The Planning Inspectorate

# Appeal Decision

Virtual Hearing Held on 17 February 2021

**by Hilary Orr MSc, MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 22 March 2021**

**Appeal Ref: APP/V2255/X/20/3249583**
**The Tweeds Highsted Valley, Rodmersham, Sittingbourne ME9 0AD**

- 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 Willis against the decision of Swale Borough Council.
- The application Ref 20/500212/LDCEX, dated 17/01/2020, was refused by notice dated 20 March 2020.
- The application was made under section 191(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 greenhouse and summerhouse which comply with GDPO (2015).

## Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing operation which is found to be lawful.

## Application for costs

2. Prior to the hearing an application for costs was made by Swale Borough Council against Mr and Mrs Willis. Prior to closing the Hearing, an application for costs was made by Mr and Mrs Willis against Swale Borough Council. These applications are the subject of a separate Decision.

## Procedural matters

3. For the avoidance of doubt, I should explain that the planning merits of the development are not relevant to this appeal, which relates to an application for a lawful development certificate (LDC). Upon review of the appeal and the submissions from the appellant and the Council, I took the view that a rational decision could be reached without the need for a scheduled site visit. The parties were invited to comment on this approach at the Hearing and I have considered the appeal on this basis.

4. The description of the proposed development as set out on the application form differs slightly from that used by the Council in their decision and provides some clarification for the development sought. Where a LDC is sought for existing development, s191(4) of the Town and Country Planning Act 1990, as amended, allows the description of the development to be modified. I note that the appellant's appeal form and statement reflect this revised description and I shall consider the appeal on the basis of this revised description and this is reflected in the above heading.

**Main Issue**

5. The main issue is whether the Council's decision to refuse to issue an LDC for the application was well-founded. In this type of appeal, the onus of proof lies with the appellant, with the relevant test on the balance of probabilities.

**Reasons**

6. The application was for a summerhouse and greenhouse that had been sited on land to the rear of the dwelling. Class E grants pp for buildings and other development within the curtilage of a dwellinghouse. At the Hearing it was agreed that both buildings would comply with all of the other conditions and limitations of Class E of the General Permitted Development Order (GDPO). The only area of disagreement is whether the buildings are sited within the residential curtilage of the dwelling, thereby triggering the above rights.

7. The appellant's evidence does not need to be corroborated with independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided the appellant's evidence is sufficiently precise and unambiguous.

8. The previous application (19/503434/LDCEX) established that the land had been used as garden for the requisite period of 10 years, and as such this use was lawful. As set out in the Informative of this decision, the Council did not however, confirm that all of the land formed the curtilage of the dwelling.

9. It is important to recognise that the question of curtilage is not a matter of land use; all the land recognised as being in residential use as a garden may not necessarily be regarded as being part of the curtilage. Caselaw has established that the curtilage of a dwelling, or building, defines an area of land that is intimately associated, and forming a single enclosure with it. Moreover, it is also established in case law that the term curtilage is a matter of fact and degree. There are generally three established tests to consider: physical layout; ownership (past and present); and use or function (past and present).

10. The aerial photograph submitted by the appellant and understood to have been taken in the 1960's shows the neighbouring dwellings had already been built. The appeal site appears as a narrow strip, which appears to be vacant, leading to a separate more extensive plot to the rear, which seems to be part of a wider agricultural use.

11. It is the appellant's case that the Land Registry results confirm that the land was purchased in a single parcel in 1971. The associated filed plan from that date, shows the entire appeal site to be in a single title (K370068). The dwelling was then built between 1971 and 1973. The exact date and details of any permission and associated plans for this and the other nearby dwellings, have not been located by either the appellant or the Council.

12. The appellant submits that the claimed land has remained undivided and been used as a single plot since 1971 and following the development of the dwelling. The previous owners are understood to have levelled part of the land to the rear for a planned tennis court, although this was not constructed. Since the appellant purchased the property in 1986, all the land has been used as residential garden.

13. The appellant has provided statutory declarations from Mr Willis and a number of witness statements that confirm that the land has been used as residential garden. The Statutory Declarations have been witnessed and signed by solicitor and accordingly I give these significant weight. The remaining witness statements are signed as statements of truth and the Council have not contested their veracity.

14. In contrast, it is the Council's view that the parcel of land to the rear of the dwelling does not form part of the original curtilage of the dwelling. The previous application during 2010 indicated that the application site for that proposal, extended only to the extent of the narrow strip on which the dwelling now stands. A later application in 2016, indicated the application site in red with the larger parcel to the rear edged in blue. They contend that this together with the physical differences between this plot and the neighbouring properties indicate that the land was in two separate plots with only the narrow part closest to Highsted Valley, being considered as the curtilage for the dwelling.

15. The Council further submits that the neighbouring properties were all built around the same time, although acknowledge that the relevant documents are all missing. It is their case that the size and form of the claimed curtilage, is at odds with the other neighbouring properties, with the land furthest from the dwelling, appearing to have been tacked on to the narrower strip.

16. It is clear that the claimed curtilage is significantly larger than others in the area. I recognise that, where a number of properties have been built as part of a single development, the pattern and characteristics of the development may be indicative of the curtilage. However, such matters are not in themselves determinative and it is necessary to consider all of the available facts.

17. The Council confirmed at the Hearing that they did not wish to pursue any argument relating to the conifer hedge shown on the plan shown at their Appendix E. Consequently, I have no evidence before me to suggest that the land has at any time been physically subdivided since the sale in 1971.

18. The dated photographs provided by the appellant demonstrate how the land has been used over the years, confirming that it has been used as garden since at least the early 1990's. Whilst, its use as garden is not in dispute, to my mind, this evidence also demonstrates that the claimed land has served the dwelling in a reasonably useful manner over a considerable number of years.

19. From the evidence the land has remained in a single title and ownership since 1971, when it seems likely to have been annexed from a larger agricultural holding. Whilst it is acknowledged that the site is larger than the neighbouring properties, it nonetheless has formed a single enclosure with the dwelling since it was built. Moreover, I have no evidence before me to indicate that the original planning permission for the dwelling defined a smaller, or alternative curtilage.

20. Drawing the above points together, I find that the evidence submitted by the appellant is sufficiently precise and unambiguous to demonstrate, on the balance of probability, that the land has been in single ownership since 1971, it has formed a single enclosure with the dwelling and has clearly had an intimate and functional relationship with that dwelling.

21. Consequently, in my judgement the curtilage of the dwelling known as The Tweeds comprises the full extent of the claimed land. It follows from this, that at the date of the application, the greenhouse and summerhouse as described in the application and shown on the sketch of buildings plan entitled 'Approximate Measurements For The Tweeds Highsted' submitted by the appellant, are sited within the curtilage of the dwelling, and thus benefit from the PD rights conveyed by Class E of Part 1 of Schedule 2 to the GDPO. As it is agreed that the buildings comply with all of the other conditions and limitations of Class E of the GDPO, I find that the greenhouse and the summerhouse do not require express planning permission.

### Conclusion

22. For the reasons given above I conclude, on the evidence available to me, that the Council's refusal to grant a certificate of lawful use or development in respect of the greenhouse and summerhouse was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

*Hilary Orr*

INSPECTOR

**APPEARANCES**

FOR THE APPELLANT:

| | |
|---|---|
| Nicholas Kingsley-Smith | Agent Solicitor |
| Mr and Mrs Kevin Willis | Appellant |

FOR THE LOCAL PLANNING AUTHORITY:

Andrew Spiers MA, MRTPI Planning Officer
Alice Reeves MA Planning Officer

INTERESTED PERSONS:
None

# Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2015: ARTICLE 39

**IT IS HEREBY CERTIFIED** that on 17 January 2020 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The available evidence demonstrates that, on the balance of probability, the greenhouse and summerhouse have been sited within the curtilage of The Tweeds, Highsted Valley, Rodmersham, Sittingbourne ME9 0AD and therefore benefit from the rights conveyed by Class E of Part 1 of Schedule 2 to the GDPO.

Signed

*Hilary Orr*

INSPECTOR

Date: 22 March 2021
Reference: APP/V2255/X/20/3249583

***First Schedule***
The erection of a greenhouse and summerhouse which comply with GDPO (2015).

***Second Schedule***

Land at The Tweeds Highsted Valley, Rodmersham, Sittingbourne ME9 0AD



IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations 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.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

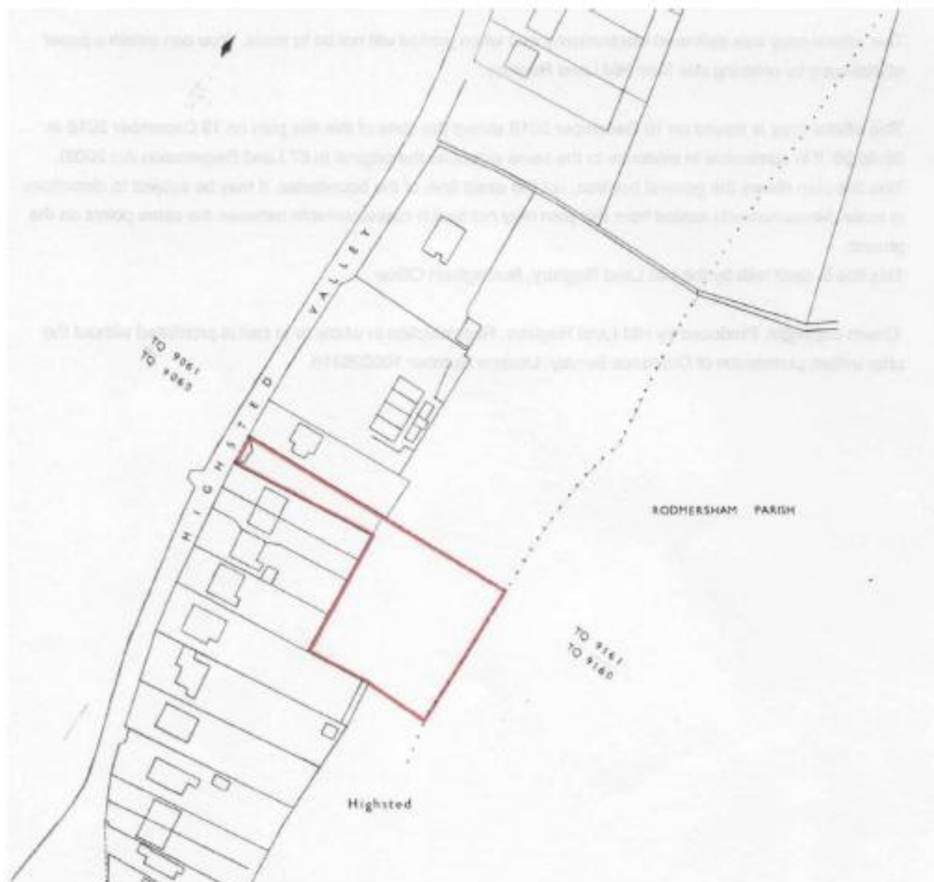
# Plan

This is the plan referred to in the Lawful Development Certificate dated: 22 March 2021

**by Hilary Orr MSc MRTPI**

**Land at: The Tweeds Highsted Valley, Rodmersham, Sittingbourne ME9 0AD**
**Reference: APP/V2255/X/20/3249583**

Scale: NOT TO SCALE



The Planning Inspectorate

# Costs Decisions

Virtual Hearing Held on 17 February 2021

**by Hilary Orr MSc, MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 22 March 2021**

**Costs application in relation to Appeal Ref: APP/V2255/X/20/3249583**
**The Tweeds, Highsted Valley ME9 0AD**

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
- Application A is made by Swale Borough Council for a full award of costs against Mr and Mrs Willis.
- Application B is made by Mr and Mrs Willis for a full award of costs against Swale Borough Council.
- The appeal was against the refusal of the Council to issue a certificate of lawful use or development for a summerhouse and greenhouse.

## Decisions

Application A

1. The application for an award of costs is dismissed.

Application B

2. The application for an award of costs is dismissed.

## Application context

3. During the course of this appeal a full application for costs was made by the Council against the appellant (Application A). At the Hearing a further application for a full award of costs was made by the appellant against the Council (Application B).

4. Parties in planning appeals and other planning proceedings are normally expected to meet their own expenses. Planning Practice Guidance advises that, irrespective of the outcome of the appeal, costs may be awarded where a party has behaved unreasonably, and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

## Reasons

Application A

5. It is the Council's case, that having explained the legal reasons for refusing the certificate application, it was unreasonable for the appellant to appeal the decision, and this has led to unnecessary expense in defending their decision.

6. The appellant has the right to pursue an appeal against the decision of the Council. Moreover, they have produced evidence prior to, and at the Hearing to support their stance.

7. The difference of opinion over the extent of the curtilage is a fact and degree judgement, and it will be seen from my decision that having listened to and considered all of the available evidence I have agreed with the appellant in this regard. The appeal has succeeded, and a Certificate has been granted.

8. It therefore follows, that I cannot agree that the appellant has acted unreasonably, and their decision to appeal the Council's decision has resulted in unnecessary or wasted expense in the appeal process.

Application B

9. In summary, the case for the appellant is that the Council has failed to substantiate their case. Broadly speaking they consider that the Council failed to objectively engage with the evidence pertaining to the physical layout, ownership and the function of the land over time, in order to establish the extent of the curtilage of the dwelling. It is submitted that the Council relied upon subjective criteria and guesswork.

10. The distinction between the way the land has been used over time and its curtilage, were discussed at the Hearing. The Council accepted that the land has been used as garden for over 10 years and this led to the grant of application 19/503434/LDCEX. However, whether it also formed part of the curtilage of the dwelling remained an area of dispute.

11. It is clear from the Officer reports for this, and the previous application, that the evidence provided by the appellant was considered as part of their overall assessment, although they did not find in the appellant's favour.

12. Nevertheless, at the appeal the Council produced evidence to support their position, with officer reports for the previous certificate applications and plans submitted from two previous planning applications in 2010 and 2016, where the boundaries of the site were marked in different ways. Their evidence went on to consider the spatial characteristics of the site, and the physical differences between the appeal site and the neighbouring properties, which I accept can be relevant to the question of the curtilage.

13. There is no authoritative definition of the term curtilage, and it is a matter of fact and degree, dependant on the circumstances of the case and primarily a matter for the decision maker. Having considered all of the available evidence, it will be seen that I concluded that, on the balance of probability, the claimed land, forms part of the curtilage of The Tweeds. Consequently, at the time of the application, the development applied for would have been lawful. Nonetheless, I do not consider that the Council failed to properly evaluate the application, albeit that they came to a different decision.

14. Accordingly, I cannot agree that the Council acted unreasonably and their decision to refuse the Certificate has caused any party to incur unnecessary or wasted expenses.

**Conclusion**

Application A

15. I therefore conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Planning Practice Guidance, has not been demonstrated in this instance. Accordingly, I refuse the application for an award of costs against the appellant.

Application B

16. I therefore conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Planning Practice Guidance, has not been demonstrated in this instance. Accordingly, I refuse the application for an award of costs against the Council.

*Hilary Orr*

INSPECTOR