The Planning Inspectorate

Appeal Decision

Site visit made on 25 August 2020

by Timothy C King BA (Hons) MRTPI

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

Decision date: 19 September 2020

Appeal Ref: APP/C1435/X/19/3237586
Green Lanes House, Church Lane, Hellingly BN27 4HA

- 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 Mr Emslie against the decision of Wealden District Council.
- The application Ref WD/2019/0654/LDE, dated 22 March 2019, was refused by notice dated 21 May 2019.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is described as *'Use of field as garden.'*

Decision

1. The appeal is dismissed.

Preliminary Matters

2. In an appeal under s195 of the 1990 Act against the refusal of a LDC the burden of proof is upon the appellant. The test of the evidence is one of balance of probability. As such, the planning merits of that applied for do not fall to be considered. The decision will be based strictly on the evidential facts and on relevant planning law.

Main Issue

3. The main issue in this appeal is whether, on the balance of probability, the use was lawful within the meaning of s191(2) of the Town and Country Planning Act 1990 as amended, and whether the Council's decision to refuse the LDC was therefore well founded.

Reasons

4. The supporting statement submitted to accompany the application says that, since its purchase in 1998, the land at issue (and ringed in red on the submitted site plan) has been used as an extension to the residential curtilage of Green Lanes House. The claim is that the field has been in use as 'garden' in this respect.

5. On this basis the Council has attempted to disprove that the land has been subsumed into the dwelling's curtilage. However, in response to the Council's decision, the appellant's appeal statement now addresses the matter differently stating:

6. *"The appellant has subsequently not attempted to establish that the land has become part of the domestic curtilage."*

7. As such, the appellant's case is now seemingly limited to the consideration that the land can reasonably be regarded as forming part of the appellant's garden area.

8. In this particular instance I understand that the sizeable field was, relative to the dwelling and its immediate garden, prior to its acquisition in 1998, in agricultural use. With the claim that the field has since been used as associated 'garden' as it was not authorised by planning permission it will not become lawful until a ten year immunity period for use as part of the residential property can, on the balance of probability, be demonstrated.

9. It therefore falls on the appellant to demonstrate that this has been the case for the period of at least ten years before the date of the application made, ie prior to 22 March 2009 (hereinafter referred to as *"the material date"*) and has continued since. The appellant has sought to prove this, but the Council considers otherwise.

10. In the circumstances, and due to the appellant's approach, I will examine, in the planning context, the concept of residential curtilage and also the matter of associated garden land.

11. The term 'curtilage' is not defined in the 1990 Act nor in any other legislation, including the GPDO. Its meaning and application is derived, instead, from court judgements.

12. The leading authority on this issue is *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P. & C.R. 195, where it was held that:

    "The ground which is used for the comfortable enjoyment of a house or other building may be regarded in law as being within the curtilage of that house or building and thereby as an integral part of the same although it has not been marked off or enclosed in any way. It is enough that it serves the purpose of the house or building in some necessary or useful way."

13. In terms of what can be reasonably considered as residential curtilage it was held *in Dyer v Dorset CC* [1989] that curtilage constitutes a piece of ground attached to a dwellinghouse and forming one enclosure with it; thereby the area attached to and containing a dwellinghouse and its outbuildings. The case of *McAlpine v Secretary of State for the Environment* [1995] did not depart from the above judgement save for the mention of it being constrained to a small area around a building, whilst the Court of Appeal in *Secretary of State for the Environment, Transport, and the Regions v Skerritts of Nottingham* [2000] decided that the definition of a curtilage in relation to a building must remain a question of fact and degree in each case.

14. The essential point, in the relationship to the dwelling to its curtilage, which must be functional, and not merely spatial. This was addressed in the judgement of *Methuen-Campbell v Walters* [1979] 1 QB 525 where it was held that for land to fall within the curtilage of a building there should be an intimate association.

15. Turning now to the appeal site's history, in April 2008, following an application made involving an area of land beyond the then apparent limit of Green Lanes

House's rear garden area, planning permission (ref WD/2008/0661/FR) was refused for 'change of use of land to residential curtilage'. The red-ringed piece of land incorporated some of what is now the dwelling's rear garden, although it also covers a small, roughly linear strip of the field the subject of the current appeal. In July 2008 planning permission (ref WD/2008/1362/FR) was then granted for the 'change of use of land to residential curtilage', but related to a lesser area of land, and which did not encroach on the said field.

16. The perimeter boundary of the field is vegetative, and largely hedged, with a prominent and well tended hedge along the south boundary of the dwelling's close and identifiable rear garden area. The field can be accessed through a gate from this garden and also via a larger gate off the dwelling's access driveway off Vicarage Lane. From the field, looking towards the rear garden's boundary hedge I noted a small table and chairs and a wooden shed, whilst close to the west boundary with Church Lane is what would appear to be the 'shepherd's hut', as referred to in the appellant's statutory declaration. I also observed a series of small trees within the field, presumably those which the appellant mentioned he planted. The grass was closely mowed, and this is consistent with the appellant's claim that this is tended monthly by a local farmer.

17. I can quite believe, given my findings, that the field was used by the appellant's children in past years, since the material date, and I have therefore given due weight to the statutory declaration of Madeleine Griffin, their former nanny. It would appear, however, that any significant use of the field is limited to the peripheral area, as described, and as depicted on the site plan submitted with the 2008 planning application (ref WD/2008/0661/FR) which isolated a section of land immediate beyond the dwelling's garden hedge. The aerial photographic images do not suggest otherwise.

18. Curtilage is not fixed for all time; its physical extent is readily capable of changing at any time. From the Court of Appeal's judgement regarding the case of *Sumption v LB Greenwich & Rokos* [2007] EWHC 2776 (Admin) it has become clear that land can very easily be incorporated into curtilage. However, land can only be treated as part of the curtilage of a building if its use, as part of the planning unit comprising the dwelling and the land occupied with it, is lawful. Until such time as its use becomes lawful this land cannot be regarded as coming within the curtilage of the house, even if it would otherwise meet both the functional test set out in *Sinclair-Lockhart's Trustees* and the 'single enclosure' test derived from *Dyer v Dorset CC.*

19. The 'planning unit' and curtilage are two separate and entirely different concepts, and one must not be confused with the other. It is important in the planning context not to use the word 'curtilage' loosely to refer to the entirety of the surrounding land forming part of a property. The actual curtilage of a house may cover only part of the land owned or occupied with that building. The terms 'curtilage' and domestic 'garden' are not interchangeable; curtilage defines an area of land in relation to a building, and not a use of land.

20. The leading case in which the planning unit was defined is *Burdle v SSE* [1972] 3 All E.R. 240. Here it was judged that there may be three possible situations which can be identified when considering the planning unit; one being where there is a single main purpose, to which any secondary activities are ancillary

or incidental. In such instances the whole unit of occupation is the planning unit. I consider that the planning unit at Green Lanes House is a case in point.

21. Accordingly, in such instances, the whole unit of occupation should be identified and considered. However, the application as submitted showed only the additional land with which it is concerned as being ringed red, and the dwelling and its immediate curtilage separately ringed in blue. This denotes other land, not the subject of the application but in the applicant's control. Further, the appellant's statement of case states:

    "The planning unit in this instance is therefore considered to incorporate the appeal site."

22. Taking the above points into account I consider that, notwithstanding the evidence provided by the appellant in attempting to show that the land has been used since 1998 in association with the domestic enjoyment of Green Lanes House, the application itself is flawed as it should have ringed red the whole planning unit. The 'field' cannot be used as 'garden' in isolation, but must instead relate to the dwelling in question.

23. Weighing all the evidence up, considering the size of the field relative to the dwelling and identifiable surrounding garden, and the clear and defined vegetative demarcation, I do not find that there is any intimate association between these two pieces of land. Further, it is an obvious disproportionate relationship. Although I acknowledge that the land has/is being used in part as an extension to the garden – more an 'outer garden' – due to the size of the field this is unlikely and is unrealistically to relate to the field in its entirety. In this regard I find that the evidence is neither precise nor unambiguous.

24. The land at issue cannot therefore be seen as having been subsumed into the dwelling's curtilage. Further, given my findings as to the presentation of the site plan and the planning unit the appeal cannot succeed.

25. I shall therefore exercise my powers under section 195(3) of the 1990 Act, as amended.

Timothy C King

INSPECTOR