefore not necessarily conclusive that something is not lawful; it may merely mean that, so far, insufficient evidence has been presented to satisfy the LPA that the use, operation or activity is lawful.

The Courts have held that the relevant test of evidence on such matters is "the balance of probability". As this test will accordingly be applied by the Secretary of State in any appeal against their decision, an LPA should not refuse a certificate because the applicant has failed to discharge the stricter, criminal burden of proof, namely "beyond reasonable doubt".

Moreover, the Court has held that the applicant's own evidence does not need to be corroborated by "independent" evidence in order to be accepted. If the LPA have no evidence of their own, or 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 certificate "on the balance of probability". The LPA should proceed on the basis that neither the identity of the applicant (except to the extent that he or she may or may not be able personally to confirm the accuracy of any claim being made about the history of a parcel of land), nor the planning merits of the operation, use or activity, are relevant to the consideration of the purely legal issues which are involved in determining an application.

Applicant's Evidence

The application has been submitted with a Statutory Declaration (SD) signed by the current site owners. The SD states that the current owners have occupied the property since 2022. Reference is made to discussions with estate agents with regards to the use of the land in question. The SD also references aerial photos.

The description of the use of the land 'lawns and wilds areas'. Firstly, suggestion of the use of part of the land as a 'wild area' suggests no domestic use purely in terms of the description ('wild' being the opposite of 'domesticated'). Whilst it is unclear from the SD where the 'wild areas' would have been, some discussion with the applicants (and evidence available within aerial photos) appears to confirm the 'wild area' comprised a triangular area of approximately 0.23ha of land extending to the north of public footpath MANN17. This triangular area of land appears to have had no residential use nor does it appear to have been regularly maintained. It appears to have been kept mainly as grassland.

The land to the south-west of the footpath (to the north of the house) does appear in aerial photos to be a more manicured area of land. However, the SD features no description of historic activities that would provide robust evidence that it had a residential use. A letter from a gardener of the site was submitted as additional evidence to attempt to demonstrate that the land has been 'maintained to a domestic garden standard' for a period of 11 years. Cutting grass within a field is not evidence of a residential use and, whilst this land is more closely related to the house (in that it has a shared boundary), it is an overly large area not commensurate in scale to the dwelling so a residential use over all of the land (incidental to the existing dwelling) is highly unlikely to have been established. No other activities, that could reasonably be considered to be incidental to the use of a dwellinghouse, have been confirmed as regularly taking place within the land.

Aerial photos confirm some grass cutting, but this could have been in association with agricultural operations or (as described by the applicant) simple maintenance of the land. No domestic chattels are visible within aerial photos (dated between 2002 and the present) and it appears that at various times the field has been separated from the domestic curtilage of the house by various boundary enclosures (hedges, walls, fences etc.). Therefore, it is considered to be unreasonable

to accept that a functional relationship between the dwelling house and the land in question was established through the general maintenance of the land.

Some consideration of the originally established curtilage for the dwelling is relevant. The 2000 appeal decision established a curtilage around the new dwelling at Rose Farm that is broadly commensurate to the land edged in blue on the submitted Site Location Plan (Rev.A 11.23). The established curtilage was confirmed within a 2004 householder planning permission that excluded the adjacent field from the domestic curtilage of the dwelling. Aerial photos dated between 2002 and the present also confirm that the wider pasture land has been separated by means of enclosure (although access from the domestic garden appears to have been maintained).

In any case, if evidence could have been produced to demonstrate a residential land use had been established, the land would not become part of the domestic curtilage of the property (with regard to the view handed down by Burford vs Secretary of State for Communities and Local Government (CO/6180/2016 – June 2017). As such, no permitted development rights would be able to be established.

The SD and additional evidence do not present a reliable argument that the land has an established residential use. There is no dispute that the land edged in red has been maintained to some degree but, the cutting of grass and general maintenance does not establish a residential use in planning terms.

CONCLUSION

The evidence submitted to the local planning authority fails to confirm that, on the balance of probabilities, at the time of the application the land edged in red within the submitted Site and Location Plan (Rev.A 11.23) was used for residential purposes for a continuous period of over ten years. Under the provisions of s.191(3) of the Town and Country Planning Act. 1990 (as amended) the application for a certificate of lawful development for an existing use is refused.

RECOMMENDATION: that the certificate of lawfulness of existing use or development is ISSUED for the following reason:

1. Taking into consideration the evidence put forward by the applicant and that available to the local planning authority, it is considered the applicant has failed to demonstrate, on the balance of probabilities, that at the time of the application land edged in red within the submitted Site and Location Plan (Rev.A 11.23) was used for residential purposes for a continuous period of over ten years. Under the provisions of s.191(3) of the Town and Country Planning Act. 1990 (as amended) the application for a certificate of lawful development for an existing use is refused.

INFORMATIVES

For the avoidance of doubt, the information submitted to the local planning authority is as follows:

- Application Form;
- Statutory Declaration of Charles and Edwina Keyser (undated);
- Letter from Mr Duncan Hogg (dated 14th February 2024).