The Planning Inspectorate

Appeal Decision

Site visit made on 17 November 2020

by Roy Curnow MA BSc(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 June 2021

Appeal Ref: APP/P0119/C/20/3257955
61 Bury Hill, Winterbourne Down, Bristol BS36 1AD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr T Gibbs against an enforcement notice issued by South Gloucestershire Council ('the notice').
- The enforcement notice, numbered COM/18/0277/OD/1, was issued on 3 August 2020.
- The breach of planning control as alleged in the notice is without planning permission the erection of two single storey buildings, neither of which is substantially complete.
- The requirements of the notice are (i) Demolish and remove the buildings, foundation materials and concrete slab (shown in the approximate position marked X on the plan) from the land; (ii) Restore the land to its condition before the breach took place; and (iii) Remove from the land all materials and debris, together with any plant, tools and equipment associated with steps (i) & (ii) above.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended.

Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Reasons

2. The appeal is made under ground (c), that is to say that those matters (if they occurred) do not constitute a breach of planning control. This is a legal ground of appeal, in which it is for the Appellant to prove his case on the balance of probability.

3. The land identified in the notice has, in plan view, something of a reversed 'L'-shape. Although slightly offset from these cardinal points, for clarity, I shall describe its short axis as running roughly east-west and its long axis as running roughly north-south.

4. 61 Bury Hill is a large detached dwelling that lies at the southern end of the land, in its short axis. It is set back from the highway, with a drive and parking area to its front and garden to its rear. This part of the site is bounded by agricultural land to its east and a residential property to its south.

5. Running north from the short axis, and conterminous with it, the long axis land is bounded by hedges and fencing, separating it from agricultural land to the east and residential properties to the north and west. There was no division of the land within the two axes when I visited.

6. A fairly large outbuilding lies very close to No 61, this is used for accommodation that is ancillary to the use of the dwelling. Further beyond this building, in the long axis land, I saw two single storey buildings. Each had four walls, a roof, windows and doors and were thus weatherproof. They did not appear to be substantially complete, however. It is these buildings that are the subject of the notice; each being marked by an 'X' on the plan that is attached to it.

7. The first main issue that arises from the appeal is whether the land on which the subject buildings are being constructed lies within the curtilage of No 61. Whether or not it is necessary to address the second main issue, that is whether the outbuildings should be considered to be permitted development[1], is dependent on the findings in the first main issue.

The curtilage to No 61 Bury Hill

8. Save for that specifically relating to the conversion of agricultural buildings in Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order (England) 2015 (as amended) (the 'GPDO') there is no statutory definition of curtilage. I have been referred to several definitions of the term. That in the Oxford English Dictionary (OED) reads "A small court, yard, garth, or piece of ground attached to a dwellinghouse, and forming one enclosure within, or so regarded by the law; the area of land attached to and containing a dwellinghouse and its outbuilding".

9. There have been a number of court judgements relating to the question of defining curtilage, including those that follow. In *Sinclair-Lockhart's Trustees v Central Land Board* [1950], it was held that to fall within the curtilage of a building, it is enough that land serves the purpose of a building in some reasonably necessary or useful manner, even though it need not be marked off or enclosed in any way. *McAlpine v SSE* [1995] found that the following characteristics of curtilage: that it is confined to a small area about a building; it has an intimate association with land which is undoubtedly within the curtilage is necessary to make the land under consideration part and parcel of that undoubted curtilage land; and, physical enclosure is not necessary. Subsequently, further case law[2] has established that that a curtilage need not be 'small'.

10. More recently, although relating to a listed building case, *Adrian Burford v SSCLG and Test Valley BC* [2017] EWHC 1493 (Admin) provides a useful reference for reaffirming previously laid down criteria for identifying curtilage, such as *Dyer v Dorset CC* [1988] 3 WLR 213, namely: (i) the physical 'layout'; (ii) the ownership past and present; and (iii) the use or function past or present. Both parties refer to these three criteria in their submissions. It was held in Burford that whether something lies within a curtilage is a matter of fact and degree for the decision-maker; it is for him to decide what weight to give to the relevant factors.

11. I am also aware of the definition in the DCLG document 'Permitted Development for Householders Technical Guidance' (updated 2019) defines it as "land which forms part and parcel with the house. Usually it is the area of

[1] Class E of Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)
[2] See Skerritts of Nottingham Ltd v SSETR (No. 1) [2001]

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".

12. Appended to his statement, the appellant has submitted a range of documentation relating to applications made under the 1990 Act, and correspondence regarding enforcement matters, on the land. These are relevant to the case he makes and there is a need to refer to these; where I have, the Council's reference number is cited.

13. An application was made for extensions and alterations to the main house (PT04/2909/F). The Officer report for this application shows all of the land at No 61, that is to say, the aforementioned 'L'-shaped area, outlined and hatched. This report describes the "detached property set in substantial curtilage, especially to the side (north) of the site".

14. Planning permission was sought for the conversion and alterations of the former pigsty to a games room/gym (PT08/2044/F). By letter dated 22 July 2008, the Council returned the application to the applicant as it found that the proposal would be permitted development[3]. Although not explicit in its letter, to reach this position would have meant that the letter's author had to have found that the building was in the curtilage of the main house in order to benefit from the permitted development rights in Class E. The letter contained a disclaimer to the extent that what was written was not a formal decision of the Council, but an Officer opinion. It referred to the option of applying for a certificate of lawfulness, presumably under S192 of the Act for a formal determination as to whether the development would have been permitted by Class E. I have not been told that such an application was made. The pigsty had been removed prior to my site visit.

15. A certificate of lawful existing use (under S191 of the Act) was issued by the Council (PT11/1116/CLE) for the use of land outlined in red and buildings, save for a garage, as a single residential unit (Class C3). This included the land on which the buildings that are the subject of the Notice have been erected. This was an application to establish the lawful use of the land for residential purposes. It was not an application that would, of necessity, have required a determination of the curtilage of No 61.

16. Applications PT12/1541/F and PT12/2376/F sought permission to convert an existing detached garage to a residential annexe ancillary to the main dwelling. The latter application was a successful attempt to overcome the Council's reasons for refusing the former. In their descriptions of the site, the reports state that "The application site comprises a large detached two-storey dwellinghouse situated within very large grounds".

17. A certificate of lawful proposed use (under S192 of the Act) was issued by the Council (PR13/4169/CLP) for the conversion of existing garages to create a residential annexe. The report into the application describes the site in the same manner as in the report into applications PT12/1541/F and PT12/2376/F.

18. An application was submitted for a certificate, under S192 of the Act, for "Erection of new buildings in the residential garden attached to No 61 Bury Hill for uses incidental to the enjoyment of the dwellinghouse" (PT14/1043/CLP).

[3] Class E of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995

The evidence shows that the buildings that were applied for are those that form the subject of this appeal. These buildings were commenced prior to the determination of the application and were the subject of correspondence relating to enforcement matters between the parties. For reasons that have not been fully explained, the Council did not determine the application until June 2020. It found that the development was not lawful for the reasons given for issuing the notice. Whilst it might have come as a surprise to the Appellant, I do not have evidence before me to show that this decision was simply a case of the Council justifying its entrenched position.

19. When the appellants purchased the property in 2004, there were two outbuildings on the long axis of the 'L'. Running south to north from a position close to the dwelling was a garage building. It is this building that was the subject of applications PT12/1541/F, PT12/2376/F and PT11/1116/CLE, all of which, in some way, related to its use as a residential annexe. This building appeared to be in some form of residential use at the time of my site visit.

20. The evidence shows that the other building, the former pigsty, ran at roughly 90 degrees to the garage/annexe, and lay fairly close to it. This was the subject of application PT08/2044/F. The northern elevations of each of these buildings were roughly in line with one another and between the two was a relatively small gap. This gap gave access to the remainder of the long axis land, to the north. These buildings provided effective separation between the land on their north and south sides.

21. The decisions made on the applications for the garage/annexe building and the letter sent when the application for the conversion of the pigsty was returned, show that the Council considered that both buildings lay within the curtilage of No 61. Taking the tests of physical layout, ownership and use into account, I too find that the area of land in the long axis as far north as a 'line' running across the land east-west along the plane of the north elevation of the annexe building, is within the curtilage of No 61.

22. The Council has made two formal determinations relating to the land to the north of these buildings. The decision on application PT11/1116/CLE defined all of the land at No 61 as being a single residential unit. That on application PT14/1043/CLP found that the erection of new buildings in the residential garden to the north of the annexe and site of the pigsty would not be lawful.

23. The two decisions are compatible. The former determined that the use of the land was as a single planning unit within Use Class C3 residential. Curtilage is not, however, a use of land and whilst it might coincide with the residential use of land associated with a dwelling, it cannot be assumed that they do. In essence, the latter decision was that the Council did not consider that the northern area of land was part of the curtilage to No 61.

24. The brief site description in the Officer's report on PT04/2909/F, described No 61 as having a "substantial curtilage, especially to the side (north) of the site". The site descriptions in later applications, save for that for PT14/1043/CLP, refer to the property's "very large grounds". None of those applications, save again for PT14/1043/CLP, were for proposals that would have required a determination on the extent of the curtilage. It is only in that case that there is evidence before me to show that the relevant tests in respect of curtilage were undertaken. As such, I take those other descriptions as

Officers' opinions that are not binding on the Council and give them little weight in my assessment of this appeal.

25. To determine whether the land where the outbuildings have been partially constructed is part of the curtilage to No 61, the tests in case law have to be applied. That is to say, the physical layout of the land; its ownership, past and present; and its use or function, past and present. This determination has to be undertaken on a fact and degree basis.

26. By reason of the certificate issued by the Council, (PT11/1116/CLE), the test of function past and present has been met. The evidence before me shows that the land as a whole at No 61 was in the single ownership of the previous owners and passed to the appellants when they bought the land in 2004. On this basis, the test of ownership past and present is also met. This leaves the physical layout to be assessed.

27. The land on which the buildings have been erected lies some distance from the dwellinghouse at No 61. It is not, as claimed, immediately adjacent to it. It does lie immediately adjacent to the annexe to the dwelling. However, this building is in use for residential purposes ancillary to the main house at 61 Bury Hill and sits within its curtilage. It is not proximity to this building that has to be used in the determination of the curtilage to No 61, but the dwellinghouse at No 61 itself.

28. I am told that the scheme for the conversion of the pigsty would have resulted in a building with direct access to the land on both its south and north sides. The latter access would have been onto the land beyond the east-west 'line' running from the north side of the annexe, I refer to above. To my mind, these access arrangements did not mean that the Council determined that the curtilage of No 61 extended northwards beyond the pigsty building.

29. The Council's finding was based on an assessment of the proposal against the permitted development rights set out in Class E of the 1995 GPDO, which relate to buildings within the curtilage of a dwellinghouse. The terms of Class E at that time gave no support to the contention that the building's resultant access arrangements mean that the land beyond the building should be considered to be curtilage.

30. From the evidence before me, my view is that the former pigsty and that which now houses the annexe, gave a degree of separation that indicated a boundary between the curtilage of No 61 and garden land beyond. Furthermore, the distance between the house and the subject land is such that it, in my view and on a fact and degree basis, would not have passed the physical layout test.

31. The pigsty building was removed, sometime between the letter from the Council in respect of PT08/2044/F (22 July 2008) and the situation in the 2017 aerial photograph submitted by the Council. This resulted in the degree of separation between the land north and south of the east-west line being much reduced. Notwithstanding this, the distance between the house and the land beyond that line was not reduced.

32. I agree with the appellant that a situation might evolve over time so that land previously considered outside a curtilage might then be included within it. However, it seems more likely that this might occur as a result of matters related to the ownership and function tests rather than physical layout. That is

not to say that it could only occur with regards to the first two. Indeed, the removal of the pigsty opened up the land thus changing the relationship between the curtilage and the land to its north. However, it did not alter the distance between the house and the land and, in this case, I do not find that the land is sufficiently closely related to the dwelling at No 61. In this, I have been aware that there is no requirement for a curtilage to be small and the matter of the size of the whole of the land has not played a part in my findings.

33. As the Council's issuing of the certificate (PT11/1116/CLE) shows, the two areas together form a single planning unit. This, however, does not mean that it is all curtilage. On this basis the Appellant reached what he described as a reasonable understanding that the curtilage and planning unit were the same. This led to his decision to erect the buildings. However, for the reasons set out above, on the basis of fact and degree, I find the that the land on which the subject buildings are being constructed does not lie within the curtilage of No 61.

34. Having reached this position, the buildings that are being built on the land could not have been lawfully erected under the auspices of Class E of Part 1 of Schedule 2 of the 2015 GPDO.

35. In the light of this finding, there is no need for me to comment other aspects of Class E of the GPDO.

Conclusion

36. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

Roy Curnow

Inspector