The Planning Inspectorate

Appeal Decision

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 09 June 2020

Appeal Ref: APP/V2255/X/19/3241797
1 New Houses, Broom Street, Graveney, Faversham ME13 9DW

- 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 & Mrs B & S Jeffreys against the decision of Swale Borough Council.
- The application Ref 19/502593/LAWPRO, dated 17 May 2019, was refused by notice dated 19 August 2019.
- 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 erection of single storey building for use as garages, home workshop, home office and games room/summerhouse.

Decision

1. The appeal is dismissed.

Procedural Matters

2. In an LDC appeal, the planning merits of the outbuilding are not relevant. My decision rests on the application of relevant planning law and judicial authority to the facts of the case. Therefore, arguments concerning potential impacts upon neighbouring property cannot be taken into account.

3. I have not conducted a site visit, but I am satisfied that I have sufficient information before me to make a decision particularly as it includes a series of plans, aerial images and other photographs.

Main Issue

4. The main issue is whether the Council's decision to refuse to issue an LDC was well-founded. This turns on whether the proposed development would constitute permitted development by virtue of the provisions of Article 3(1) and Class E(a) of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ('the GPDO').

Reasons

5. In an LDC appeal the onus of proof is on the appellant to show that, on the balance of probabilities, the development would be lawful at the time of the application.

6. The proposal is for an outbuilding to be used as a home workshop, home office

and games room/summerhouse. It would replace an existing games room/ summerhouse, most of which would removed, to facilitate construction of the new building. The outbuilding would occupy a corner position on land located behind the rear garden of the neighbouring properties at Nos 2 and 3.

7. Article 3(1) of the GPDO grants planning permission for the classes of development set out in Schedule 2 to the Order. It includes, at Part 1, Class E(a), the provision within the curtilage of a dwellinghouse of any building required for a purpose incidental to the enjoyment of the dwellinghouse as such. That is subject to prescribed limitations and conditions, but there is no suggestion they would be exceeded.

8. While the Council expressed reservations over the proposed outbuilding being required for incidental purposes, the sole reason for refusal stated in its decision notice concerns the location of the outbuilding. In the Council's view, the proposed outbuilding would not be within the curtilage of the house. Therefore, the question to be determined is whether the curtilage extends to the whole application site.

9. The GPDO does not attempt to define the term 'curtilage' and there is no other all-encompassing, authoritative definition.

10. The Technical Guidance on permitted development rights for householders[1] explains that some terms are not defined in the Order but are understood in the case of 'curtilage' to mean "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."

11. As Guidance only it does not have the force of law but represents Government advice on how the GPDO was intended to be interpreted. The term is used in different contexts within the planning system, and this may result in varying interpretations.

12. The Courts have often addressed the meaning of 'curtilage' most frequently in relation to listed buildings. In arriving at its decision, the Council considered some of these cases the earliest one being the Court of Appeal decision in *Methuen-Campbell v Walters* [1979] 1 QB 525. In that case it was held that for land to fall within the curtilage of a building, it must be intimately associated with the building to support the conclusion that it forms part and parcel of the building. It was possible that this may extend to ancillary buildings, structures or areas such as outhouses, a garage, a driveway and so forth. A curtilage may consist of more than one parcel of land, need not have been conveyed or demised together and might even fall within another, broader curtilage.

13. Most reliance appears to be placed by the Council on the Court of Appeal decision in *Dyer v Dorset CC* [1988] 3 WLR 213. This case alone is referenced in its decision. *Dyer* provides authority that the term 'curtilage' bears its restricted and established meaning connoting a small area forming part and parcel with the house or building which it contained or to which it was attached. Subsequently, in *McAlpine v SSE* [1995] 159 L.G. Rev. 429 it was held that "there is no rigid definition to a curtilage", but that: it is a feature constrained to a small area about a building; apparently in "intimate association" with such building; and no physical enclosure is necessary to

[1] Published by the Ministry of Housing, Communities and Local Government in September 2019

define it, "but the considered land must be part of the enclosure with the house".

14. The Council also relies on the Inspector's reasoning in *R (oao Sumption) v Greenwich LBC* [2007] EWHC 2276 (Admin) that the smallness of land was a relative factor as a matter of fact and degree. The Inspector's decision was in fact quashed. The case is nonetheless noteworthy as authority that a lack of historic connection between the land and a listed building can be a relevant fact but it is not determinative. It is necessary to determine the status of the land from the factual situation existing at the date of the application. On the facts in *Sumption* the curtilage did extend over a 'recently expanded garden' where the land was clearly capable of such use, some work had been done to it, there was access to it and it was part of the land attached to the building and being enjoyed with it. In those circumstances the historical lack of connection was not capable of carrying weight. The Court also made reference to the Oxford English Dictionary definition of 'curtilage' as 'an area of land attached to a house and forming one enclosure with it'.

15. The appellants cite other caselaw tackling the issue of 'curtilage'. In chronological order, *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195 it was found that "The ground used for the comfortable enjoyment of a house or other building may be regarded as being within the curtilage of the house or building" and "It is enough that it serves the purpose of the house or building in some necessary or reasonably useful way."

16. The Court of Appeal in *Skerritts of Nottingham Ltd v SSETR (No. 1)* [2000] EWCA Civ 60 described the decision in *Dyer* as plainly correct, though commenting that "this court went further than it was necessary to go in expressing the view that the curtilage of a building must always be small, or that the notion of smallness is inherent in the expression." In addition, at first instance "the deputy judge was mistaken in treating *Dyer* as having such clear force as he thought it had." Thus, the decision makes plain that there should not be a rigid application of the concept of size.

17. The High Court in *Lowe v First Secretary of State* [2003] EWHC 537 (Admin) found the judgment of Lord Justice Nourse in *Dyer* to be of most assistance to conclude that: "The expression 'curtilage' is a question of fact and degree. It connotes a building or piece of land attached to a dwelling house and forming one enclosure with it. It is not restricted in size, but it must fairly be described as being part of the enclosure of the house to which it refers. It may include stables and other outbuildings, and certainly includes a garden, whether walled or not. It might include accommodation land such as a small paddock close to the house."

18. The concept of "curtilage" was more recently reviewed by the High Court in *Burford v SSCLG* [2017] J.P.L. 1300 where it was noted that the use of land as incidental to the enjoyment of a dwelling house is not determinative of the land being curtilage. The case reaffirmed the criteria laid down in *Attorney-General ex rel. Sutcliffe and Others v Calderdale Borough Council* [1983] 46 P&CR 399 for identifying curtilage, namely: (1) the physical layout of the [listed] building and the structure; (2) their ownership, past and present; (3) their use or function, past and present. The decision is also particularly relevant as it concerned the application of Class E of the GPDO, as arises here.

19. Having regard to all the authorities it is apparent that whether land comprises

'curtilage' is a question of fact and degree to be considered on a case by case basis and thus primarily a matter for the decision maker.

20. By only considering some of the relevant authorities, the Council perhaps placed too much reliance on the curtilage being a small area about a building although other factors influenced its decision. *Dyer* must be read in conjunction with subsequent decisions where it was considered and applied. As emerged from *Skerritts,* size does not matter necessarily in identifying a curtilage, but that did not mean the relative size between the building and its claimed curtilage was not a relevant consideration. Of course, in none of these cases do I have the plans on which the decisions were based to draw comparisons, but the key principles emerging fall to be applied.

21. What emerges from the authorities is that the relevant date on which to determine the extent of the curtilage is the date of the application, but this involves considering both the past history of the land and how it is laid out and used at the time of the application.

22. The appeal property is at one end of a terrace of three houses originally built as agricultural workers dwellings after planning permission was granted in 1953. An application for a LDC was approved in 1999 for a use without complying with the agricultural occupancy condition imposed in 1953.

23. The Council notes that the drawings which accompanied both applications in 1953 and 1999 identified the residential curtilage as the narrow strip to the rear to the same depth as the neighbouring properties. That is unsurprising when the other land was a later acquisition and the 1999 application related to the 1953 permission. It does not mean that the land behind Nos 2 and 3 cannot now be within the curtilage of No 1 although it was not historically.

24. The Ordnance Survey maps of 1963 and 1978 show the three houses each with a rear garden of equal depth. The proposed site is behind the gardens and appears as an undivided plot on which a block of garages and small outbuildings have appeared by 1978. The garages lie beside the access which also serves the dwelling to the north known as 'Sparrow Court'. The proposed site is colour washed in the same way as the gardens.

25. The landholding for No 1 now includes the access and the plot behind the terrace except for two garages in the block and a small area behind No.3. It is roughly 'L' shaped. The copy Land Registry Title plan produced does not provide evidence that the whole property was one curtilage in 1999 as the appellant suggests. It merely confirms the land is part of one registered land title under the same ownership.

26. The appellant acknowledges that the status of the land between 1953-1999 is unknown but says it has been in the same ownership and used as garden for No 1 since at least the year 2000. An aerial photograph said to date from 1999 shows the land as grassed, but not much else can be gleaned. By 2000-2001, an aerial image shows a fence along the original rear boundary of No 1, but with a gap where a worn trodden path leads from the garden into the square shaped area now the subject of this appeal. A small pond is located in one corner, the area is mainly fenced and looks to be grassed with some shrubs. By 2003, the summerhouse can be seen and more shrubs/trees have appeared. Later images from 2008 and 2010 show further tree cover in both areas.

27. The material gives a firm indication that part of the land has been used as a

garden in association with the dwelling at No 1 for some years. However, land can be used as garden without being part of its curtilage.

28. When the summerhouse was erected on the land in 2002 the Council took no further action after investigating a complaint over its construction. The reason for the Council's decision is unclear. It might be because the Council concluded the summerhouse was permitted development within the terms of the previous 1995 GPDO having been built within the curtilage of the dwellinghouse. There could be other reasons. Without the details it cannot be known.

29. Another enforcement investigation was undertaken by the Council in 2015 into the stationing of a caravan on the land behind the garden of No 2. Following the completion of a planning contravention notice by the appellants, as landowners, the Council's response referred to "the caravan stationed in the rear garden of your property". It confirmed that the case was closed after confirmation that the caravan would not be used as a permanent residence.

30. The letter and conclusion reached is not especially informative. Use of the land as garden is not determinative of curtilage and the stationing of a caravan is not in itself a use of land. It is unclear if there would be in fact have been any development. More information would be needed to draw any inferences.

31. The appellants' acquired No 1 in 2007. The sales brochure described the property as benefiting from 'gardens' in the plural including a summerhouse. The gardens are distinguished from a one-acre paddock included in the sale. Photographs show both gardens; those nearest to the house with seating area, decked paths and borders and the wider landscaped area with summerhouse. Clearly, the proposed site was regarded at that time as a garden, but that does not automatically mean it formed part of the curtilage then or now. Indeed, the reference to 'gardens' appears to distinguish between the two different areas.

32. The Council refers to two Appeal Decisions. The Inspector in the 2 Ryefields Barns[2] appeal emphasised that "curtilage" and "use" are not the same thing. Further, that a parcel of land may acquire use rights for purposes related to the residential occupation of a dwelling without necessarily being within the curtilage of a dwelling. As principles, I regard both points as uncontroversial.

33. In the Maple Manor, Redhill appeal[3] the Inspector noted that neither the use of an area as additional garden land nor its description as being in 'residential use' in enforcement proceedings were decisive factors in determining the curtilage. In that case, the land in question was separated from other garden by a drive, fencing, hedgerow and a summerhouse. Having regard to its physical division and characteristics it was found that the land was a distinct piece of property which did not have the necessary intimate association with the dwellinghouse.

34. It seems to me that the points raised in both those Appeal Decisions are consistent with the long line of authorities in which no one factor was decisive. As each case turns on its individual facts, they do not take matters much further forward. However, as pointed out by the previous Inspector in the Redhill appeal, the judgment in *Sumption* cannot be taken to establish, as a matter of law, that the curtilage of a dwellinghouse can be expanded without limit on the annexation of other land, simply because that other land is used for garden purposes. All the relevant circumstances should be considered.

[2] Appeal ref: APP/Y9507/X/15/3131994 dated 20 May 2016
[3] Appeal ref: APP/L3625/C/10/2133035 dated 13 May 2011

35. In this instance, the land has been used as a garden to serve the purpose of the dwelling in some reasonably necessary or useful manner for there to be a functional relationship between the use of the land and the dwelling. The proposed building would be located on land within common ownership (as per *Sutcliffe*) although it was not in the past. Clearly, it is possible for the extent of curtilage to change over time. When the application was made the land was used in conjunction with the dwelling as residential garden and had done so for some time. The appellant places much emphasis on the functional use as garden over a 20 year period, but that is only one element of the factors requiring consideration.

36. There is an existing summerhouse on the land which would be partially replaced but as its planning status is not altogether clear I place little reliance upon its presence.

37. Historically No 1 was a narrow plot. It is now considerably larger having encompassed land to the north which extends north-westwards behind the whole terrace. The additional land beyond the original rear garden is sizeable in comparison to the original plot, but I do not find that in itself to be particularly significant. However, the proximity to the dwelling and physical layout are of note. As made clear in *Burford* in reference to both *Dyer* and *Lowe,* 'curtilage' is an area of land 'attached to' a house and 'forming one enclosure with it'.

38. The land on which the outbuilding would be constructed adjoins the original garden, but it is not physically proximate to the dwelling at No 1. It lies some way off behind the rear gardens of the neighbouring properties at Nos 2 and 3 within an area shown on the site plan as including the block containing garages belonging to two neighbours. The existing summerhouse is a wide and narrow structure extending partly behind the end garage owned by No 3. Given the configuration, there is not a close spatial relationship with the dwelling at No 1. The lack of historical connection carries little weight in itself in this case, but the awkward layout with third party property intruding into the space is reflective of its past as separate plots.

39. The existing layout plan confirms the land remains laid out as a separate area of garden from that closest to the house. It is segregated from the original rear garden by a short section of fencing with gates providing access between the areas. Access can also be obtained via gates from the drive running down the side of the property. Whatever the reason for the fence, its position appears to correspond with the original boundary. Its presence reinforces there being physically separate and distinct areas.

40. Although the outbuilding would be built on land used as garden for No 1 for many years, it is a distinct area from that which formed the original garden. Whilst the purposes for which it was used at the time of the application were incidental to the use of the dwelling, that does not necessarily make it curtilage as confirmed in *Burford*. As it is, the land is not part of the land attached to the dwellinghouse. Nor can it fairly be described as forming one enclosure with it when it is fenced and gated.

41. On the information before me, although a functional relationship exists, the land concerned does not have a close spatial relationship with the dwelling nor does it form one enclosure with it. There is not an intimate association between what is essentially an additional piece of garden and the dwelling. Taking account of the factors as a whole, I am not satisfied that the proposed

outbuilding would have been built on land comprising curtilage of the dwellinghouse at No 1 when the application was made.

Conclusion

42. 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 single storey building for use as garages, home workshop, home office and games room/summerhouse was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

KR Saward

INSPECTOR