

Appeal Decisions

Inquiry held on 15 March 2017

Site visit made on 15 March 2017

by Jean Russell MA MRTPI

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

Decision date: 30 May 2017

Appeal A: APP/Q4625/X/16/3148569

Appeal B: APP/Q4625/X/16/3148570

Kixley Farm, Kixley Lane, Knowle, Solihull, B93 0JF

- Appeals A and B made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991 against refusals to grant certificates of lawful use or development (LDCs).
- The appeals are made by Mr Mark Rhodes (Appeal A) and Mr Rhodes (Appeal B) against the decisions of Solihull Metropolitan Borough Council.

Appeal A

- The application subject to Appeal A (ref: 2014/2220) was dated 25 November 2014 and refused by notice dated 11 February 2015.
- The application was made under section 191(1)(a) of the 1990 Act as amended.
- The use for which a certificate of lawful use or development is sought is described as "established residential curtilage".

Appeal B

- The application subject to Appeal B (ref: 2014/1369) was dated 30 July 2014 and refused by notice dated 24 September 2014.
 - The application was made under section 192(1)(b) of the 1990 Act as amended.
 - The development for which a certificate of lawful use or development is sought is described as "the submitted plans are clear in confirming that the size of the building, its relationship to an adjoining dwelling and the intended use all satisfy the requirements of the GPDO".
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DECISIONS

1. Appeal A (ref: APP/Q4625/X/16/3148569) is dismissed.
2. Appeal B (ref: APP/Q4625/X/16/31485670) is dismissed.

PRELIMINARY MATTERS

The Site and Surrounding Area

3. The plans submitted in support of both LDC applications and appeals showed the same 'site edged red' and it includes the following¹:
 - A central courtyard;
 - Kixley Farmhouse, a dwellinghouse to the south/south east of the courtyard;
 - A garden to the south of the dwellinghouse;
 - The site access, which leads from the Kixley Lane to the south, past the western sides of the garden and dwellinghouse, to the courtyard;

¹ Inquiry plans D and E

- A rectangular group of buildings identified at the inquiry as F, G, H and I, with G and I being to the immediate west of the courtyard, and F and H being to the west of G and I respectively, and on the western site boundary²;
 - A building named the hobby room to the north of the courtyard and adjacent to the northern site boundary;
 - A linear group of buildings, J, K and L, to the east of the courtyard; and
 - A grassed area to the east of J, K, L and Kixley Farmhouse, adjacent to the eastern site boundary and previously used as a vegetable garden.
4. While both appeals relate to this site, the proposed building subject to Appeal B would replace and be more or less in the same position as F, G, H and I.
 5. The appellant owns the appeal site and surrounding land which is shown edged in blue on the submitted plans. The land includes a plot to the west of the appeal site which was previously occupied by a dwelling known as Kixley Farm Bungalow and buildings identified as D and E, plus adjoining open space.
 6. The Council granted a LDC (ref: 2013/1871) on 30 December 2013 for the existing use of the bungalow as a dwelling, and then planning permission (ref: 2014/478) on 13 May 2014 for a replacement dwelling. At the date of the inquiry, Kixley Farm Bungalow and buildings D and E had been cleared but redevelopment of the land had not commenced. I shall refer to that area as the 'bungalow plot'.
 7. The remainder of the appellant's land is bound at the south by Kixley Lane; from there, it sweeps around the bungalow plot and appeal site to the west, north and east. It is an expansive area of agricultural land which is mainly grazed.
 8. The appellant made a prior notification application (ref: 2012/1681) under Article 3, Schedule 2, Part 6 of the *Town and Country Planning (General Permitted Development) Order 1995* as amended (GPDO 1995) on 18 October 2012 for an extension to an existing farm track within the holding. On 30 November 2012, the Council determined that prior approval was not required.
 9. The Council also granted planning permission (ref: 2014/477) on 13 May 2014 for an agricultural store to replace buildings known as A, B and C, which had been sited to the north west of the site and north of the bungalow plot. Again, buildings A, B and C have been removed but the new store has not been constructed.

The LDC Applications

10. Where a LDC is sought under s191(1) in respect of existing development, the local planning authority (LPA) or Secretary of State may exercise powers under s191(4) to modify the terms of the application. Where a LDC is sought under s192(1) in respect of proposed development, the terms may only be modified where the applicant or appellant agrees.
11. Appeal A relates to an application made under s191(1)(a) to ascertain whether an existing use of land is lawful. As indicated above, the existing use was described on the application form as "established residential curtilage", but 'curtilage' is not a use of land. The Council did not modify the description of development, but it was agreed at the inquiry that I should. I shall consider Appeal A as relating to the lawfulness of an existing '*residential use of land*'.

² The Schedule of Buildings is as shown on the plan appended to Mr Rhodes' statutory declaration dated 11 March 2016 (inquiry document 1N) and plan PAL.02 as submitted with the application ref: 2014/477 (inquiry plan B).

12. Appeal B relates to an application made under s192(1)(b) to ascertain whether proposed operational development would be lawful if begun at the time of the application. The form did not clearly describe the proposed building; the Council considered the application as relating to: *demolition of existing outbuildings and their replacement with a new purpose built incidental building with a games room, a hobby room, a gym and a shower area*. I find that description to be accurate and shall determine Appeal B accordingly, again as agreed at the inquiry.

The Onus of Proof and Evidence before the Inquiry

13. Where a LDC is sought, the onus of proof is on the appellant and the standard is the balance of probabilities. A LDC should normally be granted if there is no evidence to contradict or otherwise make the appellant's version of events less than probable, and his evidence alone is sufficiently precise and unambiguous.
14. The appellant and his witnesses submitted statutory declarations, which stamped and signed by a solicitor. The Council does not argue that the declarations were not properly made, and so they carry significant weight as sworn evidence. All oral evidence to the inquiry was also given on oath.
15. The Council submitted aerial photographs that are annotated '2002', '2004', '2006', '2009' and '2013'. There is nothing to show when the photographs were taken, but the appellant has not said that the years given are likely to be wholly wrong. I shall take the dates as approximate.

APPEAL A: APP/Q4625/X/16/3148569

Main Issue

16. The main issue is whether the residential use of the appeal site is lawful.

Reasons

17. The appellant's case is that the appeal site has been solely in residential use for a period of at least ten years, and so any material change of use to residential use will be immune from enforcement action.
18. Under s171B(3) of the 1990 Act, no enforcement action may be taken after the end of the period of ten years beginning with the date of a breach of planning control in respect of a material change of use of land. An unauthorised use must continue substantially uninterrupted, save for *de minimis* breaks, before it can acquire immunity³. The LDC application was dated 25 November 2014 and so the appellant would need to show that the site has been put to residential use for a continuous ten year period from, at the latest, 25 November 2004.
19. Whether there has been a material change of use of land is a matter of fact and degree; there needs to be some significant difference in the character of the activities from what has gone on previously. The starting point will be the planning unit and the present and previous primary uses. The planning unit is usually the unit of occupation, unless a smaller area can be identified which is physically separate and distinct, and/or occupied for different and unrelated purposes⁴.
20. At the inquiry, I asked the parties to address what planning unit or units may exist and have existed at Kixley Farm, and whether the appeal site now represents a separate planning unit which has been put to a single residential primary use on a substantially uninterrupted basis for ten years.

³ *Thurrock BC v SSETR & Holding* [2002] JPL 1278

⁴ *Burdle & Williams v SSE & New Forest DC* [1972] 3 All ER

21. The Council's response was, in essence, that the site is part of a large planning unit which comprises the "farmstead and fields within the ownership of the appellant" and is in a mixed use for agriculture and residential uses. I shall say more about this assessment in due course.
22. The appellant put it to the inquiry that the site is a single planning unit, with a single residential primary use; it is physically and functionally separated from the remainder of the land in his ownership. There were no submissions as to what there had been a material change of use *from*, but there is some evidence on the history of the site which I set out below.

Kixley Farm

23. The appellant's grandfather, Mr Evans, bought Kixley Farmhouse and Kixley Farm shortly after World War II. He intended to use the dwelling as a "country retreat" and not farm the land himself⁵. Kixley Farmhouse was subsequently occupied by the appellant's mother from 1985 until 1999, and then the appellant moved in⁶. Thus, the dwelling has not been occupied by a farmer for many years⁷.
24. However, it was stated on the 2012 prior application form that Kixley Farm had been in use for agriculture for "100+ years". In 1961, "the land outlined in blue" was leased on an agricultural tenancy to Mr Sands, and he moved into Kixley Farm Bungalow. He retired around 1990, but he kept donkeys for longer, and the family did not vacate the bungalow plot until 2013⁸. Since 1999, Mrs Emmett has farmed the appellant's land under a tenancy agreement, alongside land of her own⁹.
25. Whatever the current use of the appeal site, it is laid out in the manner of a traditional farmyard, with the buildings F-L being sited between the Farmhouse to their south, and the fields plus the former buildings A-D to their north, west and east. I heard that cattle were kept in buildings C and D, albeit many years ago.
26. Buildings F, G, J and K are old and dilapidated timber and corrugated metal structures¹⁰. I adjudged that F and G were probably built as barns, and J and K as stables. The buildings annotated as H, I, L and the hobby room are constructed of white-painted brick in keeping with Kixley Farmhouse. I am not aware of their original uses, but the hobby room has a pre-existing stable door.
27. Mr Dauncey, a solicitor who has long known and acted for the appellant's family, told the inquiry that the outbuildings within the site had "not been used for agriculture in decades". The appellant wrote to the Council on 4 December 2014 to confirm that the Kixley Farm curtilage and outbuildings have not been used for agriculture since 1998. It would be reasonable to infer from those statements, as well as the appearance of the site, that the buildings were once in agricultural use.
28. Kixley Farmhouse is designed to face the garden to its south, but there is a well-established porch on the rear or courtyard side of the dwelling. The appellant, like his mother and grandfather before, uses Kixley Lane and the courtyard for domestic access and parking. It is unlikely that farm vehicles have been driven into the courtyard in modern times, because the farm track to the north did not reach here until recently, and a narrow bridge restricts access from the south.

⁵ Statutory declarations of Mr and Mrs Harris dated 11 June 2015

⁶ Oral evidence of the appellant and Mr Dauncey

⁷ The use of the farmhouse is not subject to any condition restricting occupancy to an agricultural worker, probably because the dwelling predates the modern planning system.

⁸ Statutory declaration of Mrs Woolmore dated 11 June 2015 and oral evidence of Mr Dauncey

⁹ Statutory declaration of Mrs Emmett dated 11 June 2015; Mrs Emmett's letter dated 26 November 2014

¹⁰ I heard that buildings had been damaged in Storm Doris in February 2017, but also that they had been 'dangerous' in recent years (oral evidence of Mr Dauncey).

29. Nevertheless, it seems to me that the courtyard must have once been used for agricultural purposes, because it provides the only route – if only on foot – to buildings G, J, K and L. The courtyard was re-surfaced in 1999 or 2000 in golden shale, but I heard that it was previously formed of cobblestones and slabs, which would be typical materials for a century old farmyard.
30. The Council's aerial photographs also indicate that, from around (if not before) 2002 until 2013, there was no boundary between the site and the buildings A-C. At my site visit, I saw that the door to building F faces the bungalow plot. Thus, the evidence suggests that the site was originally laid out and used for agricultural and residential purposes, in association with surrounding farmland and buildings. I do not dispute that there has been a decline in agricultural activity within the site since Mr Evans bought the holding, but that is not enough to show that there has been a material change of use.

The Unit of Occupation

31. I find that the site, the bungalow plot and surrounding fields still form a single unit of occupation, by reason of the appellant's single ownership. The fact that the agricultural land is farmed by a tenant does not alter that assessment. I also note that, at the date of the LDC, the two original primary uses were still being carried out within the unit of occupation: agriculture and residential uses.
32. It may not be the case, as the Council suggested at the inquiry, the the unit of occupation comprises a single planning unit. As noted above, the Council accepted a prior notification application under Part 6 of the GPDO 1995 for an extension to a farm track in the appellant's fields. However, it has been held that where land within a planning unit is in mixed use for agricultural and residential purposes, it does not benefit from permitted development rights granted under Part 6. The track was not laid out as shown on the submitted plans, and the application raises other questions as set out below, but it is still a fact that the Council accepted in principle that Part 6 permitted development rights applied to the fields.
33. It is also relevant that, as the appellant pointed out at the inquiry, the Council has treated the bungalow plot as a planning unit since it granted a LDC in relation to that land. A LDC only provides protection from enforcement action unless and until some material change in circumstances occurs¹¹. At the time of the inquiry, the plot was cleared. However, it will be a planning unit in the future if the extant planning permission is implemented. In the interests of natural justice, I shall treat it as a separate planning unit now, despite being within the unit of occupation.
34. That said, it is not for me to determine the status of the whole unit of occupation. The question is whether the appeal site is a planning unit which is in residential use alone; that will depend on the activities carried out on the land, and whether it is a physically and/or functionally separate entity as a matter of fact and degree.

Physical Separation

35. The site is mainly enclosed by fencing, but there is a gate in its northern boundary, which leads from a hardstanding in front of the courtyard to the fields to the north – and to the farm track extension subject to the 2012 application, although that had been proposed to end in the bungalow plot. I saw that there is another gate to the farmland on the eastern boundary of the site and to the north of building J.

¹¹ Under s191(6) of the 1990 Act, the lawfulness of any use for which a LDC is in force shall be conclusively presumed. This means specifically that a LDC granted under s191 is tangible proof that the immunities from enforcement in s171B apply to the existing use or development as at the date of the application.

36. The aerial photographs submitted by the Council indicate that the northern site boundary has remained much the same since about 2004. The site appears laid out differently on the photograph annotated '2002' and possibly so that there was, as the Council said at the inquiry, "direct access to the farmland". If that assessment is wrong, it is still likely that the site was linked to the fields in 2002, because Mrs Emmett stated that the gate had been there for as long as she has been a tenant.
37. I have already noted that there was no means of enclosure between the site and buildings A-C before the latter were removed, and building F was built with its door facing the bungalow plot. I could only enter building F by walking on the bungalow plot. Even if I discount those points, however, the northern and eastern gates and the farm track extension still serve to connect the site and agricultural land.
38. I heard that the appellant makes recreational use of the fields; he enjoys walking across and views of his land. He also drives occasionally to and from his home via the farm track, if and when Kixley Lane is impassable. Thus, I would not dismiss Appeal A solely because there are physical links between the site and agricultural land, but the fact that they exist must be taken into account.

Functional Separation

39. There is no dispute that hardsurfaced areas on the appeal site serve to facilitate the residential use of Kixley Farmhouse. The main access to the dwellinghouse is via Kixley Lane, and the courtyard is used for all domestic parking. Farm vehicles are not brought onto any part of the site from Kixley Lane or the farm track. I also note that the terms of Mrs Emmett's tenancy are such that she cannot use any building on the site for agricultural purposes.
40. However, I heard that Mrs Emmett can and does drive her car into the site from Kixley Lane, in order to park in the courtyard and then walk to the fields, via the northern gate, for the purpose of shepherding her flock. I also heard that the appellant helps Mrs Emmett to protect her livestock, by shooting foxes on the farmland, three or four times per year¹². Thus, there are functional links between the site and farmland, facilitated by physical links.
41. Mrs Emmett has known the appellant and site since at least 1999; other witnesses for the appellant have been familiar with the land for much longer. Their statutory declarations were all clear that the outbuildings within the site have long been disused for livestock or the storage of agricultural equipment. However, few of the written submissions gave many details of the current domestic use. Most witnesses told the inquiry that they had not often been inside many buildings in recent years.
42. In his letter of 4 December 2014, the appellant stated that "the buildings in the courtyard are just being used for domestic [?] storage or remained just empty". On the date of my visit, the buildings were being used as follows:
- F:** was largely empty save for bath tiles, ladders and disused spraying equipment;
- G:** was largely empty but used to store a set of sun loungers with a table; ladders; and a 'high chair' or 'A frame';
- H:** storage of items including lawnmowers, spades, hedge cutters, canes; scythes, doors, saws, tools; rolls of plastic fencing, rusted horseshoes and chains;
- I:** storage of items including jerry cans, a hosepipe, kitchen units, a wardrobe, empty cardboard (shot) boxes, empty gun cases, suitcases, a pallet, a spade, a roller, tools, paint and decorating equipment, cane furniture and bins;

¹² The appellant also shoots for recreational purposes on and off-site; his local club uses part of the holding.

J and K: the stables were largely empty except for rusted barbed wire, empty (human) food drums, stacked plastic bins and cast iron garden furniture;

L: the large part of this building was used to store wellingtons, weedkiller, kitchen units, desks/tables, pans, tools, garden seats and car cleaner; the smaller parts were empty or used to store planks, bricks, pallets and building waste.

43. The appellant was asked at the inquiry about his activities in these buildings; he stated that he takes mowers in and out of H; uses the bins, painting equipment and cane furniture in I; uses the ladders and high chair in G; and uses L as a boot room, for cleaning guns, and for mixing weedkiller spray. Mr Fletcher confirmed that the appellant use buildings I and L in these ways. Mrs Emmett told the inquiry that she had seen the appellant store and use gardening equipment on the site.
44. I accept, therefore, that buildings H, I and L are used to store items which are used for domestic purposes. From the solid construction of the buildings and their proximity to the Farmhouse, as well as the evidence of the witnesses, it is probable that this has been the case for many years. I heard that building L has been used as it is since before the appellant was born, and I see no reason to dispute that.
45. However, there was a notable accumulation of equipment which could be or could have been used to maintain land that is in domestic and/or farming use. I heard that because Kixley Farmhouse has been in single family occupation over three generations, and the appellant cleared the bungalow plot, there has been a "build up" of items in storage. That version of events is plausible, but it also raises questions as to whether items were only brought here and kept for domestic use.
46. Indeed, I have found that the access and courtyard areas of the site provide access to the appellant's fields as well as house. This being the case, the appellant has not shown how the storage of items such as weedkiller to maintain those areas could be described as simply domestic storage. I am also concerned that some of the items stored in buildings H, I and L, such as the plastic fencing, chains and building materials had no obvious domestic use.
47. I was most struck by the *lack* of use of buildings F, G, J and K, but then they are in such a condition as to afford little protection from the elements. The appellant described buildings J and K as "90%" empty; Mr Fletcher stated that they are "redundant stables...shut up and forgotten" for some 20 years. I saw that the sun loungers, cast iron furniture and high chair are still usable – but I heard that the latter is used by the appellant for shooting foxes as well as cutting hedges.
48. It is not necessary that every outbuilding by a dwelling must be in active domestic use for the land to be within the residential planning unit. However, the difficulty for the appellant is not simply that some structures are largely empty. I find that, as a matter of fact and degree, there are functional links between the site and farmland, arising from the use of the site for access to the fields for farming purposes; the storage of items which have a dual purpose or are used to maintain land with a dual purpose; and the storage of items with no clear domestic use.

Recent Planning History

49. The prior notification application for the farm track was made by the appellant in 2012 in relation to land at 'Kixley Farm, Kixley Lane'. The whole of the appeal site was included within the 'agricultural unit' shown edged red on the submitted plan¹³.

¹³ Untitled 1:1250 location plan, stamped as received by the Council on 22 October 2012 and annotated '12/1681'

50. The term 'agricultural unit' means agricultural land which is occupied as a unit for the purposes of agriculture, including any dwellings occupied for the purpose of farming the land¹⁴. I have found that the appellant is not uninvolved with his holding, but I would not go so far as to say that he occupies the farmhouse for the purposes of farming. Thus, it could be said that the dwelling was included in the 2012 red edged area in error – but it would not follow that the rest of the appeal site should have been excluded from the agricultural unit.
51. Indeed, the site subject to the 2014 planning application for the agricultural store was described as being in use as 'agricultural land', and shown on plan as including most of the appeal site – save for Kixley Farmhouse, the garden, access and verge areas to the south, part of the courtyard and part of building I.
52. The appeal site was shown as subdivided in the same way on plan PAL.01, which was submitted with the 2014 planning application for a dwelling to replace Kixley Farm bungalow. It was put to the inquiry that red lines are often drawn around all land in an applicant's ownership, but the difficulty for the appellant here is that the plans for the agricultural store and dwelling showed red lines *through* the site.
53. I also note that, during the course of the application for the store, the appellant's agent stated in an email dated 8 May 2014 that: 'the [appellant] has qualifications in agriculture...there is a full range of farming equipment...for maintaining and farming the land...as a result of the current condition of the buildings...[the equipment is] currently kept at an adjacent farm...the [appellant] wishes to bring them and locate them at Kixley Farm but in a secure building...'
54. I heard no satisfactory explanation as to why the appellant has previously applied for development on the basis that all or part of the site is agricultural land, which he is involved in the upkeep of. This evidence has to be read in the context that he has now failed to show that the site is physically and/or functionally separate.

The Hobby Room

55. The hobby room was fitted out in 1999/2000 to include a room with a dining set, sofa, coffee table, carpets and curtains, and a shower room. The appellant told the inquiry that the building is used for birdwatching, as a place where his friends' children can play, and where people can get clean if they have been outside. However, Mr Fletcher stated that, when he last went inside some two years ago, he got the impression that the hobby room had not been used for some time.
56. If it had been shown that this building is in active domestic use, this would not be sufficient for me to grant a LDC in relation to the whole site. As it is, however, I do not have the evidence to find that the hobby room alone has been in residential use for a continuous ten year period, such that I could make a 'split decision' under s193(4)(a) and grant a LDC for that part of the land.

Conclusion

57. It was suggested on the LDC application form that the residential use had been carried out since at least 1961. I have noted, however, that the appellant wrote in December 2014 that the farm 'curtilage' and outbuildings have not been used for agriculture since 1998. Mr Fletcher told the inquiry that the appellant had not brought livestock into the site since the shale was laid. All of the dates given by or on behalf of the appellant were more than ten years ago, but they are sufficiently divergent and unsubstantiated as to highlight the imprecision in his evidence.

¹⁴ The GPDO 1995 and now the *Town and Country Planning (General Permitted Development) (England) Order 2015*.

58. It was also stated in the grounds of appeal that this LDC application was made to confirm the clear separation between the residential use of the site and agricultural use of surrounding land. I have found that, however, that there are physical and functional links between the site and surrounding fields, and activities take place within the site for residential and agricultural purposes.
59. From the evidence before me, a few scenarios appear possible: that the site is a single planning unit which is in a mixed use, or it is part of a larger mixed use planning unit, or it falls between separate planning units, perhaps as shown on the 2014 plans. It does not matter which, if any, of those hypotheses is right, because the onus of proof is on the appellant, and he has not made his case.
60. On the balance of probabilities, the appellant has not demonstrated that the appeal site is a single planning unit which is solely in residential use, or that the use has been carried out on that basis for a period of ten years, so as to be immune from enforcement action. I conclude that the Council's decision to refuse to grant a LDC was well-founded and Appeal A cannot succeed.

APPEAL B: APP/Q4625/X/16/31485670

Main Issue

61. The main issue is whether planning permission would be granted for the proposed building by the *Town and Country Planning (General Permitted Development) (England) Order 2015* (GPDO 2015).

Reasons

62. The appellant sought a LDC on the basis that planning permission was granted for the proposed building under Article 3, Schedule 2, Part 1, Class E of the GPDO 2015, as in force at the date of the LDC application.
63. Class E states that 'the provision within the curtilage of a dwellinghouse of (a) any building...required for a purpose incidental to the enjoyment of the dwellinghouse as such...' is permitted development (PD). The Council refused to grant a LDC on the basis that the proposed building would be outside of the residential curtilage, and not demonstrably required for incidental purposes¹⁵.

Curtilage

64. The term 'curtilage' generally refers to land which serves the purpose of a building in some reasonably necessary or useful manner; it has been held that tests of physical layout, ownership (past and present) and use (past and present) apply¹⁶. The question is whether, as a matter of fact and degree, the land forms part and parcel of or has an intimate association with the building to which it is attached¹⁷.
65. It is not necessary for land within a curtilage of a building to be enclosed – or to cover a small area, as the Council suggested at the inquiry. I also note that the curtilage of a dwellinghouse need not cover the same area as the residential planning unit, although that is usually the case. It is possible for land to be in residential use and within the planning unit but outside of the curtilage^{18 19}.

¹⁵ The building would comply with limitations and conditions set out in paragraphs E.1, E.2 and E.3.

¹⁶ *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195; *Attorney General ex rel Sutcliffe; Rouse and Hughes v Calderdale BC* [1983] JPL 310

¹⁷ From a review of authorities pertaining to the exercise of PD rights in *McAlpine v SSE* [1995] JPL B43

¹⁸ The Government's *Technical Guidance: Permitted Development for Householders* as in force at the time of the LDC application did not include any definition of curtilage, but the term has been defined in the April 2016 and April 2017 versions as follows (for information): "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".

66. A different situation pertains here, but I would not dismiss Appeal B on that basis. Even if, for example, the site is or is within a mixed use planning unit, it would not automatically follow that the land could not serve the dwellinghouse in some reasonably necessary manner²⁰.
67. The appellant's case is that the whole site is the curtilage of the Farmhouse. The Council disagrees – but it does accept that *part* of the site forms the curtilage. The Council has stated that the curtilage of the Farmhouse is confined to the garden, access and landscaped areas to the south and southwest of the dwelling, while the land to the north is physically and functionally separate. Whether or not that is right, it follows that PD rights should apply to at least part of the site.
68. My remit in respect of Appeal B is to ascertain whether the proposed building would be within the curtilage of Kixley Farmhouse. It is not for me to make a wider declaration so as to define the curtilage and, were I to do so, this would be liable to prejudice future actions by either or both parties. Thus, I shall simply address whether the buildings F, G, H and I are within the curtilage of Kixley Farmhouse, because it is they which would be replaced by the proposed development.
69. I am satisfied that the appellant makes active use of buildings H and I for storage associated with the mixed use of the land, including the residential use. They face the southern access to the site and were used by Mr Evans for garaging. I also note that these buildings are brick built and relatively close to the farmhouse. It could therefore be argued that H and I are within the curtilage of the dwelling; the latter was excluded from the farmland as shown in the 2014 plans.
70. However, I am not persuaded that the same could be said of building F. It appears to be a former barn, it is accessed via the bungalow plot and it was placed closer to buildings A, B and C than Kixley Farmhouse. Building G faces the courtyard, but it also appears qualitatively disconnected from the dwelling. In its design and siting, it is related to other former farm buildings and the fields. Buildings F and G are used to keep a few domestic items, but that is not enough to place them within the curtilage, especially given the low level of the storage use.
71. The appellant has not demonstrated to my satisfaction that buildings F or G serve Kixley Farmhouse in a reasonably necessary or useful manner. On the balance of probabilities, and from their physical layout and past and present uses, these structures do not have an intimate association with the dwelling such that they could be deemed as being within its curtilage.
72. As noted above, where a LDC is sought under s191 or s192, s193(4) provides that the certificate may be issued for the whole or part of the land – or for all, some or one of the proposed operations. Even if buildings H and/or I are within the curtilage of the dwellinghouse, the application specifies a single operation and I could not grant a LDC for part of the land that a building would occupy.

Incidental Use

73. Incidental or ancillary uses are uses which are subservient to a primary use taking place within the same planning unit. They are not integral to or part of the primary use, but they are functionally related to it in a way that is normally found. In order to be PD under Class E, the whole of a proposed building must be required for incidental purposes – and not the provision of a primary living accommodation²¹.

¹⁹ *Skerritts of Nottingham Ltd v SSETR* [2000] 2 PLR 102

²⁰ It was held in *O'Flynn v SSCLG* [2016] EWHC 2984 (Admin) that regard must be had to activities carried out on the land, which may denote use incidental to the enjoyment of the dwellinghouse.

²¹ *Rambridge v SSE & East Herts DC* QBD November 22, 1996; *Peche D'or Investments v SSE* [1996] JPL 311

74. It was held in *Emin v SSE* [1989] JPL 909 that regard should be had to the use to which it was proposed to put the building. The physical size of the structure in comparison to the dwelling is not conclusive but it is necessary to consider the scale as well as nature of the proposed use, so as to identify the purpose and incidental quality of the building in relation to the enjoyment of the dwelling, and adjudge whether the development is reasonably required or necessary.
75. I am satisfied that all of the intended uses of the proposed building – a games room, hobby room, and gym and shower room – could be considered incidental to the enjoyment of the dwelling. The games room is drawn on the plan PAL.03 as containing a snooker table (accurately scaled) and circulation space around. I see no reason to dispute that the room would be of an appropriate size for its purpose.
76. However, the largest part of the proposed building would be the hobby room; it would be some 6.8m long and 5.8 wide. The submitted plans do not indicate what activities would be carried out in this room. When asked that question at the inquiry, the appellant put forward various ideas, but no firm or detailed proposals. He suggested that the room *could* be used for playing table tennis, and/or as a “relaxation” area, with a bar and large TV – and/or that the snooker table, or an American pool table, could be placed here.
77. The hobby room would include a partition wall; it would be large enough for generous games *and* TV/bar areas. This being the case, it is not clear why the appellant would require a separate games room as discussed above. He did not describe any commitment to or indeed enjoyment of table games so as to justify the quantum of space proposed overall for that purpose. The appellant also indicated that the hobby room would contain pictures, stuffed animal heads and shooting paraphernalia, but so as to suggest that those items would be decorative.
78. On paper, the proposed gym and shower areas do not appear unduly large in relation to their purpose. However, the plans do not show and the appellant was again vague to what equipment he would place in the gym. I heard that he prefers “gardening and diet” to working out. His brother is a “fitness fanatic” but he lives elsewhere and has his own gym in his garage.
79. I heard that appellant simply wants a building that is as big and nice as possible for him, his brother and his friends to enjoy at their leisure. It was submitted that the size of the building is not relevant, if it would comply with the limitations to Class E and not be too large for the intended uses. However, my concern is exactly that the whole of the building is not demonstrably required for its purposes.
80. I also heard that the word ‘reasonable’ does not appear in the GPDO, and the appellant’s personal needs are not relevant. However, it was held in *Emin* that: “the fact that such a building has to be required for a purpose associated with the enjoyment of the dwellinghouse *cannot rest solely on the unrestrained whim of him who dwells there* but connotes some sense of reasonableness in all of the circumstances...the word ‘incidental’ connotes an element of subordination in land use terms in relation to the enjoyment of the dwellinghouse itself [my emphasis]”
81. I find that the plans do not show and the appellant did not explain why he requires a building to accommodate games, hobby and gym uses of the nature and on the scale proposed. He did not demonstrate that the proposed development is reasonably required for purposes incidental to his enjoyment of his dwellinghouse.

Conclusion

82. Other appeal decisions referred to by the Council where a LDC was refused in respect of a proposed ‘incidental building’ were properly determined on their

facts²²; I must take the same approach to Appeal B. That said, the Inspector found in relation to appeal ref (ending): 2113677 that the floor plans before him lacked sufficient detail to show that the building would be used in a particular way for the incidental activities described, or therefore demonstrate that the scale of the building would be required for the use. The same situation pertains here.

83. The appellant has not demonstrated on the balance of probabilities that the proposed building would be located within the curtilage of Kixley Farmhouse, or required for a purpose incidental to the enjoyment of the dwellinghouse. For either and both reasons, the development would not be permitted by Article 3, Schedule 2, Part 1, Class A of the GPDO 2015. I conclude that the Council's decision to refuse to grant a LDC was well-founded and Appeal B fails.

Other Matters and Conclusions

84. At a site visit on 21 January 2014, after the appellant made a pre-application enquiry, a Council officer indicated that buildings F to L and the hobby room were 'ancillary' to the use of Kixley Farmhouse, and could be replaced by new incidental buildings. From that advice, the appellant made the applications and the appeals before me. I also note that, before refusing the application subject to Appeal B, the Council officer told the appellant of concerns regarding the size of the proposed building, but did not raise any questions regarding the matter of curtilage.
85. I can understand the appellant's disappointment at the above course of events, but the Council was not bound by informal officer advice when it determined the LDC applications. It is only through a formal decision made by a LPA in the proper exercise of its statutory duties under s191 and s192 that the lawfulness of a use or development may be established.
86. For the reasons given above and with regard to all other matters raised, I conclude that Appeals A and B should be dismissed.

Jean Russell

INSPECTOR

²² Inquiry documents 12 and 13

APPEARANCES

For the Appellant

Mr S Choongh of Counsel

He called:

Mr Robert Dauncey	Friend of and solicitor for the appellant's family
Mrs Angela Harris	Friend and neighbour of the appellant
Mr David Harris	Friend and neighbour of the appellant
Mrs Jo Emmett	The appellant's tenant farmer
Mr Anthony Fletcher	Friend of the appellant
Mr Mark Rhodes	The appellant
Mr Gary Winn	The appellant's agent

For the Local Planning Authority

Mr J Parker of Counsel

He called:

Mr Matthew Preece	Planning Officer, Solihull MBC
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DOCUMENTS

- 1 Mr Winn's proof of evidence, summary proof and appendices (A-UV)
- 2 Mr Winn's proof of evidence, summary proof and appendices (A-M)
- 3 Opening submissions on behalf of the appellant
- 4 Paragraphs 3B-1042.2, 3B-1042.3 and 3B-1042.25 of the
Encyclopaedia of Planning Law and Practice (EPLP)
- 5 Opening submissions on behalf of the Council
- 6 Paragraphs 3B-1028 to 3B-1032, 3B-1042.2 and 3B-1042.3 of the
EPLP
- 7 *Emin v SSE & Mid Sussex CC* (1989) 58 P&CR 416; [1989] JPL 909
- 8 *Debenhams Plc v Westminster CC* [1987] AC 396
- 9 *Attorney General ex rel Sutcliffe, Rouse & Hughes v Calderdale BC*
(1982) 46 P&CR399; [1983] JPL 310
- 10 *Methuen-Campbell v Walters* [1979] 1 QB 525
- 11 *Dyer v Dorset CC* [1989] QB 346
- 12 Appeal decision ref: APP/Q4625/X/09/2113677
- 13 Appeal decision ref: APP/P1940/X/12/2188122

PLANS

- A Site location plan submitted with LDC application ref: 2013/1871
- B Plans PAL.01, PAL.02 and PAL.018 submitted with planning application
ref: 2014/477
- C Plans PAL.01, PAL.04, PAL.06, PAL.08, PAL.09, PAL.010 and PAL.020
submitted with planning application ref: 2014/478
- D Site location plan PAL.02, dated 25 July 2014 – Appeal B
- E Site location plan PAL.01, dated 25 July 2014 – Appeal A

PHOTOGRAPHS

- P1 Aerial photograph with the bungalow plot edged red, submitted with pre-
application query received on 8 January 2014 (ref: 14/8009/P)