



Appeal Decision

Site visit made on 5 February 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 March 2021

Appeal Ref: APP/K2420/X/20/3262446

Hill Rise, Station Road, Desford LE9 9FP

- 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 Rodney Rayner against the decision of Hinckley & Bosworth Borough Council.
 - The application Ref 20/00749/CLP, dated 24 July 2020, was refused by notice dated 5 October 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 a detached ancillary recreation building.
-

Decision

1. The appeal is dismissed.

Main Issue

2. The main issue of the appeal is whether the Council's decision to refuse the certificate of lawfulness was well-founded.

Reasons

3. An application under S192(1)(b) of the Act¹ seeks to establish whether any operations proposed to be carried out in, on, over or under land would be lawful. S192(2) sets out that if on application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect. Planning merits form no part of the assessment of an application for a lawful development certificate (LDC) which must be considered in the light of the facts and the law. In an application for a LDC, the onus is on the applicant to demonstrate on the balance of probabilities that the proposed development would be lawful.
4. S191(2)(a) and (b) sets out that uses and operations are lawful at any time if:
i) No enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and ii) They do not constitute a contravention of any enforcement notice then in force. The main thrust of the appellants' case is that the proposed development is granted planning permission by the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(GPDO).

¹ Town and Country Planning Act 1990 (as amended)

5. Part 1, Class E of Schedule 2 of the GPDO permits the provision within the curtilage of the dwellinghouse of any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such...'. In order to be permitted development, the building must be located within the curtilage of the dwellinghouse. This appeal will therefore turn on whether the proposed building would be located in land which is within the curtilage of the residential property known as Hill Rise.
6. The Permitted development rights for householders Technical Guidance (2019) defines curtilage 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.'
7. As set out in *Burford v SSCLG and Test Valley BC* [2017] EWHC 1493 (Admin), interpretation of the word curtilage is a judgment for the decision-maker given the ordinary meaning of words and is a matter of fact and degree. Case law has established three tests to assist in the determination of curtilage: (i) physical layout of the building and the land said to be in the curtilage. (ii) ownership (past and present) and (iii) use or function (past and present).
8. Hill Rise is a substantial detached property set in generous grounds. Although the entire plot is within the ownership of the appellant, there appear two distinct areas within the site: The main dwelling, together with its driveway and landscaped grounds to the rear; and the area where the outbuilding would be located, which appeared disused and is delineated from the rest of the appeal site by vegetation, fencing and a gate.
9. The appellant has provided an undated aerial photograph described as the 'Inchley's aerial photo'. What appears to be the main dwelling can be seen surrounded by vegetation. The appellant suggests that the photograph shows outbuildings as well as established use of the gardens and vegetable patches, however, it is not possible to see sufficient detail within the image due to its poor quality. Furthermore, there is no detailed explanation as to how the land or the outbuildings were used at this time. Whilst the appellant suggests further statements can be provided if necessary, it is for the appellant to submit sufficient information in support of the appeal.
10. The appellant goes on to explain that he decided to grass as much of the area to 'provide areas for the kids to play football, tennis etc' and that this can be seen in an aerial photograph dated 2006. However, it is not clear exactly what activities were undertaken, when or where within the site. Given the substantial size of the overall plot, understanding how the site has been used is vital in helping to determine the extent of the curtilage.
11. The aerial photographs which were submitted as being dated 2006 show a much later date of 2015 and appear markedly similar to an aerial photograph submitted and dated 2016. Moreover, the photographs show the land in question was delineated from the main dwelling by vegetation. This suggests it was physically and functionally separate from the main dwelling.
12. The appellant has provided a number of 'family photographs' submitted in support of the appeal. However, they are undated, and it is not possible to determine where within the site they were taken. I am therefore unable to afford them any weight.

13. The appellant suggests that the property originally had an 'in' and 'out' driveway. Aerial photography submitted by the appellant shows much of the site was vegetated in 1999 and even by 2016, there remained a hedgerow, which would have physically prevented vehicles from moving from one part of the site to the other. Whilst there is hardstanding and an agricultural style gate which allows access from the highway, given the standard of construction and proximity of the main access to the dwelling, I consider it highly unlikely that users of the house would have chosen to use the agricultural style access further along Station Road.
14. The appellant has provided an OS map of the site. Although the plot the appellant purchased in 1998 is shown as a whole, this does not indicate that the land falls within the residential curtilage of Hill Rise. The OS map shows the general positions of the boundaries of registered land but is not intended to differentiate between land which is within different use classes or identify how that land is used for planning purposes.
15. The appellant states that he applied for planning permission to build two houses and left the area to 'go overgrown'. More recently, it was used 'for building materials', allowing large vehicles in and out so as not to damage the main driveway. Whilst this would explain the disused appearance of this part of the site during my site visit, its use in this way does not demonstrate that the land is within the residential curtilage of Hill Rise.
16. Whilst the whole site is within the ownership of the appellant, this by itself is not determinative, particularly given the substantial size of the plot. The outbuilding would be located within a part of the site which is substantially separate from the main dwelling. There is also significant ambiguity as to how this part of the land has been used in the past. I cannot therefore be sure it has been used as part and parcel of the house or that it forms part of the curtilage of the residential property known as Hill Rise.
17. Thus, for the reasons given above, in my view, the appellant's evidence is not sufficiently precise and unambiguous and has therefore not demonstrated, on the balance of probabilities, that the outbuilding would be located on land within the curtilage of the dwellinghouse. The outbuilding would therefore not constitute development which is permitted by Part 1, Class E of Schedule 2 of the GPDO. Given the above, it is not necessary for me to consider whether or not the proposed outbuilding would be incidental to the enjoyment of the dwellinghouse or meet the limitations set out under Class E.

Conclusion

18. Thus, for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a detached ancillary recreation building 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.

M Savage

INSPECTOR