



Appeal Decision

Site visit made on 26 January 2021

by Felicity Thompson BA(Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 February 2021

Appeal Ref: APP/Z4718/X/20/3260340

15 Woodside Lodge, Kirkburton, Huddersfield HD8 0PD

- 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 Craig Dawkins against the decision of Kirklees Council.
 - The application Ref 2020/CL/92500/E, dated 3 August 2020, was refused by notice dated 28 September 2020.
 - The application was made under section 192(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 described as 'to construct timber frame fitness studio in garden for use of homeowners. No new access required or alterations to existing access or parking.'
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description in the banner heading above is taken from the original application form. I have noted the wording the Council used in their decision notice however, under section 192 of the Act there is no implied power to modify the description of the proposed development and there is no evidence which suggests that such wording was agreed by the appellant.
3. The application sought is a certificate of lawfulness for a proposed development. The purpose of an application made under section 192 is to find out whether proposed development, as described in the application form and shown on the drawings, would be lawful if instituted or begun at the time of the application, it is not the equivalent, in law, of a planning permission. The burden of proof rests with the appellant and the appropriate test of the evidence is the balance of probabilities.
4. In an LDC appeal, the planning merits of the proposed development are not relevant. My decision rests on the facts of the case and the interpretation of any relevant planning law.
5. Consequently, that Government legislation in respect of certain permitted development rights has changed since the condition was originally imposed, that other properties have permitted development rights, the building would comply with building regulations and that a number of neighbouring properties have erected outbuildings at the top of their gardens, are matters which have no bearing on my decision which is confined to matters of planning law.

Main Issue

6. The main issue is whether the Council's decision to refuse to issue an LDC was well-founded. In particular whether the proposed development would be permitted development under Schedule 2, Part 1, Class E of The Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (GPDO).

Reasons

7. Article 3(1) and Class E(a) of the GPDO grant planning permission to provide a building required for a purpose incidental to the enjoyment of a dwellinghouse subject to conditions and limitations.
8. However, in order to benefit from any planning permission granted by Article 3 of the GPDO, the development must not be contrary to any condition on an existing planning permission; Article 3(4). The application, subject of the appeal, was refused by the Council on the basis that it would be contrary to a condition attached to a planning permission/s.
9. The proposed building would be located in the rear garden of a detached dwellinghouse for which planning permission was originally conditionally granted, as part of a development of 14 dwellings, reference 1996/62/93279/E6, with a further conditional permission for a modified house type, reference 1998/62/92594/E6. Condition number nine on the original permission and subsequently number eight on the most recent permission states:

Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995, permitted development rights are withdrawn for the erection of extensions, porches and other buildings without the prior approval of the Local Planning Authority.

10. Whilst it would have been preferable if the Council had specified the relevant part and classes of the GPDO which they were seeking to restrict, the terms of the condition are unambiguous. The effect is to remove those permitted development rights relating to extensions, porches and buildings which exist under Part 1 of the GPDO, being development within the curtilage of a dwellinghouse, so that an application for express planning permission is required for such developments.
11. 'Notwithstanding' when used in the condition, means in effect that development is precluded only where it would otherwise be granted by the GPDO and, since a detached building would only be permitted development were it within the curtilage of the dwellinghouse, the condition would clearly apply to any land within the curtilage.
12. The Council noted that the land on which the proposed building would be sited was not included in the site boundary on the original planning applications and planning permission has not been sought to include this land into the planning unit. However, the curtilage of a building is not necessarily the same as the planning unit within which that building stands.
13. There is no statutory definition of 'curtilage', which does not describe a use of land but defines an area of land in relation to a building. In the domestic context it has been held that 'curtilage' means a piece of land attached to a

dwelling and forming one enclosure with it, not restricted in size but it must fairly be described as being part of the enclosure of the dwelling to which it refers. It could include outbuildings and gardens, and possibly other land such as a small paddock close to the house. Whether or not land falls within the curtilage of a building is a matter of fact and degree.

14. As established by caselaw, there are three factors to be taken into account when determining whether land constitutes curtilage, these include the physical layout of the building and attached land, the ownership, past and present; and their use or function; past and present.
15. The land on which the proposed building would be sited consists of a large garden attached to the rear of the dwelling. Neighbouring gardens follow the same layout extending to a boundary wall at the back of the land, separated from one another by established hedges. The garden is mostly laid to lawn, as are neighbouring gardens and childrens play equipment is sited on the land.
16. I have no evidence about past ownership however, having regard to the layout of the garden and those of neighbouring properties, there is nothing to indicate that the land has not always served the dwellings as gardens.
17. The appellant's comments regarding the erection of sheds in neighbouring gardens over the last 25 years, support this view and the Council acknowledge that their mapping system shows evidence of domestic paraphernalia on the garden for at least the last ten years. In any case, it is possible for the extent of curtilage to change over time.
18. The garden is attached to the dwelling and although relatively large, clearly forms one enclosure with it and there is evidently an intimate and functional relationship between the use of the land and the dwelling.
19. As a matter of fact, and degree, based on the limited submitted evidence and my site observations, I find that the garden land on which the proposed building would be sited constitutes the curtilage of the dwelling.
20. Consequently, I find that Article 3(4) of the GPDO applies so as to make the proposed erection of the building (fitness studio) contrary to the condition which prevents any building being erected within the curtilage of the dwellinghouse. It is development for which express planning permission is required, and that could only be granted on application made to the local planning authority in the first instance.

Other Matters

21. The Council also stated that the building would exceed the limitation at E.1(e)(ii) in respect of being within 2m of the boundary of the site and greater than 2.5m in height. However, the appellant stated on the original application form that the building would be 2.5m away from the boundaries of the site and this is clarified in the appellant's appeal submission which the Council have not sought to dispute. In the absence of substantive contrary evidence or explanation from the Council in this regard I find, on the balance of probabilities, no conflict with this requirement and this would not have been a reason to dismiss the appeal.

Conclusion

22. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of '*to construct timber frame fitness studio in garden for use of homeowners. No new access required or alterations to existing access or parking*' 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.

Felicity Thompson

INSPECTOR