



Emma Keefe
Development Manager
Tonbridge and Malling Borough Council
Gibson Building,
Gibson Drive,
Kings Hill,
West Malling, ME19 4LZ

Our ref TM/21/01
Your ref
05.05.21

Dear Ms Keefe,

Application for a Certificate of Lawful Development for the existing use of land as residential garden land in association with 5 Chapel View, Chapel Row, Ightham, Sevenoaks, Kent, TN15 9AQ

I write in connection to the above address. I have been instructed to submit an application for a Certificate of Lawful Development (CLD) to establish that the land to the north of 5 Chapel View, Chapel Row, Ightham has a use as residential garden land, and this use is lawful through the passage of time and immune from enforcement action, and that my client is entitled to continue to use the land in the same way.

This covering letter summarises the application, but also forms the statement setting out the evidence to demonstrate that the use has been carried out since at least February 2007, and has continued to be used in the same way since that date. The application is accompanied by the following information;

- Site location plan;
- Statutory declarations from previous and current owners and users of the land, and
- Letters from neighbours.

The appropriate fee of £462 will be paid direct by the applicant.

By way of background, my client submitted an application for a Certificate of Lawful Development for the erection of a garden room on the land the subject of this application as permitted development, under reference TM/21/00078. The Council refused to issue the Certificate as they deemed that the building works were not permitted development (and therefore not lawful without the express grant of planning permission). My client discussed the refusal to issue a Certificate with the case officer, who advised that



a Certificate of Lawful Development should be made for the use of the land as residential garden land, before making an application for the erection of an ancillary building.

It is important to understand the legislative context and Central Government guidance in relation to this type of application. The application is for a Certificate of Lawful Development made under the provisions of section 191 of the Town and Country Planning Act 1990 (as amended). The main guidance in relation to the submission and determination of Certificates of Lawful Development is set out in the National Planning Practice Guidance document, under the heading “Lawful development certificates”.

Under the heading “Who is responsible for providing sufficient information to support an application?”, the guidance sets out that;

“The applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence.”

In addition, the guidance goes on to say that;

“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.”

This sets out two particular issues which are of significance in the determination of this application. Firstly, the onus is on the applicant to submit sufficient information to support an application. If the Council does have evidence of its own, then it has a responsibility to share this evidence with the applicant in order to enable it to be commented on and rebut the evidence if necessary.

Secondly, the test is the “balance of probability”. The applicant only needs to prove that it is probable that the existing development is lawful in order to secure the Certificate. This is a lower test than



“beyond reasonable doubt” (as used in criminal cases, for example).

In short, therefore, the evidence to be submitted with such an application needs to be sufficient for the Council to establish that the use was begun, and unless the Council are able to contradict the evidence, then it should be accepted as such. Furthermore, the evidence only needs to show that the use claimed by the applicant was probable (“on the balance of probability”) in order for the Council to issue a Certificate.

In this case, the majority of the evidence is in the form of statutory declarations from the previous and current owners and users of the land, and neighbours. All of these individuals have knowledge of the site.

Main issues

The main issue to be addressed is as follows;

- Has the use claimed become immune from enforcement action, and therefore lawful, due to the passage of time?

In establishing the immunity of the claimed use from enforcement action, it is critical to identify when the operations began. The definition of when development is begun is set out in the Town and Country Planning Act 1990 (as amended) at s56 and subsection (2);

(2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.

A "material operation" is defined (in subsection 4) as;

- (a) any work of construction in the course of the erection of a building;*
- (aa) any work of demolition of a building;*
- (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;*



- (c) the laying of any underground main or pipe to the foundations, or part of the foundations of a building or to any such trench as is mentioned in paragraph(b);*
- (d) any operation in the course of laying out or constructing a road or part of a road;*
- (e) any change in the use of any land which constitutes material development.*

For the purposes of the current CLD application, the relevant part is (e). Part (e) identifies a change in the use of any land which constitutes development as a “material operation”, and the earliest date that a “material operation” is carried out is the date at which the change of use has deemed to have taken place.

Running alongside this, it is also necessary to establish how long the claimed building operations have been carried out. The NPPG, under the heading “Definition of lawfulness and its limits” sets out the following;

“The statutory framework covering “lawfulness” for lawful development certificates is set out in section 191(2) of the Act. In summary, lawful development is development against which no enforcement action may be taken and where no enforcement notice is in force, or, for which planning permission is not required.”

Section 171B of the Act sets out the time limits for taking enforcement action. Subsection (3) sets out that;

“In the case of any other breach of planning control (other than a breach of planning control consisting of the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, or the change of use of any building to use as a single dwellinghouse), no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.”

In this case, the use claimed is a change of use of the field from agriculture to the use as residential garden land in association with 5 Chapel View. Therefore, the time period for immunity is ten years beginning with the date of the breach.

Consequently, if it can be established that the use claimed has been carried out for more than ten years



from the date of the submission of this application, then it is immune from enforcement action, and therefore lawful. It is significant to note that the Council have not carried out any enforcement action in relation to the breach since the use began.

Summary of the evidence

The evidence to support the application is in the form of the following;

- Statutory declarations;
- Letters from neighbours;

Statutory declarations

The statutory declarations set out the use of the land, outlined in red on the application documents, by the previous and current owners. The previous owners [REDACTED] set out in their statutory declaration that they owned the property (5 Chapel View and the land the subject of this application) from February 2007 up to December 2020, when it was transferred to the current owners. [REDACTED] confirm that they used the land the subject of this application “as recreational purposes as a garden”, associated with the use of the property as a residential home. The declaration also sets out that the use has been carried on without interruption, confirming that the use has been continuous over this period.

The current owners, [REDACTED] became the owners of the property on 08.12.20. [REDACTED] has confirmed that since taking over the ownership of the land, he and his sister have also used it in the same way as the previous owners, for recreational purposes as a garden, associated with the use of the property as a residential home. Again, the statutory declaration sets out that the use has been carried on without interruption, confirming that the use has been continuous.

Neighbours letters

Two neighbours have written to confirm the use of the land in question. [REDACTED] lives at 6 Chapel View which is immediately to the south east of the land the subject of this application. She has



confirmed that during the last 6 years, being the period that she has resided at the property, the land has been used as a garden [REDACTED] has lived at 2 Chapel View (at the opposite end of the terrace) since 2008, and can also confirm that during his residency, the land the subject of this application has always been used as a garden.

Conclusion

On the balance of probability therefore, the use of the land for recreational use in association with 5 Chapel View (effectively, as a garden) has been carried on since at least February 2007. The use has been continuous since that time. As this is a period in excess of 10 years starting from the date of the submission of this application, it is submitted that the use meets the time periods identified above for immunity from enforcement action. No enforcement action has been taken by the Council. As a result, the use claimed by the applicant, and that is the subject of this application, is lawful as a result of the passage of time, and immune from enforcement action.

I trust the above, and accompanying documentation, sets out the applicant's case clearly. Should you wish to discuss any of the above, please do not hesitate in contacting me on the details below.

Yours sincerely,



Encs

Statutory declarations from Mr and Mrs Stanborough and Mr and Mrs Burt
Neighbours letters from Mr Gwyn Jones and Mrs Godfrey