

Appeal Decision

Site Inspection on 2 March 2020

by Graham Self MA MSc FRTPI

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

Decision date: 12th March 2020

Appeal Reference: APP/B1740/X/19/3239960

Site at: The Copse, Hart Hill, Hythe SO45 3ND

- The appeal is made by Mr Gavin Schrader under Section 195 of the Town and Country Planning Act 1990 as amended against the refusal by New Forest District Council to grant a certificate of lawfulness.
- The application (Reference No. 19/10795) dated 21 June 2019 was refused on 19 August 2019.
- 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: "Erection of a domestic garage".

Summary of Decision: The appeal does not succeed.

Costs

1. An application for an award of costs has been made on the appellant's behalf. A separate decision is being issued on that application.

Assessment and Reasons

2. This appeal concerns a proposal to erect a double garage on land south of the dwelling known as The Copse. The dwelling stands on the east side of Hart Hill, on land which slopes down from the house towards a stream and then up beyond the stream to the south. The proposed garage would be located on the land south of the stream.
3. The Town and Country Planning (General Permitted Development) (England) Order 1995 as currently amended (abbreviated below to "GPDO") grants planning permission for (among other things) the provision within the curtilage of a dwellinghouse of any building required for a purpose incidental to the enjoyment of the dwellinghouse as such. The permitted development rights are not universal and can be removed by a direction under Article 4 of the GPDO, but no such direction applies in this instance.
4. The council have contended that the garage would not be permitted development under the GPDO because it would not be sited within the curtilage of the house at The Copse. The appellant maintains that the garage would be within the curtilage and that the proposal would be permitted under Class E of the GPDO.¹ In this decision, I first set out some legal points relating to the definition of "curtilage", then explain how they affect this appeal, and then refer to some other matters.

¹ In full, this provision is in Article 3 and Class E of Part 1 of Schedule 2 of the GPDO.

5. The term "curtilage" is not defined in the 1990 Act or in any other legislation such as the GPDO. Its meaning and application is derived from court judgments. The case of *Burford v SSCLG & Another* [2017] EWHC 1493 (Admin) is quoted in the appellant's planning statement as setting out three factors to be taken into account: the physical layout of the building and land; the past and present ownership; and the past and present use or function of the land. However, *Burford* is only one of numerous judgments which have dealt with the meaning of "curtilage" and these have to be considered, though some of them have been inconsistent with each other. The leading judgments go back to *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195,² where the court held that to fall within the curtilage of a building, the land should serve the purpose of the building in some necessary or useful way, taking past and present relationships of ownership and function into account. In the case of *Dyer v Dorset County Council* [1988] 3 WLR 213 the court held that "curtilage" had a restricted meaning referring to a small area forming part and parcel with the house or building which it contained or to which it was attached.
6. Later judgments include: *James v SSE & Another* [1991] 1 PLR 58; *McAlpine v SSE* [1995] JPL B43; and *Skerritts of Nottingham Ltd v SSETR* [2000] 2 PLR 102 & [2001] JPL 1025. The judgment in *James* confirmed that the definition of a building's curtilage had to be considered according to the facts of each particular case. In *McAlpine*, the court defined curtilage as referring to a small area about a building or having an intimate association with land which is undoubtedly within the curtilage, though location within the same physical enclosure was not necessary. In *Skerritts*, the court found that the curtilage of a building did not necessarily have to be small, although this case concerned a substantial listed building and outbuildings. The case of *Sumption v Greenwich LBC* [2007] EWHC 2776 (Admin) also involved a listed building and raised some different issues; but basically the judgment confirmed that whether or not a piece of land was inside or outside the curtilage of a building had to be judged from the factual situation existing at the date of an application for a certificate of lawfulness.
7. In their case against the present appeal, the council appear to have given considerable weight to some aspects of the site's past history, including the planning permission for the dwelling at The Copse granted in 1964. The site boundary shown in the 1964 application (and therefore the extent of the 1964 permission site) follows the line of the stream. A drawing submitted in connection with an application for planning permission for a conservatory extension in 2010 also showed the southern boundary of the application site along the stream, with the land south of the stream in the same ownership but outside the application site.
8. The council contend that in the absence of any certificate of lawfulness relating to the use of the land south of the stream (for which no application has been made) this land is not lawfully part of the residential curtilage and therefore does not benefit from permitted development rights. Emails exchanged between the council and the appellant's agent show that the council requested an application for a certificate of lawfulness to establish whether "the area of woodland [ie the area south of the stream] has been used as garden area for a period of 10 years".³ The council say that the appellant has failed to establish that "the existing use of the area of land beyond the stream is lawfully incorporated within the garden".

² The references quoted here are in standard format using standard abbreviations: for example, PLR=Planning Law Reports; JPL=Journal of Planning Law; EWHC=England & Wales High Court.

³ The quotation is from an email from Jacky Dawe of NFDC to Tony Huggett the appellant's agent dated 25 July 2019.

9. This part of the council's case is flawed in three ways. First, although the use of the land is a factor in deciding the extent of a building's curtilage, the term "curtilage" does not denote a use of land, as the council appear to believe. Second, a "garden" or "use as garden" is not necessarily the same thing as a curtilage - a garden used for domestic purposes in association with a dwelling may or may not be within or coincident with the curtilage of the dwelling. Third, the council apparently rely on the boundary shown on the 1964 and 2010 planning applications as evidence of the extent of the curtilage relevant to the certificate application. But the question whether the proposed building would be within the curtilage of the house has to be decided having regard to the situation at the date of the certificate application. To a much lesser degree, the appellant's agent also makes some incorrect references to "curtilage". For example, the appellant's statement refers to "the use of the land as part of a curtilage".
10. A "planning unit" with use rights may not coincide with a curtilage.⁴ Under Article 3(5)(b) of the GPDO,⁵ where a residential planning unit and the curtilage of a dwelling initially coincide, but the curtilage is later extended into land not in lawful residential use, GPDO Class E permitted development rights do not apply to the extended area. To put this another way, a building cannot be legitimately required for use for a purpose incidental to the enjoyment of a dwellinghouse if the residential use of the land where the building would be sited is unlawful. However, the ten-year rule in Section 171B(3) of the 1990 Act applies, so permitted development rights may eventually apply through the passage of time.⁶
11. There have been changes at this site since 1964. It is fairly clear to me that the residential use permitted in 1964 only extended to the land north of the stream. The situations in 2005 when the ownership changed, and in 2010 when the application for a conservatory extension was made, are less clear. In 2005 an estate agent's description mentioned views from the house over the garden and woodland beyond - that probably refers to woodland south of the stream within the present appeal site but it could perhaps refer to woodland further south. A surveyor's valuation report in October 2005 mentions a "garden extending to approximately 1.8 acres", which would appear to include the land south of the stream; but a surveyor carrying out a valuation would not have in the forefront of his or her mind the definition of curtilage for planning purposes and whether "garden" meant "curtilage". The surveyor's report does not mention the tree preservation order which has evidently applied to the area south of the stream since 1992. The appellant's statement refers to this southern area being laid to lawn, although photographs apparently taken in 2006 suggest that the "lawn" may have been rather roughly grassed and only covered parts of the land between groups of trees.
12. Among the appellant's supporting evidence there is a copy of an affidavit, which contains sworn statements about aspects of the site's history. The land south of the stream was evidently cleared of undergrowth in 2006. In 2007 a shed on the

⁴ The concept of "planning unit" was set out many years ago by the court in the case of *Burdle and Williams v New Forest RDC* [1972] 1 WLR 1207. The starting point for defining a planning unit will normally be the unit of occupation, but that is not always so.

⁵ Neither side have specifically referred to this part of the GPDO in their appeal statements, but it is mentioned in an email from the appellant's agent to the council sent in August 2019.

⁶ I am not referring here to rights for "use as curtilage", because there is no such use: I am referring to residential or "ancillary or incidental to residential" use serving the purpose of a dwelling. The period during which an unauthorised use has to be carried on before it gains immunity from enforcement and so becomes lawful is 4 years for use as a dwellinghouse but 10 years for residential (or ancillary or incidental to residential) use of land associated with a dwellinghouse.

land south of the stream was replaced and a second shed was erected. Later, at a date described as "about 2012" a footbridge across the stream was "upgraded" to enable vehicular access to the area south of the stream, and another pedestrian bridge was constructed. From what I saw, I think "upgraded" means in effect replaced by the existing much more substantial structure, which has what appear to be timber beams mounted on blockwork pillars, post and rail side balustrades and a timber-plank surface capable of carrying a vehicle.

13. The shape of the house which now stands on the site differs from that shown in the 1964 drawings submitted in evidence and the detached garage shown in the 1964 plans does not seem to exist. Nor does the "integral tandem garage" mentioned in the estate agent's description of the property in 2005 - this may have been converted into living accommodation, although there is no evidence about when this may have happened. However, the evidence indicates that the land south of the stream was used as what might best be described as well-wooded garden or private amenity land from about 2006-7, after an earlier period when it appears to have been unkempt woodland partly overgrown with shrubs.
14. The stream is a significant physical feature, with steep banks partly reinforced with concrete slabs and other structures and with a width such that it cannot be easily crossed without a bridge. A driveway surfaced with slabs and chippings has been built from the area next to the house down to the vehicle-width bridge. The bridge leads to a circular-shaped driveway which has been constructed on the sloping land south of the bridge. This driveway is surfaced with shingle and appears to have a base formed from hardcore.
15. The age of the northern part of the driveway is difficult to discern. From what I saw, the driveway to the south looked quite recently built. It covers quite a large area of land and it seems to me that the character of this area has been altered as a result, because it has been made more open, less vegetated and more "man-made". Evidently no specific planning permission has been sought or granted for the sheds and driveway construction south of the stream, or for the bridges.
16. The general thrust of the court judgments mentioned above is that in considering the extent of a building's curtilage, the starting point is the area immediately around the building. Beyond that, particularly beyond a demarcating physical feature, a larger area should not readily be included without reasonably clear justification, especially as the house at The Copse is a five-bedroomed dwelling, not a *Skerrits*-type listed building with substantial outbuildings. In the case of the curtilage of a dwelling, the use of the land for residential purposes also has to be lawful.
17. Putting together all the above legal and evidential points, I find that until about 2006-7, the land south of the stream was clearly outside the curtilage of the house. The stream separated the land to the south from the area next to the house, and vegetation alongside the stream (visible in the 2006 photographs) had an additional dividing effect. Much of that vegetation seems to have been removed in the year or two after 2006, and after about 2012 access from the land near the house became easier because of the provision of the vehicle-width bridge. A new footbridge also reduced the separating effect of the stream, but the stream has remained a significant physical feature, not only because it can only be crossed at limited points but also because it marks the break of slope between the land to the north and south.
18. It seems to me that the bridges over the stream are comparable to gates in a fence, even though the stream does not have the visually enclosing impact of a

fence. The presence of the bridges as a means of crossing the stream also draws attention to the existence of the stream and its demarcating effect. The land south of the stream is within the same ownership as the house, and its use for "ancillary residential" purposes may have been carried on for more than ten years by June 2019, but in terms of use there is a degree of separation from the house - for example, the sheds are evidently used for storing items for working on the land south of the stream, not domestic items closely associated with the house, or even with the land immediately surrounding the house.⁷

19. The situation in June 2019 would have been more marginal than during the period up to about 2012; but having regard to all the foregoing factors I judge that at the date of the certificate application the line of the stream still formed the boundary of the curtilage of the house.
20. I make no finding about the situation after June 2019. I say that because I suspect that the quite extensive area covered by the driveway on the land south of the stream is likely to have involved recent further clearance of vegetation, and the construction of this driveway may have changed the appearance and function of this land to a degree which might potentially have affected its status with regard to the curtilage issue. A notable feature of the evidence supplied for the appellant, including the affidavit sworn in July 2019, is that no mention is made of the formation of the driveways (either to the north or the south of the stream). This reinforces my suspicion that the southern part at least may well not have been constructed until after the certificate application date, and I have discounted its presence when assessing the extent of the house's curtilage at that date.
21. Both sides in this case have been so tied up with the curtilage issue that some other basic points seem to have been missed. The erection of a building in the curtilage of a dwelling is not permitted by the GPDO if the height of the building would exceed 2.5 metres and the building would be within 2 metres of the curtilage boundary.⁸ According to the application drawings, the ridge height of the proposed building would be about 4 metres above ground level, and at the central point of its western wall there would be a 2 metre gap between this point and the site boundary - the 2 metre dimension is specifically labelled at this location. The precise line of the site boundary here is difficult to determine on the ground - there is a small ditch, some unkempt vegetation and strands of barbed wire. Be that as it may, on the application drawing the site boundary is not exactly parallel to the wall of the proposed building, and towards the north, the wall of the building would be slightly less than 2 metres from the site boundary.
22. The less than 2 metre dimension just mentioned would be a small shortfall and considered in isolation it might be possible to ignore it. But the same cannot be said for the additional effect of the roof overhang. The drawings show that the proposed 2 metre dimension refers to the wall. The roof would project out beyond the line of the wall. As far as I can tell by scaling from the drawings, the amount of this projection would be about 25-30 centimetres. Therefore the building - including its roof which would obviously be an integral part of the structure - would be about 1.7-1.75 metres from the site boundary at the building's mid-point, or slightly less than that at the northern corner. So even if

⁷ The affidavit refers to the sheds having been erected to store garden maintenance items "to avoid having to cross the bridge", which indicates to me that the items kept in the sheds are for use on the land south of the stream.

⁸ This refers to sub-paragraph E.1(e)(ii) of Class E.

this part of the site were taken to be within the house's curtilage, the building would not meet the 2 metre criterion applicable to a building 4 metres in height.

23. Part of the appellant's case is that all the criteria on size and location set out in the legislation would be met. Given the dimensions quoted above, that would not be so. The discrepancy would not be very great and could be avoided by a change to siting, but I have to decide whether what is proposed would be lawful, not whether it might be rendered lawful by modifying it.
24. I also have doubts about whether the proposed building is "required for a purpose incidental to the enjoyment of the dwellinghouse as such". The courts have held that the term "required" in this part of the GPDO should be interpreted to mean "reasonably required".⁹ The representations for the appellant state that the building would be used for "parking the occupiers' own vehicles used as part of the residency of the dwelling and also storage similarly required as part of the use of the site as a residence". Bearing in mind the size of the house and the apparent lack of garaging, I can accept that a building for garaging a vehicle or vehicles would be reasonably required within the terms of the GPDO. But no case has been made out for a requirement for additional storage incidental to the enjoyment of the dwellinghouse as a dwellinghouse, especially in this location well away from the house where there are already two sheds. The "requirement" in this context has to be more than just a desire or whim of a current occupier.
25. During my inspection I noted the presence of several structures on land immediately east of the area edged red on the application plan. This area is not fenced off or otherwise subdivided from the appeal site and appears to be occupied together with the appeal site. I do not know the planning status of these structures, which looked as if they were formed mostly from waterproof sheet material attached to a frame, but they appear to provide outside storage capacity. This further weakens the argument that the proposed building is required for storage incidental to the enjoyment of the house as a house.
26. The drawings submitted as part of the certificate application show a building standing on level ground. That does not depict the situation at the appeal site. Because of the irregularly sloping topography here, earthworks would be necessary in order to construct the building on level ground. The application does not show what in practice is intended, including for example the extent of "cut and fill". Without more accurate drawings showing how it is proposed to fit the building into the slope, it is not possible properly to determine whether the height of the building would meet the relevant GPDO criterion.
27. In this type of case the onus of proof is on the appellant. Quite apart from the curtilage issue there are too many doubts and uncertainties for me to find that the onus has been met. I judge on the balance of probability that the land on which the proposed building would be sited was not within the curtilage of the house at the date of the certificate application; and even if it had been, the proposal would not be permitted under the GPDO because the building would be located too close to the property boundary to meet the criteria in Class E and would not be reasonably required for both of the purposes stated in the application. I also have reservations about the accuracy of the application drawings with particular respect to the building's height above ground level.

⁹ The judgment in *Emin v SSE and Mid Sussex DC* [1989] JPL 909 held that when deciding whether the proposed use of a building would be incidental to the enjoyment of the dwellinghouse it was necessary to consider whether the building is genuinely and reasonably required or necessary to achieve that purpose. That principle was reiterated in *LB Croydon v Gladden* [1994] 1 PLR 2 and *Holding v FSS & Thurrock BC* [2004] JPL 1405.

Conclusion

28. My findings differ in several respects from those of the council. Nevertheless for the reasons given above I conclude that the council's refusal to grant a certificate of lawfulness in respect of the application reference No. 19/10795 dated 21 June 2019 was well-founded.

Formal Decision

29. I dismiss the appeal.

G F Self

Inspector