The Planning Inspectorate

Appeal Decision

Site Inspection on 17 January 2019

by Graham Self MA MSc FRTPI

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

Decision date: 30 January 2019

Appeal Reference: APP/R3650/X/18/3205674
Site at: Springfield, 30 Frensham Vale, Lower Bourne, Farnham GU10 3HT

- The appeal is made by Mr and Mrs C Abrahams under Section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against the refusal by Waverley Borough Council to grant a certificate of lawfulness.
- The application (Reference No. WA/2018/0744) dated 12April 2018 was refused on 8 June 2018.
- The application was made under Section 192 of the Town and Country Planning Act 1990 as amended.
- The application sought a certificate of lawfulness for: "Construction of outbuilding". In the council's refusal notice, the development was described as: "Construction of swimming pool and erection of pool house".

Summary of Decision: The appeal fails.

Site Description and Background History

1. The house at the appeal site is set well back from the road in substantial grounds, which extend partly behind other houses and their gardens along Frensham Vale. A curved driveway leads towards the house from a gated entrance. There is a tennis court in the south-eastern part of the site and a fenced paddock in another part. An oak-framed open-fronted single-storey building stands near the south-west boundary.

2. The land in this area rises towards the north-west. The land near the road partly occupied by the tennis court is at a lower level than the rest of the site. The house, together with an existing swimming pool and a paved terrace, stands roughly in the middle of the site. Next to the house (behind it and at the side near the top of the driveway) there is a level area which appears to be mostly used for access and car parking. There are also some outbuildings next to this area, including a block of five garages and a large shed-like building.

3. The rear of the level area just mentioned behind the house is bordered by a stone wall around 0.8 metre in height (marked by a black line on the site plan). This has the appearance of a retaining wall, as the land behind is at a higher level than the area near the house, and slopes up further towards the north and north-west going away from the house. Along the edge of the area next to the garages and shed there is a broadly similar low brick wall, also looking like a retaining wall with rising ground behind it.

4. Much of the area north and north-west of the partly-walled, level area next to the house and outbuildings is woodland. The northern corner of the site, where the

proposed building would be located, is in a clearing reached along a path through the woods. There is a levelled area in approximately the position of the proposed building. This level area appears to have been artificially created, that is to say it is not a natural landform.

5. The evidence submitted by both sides lacks historical detail, but from checks I have made on the council's website[1] I am aware that the council has issued a certificate of lawfulness for the use of the whole site as "residential garden".[2] As far as I can tell, no specific planning permission has been granted for the operational development involved in levelling land in the northern part of the site.

Assessment and Reasons

6. The dispute in this case relates to the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (abbreviated below to "GPDO"). Under Article 3 and Class E of Part 1 of Schedule 2 of the Order, planning permission is granted for the provision within the curtilage of a dwellinghouse of (among other things) any building required for a purpose incidental to the enjoyment of the dwellinghouse as such. This "permitted development allowance" is subject to numerous limits and provisos. The courts have held that the term "required" should be interpreted as meaning "reasonably required", as opposed to resulting from a person's unrestrained whim.

7. The basis of the appellant's case is that the proposed building would meet the criteria of the GPDO and so would be permitted development. The council contend that the building would not be permitted by the GPDO, mainly because of the scale of the development.

8. In order to be permitted by the GPDO, development of the sort proposed here has to meet two basic tests. The first is whether any of the rights under Part 1 of Schedule 2 of the GPDO apply, taking into account that such rights apply to development within the curtilage of a dwellinghouse. The second is whether permitted development rights under Class E of Part 1 are available, or more accurately were available at the date of the application.

9. The term "curtilage" is not defined in planning legislation, but has been the subject of court judgments, going back many years to *Sinclair-Lockhart's Trustees*.[3] There are several more recent judgments involving curtilage and related permitted development rights for operational development.[4] In summary, the curtilage of a building is confined to an area around the building, having an

[1] Although inspectors should not have to search websites to obtain information which should be supplied by appeal parties, I have done so in this instance to reduce delay.

[2] This certificate (reference WA/2017/0675) was apparently issued in June 2017 under Section 191 of the 1990 Act for "continued use of the area edged red on the site plan as residential garden (C3 use) in association with the residential use and occupation of 30 Frensham Vale Road".

[3] *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195.

[4] These include *Dyer v Dorset CC* [1988] 3 WLR 213; *McAlpine v SSE* [1995] JPL B43; *Skerritts of Nottingham Ltd v SSETR* [2000] 2 PLR 102 [2001] JPL 1025; and *James v SSE and Chichester DC* [1991] JPL 550. The Skerritts judgment concerned a listed building but has some more general relevance, including the finding that the curtilage of a substantial listed building would not necessarily be a "small" area (as held in *Dyer*) and could include existing outbuildings. There are Other judgments about the definition of curtilage mostly either concern listed buildings (eg *R [oao Sumption] v Greenwich LBC* [2007] EWHC 2776 (Admin), or concern use rights as opposed to GPDO rights for operational development.

intimate association with the building, serving the purpose of the building in some necessary or useful way, and usually (though not necessarily) forming one enclosure with the building.

10. The northern corner of the appeal site where the proposed building would be located is separated from the house by the intervening woodland (which is more extensive than indicated by the individual trees marked on the site plan), has a markedly different character compared with the area next to and on the same level as the house, and does not have the sort of intimate association with the house required to be part of the house's curtilage. Taking those factors into account, I find as a matter of fact and degree that this piece of land is not within the curtilage of the house.

11. In this type of case, whether land is within a building's curtilage has to be decided before proposed development is carried out, not afterwards. It is also important to note that "curtilage" is not a term of land use. Nor does the curtilage of a building necessarily equate to the "planning unit" (which typically, though not always, refers to a unit of occupation). The existence of a certificate of lawfulness for the use of the whole appeal site for use as "residential garden" does not mean that the whole site is within the curtilage of the house. Setting aside the fact that a hard-surfaced tennis court is not a "garden" in any normal English sense of that word (and nor is a paddock or fenced area used for animal grazing), the term "residential garden" is muddled for the purposes of planning law and fairly meaningless for the purposes of GPDO rights. But be that as it may, a "residential garden" is not the same thing as a curtilage.

12. I now turn to matters relating to the existing swimming pool, which is adjacent to the house. It appears to be fairly old, though no evidence has been supplied about its planning history. The appellants state that this pool would be filled in and converted into a terrace. Drawing Number PL201 is labelled to this effect ("Existing outdoor pool infilled and replaced with garden terrace"). However, cannot be imposed on certificates of lawfulness; so if, hypothetically, a certificate were to be issued for the proposed development, it would not be possible to impose a condition requiring the existing pool to be infilled within a specified time period. The lettering on the drawing, relating to a feature which is not covered by the certificate application, has to be treated as an indication of intent. The intent is also mentioned in the written statements for the appellants. But ownership as well as intentions can change at any time, and a mere statement or indication of the present owners' current intention is not enforceable.

13. I judge that a second swimming pool (ie two pools in total) cannot be regarded as reasonably required for a purpose incidental to the enjoyment of the dwellinghouse as a dwellinghouse. In effect, Class E rights for the provision of "any swimming or other pool" have been used up - certainly no case has been made out for requiring two pools, and the onus is on the appellants to justify any such requirement.

14. I make that judgment allowing for the fact that the proposal would create an indoor pool (as opposed to the existing outdoor pool) and that the proposed pool would be larger than the existing one. The main purpose of the proposed building would be to house the pool (and associated facilities such as a plant room and store), so the building and pool have to be treated as one composite scheme.

15. In the light of the findings above, there are clear reasons why a certificate of lawfulness should not be issued: permitted development rights under Part 1 of the GPDO would not apply because the site of the proposed building is not in the curtilage of the house; and Class E rights would not arise because the proposal as it stands (with an existing pool) would not be reasonably required for a purpose incidental to the use of the dwellinghouse as a dwellinghouse. The proposal would not be permitted by any other means. In the circumstances it would be superfluous for me to comment on the scale of the proposed development or whether it would be subordinate to the house.

16. Sometimes if an appeal decision is affected by matters on which the main parties have not commented, it is necessary to invite comments before the appeal is decided. I judge that in this instance that would merely cause delay, inconvenience and cost for all involved. This is not a marginal case - the fact that the curtilage of the house does not include the northern corner of the appeal site is clear and obvious from on-the-ground inspection.

Other Matters - Third Party Representations

17. Written representations have been submitted by numerous local residents and organisations objecting to the proposal. The volume and scope of the objections is such that I consider the following comments should be made, and I hope these will reach interested parties.

18. The Farnham Society refer to the appearance of the proposed building and say that the proposal conflicts with planning policies on development in the countryside. Other objectors also quote planning policies and point out that the site is outside the built-up area. The possible effect of the development on flooding is frequently mentioned, and the Frensham Vale Action Group (stated to have over 250 members) say that "any application for this site should be scrutinised properly under full planning NPPF regulations".

19. The Action Group evidently feel particular frustration at what happened in connection with past proposals, including a scheme for a new access and driveway. An application for planning permission was refused and a subsequent appeal against the refusal was dismissed.[5] A certificate of lawfulness was then granted by the council.[6] The Action Group consider the use of certificate of lawfulness applications to be a "planning scandal" for which the Group has never been given an explanation. Others put forward similar arguments. There is clearly a general view among local residents and bodies that the legislation on certificates of lawfulness is unacceptably flawed.

20. An appeal decision is not the place for a full explanation of planning law, but I shall try to clarify four matters in the hope of aiding understanding. First, many of the interested parties appear to believe that this appeal concerns an application for planning permission. That is not so. Second - following from the first point - planning policies and all the related issues which might be relevant to an application for planning permission do not have any bearing on this appeal.[7]

[5] Council reference WA/2015/2287.

[6] Council reference WA/2017/1825.

[7] For example, policy on flood risk is not one of the excluding or limiting criteria under Class E of the GPDO. Nor is designation as an Area of Great Landscape Value.

21. Third, although I can understand why many local residents are unhappy about the way repeated applications have been made, any applicant is entitled to apply for a certificate of lawfulness, and has a right of appeal against refusal. Fourth, permitted development rights under the GPDO can be taken away by a Direction under Article 4 of the Order; but - contrary to what has been suggested by some objectors - I do not have powers to do that when deciding this appeal. There is currently no Article 4 Direction in force.

22. I have set out the points above in view of the number of written objections. Despite their volume, most are misguided and have little or no weight. It would not be appropriate for me to comment on past decisions by the local planning authority or on whether legislation is a "planning scandal". If the Frensham Vale Action Group want a full explanation of relevant planning law I can only suggest that they should seek advice from the council or from a professionally qualified planning consultant.

Conclusion

23. For the reasons given above I conclude that the council's refusal to grant a certificate of lawfulness in respect of the proposed development (described in the application as "Construction of outbuilding" and in the council's refusal notice as "Construction of swimming pool and erection of pool house") was well founded.

Formal Decision

24. I dismiss the appeal.

G F Self