
Appeal Decision

Site visit made on 3 August 2017

by **B M Campbell BA(Hons) MRTPI**

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

Decision date: 16 August 2017

Appeal Ref: APP/V2255/X/17/3168048

New Orchard Farm, Upper Road, Rodmersham, Sittingbourne ME9 0QL

- 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 and Mrs J McGrath against the decision of Swale Borough Council.
 - The application Ref: 16/506852/LAWPRO, dated 13 September 2016, was refused by notice dated 14 November 2016.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is the erection of a garage.
-

Decision

1. The appeal is dismissed.

Preliminary matters

2. For the avoidance of doubt, it was confirmed at my visit that the correct name of the property is New Orchard Farm and that the drawings formally considered by the Council were 497-01F, 497-03C and 497-04B.

Reasons

The matter in dispute

3. There is no dispute that the erection of the proposed garage would comprise operational development within the meaning of s55 of the Act for which planning permission is required. The Appellants, however, consider that planning permission is granted by way of Article 3 of the Town and Country Planning (General Permitted Development) Order 2015 (GPDO). That grants permission for classes of development described as permitted development in Schedule 2 to that Order. The Appellants rely on Class E of Part 1 of Schedule 2 which (amongst other things) permits the provision of any building within the curtilage of a dwellinghouse required for a purpose incidental to the enjoyment of the dwellinghouse as such (subject to certain limitations).
4. There is no suggestion that any of the limitations imposed by Class E would not be met by the development. Rather there is disagreement as to whether the land on which the building would be erected falls within the curtilage of the dwellinghouse, New Orchard Farm. If it does then Class E would apply and the

proposal would be permitted by way of the GPDO. If it does not, then Part 1

(including Class E) to Schedule 2 to the GPDO which is entitled "Development within the curtilage of a dwellinghouse" would not apply; the development would require express planning permission; and until that was obtained the development would be unlawful.

Does the land fall within the curtilage of New Orchard Farm?

5. Curtilage defines an area of land in relation to a building and not a use of land. In a conventional housing estate layout, the residential curtilage will generally equate with the residential planning unit. However, in other situations it is not uncommon for land to be in the same unit of occupation and in use for residential purposes incidental to the use of the dwellinghouse and yet fall outside the residential curtilage. A curtilage relates to a building and a planning unit to a use. Thus, use of land in connection with the dwellinghouse does not, in itself, bring that land within the curtilage.
 6. The DCLG publication – *Permitted Development for Householders, Technical Guidance* provides guidance for the application of Part 1 of Schedule 2 to the GPDO. It says curtilage is understood to be *land which forms part and parcel with the house. Usually it is the area of land within which the house sits, or to which it is attached, such as the garden, but for some houses, especially in the case of properties with large grounds, it may be a smaller area.*
 7. The appeal property is not part of a conventional housing layout. The house was erected within a small complex of farm buildings following a grant of permission in 1992. It is approached from a drive shared with The Stables (which I understand to comprise holiday accommodation) and an agricultural access to farmland beyond. The history of the property does not assist since the farm has been subdivided to provide a number of separate dwellings, all potentially with their own curtilages.
 8. The formal, cultivated garden for New Orchard Farm lies to the rear (northern) and western sides of the house and is fully enclosed, primarily by a tall brick wall. The appeal site lies to the eastern side of the house and garden, outside the enclosed area, and separated from it by the wall and a track serving farmland immediately to the north and a barn to the east. This rectangular area of rough grass does not have the character of a garden but is more closely associated in appearance to the adjoining farmland from which there is no physical separation. At the time of my visit there was no indication of any residential use, although the site for the proposed garage appears to have been excavated. There was, however, a football net and posts on the adjoining farmland to the north.
 9. There is disagreement between the Council and the Appellant as to the lawful use of this rectangle of land to the east of the dwelling. The Council consider it has agricultural use whilst clearly the Appellants, in claiming it as part of the curtilage of the house, say it has lawful residential use. They say the walled garden was formed to enable dogs to roam and children to play without straying and that the unenclosed area to the east was laid to grass and used for outdoor ball games and the like and latterly was used for growing vegetables. There are two pedestrian gates in the walls of the enclosed garden giving access to the north and east.
 10. Even if the land to the east, and outside the walled garden, does have lawful use for residential purposes in connection with the dwelling, New Orchard
-

Farm, (and I make no such formal finding) that does not, in itself bring that land within the residential curtilage of that dwelling. The Appellants have drawn attention to the case of *O'Flynn v SSCLG and Warwick DC* [2016] EWHC 2894 (Admin) which was concerned with whether land had lawful use for residential purposes incidental to the use of the dwellinghouse. In that case it was found that the Inspector should have considered whether the land fell within the curtilage of the dwelling since if it did it would have had lawful incidental residential use (s55(2)(d) of the Act). That is not authority for saying that land which has been used for incidental purposes and can be lawfully used as such necessarily falls within the curtilage of a dwellinghouse.

11. The function of the land is relevant to the question of curtilage but it is not determinative. Thus even adopting the Appellants' stance that the land has lawful incidental residential use and forms part of the residential planning unit would not be an end to the matter. Whether the land forms part of the curtilage is a matter of fact and degree. In this case the land is physically separated from the house and associated domestic cultivated garden by a tall wall and the farm access. There is no intimate association with the building and nor would there have been when the land was previously enclosed on three sides by tree hedges but open to the farmland to the north¹. The land is neither attached to the dwellinghouse and garden, nor does it form one enclosure with it. It gives no indication of being part and parcel with the house. Visually, there is nothing to associate it with the dwelling. It is a physically and visually separate area with a quite different character more readily associated with the adjoining farmland.
12. Even if I accept the Appellants' claim (disputed by the Council) that the land forms part of the residential planning unit and might lawfully be used for such purposes, I nonetheless find, as a matter of fact and degree, that the land upon which the proposed garage would be sited does not form part of the curtilage of the dwellinghouse, New Orchard Farm. It does not form one enclosure with the house.
13. As such, Class E of Part 1 to Schedule 2 to the GPDO does not apply; the proposed garage requires express planning permission.

Conclusion

14. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the erection of a garage was well-founded and that the appeal should fail. I exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

B M Campbell

Inspector

¹ As described by the Appellants with reference to a 2008 aerial photograph