



Appeal Decision

Site visit made on 12 November 2020

by Andrew Dale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 December 2020

Appeal Ref: APP/G5180/X/19/3242690

80 Crescent Drive, Petts Wood, Orpington BR5 1BD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development ("certificate").
 - The appeal is made by Mr Terence Willis against the decision of the Council of the London Borough of Bromley.
 - The application ref. DC/19/02944/PLUD, dated 4 July 2019, was refused by notice dated 4 October 2019.
 - The application was made under section 192(1) (b) of the Town and Country Planning Act 1990 as amended.
 - The proposed development for which a certificate is sought is described on the application form as "*Erection of detached outbuilding together with hardstandings.*"
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Decision

1. The appeal is dismissed.

Matters of clarification

2. A certificate is not a planning permission. Thus, the planning merits of the proposed development are not relevant in the context of an appeal made under section 195 of the 1990 Act as amended. My decision must rest on the facts of the case and the interpretation of any relevant planning law or judicial authority. The burden of proving relevant facts in this appeal rests on the appellant. The test of the evidence is made on the balance of probabilities.
3. Notwithstanding the description of the proposal on the application form, it is apparent from the submitted plans, the appeal form and the Council's decision notice that only one area of hardstanding, in the shape of a hammer head, is proposed. I have assessed that part of the proposal accordingly.

Main issue

4. I consider that the main issue is whether the Council's decision to refuse to grant a certificate was well founded.

Reasons

5. No. 80 is a 2-storey, semi-detached house on the junction between Crescent Drive and Shepperton Road. As well as the house, the appeal site contains a detached garage/outbuilding, as extended pursuant to a planning permission issued under application ref. 14/00022/FULL6, and land extending back parallel to Shepperton Road and wrapping around the end of the rear gardens of 76

and 78 Crescent Drive. The appellant acquired the original ends of both those rear gardens in 2016 after purchasing the property and original garden at 80 Crescent Drive in 2013.

6. It is proposed to erect a detached outbuilding to provide a garage and a garden store/tool shed. The building would have a floor space of about 34 sq. m and a maximum height of 4 m to the ridge of its pitched roof. There would be a new hardstanding alongside the part of the outbuilding containing the garage. This would involve creating a new means of vehicular access to Shepperton Road. The existing garage/outbuilding would be used as a home gym.
7. The appellant had 2 applications for certificates for similar proposals refused by the Council (ref. DC/18/05257/PLUD and ref. DC/19/00723/PLUD), except the footprint of the outbuilding then would have been about 66 sq. m and about 57 sq. m respectively. The Council reached the view in both those cases that the proposed outbuilding would not be required for a purpose incidental to the enjoyment of the dwellinghouse as such.
8. The previous objections regarding the purpose of the outbuilding were overcome in the application the subject of this appeal. However, the Council maintained in its decision notice that "The application site, taking account of its physical layout, its ownership past and present and its use and function, both past and present, does not fall within the curtilage of No 80 Crescent Drive. As a result the land does not benefit from the permitted development rights associated with No 80 Crescent drive (sic) ...". Whilst consistency in decision-making is important, the Council was entitled to assess all matters afresh at the time of the subject application and the officer's recommendation of approval included an "on balance" judgement about the matter of curtilage.
9. Determining if the proposed outbuilding and hardstanding would have amounted to permitted development at the time of the application therefore turns on whether they would have then been within the curtilage of the dwellinghouse at 80 Crescent Drive, such that they could have been granted planning permission under Classes E and F, Part 1, Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). In Classes E and F, it is necessary to show that the provision of the outbuilding and hardstanding respectively would be within the curtilage of the dwellinghouse. Looked at another way, the question to be answered in this case is whether the curtilage extends to the whole application site.
10. The term "curtilage" is not formally defined in planning legislation. The Oxford Dictionary of English, Second Edition, Revised says that curtilage is "*an area of land attached to a house and forming one enclosure with it*". The Government's Technical Guidance on *Permitted development rights for householders* (September 2019) defines 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.*" Although not law, it is nonetheless the Government's interpretation about how the term "curtilage" is to be used in interpreting the GPDO in cases like this.
11. The parties have referred to various Court judgements going back over a number of years from *Sinclair-Lockhart's Trustees v Central Land Board (1950) 1 P&CR 195* to *Challenge Fencing Ltd v SSHCLG & Elmbridge BC [2019] EWHC 553 (Admin)*, all of which I have had regard to. The former judgement found

that generally, to fall within the curtilage of a building, it is enough that land serves the purpose of a building in some necessary or reasonably useful manner, even though it need not be marked off or enclosed in any way. The latter judgement usefully set out propositions from several other relevant Court cases that have refined the concept of curtilage and confirmed, amongst other things, the tests in *HM Attorney-General ex rel Sutcliffe & Rouse & Hughes v Calderdale BC [1983] JPL 310* to be taken into account in determining what constitutes the curtilage of a building, namely physical layout, ownership past and present, and the use or function of land and buildings, past and present. It is a settled view in the various authorities that whether land comprises curtilage is a question of fact and degree to be considered on a case-by-case basis and thus primarily a matter of judgement for the decision-maker.

12. There is no dispute that the original rear gardens of 76, 78 and 80 Crescent Drive each ran up to the rear boundaries of the properties on Nightingale Road. The expansion of the land in the appellant's ownership in 2016 to include parts of the rear gardens of nos 76 and 78 is not problematic in itself as the curtilage of a building is not fixed, there is no physical boundary at the line of inclusion and the size of the overall application site is not obviously out of proportion to the size of the extended dwelling at no. 80. The ownership of land past and present is not held by the Council to be a matter of dispute but that factor alone cannot be decisive if other factors pull in a different direction.
13. However, the degree to which the dwelling and claimed curtilage fall within one enclosure is relevant and is a key aspect of the matter of physical layout. The appellant has not produced any photographic or other clear evidence to show the layout of the site in July 2019. According to the Council's records and photographs, it would appear that in or around 2016 the original back garden of no. 80 was also bisected by fencing close to and alongside the western side of the existing garage/outbuilding. There is reason to believe that this situation pertained at the time of the application according to the officer's report on the application. I saw on my site visit that most of the fencing is still in place. Taking out just a section or two of fencing from time to time to permit access does not fully remove the real presence and effect of a sturdy and lengthy boundary structure being in place.
14. At the time of the application, I find it more likely than not, that the land on which the outbuilding and hardstanding would be constructed was therefore physically separated from the other land, which included the existing house and garage/outbuilding and the garden in between them, by substantial fencing of the type that is normally found to enclose the boundaries of residential properties. Indeed, there is little, if anything, to distinguish it from the fencing that now borders the remaining back gardens of 76 and 78 Crescent Drive. Whatever the reason for the fencing alongside the garage/outbuilding, the land to the west of it was not part of the land attached to the dwellinghouse and could not be fairly described as forming one enclosure with that dwelling.
15. Whilst the extended garage/outbuilding adds to the barrier-like effect, this structure on its own would not seriously disadvantage the appellant's case. There is a gap about 1.5 m wide between it and the back edge of the footway. I note also in passing that there has been a sizeable outbuilding here for some time and that a fence once ran along the boundary with the back of the footway (where the crossover now is) allowing for a noticeably more intimate and accessible relationship between the lands on either side of that outbuilding.

16. I accept that how gardens are used is primarily a choice for the owner or occupier. Still, for some time the land near to where the outbuilding and hardstanding would be constructed seems only to have been used to store a small amount of material left over from paving work carried out in the front garden. I tend to agree with the Council that there is barely any evidence to suggest that at the time of the application, the alleged curtilage to the west of the extended garage/outbuilding was being used for the genuine and comfortable enjoyment of the main building at 80 Crescent Drive in connection with its use and occupation as a dwelling. Rather, as asserted by the Council, the land has been left virtually unattended. This, when added to my finding about the degree to which the application site cannot be identified as falling within one enclosure, confirms to me that the land in question lacks a close spatial relationship and a shared functional relationship with the dwelling at No. 80 to the extent that it does not fall within its curtilage.
17. It may have been more complete at the Council's Committee meeting for reference to have been made to both appeal decisions at 64 Great Thrift but the second one really confirms the first one as to the significance of fenced-off land. Once the relevant fence had been removed, the second Inspector found that the curtilage issue could be resolved in favour of the appellant.
18. I have also considered the other 2 appeal decisions referred to by the appellant: land at Elm House, 15 Church Road, Farnborough, Kent (ref. APP/G5180/D/17/3172171) and land at The Watch House, 1 Coastguard Cottages, Mullion, Helston, Cornwall (ref. APP/D0840/X/16/3155336). The gist of these cases seems to have been that separation by an area of hardstanding (Kent case) or by a narrow unmetalled access track/public footpath (Cornwall case) did not preclude the possibility that detached land could still form part of the residential curtilage. In contrast to the appeal case before me, physical barriers were not encountered by the Inspectors and the relevant lands had domestic character. The points raised in both those decisions are consistent with the long line of authorities in which no one factor was decisive. As each case turns on its individual facts, they do not really take matters further forward in favour of the appellant.
19. In the light of the above and having taken into account all other matters raised, I find on the balance of probabilities that the proposed outbuilding and hardstanding would not be permitted development, as they would be provided on land that was not within the curtilage of the dwellinghouse at the time of the application. It follows that the new access to Shepperton Road would also fail to amount to permitted development as it is not required in connection with development permitted by any Class in Schedule 2 of the GPDO.

Conclusion

20. For the reasons given, I conclude that the Council's refusal to grant a certificate 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.

Andrew Dale INSPECTOR