



Appeal Decision

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 14 May 2020

Appeal Ref: APP/R0660/X/19/3239458

Heathfields, New Road, Moreton, Congleton CW12 4RX

- The appeal is 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 a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr and Mrs S Salt against the decision of Cheshire East Council.
 - The application Ref 19/2147C, dated 1 May 2019, was refused by notice dated 23 August 2019.
 - The application was made under section 192(1)(b) of the 1990 Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is an "incidental outbuilding".
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr and Mrs S Salt against Cheshire East Council. This application is the subject of a separate Decision.

Preliminary Matters

3. In response to travel restrictions currently in place due to the COVID-19 pandemic, I consider that this appeal can be determined without the need for a site visit. This is because I have been able to reach a decision based on the information already available. The appellants and the Council have agreed to the appeal proceeding on this basis.
4. In this type of appeal, the onus of proof is firmly upon the appellants. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The applicants' own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellants' version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case. For the avoidance of doubt, the planning merits of the proposal are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act as amended.

Main Issue

5. The main issue is whether the Council's decision to refuse to grant a lawful development certificate was well-founded.

Reasons

6. The appellants' case is that the proposed development would fall within that 'permitted' under Article 3 and Schedule 2, Part 1, Class E to the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO), which concerns buildings within the curtilage of a dwellinghouse. E.(a) states that *the provision within the curtilage of a dwellinghouse of any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse* is permitted development subject to conditions and limitations. The main dispute between the parties concerns whether the building would be reasonably required or would be wholly used for purposes incidental to the enjoyment of the dwellinghouse.
7. The outbuilding would be sited to the east of the main dwelling on land subject to a recent LDC for the "existing use of land as residential C3 use" (Ref 18/4115C, dated 5 October 2018). The outbuilding is intended to be used as a storeroom, children's playroom, garden room, office, gym, sauna and WC. The appellants have provided a floorplan of the existing house which indicates the accommodation comprises four bedrooms and a bathroom on the first floor. On the ground floor there is a living room, cloak/WC, small office, dining room, kitchen, store and utility room. It is argued that the outbuilding would provide accommodation to the property that is not currently available.
8. E.4 says that *for the purposes of Class E, "purpose incidental to the enjoyment of the dwellinghouse as such" includes the keeping of poultry, bees, pet animals, birds or other livestock for the domestic needs or personal enjoyment of the occupants of the dwellinghouse*. The Technical Guidance¹ advises the rules also allow, subject to the conditions and limitations, a large range of other buildings on land surrounding a house. Examples could include common buildings such as garden sheds, other storage buildings, garages, and garden decking as long as they can be properly described as having a purpose incidental to the enjoyment of the house. The Guidance continues, a purpose incidental to a house would not, however, cover normal residential uses, such as separate self-contained accommodation nor the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen.
9. In addition, case law has established that permitted development rights under Class E extend only to buildings required for a purpose incidental to the enjoyment of the dwellinghouse as such, not to buildings required for a purpose integral to the use as a dwellinghouse. Whether this is the case will depend on a fact and degree assessment². Incidental uses are not distinguished by scale, although that may be relevant.
10. The Court in *Emin*³ confirmed that regard should be had not only to the use to which the Class E building would be put, but also to the nature and scale of that use in the context of whether it was a purpose incidental to the enjoyment of the dwellinghouse. The physical size of the building in comparison to the dwellinghouse might be part of that assessment but is not by itself conclusive. It is necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwelling and answer the question as to whether the proposed building is genuinely and reasonably required in order to accommodate the

¹ Permitted Development Rights for Householders: Technical Guidance, MHCLG (September 2019).

² *Pêche d'Or Investments v SSE* [1996] JPL 311; *Holding v FSS* [2004] JPL 1405.

³ *Emin v SSE & Mid Sussex DC* [1989] JPL 909.

proposed use or activity and thus achieve that purpose. The use of the building should be subordinate to the use of the house as a dwellinghouse.

11. I acknowledge that a home gym/sauna for the use of the occupants of the dwellinghouse, within an outbuilding, could be considered incidental to the enjoyment of the dwellinghouse. Similarly, a storeroom for garden tools and/personal belongings could be considered an incidental use of an outbuilding. The proposed office would provide space for a desk and would enable the storage and display of books. This would allow the existing but relatively small office to be used as a larder, which is a reasonable requirement given the layout of the house. Also, I accept that a garden room, or summerhouse, can be incidental as a means of enjoying the garden in a position away from the main house, as such buildings can be sited to take advantage of a particular view, feature or sunlight. However, they should not comprise primary accommodation and should remain subordinate.
12. In this case, the proposed garden room would occupy the central area within a relatively large building of substantial construction. It is indicated that it would be used for the purposes of entertaining, which goes beyond the more traditional use of a garden room as a space for the occupants to sit and relax away from the main house. This room would be in addition to a playroom, of equal size, which would provide space for entertaining children and for the storage of toys, as well as providing a further garden room and/or a family games room. These rooms, as proposed, would have a function and purpose not unlike reception rooms in a dwellinghouse. In my opinion, they would comprise additional primary living accommodation that would supplement the accommodation provided in the main house.
13. While it is not necessary for the appellants to demonstrate a requirement for the outbuilding, it must be shown to be required for a purpose incidental to the enjoyment of the dwellinghouse as such. Given the extent of primary accommodation that would be provided, by the playroom and the garden room, a significant proportion of the building would be for purposes integral to the use as a dwellinghouse, as opposed to incidental uses.
14. Overall, there is no clear justification for an additional building of the size and layout proposed, and for the purposes described. I am not satisfied that the building is genuinely and reasonably required or necessary to accommodate the proposed use or activity, because a significant proportion of those uses would not be incidental. Furthermore, the use of the building would not be subordinate to the use of the house as a dwellinghouse but would be supplementary.
15. The appellants draw my attention to an appeal concerning an LDC for an outbuilding in a rear garden⁴. The full evidence is not before me, but the appellants have highlighted paragraphs from the decision letter which are considered to be the most relevant. I understand that the Inspector in that case was considering a proposal for a home office/summerhouse and replacement store. In contrast to the appeal proposal, the Inspector found that the outbuilding would be used for purposes that are "typical incidental domestic uses" and it would not be too large for those purposes. I consider that the facts make the cases distinguishable.

⁴ Ref APP/R5510/X/3212097 dated 2 September 2019.

16. The appellants list six recent applications, considered to be comparable, for which the Council has issued LDCs. I accept that these are all relatively large scale and some show accommodation for purposes that could be considered integral to the use as a dwellinghouse. However, I cannot be determinative about this latter point as I am only presented with a snapshot of the evidence. It would be necessary for me to understand the relationship between the main dwellinghouse and the outbuilding to make a fact and degree assessment. I am unable to find inconsistency in the Council's approach, therefore.
17. In its appeal statement, the Council expanded its reasoning to include an argument that the outbuilding would not be within the curtilage of the dwellinghouse, and so would not be permitted development.
18. Curtilage defines an area of land in relation to a building and not a use of land. There is no all-encompassing, authoritative definition of the term curtilage. The Technical Guidance includes "curtilage", for Part 1 purposes, as 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.
19. 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 way⁵. However, other considerations, such as past and present relationships of ownership and function, must be taken into account. In the absence of any statutory or authoritative definition, it was held in *Dyer*⁶ 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.
20. The relevant authorities were reviewed in *McAlpine*⁷ and the following characteristics of curtilage defined: a) it is confined to a small area about a building; b) intimate association with land which is undoubtedly within the curtilage is necessary to make the land under consideration part and parcel of that undoubted curtilage land; and, c) physical enclosure is not necessary.
21. More recently the matter was considered in the context of listed building enforcement in *Skerritts*⁸. 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 recent case of *Burford*⁹ reaffirms the criteria laid down in *Sutcliffe*¹⁰ for identifying curtilage as being - a) the physical layout of the listed building and structure; b) ownership past and present; c) use or function past or present. Whether something falls within a curtilage is a question of fact and degree and, thus, primarily a matter for the decision maker, based on an assessment of the factual situation at the date of the application¹¹.

⁵ *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195.

⁶ *Dyer v Dorset CC* [1988] 3 WLR 213.

⁷ *McAlpine v SSE* [1995] JPL B43154.

⁸ *Skerritts of Nottingham Ltd v SSETR* [2000] 2 PLR 102, [2001] JPL 1025155.

⁹ *Adrian Burford v SSCLG and Test Valley BC* [2017] EWHC 1493 (Admin).

¹⁰ *Sutcliffe v Calderdale BC* [1982] 46 P & CR 399.

¹¹ *Sumption v Greenwich LBC* [2007] EWHC 2776 (Admin).

22. The dwelling known as Heathfields is situated within a rectangular plot of land fronting New Road. There are open fields to the north and west. There is a further parcel of land to the east between the dwelling and the neighbouring property. This is where the outbuilding would be sited and is the land under dispute, referred to hereafter as 'the Land'. The appellants became owners of the Land in 1999.
23. In 2018, the Council granted an LDC for residential use which included the gardens immediately to the front and rear of the house, plus the Land to the east. In granting the 2018 LDC, the Council accepted the Land had been in continuous residential use for a period of 10 years, prior to the date of the application. Aerial photographs submitted with the LDC application show that the Land has been associated with the residential use of the house since at least 2010. The grass is mown and the images show evidence of a greenhouse and vegetable patch. The Land is more akin to the garden of the house than the adjoining fields. As such, it served the residential purpose of the house.
24. The Land is relatively large and is separated by a hedge and a driveway which also serves the buildings to the rear. It has its own direct access from New Road. Size, in itself, is not a critical factor as shown by established case law. While physical separation and/or separate access can indicate dissociation with the building, this is not the case here. It is clear that the Land has been used for residential purposes by the occupiers of the house for a significant period of time. Importantly, it serves the house and is functionally associated with it.
25. I consider that the use or function of the Land has been associated with the dwellinghouse for several years. It has fallen within the same ownership for a significant period. The separate access, internal boundary, size and extent of domestic use are not indicative that the land falls outside of the curtilage in this instance. Therefore, I am satisfied that, as a matter of fact and degree, the Land is within the curtilage of the dwellinghouse for Part 1 purposes. However, this does not overcome my findings about the incidental use, as set out above.

Conclusion

26. The totality of the evidence presented in support of the appellants' claim does not show that, on the balance of probability, the proposal would satisfy the test of being required for a purpose incidental to the enjoyment of the dwellinghouse as a matter of fact and degree. Accordingly, it would not be permitted development by virtue of the rights conveyed by Article 3 and Schedule 2, Part 1, Class E to the GPDO.
27. I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of an incidental outbuilding 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.

Debbie Moore

Inspector