Appeal Decisions

Hearing held and site visit made on 28 August 2014

by Alan Woolnough BA(Hons) DMS MRTPI
an Inspector appointed by the Secretary of State for Communities and Local Government (SSCLG)

Decision date: 16 October 2014

Appeals A & B: APP/T3725/C/13/2210566 & 2210567
Land adjacent to Pinley Acres, Pinley Green, Claverdon, Warwick CV35 8LZ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr George William Cooper (2210566, Appeal A) and Mrs Laureen Denise Cooper (2210567, Appeal B) against an enforcement notice issued by Warwick District Council.
- The Council's reference is Act 381/13.
- The notice was issued on 26 November 2013.
- The breach of planning control as alleged in the notice is: ‘Without planning permission, change of use of the Land to garden land’.
- The requirements of the notice are:
  1. Cease the use of the land as garden land.
  2. Remove from the land all vehicles, equipment, furniture or materials not connected with agricultural use.
- The period for compliance with the requirements is three months.
- Appeal A is proceeding on the grounds set out in section 174(2)(a) and (d) of the 1990 Act as amended. Since the prescribed fees have not been paid within the specified period for Appeal B, the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended and the appeal on ground (a) do not fall to be considered in that case. Appeal B is therefore proceeding on ground (d) only.

Summary of Decisions: The appeals are allowed in part on ground (d) but are otherwise dismissed and the enforcement notice is upheld with corrections.

Appeal C: APP/T3725/X/14/2211699
Land adjacent to Pinley Acres, Pinley Green, Claverdon, Warwick CV35 8LZ

- 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 (LDC).
- The appeal is made by Mr George William Cooper against the decision of Warwick District Council.
- The application ref no W/13/1024, dated 8 August 2013, was refused by notice dated 4 October 2013.
- The application was made under section 191(1)(a) of the 1990 Act as amended.
- The existing use for which a LDC is sought is described on the application form as ‘residential curtilage’.

Summary of Decision: The appeal is allowed in part but is otherwise dismissed and a certificate of lawful use or development is issued in the terms set out below in the formal decision.
Procedural matters

The validity of the LDC refusal and enforcement notice

1. The Appellants have questioned the validity of both the District Council’s decision on the LDC application and the subsequent enforcement notice, on the basis that the application was determined before it had been fully considered by Rowington Parish Council. At the Hearing it was explained that, in the light of a telephone conversation between the Parish Clerk and a District Council officer, the Parish Council had been expecting to finalise its recommendation to the District Council on the application at a meeting on 10 October 2013, which Mr Cooper had intended to address. However, the District Council issued its decision six days before the meeting.

2. In alleging invalidity the burden of proof is firmly on the Appellants to demonstrate their case on the balance of probabilities. In this regard, it is pertinent that no written record of the conversation between the Parish Council and District Council officer has been produced and that the officer was not available to give evidence at the Hearing. Nor has it been shown that the officer had the authority to postpone the District Council’s decision in order to accommodate the Parish Council.

3. It is also relevant that there is no statutory obligation on the District Council to consult the Parish Council or, indeed, any other third party on a LDC application. I have seen no cogent evidence to the effect that the Parish Council was formally consulted in this case. Moreover, the Parish Clerk, Ms Coleman, confirmed at the Hearing that her ‘holding comment’ to the District Council, dated 29 August 2013, made on behalf of the Parish Council under delegated authority (given the absence of a Parish Council meeting during the month of August), was sent proactively rather than by invitation.

4. Taking these points into account, I find that a departure from essential procedures sufficient to invalidate the District Council’s decision on the LDC application and the subsequent enforcement notice has not been demonstrated. Accordingly, both decision and notice stand and the appeals against them remain before me to determine. Beyond this, the question of whether the District Council should have handled the administration of the LDC application differently is not a matter for me and, if deemed necessary, falls to be pursued by means separate from the planning appeal process.

Further consultation

5. It became apparent during the course of the Hearing that neither the main parties nor the Parish Council had benefited from sufficient time to address the relevance to the ground (a) appeal of the scope of the plans approved pursuant to planning permission ref no W9804381 and, additionally, the High Court’s decision in Redhill Aerodrome v SSCLG, Tandridge DC & Reigate & Banstead BC [2014] EWCH 2476 (Admin). With regard to the former, there was a concern that the plans made available at the time of the Hearing were less than comprehensive.

6. As to the latter, the High Court held that in considering whether ‘very special circumstances’ exist to justify ‘inappropriate development’ in the Green Belt,

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1 Full planning permission for ‘Erection of a replacement dwelling (alternative position) and inclusion of agricultural land in residential curtilage’ at Pinley Acres, granted on 4 June 1998.
the phrase ‘and any other harm’ in paragraph 88 of the National Planning Policy Framework (NPPF) should be limited solely to the Green Belt rather than, as was previously the case, including non-Green Belt harm. The District Council was therefore asked post-Hearing to supply copies of the approved plans held on official record. The Appellants, District Council and Parish Council were then invited to make further written representations on the relevance to my decisions of those plans and the High Court’s Redhill judgment and to respond to each others’ submissions.

7. In determining the appeals I have taken into account all post-Hearing representations received by the appropriate deadlines which addressed those particular matters. However, in doing so I have borne in mind that, on 9 October 2014, the Court of Appeal overturned the High Court’s decision in Redhill (citation [2014] EWCA Civ 612). This means that the Courts’ stance on the Green Belt policy test now reverts back to the pre-High Court position. I have determined the appeal against the enforcement notice on ground (a) on this basis.

The appeal sites

8. For the purposes of the Hearing and these decisions, the land at Pinley Acres has been subdivided into three sections, hereinafter referred to for convenience as Area A, Area B and Area C. The extent of each area is shown on Plan A attached to these decisions.

9. There are significant differences between the area of land subject to the LDC application and that subject to the enforcement notice and, accordingly, between the Appeal C and Appeal A/B sites. The latter comprises most of the land at Pinley Acres that falls within the Appellants’ ownership (Areas A, B & C) with the exception of the house and garage, a small area of land immediately adjacent thereto and a sliver of land at the north-west corner of the property. The LDC application site includes the house, garage and adjacent land but excludes Area C.

10. At the Hearing, the Council acknowledged that the lawfulness of the use of the land immediately adjacent to the house and garage, as excluded from the Appeal A/B site, for the purposes to which it is currently put was not in dispute. Nothing before me leads me to take a different view and, this being so, there has been no need for me to examine specifically the lawful use of the land in question, although it remains part of the Appeal C site.

11. The LDC application form gives the address of the site as ‘Pinley Acres, Shrewley Common Road, Shrewley’. However, at the Hearing it was agreed between the parties that the address used in the Appeal C heading above is correct.

The description of existing use

12. There are two different LDC application forms before me, purportedly for the same application. That dated 8 July 2013 describes the existing use for which a LDC sought as ‘existing use of land as garden land as per letter and statement dated 8 July 2013’. That dated 8 August 2013 describes the use as

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2 The Appellants have pointed out that the land at the north-west corner is not subject to the enforcement notice. However, such exclusion does not invalidate the notice. Moreover, a correction to include it, thereby expanding the scope of the notice, could give rise to injustice and is therefore beyond the powers available to me.
‘residential curtilage’. It was confirmed at the Hearing by both main parties that the latter form should be the basis for my decision on Appeal C. I concur.

13. Nonetheless, ‘curtilage’ is a legal concept defining an area of land in relation to a building and must never be confused with a use of land. It cannot therefore form part of a description of development for the purposes of a LDC. This being so, I will utilise an alternative description that properly conveys a use of land in planning terms, pursuant to the powers available to me under section 191(4) of the 1990 Act as amended and case law arising from the judgment in Panton & Farmer v SSETR & Vale of White Horse DC [1999] JPL 461, for the purposes of determining Appeal C.

14. At the Hearing, it was agreed with the main parties that this should be: ‘Use as garden land incidental to the enjoyment of the dwellinghouse as such’. Additionally, as the Appeal C site as defined in the LDC application includes the house and garage, the lawfulness of which is not in dispute, I find a further amendment to the LDC application description to be necessary in the interests of accuracy, such that it should read: ‘Use comprising a single dwellinghouse and domestic garage and the use of land as garden land incidental to the enjoyment of the dwellinghouse as such’. I am satisfied that no injustice to any party arises in doing so.

Other matters

15. Initial appeals against the enforcement notice on ground (c) were withdrawn at the Hearing. All the arguments pursued by the Appellants under that heading have instead been addressed in the context of the appeals on grounds (d) and (a).

16. Although an appeal against the notice on ground (f) has not been formally pursued, the Appellants nonetheless contended that requirement (ii) of the notice exceeded what was necessary to remedy the alleged breach of planning control. At the Hearing, the main parties agreed that this matter should be dealt with by means of a correction to the notice rather than in the manner of a ground (f) appeal. Accordingly, it is addressed below under the heading ‘The notice’.

17. The Appellants’ written representations on the appeals make extensive reference to matters that fall outside their scope, such as enforcement action against the construction of an access track and the refusal of planning permission for a storage facility on the land. It was made clear both prior to and during the Hearing that such matters are not within my remit. Accordingly, they have played no part in my determination of the appeals. Nor are the Appellants’ criticisms of the way in which their various planning concerns have been handled by the District and Parish Councils for me to address.

The notice

18. The cover sheet and section 2 of the enforcement notice give the address of the land it targets as ‘Pinley Acres, Shrewley Common, Rowington’. However, the plan attached to the notice bears the address ‘Pinley Acres, Pinley Green, Claverdon’. At the Hearing, all parties agreed that the latter is more accurate. I will correct the notice accordingly.
19. Section 3 of the notice alleges a ‘change of use of the Land to garden land’. However, the act of development as defined by statute is a material change of use. Moreover, as pointed out by my fellow Inspector in determining a previous LDC appeal relating to the same land (APP/T3725/X/11/2144614) in 2011, the term ‘garden’ is open to wide interpretation. It was therefore agreed at the Hearing between the main parties that, in the interests of clarity and precision and for consistency with Appeal C, the alleged breach of planning control should be corrected to read: ‘Without planning permission, the material change of use of the Land to garden land incidental to the enjoyment of the dwellinghouse as such’.

20. As previously referred to, the Appellants considered requirement (ii) to be excessive, in that it specifies the removal from the land of all vehicles, equipment, furniture or materials not connected with agricultural use, rather than the removal of all such items that facilitate the specific use targeted by the notice. The Appellants’ particular concern was that the removal from the land of materials derived from the demolition of a former dwelling on the site would thus be required and would be a step too far. I agree that requirement (ii) exceeds the lawful scope of the notice and will therefore amend it such that it specifies only the removal of items facilitating use of the land as garden land.

21. In the interests of consistency with section 2 of the notice, the term ‘Land’ with a capital ‘L’ should be used in requirements (i) and (ii) in section 5. Moreover, for completeness, reference to the plan attached to the notice, on which the ‘Land’ is defined cartographically, should be included in section 2. I am satisfied that no injustice to any party arises from any of the above corrections.

22. The question arose at the Hearing of whether Areas B and C should have in fact been targeted by the enforcement notice, the District Council having expressed doubt as to whether those areas were in fact subject to garden use when the notice was issued. It was also noted that the LDC refusal notice, issued less than two months before the enforcement notice, states that ‘from the evidence it is likely that the land denoted as B has never been used to a significant extent for residential purposes’. The District Council’s representative at the Hearing was not the original case officer and was unable to give a satisfactory explanation as to why, in such circumstances, it was considered necessary and expedient to target land beyond Area A for enforcement purposes.

23. However, there is no appeal against the notice on ground (b) to the effect that Area B and/or Area C were not used for the purposes alleged. Moreover, exclusion of those areas from the notice for the purposes of my decisions would cause injustice to the Appellants, who clearly regard both parcels as garden land and seek planning permission for such use of both Areas pursuant to ground (a). Both Areas B and C, together with Area A, therefore remain subject to the notice for the purposes of determining Appeals A and B.

24. In pursing an appeal against the enforcement notice on ground (d) and seeking a LDC, the onus of proof is firmly on the Appellants to demonstrate on the balance of probabilities that the use of the land as garden land incidental to the enjoyment of the dwellinghouse as such was continuous for a period of ten years prior to the issuing of the notice and the time of the LDC application respectively (hereinafter referred to as the ‘relevant periods’). Having said this, the judgment in Gabbitas v SSE & Newham LBC [1985] JPL 630 makes it
clear that if the local planning authority has no evidence of its own, or from others, to contradict or otherwise make the Appellants’ version of events less than probable, there is no good reason to dismiss an appeal on ground (d) or refuse to grant a LDC, provided the Appellants’ evidence alone is sufficiently precise and unambiguous.

25. As the notice was issued some time after the LDC application was made, the material dates for Appeals A/B and Appeal C are different. That for Appeals A and B is 26 November 2003; that for Appeal C is 4 October 2003. It was confirmed at the Hearing that the appeal against the notice on ground (d) relates solely to Areas A and B and does not include Area C, the Appellants having acknowledged that the use of the latter for the purpose alleged was not continuous throughout the relevant period. The scope of the LDC appeal is similarly constrained by reason of the format of the initial application, which omitted Area C.

The concept of residential curtilage

26. I turn first to address the question of residential curtilage. Although ‘curtilage’ does not constitute a use of land, the term is nonetheless relevant insofar as section 55(2)(d) of the 1990 Act as amended provides that the use of any land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such shall not be taken to involve development of the land. If a use does not amount to development and does not therefore require planning permission, whether deemed or express, it must be lawful.

27. The Appellants have presented lengthy and somewhat convoluted arguments to the effect that various plans and documents issued over the years have effectively demonstrated that Areas A and B fall within the residential curtilage of Pinley Acres and had done so continuously for at least ten years by the time of the LDC application and the issuing of the enforcement notice. However, I find little here that could be said to form a sound basis for anything other than mere speculation. Old plans of the locality do little more than indicate the layout of and interrelationship between parcels of land at a particular point in time and give no reliable indication of use.

28. Records such as the District Council’s mapping website and plans associated with rateable values are clearly intended for purposes other than the definition of lawful uses or curtilages in planning terms and are thus of very limited relevance. Nor do I attach weight to accounts of discussions regarding curtilage said to have taken place with my fellow Inspector during his visit to the site on 14 June 2011. Quite simply, I have seen no documentary evidence that substantiates the claims of any party as to what may have been discussed or presented at that time.

29. More pertinent is the extent of the site which formed the basis for the granting of planning permission for the existing replacement dwelling at Pinley Acres in 1998 (ref no W980438). The District Council presents amended plan 1156.7B (Revision B) as the definitive drawing in this regard. The Appellants contend that this ‘is clearly not the last drawing presented nor agreed’, on the basis that ‘the application was primarily to re-site the house’. However, I note that Revision B is specifically referred to in condition (7) of the permission and that the permission itself describes the erection of a replacement dwelling in an alternative position. This being so, I have no reason in the absence of any
cogent supporting evidence to accept the view that post-issue amendments to the 1998 planning permission repositioned the house further.

30. Bearing in mind that the onus of proof rests with the Appellants rather than the District Council, I must make a judgment as best I can about the authenticity and comprehensiveness of the material made available to me. Revision B shows, by means of shading, a very limited area immediately adjacent to the house labelled ‘area of land changed to domestic garden land’. Contrary to the Appellants’ observation, it differs from the earlier superseded drawing (Revision A) in terms of the layout of the driveway and parking/turning area. I thus have no reason to believe that the Revision B plan before me is not the drawing referred to in condition (7). Accordingly, having regard to the comments of all parties I accept that, on the balance of probabilities, this plan depicts presents the final scheme approved pursuant to the 1998 planning permission.

31. Its relevance to ‘curtilage’ is open to interpretation. However, in my judgment, and in the absence of any cogent evidence to the contrary, I find it reasonable to surmise that the roughly triangular area extending to the west and south of the dwelling, plus the shaded area, was regarded at that time by the District Council as the full extent of the approved incidental garden area. This is given added weight by the fact that Revision A, although differing only marginally in terms of the detail of the scheme, shows a thick line around the area in question which distinguishes it from the remainder of the Appellants’ land. Although it appears from the evidence before me that the previous dwelling on the site had a more extensive garden than this, it has not been demonstrated convincingly that it was lawful.

32. Nor do I attach significance to the rulings of Moses LJ and Blake LJ in Rockall v DEFRA [2008], as reported by the Appellants, for the purposes of the appeal on ground (d). Firstly, there is insufficient cogent evidence before me to the effect that this land was used as a garden in the distant past, whether as ‘garden meadows’ or otherwise, but subsequently fell into disuse. Secondly, although I have not been provided with a full transcript or citation, the Appellants indicate that the case involved the Department for Environment, Food and Rural Affairs rather that the SSCLG, which calls into question the relevance of the case in a planning context.

33. In any event, the demolition of that property and the construction of its replacement elsewhere on the land will have opened a new chapter in the site’s history. I therefore find on the balance of probabilities that the existing dwelling at Pinley Acres does not benefit from an historic residential curtilage established over time that would render the incidental use of Areas A and/or B lawful by reason of section 55(2)(d) of the 1990 Act as amended.

The use of Area A

34. I turn now to consider the length of time for which Area A has been actively used as garden land. Having viewed the site for myself, I found this part of the land to read visually, at the time of my visit, as a garden incidental to the enjoyment of the dwellinghouse as such. Despite a lack of formal flowerbeds throughout most of this area, I found there to be an abundance of trees and ornamental shrubs, some garden furniture in evidence, and an extensive domestic lawn closely mown and neatly manicured. There is no

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3 A full citation or transcript for this judgment has not been supplied by the Appellants or any other party.
physical barrier between the land and the house, but it is effectively severed in visual terms from Areas B and C by a ditch and high, well established screen vegetation.

35. Although planting and maintenance does not in itself infer active use, I consider it most unlikely that an enclosed area of this size so immediately accessible to the occupiers of the house would not have been used for domestic purposes of one kind or another on an almost daily basis. Moreover, the maturity of much of the planting strongly suggests that it has functioned as an incidental garden for some years. I therefore agree with my colleague’s conclusion in 2011 that this area was probably used as a garden when the LDC application before him was submitted in June 2010. However, more pertinent to my decisions is whether Area A was so used continuously from at least November 2003.

36. The Appellants’ evidence in this regard is somewhat lacking in documentary substance. The aerial photographs before me are merely snapshots in time and do little to either support or refute the Appellants’ claims, given that they invariably show an expanse of grass which could be put to a variety of purposes. Moreover, the Appellants’ extensive written evidence focuses to a far greater extent on the manner in which Area A has been planted, landscaped and maintained over the relevant period, rather than on the way in which it has been actively used. Landscaping and maintenance does not in itself constitute garden use for planning purposes.

37. Nonetheless, certain components of the Appellants’ evidence stand out. Firstly, I give substantial weight to the sworn evidence of Christine Thompson who, although not present at the Hearing, provided a statutory declaration. Ms Thompson lived opposite Pinley Acres from 1990 to 1998 and recalls that the previous owners of the property, Mr & Mrs Sparkes, undertook the development of a garden on Area A, including the introduction of a pond and the planting of trees and shrubs. There is nothing before me of substance that contradicts Ms Thompson’s account or renders it less than probable.

38. I am mindful that her recollection of garden use prior to the Appellants’ acquisition of the land pre-dates the relevant periods and does not confirm the lawfulness of such use at the point when the property changed hands. Nonetheless I find it most likely that, Area A having been used as a garden by that time, the Appellants would not have foregone the opportunity to continue to use it for ancillary domestic purposes from their initial occupation in 1998, let alone from 2003 onwards. My finding in this regard is again informed by the lack of physical separation between the house and Area A and the consequent immediate and convenient access to the land available to the occupiers of the dwelling. Indeed, Ms Thompson confirms that the Appellants have since used and developed Area A as a garden.

39. Secondly, I found the oral evidence given at the Hearing by Mr Cooper and his daughter, Alexa, to counter much of the imprecision and ambiguity apparent in their written accounts of the use of Area A. Both were adamant that this land had been used continuously for garden purposes incidental to the enjoyment of the dwellinghouse as such throughout the relevant periods and, in response to

4 Although Ms Thompson’s statutory declaration is not accompanied by a plan, I have no reason to suppose that her definitions of Areas A, B and C depart in any way from those used throughout the remainder of the appeal documentation before me.
questions, supported their assertions with details of the nature and frequency of activities undertaken within its confines.

40. These accounts were convincing and persuasive but, more pertinently in the light of Gabbitas, no evidence of substance to render them less than probable has been forthcoming from any other party. The Parish Council’s assertions to the contrary are not substantiated and the District Council’s written case on the appeals was particularly thin, comprising little more than a delegated decision worksheet for the Appeal C application. The only snippet of information that I find jars slightly with claims of the use of Area A as a garden during the earliest parts of the relevant periods concerns the references in the Appellant family’s various statutory declarations to the use of part of the appeal site by Lauren and Alexa Cooper for the parking and driving of cars as teenagers.

41. These describe driving practice on both Areas A and B in a red Skoda given to Lauren and Alexa by their older sister in 1998 and, from 2002, the similar use of a blue Honda Concerto. Such activity is unlikely, to my mind, to have been consistent or compatible with garden use. However, I note that the declarations refer specifically to the use of the Honda on Area B alone between 2002 and 2004. Moreover, elucidation at the Hearing suggests a probability that driving practice was confined mainly to Area B and only took place on Area A during the earliest part of the family’s occupancy of Pinley Acres, before the material dates. Again, I have seen no cogent evidence to the contrary.

42. I therefore conclude on the balance of probabilities that by the time the LDC application was made and the enforcement notice was issued, Area A had been used continuously as garden land incidental to the enjoyment of the dwellinghouse as such for a period of ten years. This being so, the use was by then immune from enforcement action by reason of the passage of time and thus lawful. Accordingly, Appeals A and B succeed on ground (d) and Appeal C also succeeds insofar as they relate to Area A. I will correct the enforcement notice so as to exclude Area A and grant a LDC in relation thereto.

The use of Area B

43. Notwithstanding the above, I am not similarly persuaded by the Appellants’ case regarding the lawful use of Area B as incidental garden land. At present, this parcel of land contrasts markedly with Area A in visual terms. I do not take issue with claims that the land has been cleared, planted, laid to grass and mown throughout the relevant periods. However, it is far less manicured in appearance than Area A and is physically separated from the dwellinghouse by a ditch and well-established screen of vegetation, narrow bridges providing the only access link.

44. As I have already made clear in relation to Area A, the planting and maintenance of land does not in itself infer active use. Nor is occasional use for recreation, as described by and on behalf of the Appellants, sufficient for the land to accrue lawful status as either residential curtilage or for use incidental to the enjoyment of the dwellinghouse as such. I also note that much of the written evidence provided in relation to this area concerns its lack of use or suitability for agricultural purposes, rather than the positive and continuous use as garden land that the Appellants must demonstrate on the balance of probabilities in order to fulfil the burden of proof.
45. The use of Area B for storing building materials, albeit likely to have been the case since the original dwelling was demolished, does not amount to incidental use as a garden. Interpreting the presence of metal sheeting embedded in the land and the possibility that it once accommodated a building of some kind as indicators of past domestic usage is tenuous at best and, in the absence of cogent evidence as to the precise purpose of these items, purely speculative.

46. Indeed, I found none of the additional information imparted at the Hearing by George or Alexa Cooper in relation to this parcel of land to give weight to the contention that it has been used so frequently for domestic purposes as to form part of a garden in planning terms, as distinct from a paddock adjacent to a residential property, notwithstanding the presence of vehicle parking and burial plots for family pets. On the contrary, distance from the house, physical severance broken only by narrow bridges and the contrasting, less tended appearance of this plot in comparison with Area A lead me to a view similar to that of my colleague who, when visiting it in 2011, found no evidence that it was actively used for any purpose, domestic or otherwise, let alone as a garden.

47. My finding in this regard is tempered to a degree by photographic and documentary evidence of intermittent domestic use. Nonetheless, it is far from uncommon for the occupiers of substantial residential properties such as Pinley Acres to have access to paddock land beyond their domestic gardens. Overall, I find the evidence before me to point to the likelihood of this scenario insofar as Area B is concerned. The absence from Ms Thompson’s declaration of reference to the use of Area B as a garden, together with the statements by various members of the Appellants’ family that it was used for driving practice until 2004, give further weight to my conclusion.

48. Indeed, I question the District Council’s perception, as implied by the framing of the enforcement notice but in contrast to its reasons for refusing an LDC, that Area B has been subject to a material change of use to incidental garden land even in recent years. However, as previously stated, I have not been able to consider deletion of Area B from the notice in the absence of an appeal against it on ground (b), in view of the implications this would have, in terms of injustice to the Appellants.

49. I conclude on the balance of probabilities that by the time the LDC application was made and the enforcement notice was issued, Area B had not been used continuously as garden land incidental to the enjoyment of the dwellinghouse as such for a period of ten years. This being so, any such use then ongoing was not immune from enforcement action by reason of the passage of time and was not therefore lawful. Accordingly, insofar as Area B is concerned, Appeals A and B fail on ground (d) and Appeal C also fails. That area thus remains subject to the enforcement notice, together with Area C, and I decline grant a LDC in relation to it.

The appeal on ground (a) – Appeal A

50. In the light of my finding on the appeals on ground (d) and the LDC appeal, my consideration of the appeal on ground (a) is confined solely to Areas B and C.
Main issues

51. The appeal property is located within the Green Belt. The alleged breach of planning control concerns a material change of use of land. All such changes are effectively defined by paragraph 90 of the NPPF as inappropriate development in the Green Belt for the purposes of national policy and the development plan. Such categorisation is confirmed by the finding of the High Court in Fordent Holdings Ltd v SSCLG & Cheshire West and Chester Council [2013] EWHC 2844 (Admin).

52. Paragraph 87 of the NPPF makes it clear that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. The existence of such harm is a main issue in determining the appeal on ground (a). Given that it is embodied in current national policy it requires no further elucidation on my part and, necessarily, carries very substantial weight.

53. In the light of the above, the other main issues are:
   • the effect on the openness of the Green Belt and the character and appearance of the surrounding countryside of the use of Areas B and C as garden land incidental to the enjoyment of the dwellinghouse as such; and
   • whether the harm by reason of inappropriateness and any other harm arising from the above issues is clearly outweighed by other considerations and, if so, whether there exist very special circumstances that justify the granting of planning permission.

Planning policy

54. The development plan includes certain policies of the Warwick District Local Plan 1996-2011 (LP), adopted in 2007, that have been saved following a Direction made by the Secretary of State. Paragraph 215 of the NPPF advises that due weight should be given to relevant policies in existing plans according to their degree of consistency with the NPPF.

55. However, the only local planning policy cited by any party in this case is LP Policy DAP1, as cited in the enforcement notice. The Council has confirmed that this was referred to in error as it had not been saved by the Secretary of State. Accordingly, it carries no weight for the purposes of planning decisions. This being so, I shall rely solely on national policy in the NPPF for the purposes of determining the appeal on ground (a).

Reasoning

Openness, character and appearance

56. Paragraph 79 of the NPPF identifies openness as one of the essential characteristics of the Green Belt and, in the enforcement notice, the Council cites its concern to protect the openness of the Green Belt as one of the reasons for issuing it. However, insofar as the use of Areas B and C for garden purposes is concerned, current impact on openness strikes me as extremely limited. No substantial structures have been provided within these areas. Whilst some domestic chattels were present at the time of my visit, including a vehicle, these were relatively insignificant in terms of the volume of space they occupied.
57. I acknowledge that tree planting, such as that which has recently taken place across Area C, can be interpreted as eroding openness. Nonetheless, the nature and effect of an impact on openness arising from vegetation is very different from that likely to be associated with built development or substantial items of domestic paraphernalia and, in my judgment and experience, is far less likely to cause discernible harm. Whilst the amount of paraphernalia present on the land could potentially increase with time, this seems improbable at such a distance from the dwelling.

58. I am also mindful that tree planting could take place lawfully if the land is not used as a garden, essentially providing the Appellants with a fallback position. Moreover, adverse impacts arising from permitted development rights that might be applied to land put to garden use, such as the erection of fencing to subdivide it, could be kerbed through the removal of such rights by condition. I therefore conclude that, overall, the potential for garden use to impact adversely on the openness of the Green Belt is relatively insignificant and, therefore, carries very little weight.

59. Notwithstanding the above, the effect of such use of Areas B and C on the character and appearance of the Green Belt, also cited in the notice as a reason for issuing it, is potentially more harmful. The Appellants portray the local street scene as an up-market vista comprised of high quality houses and gardens. However, I find this picture to be incomplete. Non-residential, undeveloped land also plays an important role in defining the locality’s sense of place, particularly as one moves northward along Shrewley Common Road.

60. Indeed, at present it is not easy to distinguish Areas B and C in visual terms from agricultural land that is not actively used for farming purposes. Paddocks and pockets of tree planting of similar appearance are common place throughout the local countryside. However, their potential to evolve as more manicured, landscaped spaces is clearly illustrated by the marked contrast of these areas with Area A. The latter is resolutely domestic in appearance and effectively extends the residential character of the dwellinghouse and its immediate surrounds in a way that, inevitably, would have an urbanising effect if it were more publicly visible, to the visual detriment of the rural area.

61. As it is, Area A is screened from the public highway by thick high hedging and belts of trees such that, at least for the moment, it has little adverse impact on the prevailing rural sense of place. However, I must have regard to the fact that vegetation is, by its very nature, temporary and cannot be relied upon to provide effective screening in the longer term. If planning permission were to be granted for the use of Areas B and C as a garden, there would be nothing to prevent the Appellants or their successors from landscaping and cultivating it in the same manner as Area A. Indeed, were the appeal on ground (a) to be allowed, there seems to be no good reason why this should not occur in due course, irrespective of the intentions of the current owners and despite the poorly drained nature of the soil.

62. Unlike Area A, some of the land that remains subject to the appeal on ground (a) is readily visible from Shrewley Common Road through the existing field gate, albeit that its eastern extremity falls away from public view. Whilst a higher, more solid replacement gate might close this vista, it is still the case that existing vegetative screening along the remainder of the site boundary could not be relied on as visual mitigation in the longer term. I am also
mindful that, whilst Area C is treed at present, the specimens planted are relatively young and may not all survive in sufficient numbers to obscure views of the wider land or inhibit general domestic garden use even in the short term.

63. It would be unreasonable in the terms set out in the DCLG’s Planning Practice Guidance (PPG) to impose conditions on a grant of planning permission for garden use that would forbid the formal landscaping of the area, prohibit the stationing of domestic paraphernalia or require the permanent maintenance of a planted screen. Allowing the appeal on ground (a) thus has considerable potential to facilitate a marked domestication of Areas B and C that would be readily apparent in public perceptions of the land.

64. Accordingly, I conclude that the granting of planning permission could, in all likelihood, have a significant adverse effect on the character and appearance of the surrounding countryside and the designated Green Belt, contrary to national policy. I attribute significant weight to such harm.

Other considerations

65. I turn now to consider other planning matters which, potentially, might be held to weigh in favour of the appeal scheme. In this regard the absence of discernible harm to the openness of the Green Belt does not lend support to the subject use, but merely adds little or no weight against it. The same applies to other ‘absence of harm’ matters raised by the Appellants, such as the disputed unsuitability of Areas B and C for productive agriculture, whether presently or historically, and the fact that the land is not readily visible from neighbouring properties.

66. I acknowledge that Areas B and C may well originally have been, in the Appellants’ words, ‘a wasteland’ and that Mr & Mrs Cooper have done much to maintain the land in a neat and tidy condition during their period of ownership. However, it does not logically follow that inability to use the land lawfully as a garden would necessarily lead to a deterioration in its appearance so significant as to cause unacceptable harm to the character and appearance of the countryside above and beyond what could arise from its further domestication. This is particularly pertinent when one considers that the Appellants have taken good care of the land despite, on the evidence before me, it not having been used genuinely as an incidental garden, as distinct from a paddock put to occasional recreational use, for much, if not all, of the time.

67. In any event, land overgrown with brambles and other impenetrable vegetation is commonplace in rural areas and unlikely to draw the eye as incongruous or particularly unsightly so as to make a poor impression on visitors to the area. I therefore give little weight to this consideration, including its implications for local property values. I also acknowledge that an extended garden could provide a useful and enjoyable private recreational facility for the occupiers of Pinley Acres. However, the planning merits of such provision are very limited, given that the use of Area A as a garden has been found to be lawful and is ample for amenity requirements associated with the existing dwellinghouse. This consideration therefore carries limited weight.

68. Whilst I note the Appellants’ comments to the effect that neighbouring residents have been allowed to build hardstandings on their land without penalty, development of that kind does not necessarily equate to garden use. In any event, I know nothing of the circumstances associated with the use of
those other areas of land and am mindful that each case must be assessed primarily on its own merits. For similar reasons, fears that a grant of planning permission in this case would set a precedent have no sound basis. These considerations therefore carry very limited weight.

69. The Appellants appear to try and build a case for garden use on the basis of a need for a safer vehicular access point to serve Pinley Acres than that to the immediate north of Oakhall Cottage. However, it is not apparent to me why the use of the field gate leading into Area C for access purposes, should this be justified in safety terms, should carry with it the implication that land on either side of the envisaged driveway should become a garden. In any event, there is no cogent evidence before me to the effect that the principal access to the appeal property is inherently unsafe. This consideration therefore carries very little weight.

70. Arguments to the effect that the District Council has not defined a residential curtilage and that, in the Appellants’ view, the material change of use to garden land is immune from enforcement action by reason of the passage of time can play no part in the balancing of the use’s planning merits. Rather, they have already been dealt with properly in the context of the appeal on ground (d). The appeal on ground (a) must be considered on the basis that the use alleged in the enforcement notice remains subject to planning control, as I have found in relation to Areas B and C. These matters therefore carry no weight at all for the purposes of applying Green Belt and countryside policy.

Summary

71. In the light of the above, I have found the material change of use of Areas B and C to garden land incidental to the enjoyment of the dwellinghouse as such to be harmful to the Green Belt by reason of inappropriateness, in accordance with current national policy, and that this carries very substantial weight. I have found that such use is unlikely in itself, if subject to restrictive conditions, to erode the openness of the Green Belt to a significant degree. However, there is potential for it to cause detriment to the character and appearance of the surrounding countryside, to which I attribute significant additional weight.

72. I conclude that the harm thus identified is not clearly outweighed, individually or cumulatively, by other considerations. Those put forward by the Appellants are either passive, ‘absence of harm’ aspects of the subject use rather than positive attributes with the potential to counter the harm I have identified or, alternatively, are so low key as to carry little weight in balancing the planning merits of the appeal scheme.

73. Having so found, I further conclude that very special circumstances do not exist that justify the granting of planning permission in this case and that to do so would be contrary to the provisions of the NPPF. I have considered the content of the PPG, insofar as it is relevant. However, neither this nor any other matter is of such significance as to outweigh the considerations that have led to my conclusions. The appeal on ground (a) therefore fails.

Conclusions

74. For the reasons given above I conclude that Appeals A and B should succeed on ground (d) insofar as they relate to Area A as defined on Plan A attached.
hereto but should otherwise fail in relation to Areas B and C. I shall uphold the
enforcement notice with corrections and refuse to grant planning permission on
the deemed application as amended.

75. I further conclude, for the reasons given above and on the evidence now
available, that the Council’s refusal to grant a LDC in respect of Area A was not
well-founded and that the appeal should succeed insofar as it relates to that
area. I will exercise accordingly the powers transferred to me under section
195(2) of the 1990 Act as amended.

76. However, I also conclude on the same basis that the Council’s refusal to grant
a LDC in respect of Area B was well-founded and that the appeal should fail
insofar as it relates to that area. I will exercise accordingly the powers
transferred to me in section 195(3) of the 1990 Act as amended.

Formal decisions

Appeals A & B: APP/T3725/C/13/2210566 & 2210567

77. It is directed that the enforcement notice be corrected by:
   (i)  the deletion of the plan attached to the notice and the substitution
        therefor of Plan B attached to these decisions;
   (ii) the deletion from both the cover sheet and section 2 of the words
        ‘Shrewley Common, Rowington’ and the substitution therefor of the
        words ‘Pinley Green, Claverdon’;
   (iii) in section 2, the insertion after the postcode of the words ‘as hatched in
        black on the plan attached to appeal decisions ref nos
        APP/T3725/C/13/2210566 & 2210567’;
   (iv)  in section 3, the deletion of the words ‘change of use of the Land to
        garden land’ and the substitution therefor of the words ‘the material
        change of use of the Land to garden land incidental to the enjoyment
        of the dwellinghouse as such’;
   (v)   in requirements (i) and (ii) in section 5, the deletion of the words ‘the
        land’ and the substitution therefor of the words ‘the Land’; and
   (vi)  in requirement (ii) in section 5, the deletion of the words ‘not connected
        with agricultural use’ and the substitution therefor of the words ‘present
        for the purpose of facilitating its use as garden land’.

78. Subject to these corrections, the appeals are allowed in part on ground (d)
insofar as they relate to Area A as defined on Plan A attached hereto but are
otherwise dismissed and the enforcement notice is upheld.

Appeal C: APP/T3725/X/14/2211699

79. The appeal is allowed in part insofar as it relates to Area A as defined on Plan A
attached hereto but is otherwise dismissed. Attached to this decision is a
certificate of lawful use or development describing the extent of the existing
use which is considered to be lawful.

Alan Woolnough

INSPECTOR
APPEARANCES

FOR THE APPELLANTS:

George Cooper  Appellant
Alexa Cooper  Appellants’ daughter

FOR THE LOCAL PLANNING AUTHORITY:

Liam D’Onofrio  Senior Planning Officer, Warwick District Council

INTERESTED PERSONS:

Nicola Clarke  Member of Rowington Parish Council
Allyson Coleman  Clerk to Rowington Parish Council

DOCUMENTS SUBMITTED OR SUPPLIED AT THE HEARING

1  Witness statement made by Alexa Cooper on behalf of the Appellants, supplied by the Council
2  Draft witness statement intended by the Appellants for the signature of Richard Titterton and associated documentation, submitted by Ms Coleman
3  Decision notice for planning permission ref no W980438 and associated documentation and plans, supplied by the Council
4  Written statement by Mr Cooper, submitted by the Appellants

PLANS

A  Plan attached to the enforcement notice
B  Application plan associated with Appeal C

PHOTOGRAPH SUBMITTED AT THE HEARING

1  Aerial photograph of the appeal property taken on 6 May 2013, submitted by the Appellants
Plan A

This is Plan A referred to in my decision dated: 16.10.2014

Alan Woolnough

Alan Woolnough BA(Hons) DMS MRTPi
Land adjacent to Pinley Acres, Pinley Green, Claverdon, Warwick CV35 8LZ
References: APP/T3725/C/13/2210566, C/13/2210567 & X/14/2211699
Scale not stated
Plan B

This is Plan B referred to in my decision dated: 16.10.2014

Alan Woolnough

Alan Woolnough  BA(Hons) DMS MRTP

Land adjacent to Pinley Acres, Pinley Green, Claverdon, Warwick CV35 8LZ

References: APP/T3725/C/13/2210566 & 2210567

Scale not stated
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 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 8 August 2013 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched in black 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:

It has been demonstrated on the balance of probabilities that, by the above date, the land in question had been used continuously for the purpose specified in the First Schedule for a period of ten years and that the said use was thus immune from enforcement action in accordance with section 171B(3) of the 1990 Act as amended.

Signed

Alan Woolnough
Inspector

Date 16.10.2014

Reference:  APP/T3725/X/14/2211699

First Schedule

Use comprising a single dwellinghouse and domestic garage and the use of land as garden land incidental to the enjoyment of the dwellinghouse as such

Second Schedule

Land adjacent to Pinley Acres, Pinley Green, Claverdon, Warwick CV35 8LZ
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 described in the First Schedule taking place on the land specified in the Second Schedule was lawful on the certified date and, thus, was not liable on that date to enforcement action under section 172 of the 1990 Act as amended.

This certificate applies only to the extent of the use 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: 16.10.2014

Alan Woolnough

Alan Woolnough  BA(Hons) DMS MRTPI

Land adjacent to Pinley Acres, Pinley Green, Claverdon, Warwick CV35 8LZ
Reference: APP/T3725/X/14/2211699

Scale not stated