



Appeal Decision

Site visit made on 14 January 2020

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 27th January 2020

Appeal Ref: APP/J1535/X/18/3219245

Magnolia House, Vicarage Lane, Chigwell IG7 6LZ

- 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 Ms E Hall against the decision of Epping Forest District Council.
 - The application Ref EPF/2160/18 CLD, dated 1 August 2018, was refused by notice dated 19 October 2018.
 - 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 provision of a hard surface for purposes incidental to the enjoyment of the dwelling.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. The description of development given in the Council's decision differs from that given above. It describes the development as "construction of hard surfaced driveway". There is provision within section 191(4) of the 1990 Act for the local planning authority to modify or substitute the description. I consider the Council's description more readily reflects what has been built.

Main Issue

3. The main issue is whether the Council's refusal to issue a Lawful Development Certificate ('LDC') for the existing development was well-founded.
4. That turns on whether the operations: (i) constitute permitted development by virtue of the provisions of Article 3(1) and Class F of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 ('the GPDO'), and (ii) do not constitute a contravention of any of the requirements of an enforcement notice in force.

Reasons

Background

5. The appeal concerns the construction of a hard-surfaced driveway completed with block paving laid within the appellant's landholding which includes the residential dwelling known as 'Magnolia House'.

6. The appellant has sworn a statutory declaration. It confirms that she has owned Magnolia House since September 2007. At that time, the land title did not include the land on which the hard-surfacing has now been laid. It formed part of an adjoining plot. When the adjoining land was purchased by the appellant on 1 June 2009 it subsequently became amalgamated within the same registered title¹ as Magnolia House.
7. An enforcement notice was issued on 6 May 2010 against the unauthorised construction of a roadway (amongst other development) in the field to the north of Magnolia House. It was upheld on appeal. There is no dispute that the roadway attacked by the enforcement notice was removed in compliance with its requirements. Section 181(1) of the 1990 Act makes clear that compliance with an enforcement notice by removal of works does not discharge the notice. It remains in force. An offence is committed if without planning permission any development is carried out by reinstating works removed in compliance with an enforcement notice (section 181(5)).
8. The hard-surfacing applied for may properly be regarded as a 'roadway' which for the most part is located within the area identified in the 2010 enforcement notice. Only a small section at the southern-most end nearest to the dwelling lies outside, which corresponds with the original boundary for Magnolia House.
9. For the purposes of the 1990 Act operations can only be lawful if they do not constitute a contravention of any of the requirements of an enforcement notice then in force (section 191(2)(b)).

Analysis

10. 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.
11. Class F permits development consisting of the provision within the curtilage of a dwellinghouse of a hard surface for any purpose incidental to the enjoyment of the dwellinghouse as such. That is subject to prescribed limitations and conditions, but there is no suggestion they have been exceeded.
12. The crux of the dispute regarding Class F is whether the hard-surfacing is within the curtilage of Magnolia House.
13. According to the appellant the works were undertaken in October 2016 when the 2015 GPDO was in force. When the works were done there was provision within Class F, which post-dates the enforcement notice, for a hard-surfaced area to be laid as permitted development. A similar provision was found in the earlier 1995 Order, but when the roadway was laid there was no question of it being within the curtilage of the dwelling.
14. Although the enforcement notice remains in force, it cannot take effect with respect to any development which is lawful. In the case of *Duguid v SSETR & W Lindsay DC*² the Court of Appeal confirmed that an enforcement notice cannot be interpreted so as to make an offence out of a lawful activity.
15. The effect of Article 3(1) is to grant deemed planning permission for the classes of development that follow within the GPDO. Provided the terms of Class F are

¹ At H.M. Land Registry

² [2001] 82 P&CR

- met, then the operations benefit from deemed consent and the provisions of sections 191(2)(b) and 181(5) do not bite.
16. The GPDO does not attempt to define the term 'curtilage' and there is no other all-encompassing, authoritative definition.
 17. The Technical Guidance on permitted development rights for householders³ 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."
 18. 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. Generally, to fall within the curtilage of a building, it is enough that land serves the purpose of a building in some reasonably necessary or useful manner, even though it need not be marked off or enclosed in any way.
 19. The appellant draws my attention to several specific judicial authorities in which the term was discussed starting with *Methuen-Campbell v Walters*⁴. 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.
 20. In the same case, it was held that 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.
 21. In the absence of any statutory or authoritative definition, it was held in *Dyer v Dorset CC*⁵ that the term 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.
 22. The matter was considered in the context of listed building enforcement by the Court of Appeal *Skerritts of Nottingham Ltd v SSETR*⁶. While regarding the decision in 'Dyer' as correct, it was felt that the Court in that case had gone further than necessary in expressing the view that the curtilage of a building must always be small, or the notion of smallness is inherent in the expression. The curtilage of a substantial listed building was likely to extend to what were or had been, in terms of ownership and function, ancillary buildings.
 23. More recent case law has reaffirmed the criteria laid down in *Sutcliffe v Calderdale BC*⁷ for identifying curtilage as being (i) the physical 'layout' of the [listed] building and structure; (ii) their ownership past and present; (iii) their use or function past or present. Where they are in common ownership and one is used in connection with the other, there is little difficulty in putting a structure near a building or even some distance from it into its curtilage.

³ Published by the Department for Communities and Local Government in April 2017

⁴ [1979] 1 QB 525

⁵ [1988] 3 WLR 213

⁶ [2000] 2 PLR 102, [2001] JPL 1025

⁷ [1982] 46 P & CR 399

24. Not all the authorities involved the application of permitted development rights and a narrower interpretation may be appropriate for the GPDO. What emerges from the authorities is that whether something falls within a curtilage is a question of fact and degree depending on the particular circumstances. It is primarily a matter for the decision-maker.
25. A curtilage defines an area of land in relation to a building and not a use of land. Therefore, the fact that the land is used as a family garden in association the dwelling is not decisive. The Council acknowledges that by reason of ownership and proximity the whole landholding outlined on the application plan forms a single planning unit. Frequently the residential curtilage will equate with the residential planning unit. However, it is not uncommon for land in the same residential use which forms the planning unit to go beyond the curtilage. With a large house such as this, the curtilage can often be more tightly drawn.
26. The Council points to previous approvals for development at the house where the applications showed the residential curtilage as drawn tightly around existing landscape features. It is also pointed out that the enforcement notice plan from 2010 shows the land to be a separate parcel from Magnolia House.
27. When the enforcement notice was issued in 2010 for unauthorised development on the land on which the application site forms part, it was regarded as a 'field' or 'paddock'. Indeed, the allegation included "the construction of a roadway in the field". The appellant disputes that the land was or is a 'paddock' as described by the Council, but this corresponds with the observations of the previous Inspector in 2010. The appellant relies on one reference made by the Inspector to it being "previously" an open paddock as evidence that it was not a paddock at that time. This is taken out of context. When read in context the sentence describes the development and its effect on the openness of the Green Belt. The point being made was that it was no longer an *open* paddock because of the development rather than any change in the land use. Indeed, the Inspector made numerous references to the land as a paddock. These included mention of "Magnolia House and the adjoining paddock" and "an access road laid across the paddock". He further recorded that "the appellant indicates there is no intention to incorporate the paddock into the curtilage of the dwellinghouse".
28. The appellant says that no animals have been kept on the land since her purchase in June 2009. The land would not cease to be a field or paddock merely through the absence of animals. It is further argued that the land has always been naturally associated with Magnolia House. That is not the same as comprising residential curtilage.
29. From the copy aerial photographs supplied by the Council it can be seen that in 2007 vegetation clearly divided the land surrounding the house from the land where the driveway is now laid. Vegetation had been removed by the time of the 2010 image to make way for the access road which was enforced against. The access road has gone in the 2013 image and there was no longer a clear distinguishing line of vegetation physically separating the land in front of the house from the grassed land where the driveway is now built.
30. Magnolia House is a very large dwelling accessed off Vicarage Lane via an existing driveway which curves around the garden before opening out into a large forecourt around a water feature in front of the house. The field has been laid to lawn in the same way as the original garden with ornamental hedges in

various locations across what was once the dividing line. Given the landscaping which has taken place it is no longer readily apparent where the original garden ends whilst stood on site.

31. I note that when Council Officers first investigated the new driveway the conclusion was drawn that there was no breach of planning control and the file was initially closed. Even so, I am not bound by that finding.
32. Around the perimeter of the whole landholding there is hedging to form a single enclosure with the house. The new driveway leads from a new access point created further north along Vicarage Lane behind large metal gates and pillars in similar fashion to the original access. It sub-divides the plot with lawn on either side. It proceeds to an outbuilding orientated lengthways beside the north-eastern boundary with a forecourt created in front. The remainder of the new drive continues to curve around to connect with a spur off the main forecourt. It would be possible to drive in one entrance across the forecourt in front of the house and exit out of the other. To this extent the driveway is incidental to the use of the dwelling.
33. A full width drain demarcates the join between the existing spur and the new driveway although this does not denote the original boundary line which would include a small section of the new driveway.
34. Whilst there is a single enclosure laid out as garden, the outbuilding is some way from the house and visually separate from it. Indeed, hedgerow has been planted to screen it from the house. It is built on the land which formed part of a field. The land now laid as garden is further away from the house than the original garden and it appears as though associated with the outbuilding. This impression is reinforced by the new driveway serving the outbuilding.
35. Thus, there is a distinction between how the expansive lawn appears with intersecting driveway where the field once was and the garden closest to the house where there is a parking area and more planting. With the driveway sweeping around to connect with the existing spur, there is inter-connectivity between the areas, but the incorporated land does not appear as though it is closely associated with the house. This can be appreciated from the 2017 aerial photograph where the former boundary can be ascertained in line with the hedgerow in the neighbouring field. The more newly laid driveway does not appear as though it is part of the front garden, but simply within the wider landholding.
36. In assessing the extent of the curtilage, past and present use may be relevant. In *R (oao Sumption) v Greenwich LBC*⁸ a lack of historic connection between the land and a listed building was found to be a relevant fact but not determinative. Over the years, land may be acquired which serves to extend a garden. It is necessary to determine the status of the land from the factual situation existing at the date of the application. In the '*Sumption*' case, land had been acquired in 2004 and fenced; it was usable and intended to be used as an extension to the garden. It was not relevant that the garden use had not been formally approved.
37. In this case the evidence points clearly to the lawful use of the land being for agriculture at the time of the enforcement notice appeal in 2010. Therefore,

⁸ [2007] EWHC 2276 (Admin)

when the new driveway was laid in 2016 the land did not have a lawful residential use. Based on the judgment in *Sumption* this may not matter, but that decision involved a listed building and not the application of permitted development rights.

38. Here, the land was a field/paddock which did not fall within the residential curtilage when the previous roadway was built and enforced against. The field is attached to the land surrounding the house and it has since been laid out as garden and encompassed within a single enclosure. I recognise that a curtilage can be expanded, and it might include accommodation land or an area with an outbuilding. However, in these particular circumstances the land was not in residential use and did not function as one enclosure with the dwelling until recent years, and only after an enforcement notice was issued. It was not within the curtilage then and is not now just because it has been laid out and used as garden. It cannot fairly be described as part of the enclosure of the house to which it refers. Moreover, only the land nearest to the house can in my view be regarded as closely associated with it. Thus, it is not curtilage.
39. Furthermore, at the point when the enforcement notice was upheld in 2010 the area concerned was an agricultural field. Although it has been incorporated within the garden since then the land did not at the time of the LDC application have a lawful residential use to take advantage of permitted development rights in respect of the dwellinghouse.
40. In my judgement the land cannot properly be regarded as 'curtilage' of the dwelling at Magnolia House for the purposes of the GPDO for Class F to apply. The hard surfacing has been laid out in similar manner to the 'roadway' previously enforced against, but with added section to the outbuilding. Despite what the appellant says, the hard surfacing is a roadway which has been laid in contravention of the enforcement notice which remains in force.

Conclusion

41. 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 provision of a hard surface 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 Seward

INSPECTOR

