



Appeal Decision

Site visit made on 21 April 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 May 2021

Appeal Ref: APP/J3720/X/20/3262728

80 Tiddington Road, Stratford-Upon-Avon CV37 7BA

- 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 & Mrs A Krauze against the decision of Stratford on Avon District Council.
 - The application Ref 20/00907/LDP, dated 31 March 2020, was refused by notice dated 15 June 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 the construction of a swimming pool complex and construction of a hard surface.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed operations which are considered to be lawful.

Procedural Matters

2. I have taken the description of development from the letter accompanying the application form, confirmed as correct by the appellants in correspondence with the Council.
3. Various comments have been raised by interested parties regarding the planning merits of the appeal scheme. Concern has also been raised regarding previous applications for dwellings at the appeal site, as well as tree clearance within the site. However, 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 and so I cannot consider such matters.
4. A request was made to view the appeal site from 80a Tiddington Road, as well as the Golf Course at the rear of the plot. Since I cannot take into account the planning merits of the scheme, it was not necessary for me to view the appeal site from these neighbouring properties.

Main issue

5. The main issue is whether the Council's decision to refuse an LDC was well-founded. This will turn on whether the proposed development would constitute permitted development by virtue of the provisions of Article 3(1) and Class E(a) and Class F(a) of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)('the GPDO').

Reasons

6. An application under S192(1) of the Town and Country Planning Act 1990 (as amended)(the 'Act') seeks to establish whether (a) any proposed use of buildings or other land; or (b) 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.

Curtilage

7. Class E of the GPDO allows the provision within the curtilage of the dwellinghouse of (a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such... subject to conditions.
8. The Council refused the LDC on the basis that it considered the proposed hardstanding and swimming pool complex would be sited outside of the curtilage of the main dwellinghouse. There is no suggestion that the proposed development would exceed the limitations or conditions set out in the GPDO and whilst the appeal site is within a conservation area, I have no reason to conclude otherwise.
9. The GPDO does not define the term 'curtilage', however, the Technical Guidance: Permitted development rights for householders (2019) advises it is '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.'
10. 80 Tiddington Road comprises a substantial detached dwelling set in generous grounds, with a sweeping driveway to the front and a landscaped garden to the rear, enclosed by a combination of mature hedgerows, vegetation and fencing. Planning permission was granted for the dwelling under planning permission 08/02905/FUL. The site, at the time, comprised, amongst other things, a swimming pool and range of outbuildings. Towards the end of the garden was a tennis court which was located at some distance from the main house and which was separated from the main house by a hedge and a Chinese moon gate.
11. The appellants assert that the red line boundary for the application formed the established curtilage to the original property. The appellants also provide an aerial photograph of the site, which it is asserted shows the area of land as comprising the curtilage of the original dwelling prior to the 1948 Act. However, land can be used as garden without being part of its curtilage. It is therefore necessary for me to consider whether the land in question forms part of the curtilage of the dwelling.
12. The parties have drawn my attention to various case law regarding the curtilage of a building. In *Methuen-Campbell v Walters* [1979] 1 QB 525 it was held that for land to fall within the curtilage of a building, it must be intimately associated with the building to support the conclusion that it forms part and parcel of the building and in *Dyer v Dorset CC* [1988] 3 WLR 213 it was held

that “curtilage”, on its true construction bore its restricted and established meaning connoting a small area forming part or parcel with the house or building which it contained or to which it was attached.

13. *Challenge Fencing Limited v SSHCLG & Elmbridge BC* [2019] EWHC 553 (Admin) confirms that the extent of the curtilage of a building is a question of fact and degree, and a matter for the decision maker and *Burford v SSCLG & Another* [2017] EWHC 1493 (Admin) sets out three factors to be taken into account: the physical layout of the building and land; the past and present ownership; the past and present use or function of the land.
14. The proposed building would be located towards the rear of the back garden, set away from the main dwelling. The Council makes reference in its delegated report to newly planted laurel plants forming a juvenile hedge, which lie approximately 1 metre apart along the south eastern and north eastern sections of the rear garden. Whilst I saw what appeared to be a juvenile hedge during my visit, it does not extend the full width or length of the garden. Its limited extent means that, even when mature, it would not create a physical or visual barrier between the house and the proposed building and in my view, does not demarcate the curtilage of the dwelling. Although there are mature trees and other vegetation within the site, there is no clear delineation between the area within which the building would be located and the remainder of the garden.
15. An interested party has drawn my attention to sales particulars from 2007 which show the property was to be sold with the owners retaining some of the associated land. Although the intention may have been for the previous owners to retain a proportion of the land, they did not do so and so whilst the ownership of the site has changed over the years, the extent of the land associated with the dwelling has remained the same.
16. While a dwelling was previously constructed on the appeal site in 1934, the current property was not constructed until much later, following the grant of planning permission 08/02905/FUL. Although there were features within the garden which would have provided a degree of separation between different parts of the garden, such as a water feature and mature hedgerow, other features, including a foot bridge and the Chinese moon gate, would have enabled free flowing pedestrian access.
17. The area where the building would be located appeared to be well maintained at the time of my site visit and was set up with goal posts, a trampoline and various other residential paraphernalia. Although such items are not permanently fixed to the ground, they provide an indication of how the land is used. Whilst the term curtilage¹ does not denote a use of land, the way in which the land is used points towards the land in question having an intimate association with the use of the house, serving the purposes of the dwellinghouse in a reasonably useful manner.
18. Drawing everything together, although the rear garden is substantial, in my view an intimate functional relationship exists between the use of the dwelling and the use of the land. The garden as a whole comprises part of the land attached to the dwellinghouse and forms one enclosure with it. I therefore conclude that as a matter of fact and degree, the land upon which the

¹ As found in appeal reference APP/B1740/X/19/3239960

proposed building and hardstanding would be located forms part of the curtilage of the dwelling.

Whether it would be incidental

19. The Council also refused the application the basis that, by reason of the scale and arrangement of the internal accommodation, the swimming pool complex was not considered to be incidental to the use and enjoyment of the main dwelling.
20. Case law has established that consideration of the term "incidental to the enjoyment of the dwellinghouse" there should be some connotation of reasonableness in the circumstances of each case, it should not be based solely on the unrestrained whim of a householder². The test is whether the proposed building is genuinely and reasonably required or necessary in order to accommodate the proposed use or activity and thus achieve that purpose.
21. Size is a relevant but not conclusive factor in determining whether the proposal would be incidental to the use of the main dwellinghouse. The word 'incidental' connotes an element of subordination in land use terms in relation to the enjoyment of the dwelling house.
22. The proposed building would have a footprint of approximately 360sqm and would comprise a swimming pool, plant room, store room, changing and shower room, office, summer room and garden room. The Council did not raise concern with the office, swimming pool, plant, store room, changing room and shower facility, all of which it agreed could be uses that are incidental to the enjoyment of the dwelling.
23. The Council's concern relates to the garden room and summer room, which it asserts would replicate or replace existing provision in the dwelling and the generous provision of circulation space. The Council has carried out a numerical exercise and suggests that lounge areas outside the pool itself and its associated facilities would account for approximately two thirds of the outbuilding's floor space.
24. The building would be laid out in a 'L' shape, with the swimming pool located in the summer room, off which the other rooms would be located. Circulation space around the swimming pool would be required for access, maintenance purposes and safety purposes. Seating is shown either side of the swimming pool. In my view, it is not unusual or unreasonable to provide seating near a pool, to enable users of the pool to rest between bouts of activity. Such provision would not constitute primary living accommodation, nor would it replace existing provision within the dwelling.
25. Circulation space would also required to enable access to the various rooms, including the Garden Room. I agree that circulation space within the building would be generous, however, I do not believe it would be unreasonably so given the layout of the building and the need to move safely between the different rooms and around the swimming pool. Additional space would also enable activities such as table tennis.

² *Emin v SSE & Mid Sussex DC* [1989] JPL 909

26. The garden room would be modest in size and whilst there is a family room and sitting room in the host dwelling, a garden room can, in my view, be incidental as a means of enjoying the garden in a position away from the main house.
27. Although the proposed building would set away from the dwelling, it is sufficiently close that occupants could easily walk across the garden between the two buildings. Whilst there is no pedestrian path proposed to the building, I do not consider one is essential to enable occupants of the dwelling to walk to the outbuilding.
28. The host dwelling is a substantial building and, whilst the proposed outbuilding would also be substantial, it would remain subordinate in size to it. Whilst it would be larger than the summer house, pool maintenance room and sauna which were previously located in the garden, these structures have now been removed. There is no requirement within the GPDO that subsequent structures reflect ones which have been removed.
29. Given the above, I conclude that the swimming pool complex would be for a purpose incidental to the enjoyment of the dwellinghouse and as such, is development which is permitted by Class E of Part 1 of the GPDO.
30. Class F of Part 1 of the GPDO permits hard surfaces incidental to the enjoyment of a dwellinghouse. The appellant proposes to construct the hard surface so that maintenance equipment can be transported to the building on a regular basis. As I have found the proposed building, including swimming pool, would be incidental to the enjoyment of the dwellinghouse, I consider that the use of the track for access and maintenance of the pool would also be incidental to the enjoyment of the dwellinghouse. The construction of the hard surface is therefore development which is permitted by Class F of Part 1 of the GPDO.
31. Thus, for the reasons given above, I find on the balance of probabilities that the proposed swimming pool complex and hard surface would be development which is permitted by the GPDO.

Conclusion

32. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the construction of a swimming pool complex and construction of a hard surface was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

M Savage

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 31 March 2020 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The proposed operations would constitute permitted development within the terms of Schedule 2, Part 1, Class E and Class F of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended).

Signed

M Savage

Inspector

Date 20 May 2021

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First Schedule

The construction of a swimming pool complex and construction of a hard surface in accordance with the following drawings: Proposed Site Plan, drawing number 10H; Proposed Site Plan, drawing number 11E; Proposed Floor Plan, drawing number 20C; Proposed Elevations, drawing number 22A.

Second Schedule

Land at 80 Tiddington Road, Stratford-Upon-Avon CV37 7BA

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 20 May 2021

by M Savage BSc (Hons) MCD MRTPI

Land at: 80 Tiddington Road, Stratford-Upon-Avon CV37 7BA

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Scale: NTS

