



Appeal Decision

Site visit made on 30 August 2022

by P N Jarratt BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 September 2022

Appeal Ref: APP/D0840/X/22/3292709

Rear of 47 Cliff Street, Portmellon Road, Mevagissey, Cornwall, PL26 6QJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC)
 - The appeal is made by Mr Maurice Douglas & Ms Sarah Wells against Cornwall Council.
 - The application Ref PA21/08455, is dated 20 September 2021.
 - The proposed development for which an LDC is sought is the erection of a single storey building under Part E of the General Development Order within the curtilage of 47 Cliff Street, Mevagissey.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. As the site is visible from the public highway, I was able to view it adequately without the need for an accompanied site visit.
3. The appellants refer to Part E the General Development Order on the appeal form but this should more accurately refer to Article 3, Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) (England) Order, 2015, as amended (GPDO).
4. For the avoidance of doubt, I should explain that the planning merits of any use or operations are not relevant, and they are therefore not an issue for me to consider in the context of an appeal under s195 of the Town and Country Planning Act 1990, as amended, which relates to an application for an LDC. My decision rests on the facts of the case and on relevant law and judicial authority.

The site and relevant planning history

5. The site is a triangular parcel of land between Battery Terrace to the north and a public right of way to the south. It is utilised as an amenity area to the host property, No 47 Cliff Street, and has a steep gradient. There are areas of paving, gravel, decking and a green painted shed, referred to as a summerhouse by the appellants.
6. An LDC was refused in July 2021 for the construction of a single storey building in accordance with Class E of the GPDO.

7. An application for a proposed one bedroom dwelling incorporating part of the appeal site was refused in August 2021 and is the subject of a separate appeal reference APP/D0840/W/22/3293029.

The question of estoppel and legitimate expectation

8. The appellants state that in 2016 following enforcement investigations relating to the laying of decking, an email from the Council determined that “the parcel of land forms part of the residential property known as 47 Cliff Street, as such the works are permitted by permitted development rights and that planning permission is not required”. The appellant states that the decision was influenced by a letter from a neighbour saying that the land had been garden for over 30 years; by a conveyance dated 30 August 1985; and by a Land Registry title.
9. The Council’s 2016 email is brief and short on detail. Whilst it refers to the parcel of land forming part of the residential property, it does not refer to it being within the curtilage of the dwellinghouse, nor does it refer to which part of the GDPO is being relied upon in reaching the view that the work is permitted development. No caveat about reliance on the contents of the email is made. Notwithstanding these shortcomings, it seems reasonable to me that the appellants have relied on it in submitting the earlier and current LDC applications.
10. I have considered whether the Council is estopped from changing its conclusion regarding the curtilage of the dwellinghouse. The Council makes reference to enforcement action being discretionary and that they should act proportionately. However, this of little relevance to the central point being made in the email. The Council claims that the email does not prevent the Council from revisiting the matter, especially with the benefit of subsequent case law and appeal decisions.
11. The Council does not provide any case law to support their view that they can revisit the matter, only references to what defines curtilage. However, in *R v E Sussex CC ex parte Reprotech (Pebsham Ltd {2002} UKHL 8* the House of Lords held that concepts of private law (such as estoppel) should not be introduced into the public law of planning control which binds everyone. The general principle is that public authorities cannot be estopped from performing their statutory duties. Any representation by a local planning authority as to how it will or will not exercise its powers under s172 (the power to issue enforcement notices) will not give rise to a binding estoppel.
12. It was held in *Flattery & Japanese Parts Centre Ltd v SSCLG & Nottinghamshire County Council [2010] EWHC 2868 (Admin)* that legitimate expectation is irrelevant to lawfulness. Only a formal decision by a local planning authority in the proper exercise of its statutory powers would represent a conclusive assessment of the status of a use.
13. Accordingly, the 2016 email is not an LDC or equivalent to an LDC as the appellant suggests and the Council is not bound by it. Similarly I am not bound by it in determining the appeal against non-determination, despite acknowledging that the appellants have proceeded in good faith.

Reasons

14. The main issue is whether the proposed single storey building is granted planning permission by Article 3, Schedule 2, Part 1, Class E of the GDPO. It is necessary for the appellants to show, on the balance of probabilities, that the proposed development meets the conditions and limitations for that class, that it is within the curtilage of a dwellinghouse and is required for a purpose incidental to the enjoyment of the dwellinghouse as such.
15. The Council accepts that the proposed development complies with the physical limitations of Class E with the exception of whether the site is part of the curtilage of the dwellinghouse. As the appellants point out, whether something falls within a curtilage is a question of fact and degree and thus primarily a matter for the decision maker.
16. In 'Permitted Development Rights for Householders: Technical Guidance' (MoHCLG 2019), curtilage is defined for GDPO Part 1 purposes 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'.
17. It has been held in *Sutcliffe v Calderdale BC [1983] JPL 310* that the relevant factors in determining curtilage are the physical layout; ownership past and present; and use or function past and present.
18. The appellants state that it is reasonable to assume that the appeal site has been used exclusively for enjoyment incidental to the use of No 47 and draws attention to the *Sinclair Lockhart v Central Land Board* case of 1950 in which it was held that ground which is used for the comfortable enjoyment of a house may be regarded in law as being within the curtilage of that house in some necessary and useful way. Additionally it is the actual occupation and use of the land and buildings that will be determining factors, rather than historic layout.
19. The appeal site is detached from the host dwelling by a public footpath running to the rear of the dwellings on Cliff Street. This is not necessarily fatal to determining the extent of curtilage but it is a very significant factor. The *Burford v SSCLG [2017] EWHC 1493 (Admin)* judgement endorsed the view that curtilage is an area of land 'attached to' a house and 'forming one enclosure with it'. In *Lowe v SoS [2003] EWHC 537 Admin* curtilage 'connotes a building or piece of land attached to a dwellinghouse and forming one enclosure with it. It is not restricted in size, but it must fairly be described as being part of the of the enclosure of the house to which it refers'. There is no indication of the appeal site showing any 'belonging' to No 47, indeed it could be garden land of a number of properties in the vicinity.
20. The case of *Blackbushe Airport Ltd v Hampshire CC, R On the application of) and Ors [2021] EWCA Civ 398* provides a useful commentary on what comprises curtilage in which it states at paragraph 21 'The correct question is whether the land falls within the curtilage of the building, and not whether the land together with the building fall within, or comprise, a unit devoted to same or equivalent function or purpose, nor whether the building forms part and parcel of some unit that includes the land'

21. The neighbour's letter of 8 August 2016 confirms that the appeal site has been used as a garden for over 30 years (at the time of writing) and that there had been a garden shed for almost as long. However, curtilage is not a use of land and should not be confused with it. The fact that a site may have been used as a garden is not determinative to it forming part of the curtilage. I note also that historically the appeal site served a variety of local shared use for the storage of fish baskets, nets and lobster pots.
22. The dwellinghouse and the appeal site were originally in separate ownerships. The conveyance dated 30 August 1985 shows the appeal site and the dwelling at No 47 being conveyed as two parcels of land together to new owners. There is no indication that the public footpath is in the same ownership as the dwellinghouse and appeal site and it is expressly excluded from the application plans.
23. The appellant suggests that the Council's indecision on the application was triggered by representations from Mevagissey Parish Council questioning the status of the land but this is not a material factor in this appeal.
24. Having had regard to the facts relating to the appeal site and to the case law referred to by the parties I consider the appeal site does not fall within the same curtilage as the host dwelling, particularly as it is a distinct and separate parcel of land with no common boundary with the dwelling.

Conclusion

25. I therefore conclude that the appellants have not shown on the balance of probabilities that the proposed development would satisfy the requirements of development otherwise permitted by Article 3, Schedule 2, Part 1, Class E of the GDPO.

P N Jarratt

INSPECTOR