
Appeal Decision

Site visit made on 7 September 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 October 2021

Appeal Ref: APP/R0660/X/20/3264261

Bracken Hill, Mottram Road, Alderley Edge, SK9 7JF

- 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 Gouge against the decision of Cheshire East Council.
 - The application Ref 19/5424M, dated 4 November 2019, was refused by notice dated 16 June 2020.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is an orangery to rear of existing house plus outbuilding to provide garaging, pool complex and gym.
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Summary Decision: the appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision

Application for costs

1. An application for costs was made by Mr & Mrs Gouge against Cheshire East Council. This application is the subject of a separate Decision.

Procedural matters

2. The description of the development for which the LDC is sought is taken from the application form. The appellant advises that an extension corresponding with the orangery included in the appeal application was found by the Council not to require Prior Approval in December 2019 (Council Ref:19/4890M). The LDC was refused only in respect of the proposed outbuilding.
3. The operational development for which the LDC is sought comprises, in summary, a single-storey extension described as an orangery and an outbuilding. Although the Council found the orangery not to require Prior Approval under a different application process, that operational development still forms part of the LDC application. There is no suggestion that the appellants agreed to the orangery being removed from the LDC. Consequently, that aspect of the LDC remains undetermined by the Council and remains before me to determine.
4. The Council found that the single storey extension (orangery) is permitted by Class A, Part 1, Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) and that Prior Approval was not required for this development. I see no reason to take a different view. Consequently, my Decision will focus on the proposed outbuilding, which the Council found not be development permitted by the GPDO.

Reasons

5. Section 192(2) of the Town and Country Planning Act 1990 (1990 Act) indicates that if, on an application under that 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; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development (LDC) was well founded. In this respect, the burden of proof is on the appellant to show that, on the balance of probability, the development proposed would have been lawful on the date on which the application was made.
6. The Council's decision notice does not state the reason(s) for the conclusion that the proposed outbuilding does not accord with Class E, Part 1, Schedule 2 of the GPDO. It is necessary to refer to the Officer Report on the application to discover the reasons why the proposed outbuilding was considered by the Council to accord with Class E of the GPDO. It is confirmed there that, in the Council's opinion, the outbuilding accords with the conditions and limitations of Class E (and therefore by implication Classes E.1, E.2 and E.3). I see no reason to take a different view. The sole reason for the refusal of the LDC was that the outbuilding was not considered to form part of the residential curtilage of the property known as Bracken Hill.
7. The Officer Report goes on to state that, on balance, the Council considered that following the submission of amended plans the uses would appear to be incidental to the dwellinghouse as such and not overly excessive. On my initial reading of the evidence before me, I identified a number of concerns in that regard. Understandably, given the Council's position, the appellants did not provide detailed evidence on that point in their initial written submissions on the appeal. I therefore considered that I had insufficient information on that point to reach an informed decision. Accordingly, I invited the appellants to make further written submissions on that specific point. A Supplementary Appeal Statement to address those points was submitted on 1 October 2021, and I have taken that into account.
8. Having regard to the above, I consider that there are two main points that I need to address:
 - would the proposed outbuilding be located within the residential curtilage of property known as Bracken Hill, and
 - could the accommodation within the proposed outbuilding be considered to be reasonably required for purposes incidental to the dwellinghouse as such.

Residential curtilage

9. There is no all-encompassing, authoritative definition of the term 'curtilage'. The matter has been the subject of extensive case law over the years, but the main principles derived from that case law have been distilled in the judgment

of the High Court in *Challenge Fencing Ltd. v SSHCLG* [2019] EWHC 553 (Admin). In summary, those principles are:

- i) The extent of the curtilage of a building is a question of fact and degree
 - ii) The three 'Stephenson' factors of physical layout, the ownership past and present, and the use or function of the land or buildings, past and present must be taken into account
 - iii) A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration
 - iv) Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration
 - v) The degree to which the building and the claimed curtilage fall within one enclosure is relevant
 - vi) The relevant date on which to determine the extent of the curtilage is the date of the application; but this will involve considering both the past history of the site, and how it is laid out and used at the time of the application itself.
10. Applying the principles set out in *Challenge Fencing* to this case, I note firstly that the land is within the single ownership of the appellants. It was also in the single ownership of the previous owner for a period of some 25 years.
11. The land on which the proposed outbuilding would be sited has a close physical relationship to the remainder of the appellants' land and the main dwelling, being accessed from the latter by steps that form part of a rockery. It is contiguous with the areas of garden to the north and to the south of the dwelling. At the date on which the application was submitted, the land was largely laid to lawn and formed part of the appellant's garden. These is a children's play area immediately to the north which also forms part of the appellants' garden. The Council questions whether this was the position in the past, and I return to that matter below.
12. The area surrounding the dwelling is not small, but the main dwelling itself is relatively substantial. The area of land is commensurate with a house of that size. At the time the application was submitted, the land around the building was enclosed as one parcel and not internally segregated. At that time, the land was being used for purposes ancillary to the main dwelling: i.e it formed part of the garden to that property.
13. The judgment in *Challenge Fencing* confirms that the relevant date on which to determine the extent of the curtilage is the date of the application, but that this will involve considering the past history of the site. Turning then to the Council's view on the past history of the site, the Officer Report starts from the premise that the issue of whether the proposed building falls into the curtilage of the property is different from what is the planning unit but then, on my reading, conflates the two matters.
14. The Council's Officer Report relies solely on photographic evidence. The aerial photograph taken in 1971-73 does appear to show the garden area to Bracken Hill tightly drawn around the dwelling, with the principal garden area being

immediately to the north of the house but with no obvious association or linkage with the surrounding land. There is a very clear difference in appearance of the garden area in front of the dwelling compared with the land outside the boundary to the west.

15. By 1993-2003, that situation had changed. The land to the immediate west of the dwelling had by then been enclosed, such that it appears to form a single parcel of land that includes the main dwelling. It is clear that a hedge separates the land to some extent, but there are significant gaps in that hedge which clearly provide linkage to the land by then enclosed. There is no domestic paraphernalia on the land to the west, but by that time there is no discernible difference in the appearance of the land in front of the dwelling and that to the immediate west. By contrast, there is a distinct difference in appearance to the land then immediately to the west of the land enclosed.
16. The Council consider that the aerial photograph taken 2010 clearly shows a clear difference between the domestic area to the east and the area to the west. The principal difference between the two areas, it seems to me, is that the area to the east is by then more heavily planted than in the previous photograph. The area to the west is still open, and the gaps in the hedges are present providing a clear link between the two areas. The steps within the rockery, which also appear to be present in the previous photograph, are more clearly visible in this photograph. There is again a distinct difference in appearance to the land immediately to the west of the land enclosed.
17. In my interpretation, the photographs taken in 1971-73 show that the land to the west of Bracken Hill was clearly outside the residential curtilage of the dwelling at that time. However, by 1993-2003 the land to the west had been incorporated with that to the east to form one parcel of land. It had a clear linkage with the eastern part of the site and an intimate relationship with the main dwelling. The situation remained broadly unchanged in 2010. On the aerial photographs alone, by that time the land had the appearance of forming part of the curtilage of Bracken Hill and on the balance of probability had done so since 1993-2003.
18. The appellants have provided a series of photographs taken between 2012 and 2018 showing various family events at Bracken Hill. Insofar as the land and garden are visible, those photographs show the land to the immediate west of the dwelling as garden land. The activities taking place in those photographs are incidental to the enjoyment of the dwelling as such. Several of those photographs show the steps through the rockery between the dwelling and the land to the west of the dwelling being used as a garden. The appellants have also provided photographs from the sales particulars when the property was marketed in 2009, both of which show the land to the to the immediate west of the dwelling as a garden. This evidence reinforces that of the aerial photographs.
19. There are also the statutory declarations of Mrs Gouge and Mr Dentith. In her Statutory Declaration, Mrs Gouge confirms that the whole of the land edged in red on the application plan has been used as a domestic garden for personal and private enjoyment since May 2011, when the family began living at the property. Mr Dentith, a gardener employed by the previous owners of the property, confirms that from 2005 onwards he mowed, weeded, trimmed and fed the lawns, borders, shrubs and hedges across all the land.

20. The Council has presented no evidence of its own to contradict that of the appellants or make their version of events less than probable. Consequently, having regard to the above, I conclude that as a matter of fact and degree the land on which the proposed outbuilding would be located fell within the residential curtilage of property known as Bracken Hill on the date on which the application was submitted.

Reasonably required for purposes incidental to the dwellinghouse as such

21. Class E, Part 1, Schedule 2 of the GPDO permits the provision within the curtilage of a dwellinghouse of any building or enclosure, swimming or other pool *required* for a purpose incidental to the enjoyment of the dwellinghouse as such (emphasis added). It is settled case law that the keynote is reasonableness¹. Case law establishes that what is abnormal is not necessarily unreasonable, but also that what could be regarded as incidental does not depend on the unrestrained whim of the occupier. It is therefore not a question of the minimum size that is necessary to provide for a purpose incidental to the enjoyment of the dwellinghouse: it is a question of what is genuinely and reasonably required.
22. In inviting further comments from the appellants on this matter, I identified four points on which I specifically wanted further information on. These were:
1. The need for/size of the garage, given the existence of the garage attached the host property
 2. The size of the gym, and why the gym cannot be provided within the main dwelling
 3. The size of the 'Pool Change' space
 4. The amount of circulation space/seating areas around the pool
23. In relation to the garage, the main dwelling currently includes an attached double garage. The appellants advise that the garage currently accommodates storage cupboards for tools and outdoor domestic items along one wall and that there are utilities meters and distribution boards along another. These reduce the internal space available for car parking. The garage provides storage for a tractor mower (and limited other domestic equipment) used to maintain the garden and this leaves space for parking one (average sized) domestic car.
24. The appellants explain that the existing garage is far from ideal for any of their vehicles. The family currently owns three cars. One of those cars measures 4.5m in length by 1.9m width. The other two both measure just over 5m in length and 2m in width. The appellants therefore consider that there is an absolute need as a minimum for 2 additional above average-sized garage spaces to accommodate these cars and to allow access to both driver and passenger doors to be opened comfortably. The proposed outbuilding includes a larger double garage to accommodate those vehicles in addition to the existing garage.
25. The revised site layout drawing submitted with the application (Drawing No. bh-300519/01/A) shows a 2-car garage. The drawing is annotated with

¹ *Emin v Secretary of State for the Environment* [1989] J.P.L. 909

dimensions, which indicate that externally the garage measures 8.25 metres by 7.38 metres. This appears excessive to accommodate two standard family size cars, that being the basis of my initial concern. However, on the basis of the information provided in the appellants' Supplementary Appeal Statement, I now understand that two of the cars currently owned by the family are larger than average. I can therefore accept that the additional width is necessary to allow sufficient space to comfortably open the doors of those particular cars. On that basis, I am now satisfied that the size of the double garage in the proposed outbuilding is reasonably required for purposes incidental to the enjoyment of the dwellinghouse as such.

26. I accept the appellants' explanation why the gym cannot be provided within the main dwelling. I can also understand the appellants' preference for the gym to be located in the outbuilding where it would be commonly used in connection with the other leisure facilities proposed, particularly the swimming pool. I can also accept that the gym is now of size that is comparable to other examples quoted in the appellants' Supplementary Appeal Statement as being found to reasonably required for purposes incidental to the enjoyment of the dwellinghouse as such.
27. Similarly, I can accept that the size of the 'pool change' space, whilst in my view generous, would be reasonably sized for domestic use in this context.
28. The poolside seating/circulation area is not so straightforward. I have no difficulty with the width of the circulation space around the pool itself, but the size of the poolside seating area immediately strikes me as being excessive in relation to the size of the outbuilding and the main dwelling itself.
29. I fully accept the appellant's explanation that the pool area is intended to be for leisure use rather than solely for the purpose of exercising, and would be regularly used to entertain extended family and friends as well as being used on a day-to-day basis by the family themselves. I also understand that the poolside seating area does not seek to provide space for all potential guests and that the circulation space around the pool would partly form an indoor-outdoor transition and route for dry-clothed guests to access toilet facilities in the changing room when the doors are open.
30. The appellants consider that the proposed poolside seating is reasonable in the context of the overall function of the pool area and the particular circumstances of the family's lifestyle. Therein lies my concern. The poolside seating area is proposed, it seems to me, on the basis of an unrestrained whim on the part of the appellants to meet their personal aspirations. The size of the poolside seating area reflects that personal aspiration rather than being directly proportional to the size of the main dwelling.
31. The matter is finely balanced. In other circumstances, I might have concluded that the poolside seating area was disproportionate to the size of the swimming pool itself and could not be considered as being reasonably required for purposes incidental to the dwellinghouse as such. However, on the basis of the additional information provided in the appellant's Supplementary Appeal Statement, I consider that the poolside seating area and indeed the outbuilding as a whole can be considered to be reasonably required for purposes incidental to this particular dwellinghouse. I therefore conclude that the outbuilding does constitute development permitted by Class E, Part 1, Schedule 2 of 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 proposed outbuilding 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.

Formal Decision

33. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed operation which is found to be lawful.

Paul Freer
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 4 November 2019 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 reasons:

The proposed orangery to rear of the existing house constitutes development permitted by Class A, Part 1, Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015.

The proposed outbuilding to provide garaging, pool complex and gym constitutes development permitted by Class E, Part 1, Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015.

Signed

Paul Freer

Inspector

Date: 27 October 2021

Reference: APP/R0660/X/20/3264261

First Schedule

An orangery to rear of existing house plus outbuilding to provide garaging, pool complex and gym (as shown on Drawing Nos. bh-300519/01A; bh-300519/02B; and bh-300519/03B)

Second Schedule

Land at Bracken Hill, Mottram Road, Alderley Edge SK9 7JF

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: 27 October 2021

By Paul Freer BA (Hons) LLM PhD MRTPI

Land at: Bracken Hill, Mottram Road, Alderley Edge, SK9 7JF

Reference: APP/R0660/X/20/3264261

Scale: Not to scale

