

Appeal Decision

Site visit made on 7 September 2022

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 4 October 2022

APP/R0660/X/22/3294400

9 Lees Lane, Newton, Mottram St Andrew, Cheshire SK10 4LJ

- 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 by Cheshire East Council to grant a certificate of lawful use or development.
- The appeal was made by Mr J Sleddon.
- The application, reference 21/3875M, was received by the Council on 19 July 2021. It was refused by a notice dated 8 December 2021.
- The development for which a certificate of lawful use or development was sought was the proposal for the erection of ancillary accommodation within curtilage of existing dwelling to include cinema, gym, garage space, workshop and garden storage plus external swimming pool.
- The application was made under section 192(1)(b) of the Act for a certificate of lawfulness for the proposed development.

Summary of decision: A certificate of lawfulness is not issued.

Appeal site and proposal

1. Application plan 7076_SK01 dated January 2021 shows outlined in blue, the extent of the Appellant Mr Sleddon's holding at No. 9 Lees Lane, Newton, Mottram St Andrew. The property had been part of a horticultural nursery. Allowing for scaling errors, the blue outlined site is about 70m wide extending some 300m south-west from Lees Lane. Plan 7076_SK02 shows outlined in red, the area of land within the 7076_SK01 blue line area, the proposed site layout of the development for which a certificate of lawfulness is sought. This red line also purports to show the extent of the residential curtilage to No. 9.
2. Planning permission ref: 15/0917M was granted on 22 September 2015 for the change of use from A3 Restaurants and Cafes and B1 Business (Offices) into C3 Dwelling house – what is now the substantial semi-detached appeal dwelling, garden and land at No. 9 Lees Lane. The location plan attached to that permission shows, outlined in red, an incongruously small approximately trapezoidal area of land around the dwelling. Its red line shows an area about half the approximately 50m x 50m roughly square area shown on the 7076_SK02 plan of the current appeal application project.
3. Plan 7076_SK05, included with the current appeal application, shows the extent of the 15/0917M permission red line, (shown as a broken line), and the larger area 7076_SK02 red line the Appellant claims is the agreed extent of the residential curtilage.

4. Mr Sleddon wishes to construct ancillary accommodation within what he said is the curtilage of his home. The lawful development certificate proposal was described as cinema, gym, garage space, workshop and garden storage and outside swimming pool. An 18m x 12m 'L' shaped building at the south-western corner of the garden would consist of a single space 5 car garage, (drawings also show a possible 4 car/store area use of the garage), a cinema room with seating for up to some 8 persons, a changing room, a gymnasium and shower with w.c. room. The 10.4m x 5.4m swimming pool would be constructed close to the ancillary building.
5. Mr Sleddon said the works were permitted by The Town and Country Planning (General Permitted Development) (England) Order 2015, (the Order).

The Order

6. Subject to Article 3 to the Order, Schedule 2 Permitted development rights, Part 1 - Development within the curtilage of a dwellinghouse at Class E.(a) permits the provision of any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such, Development is not permitted by Class E if, (amongst others): — (e) the height of the building, enclosure or container would exceed - (i) 4 metres in the case of a building with a dual-pitched roof, (ii) 2.5 metres in the case of a building, enclosure or container within 2 metres of the boundary of the curtilage of the dwellinghouse.

Council's objections

7. The Council set out 3 reasons why they considered Mr Sleddon's project would not be permitted by the Order.
 1. The development falls outside the curtilage associated with the dwelling at No. 9 Lees Lane. Permitted development rights in Class E were therefore not available.
 2. Provision of a further 5 no. car garage in addition to the previously permitted 3 no. car garage is not considered incidental. The additional accommodation is not considered incidental as it had not been shown to be genuinely and reasonably required for the enjoyment of the dwelling.
 3. Even if the red line on the application location plan was deemed to represent the residential curtilage, the outbuilding would be within 2m of its boundary and higher than 2.5m. That would not comply with E.1(e)(ii) to Class E of the Order.

Reason for refusal 1. - Curtilage

8. As there was disagreement as to the extent of the residential curtilage of No. 9 and which directly affects application of the Class E Order concessions, I need to come to a view on its extent.
9. The Council said the appeal project would stand on land outside the curtilage of the dwelling at No. 9. Their view relied upon the plan attached to the 22 September 2015 15/0917M change of use planning permission as showing the then and current extent to the residential curtilage. That excludes the site for the projected amenity buildings and swimming pool.
10. Mr Sleddon said the Council had previously confirmed the extent of the property's curtilage in an earlier householder application, (plan - permitted

development (ancillary accommodation) 7076_SK05). He said the Council had subsequently issued a certificate of lawfulness for the development using the same curtilage shown on the certificate application. Appellant drawing 7076_SK05 dated January 2021 shows, with a dashed red line, what is described as "historic red line from application ref: 15/0917M", (the small trapezoidal area), and, in solid red line, said to be "agreed extent of residential curtilage", (the 2x larger application area). However, the Council did not accept this claim. They said applications submitted in 2018 and 2019 may have had a larger red edged area than shown on plans attached to planning permission 15/0917M, but they did not specifically grant permission for an extended residential use or garden use of the land edged red as shown in the current appeal application.

11. The 15/0917M change of use permission plan shows that the small trapezoidal curtilage excludes a small part of the current road access splay to the property, a corner of the 3 car garage, a substantial length of the driveway to the garage and a rear extension, single storey glazed link, porch and outbuilding converted to residential living space, all of which was built following the grant of planning permission 19/1693M on 7 August 2020. The layout plan to that permission shows the same curtilage red line as shown on the current appeal application plan.
12. In my view, the current appeal application plan shows an appropriate residential curtilage to the house at No. 9 Lees Lane. However, in reaching that determination 2 steps had to be cleared. First, does the land within the larger red line area have a lawful residential use? If so, can it be considered to be curtilage land to the dwelling at No. 9?
13. Plans attached to the following approvals all show a development project red line in the position shown in the current appeal application:
 - 19/1693M - Two storey rear extension, single storey glazed link, porch and conversion of existing outbuilding to residential living space (C3) together with a detached garage – approved with conditions – 7 August 2020.
 - 19/0617M - Certificate of proposed lawful development for two storey rear extension and detached garage – positive certificate – 15 March 2019.
 - 18/5063M - Erection of single storey glazed link, porch and conversion of existing outbuilding to residential living space (C3) – approved with conditions – 22 January 2019.
14. The judgement in the case of *R (oao Sumption) v Greenwich LBC* [2007] EWHC 2276 (Admin) shows that a curtilage can be readily extended, and that there is no qualifying time before it can be so treated. The proviso is that curtilage can only be extended into an area which is already lawfully part of the residential planning unit. The September 2015 15/0917M change of use planning permission showed that the red lined land area shown on its Location Plan AD2104.00 gained a residential use permission, with the remaining blue lined area of land assumed to retain its lawful A3 Restaurants and Cafes and B1 Business (Offices) use. Without consideration of the effect of the 19/1693M 7 August 2020 planning permission or the 2 2019 permissions, which show the same red line area as for the current appeal, any part of Mr Sleddon's holding outside the red lined area shown on the

September 2015 15/0917M Location Plan AD2104.00 could not be part of the residential curtilage, following the proviso in *Sumption*.

15. The Council said the post 2015 permissions showing a larger red edge area than on that 15/0917M permission did not grant permission for an extended residential use or garden use. The only aspects of those applications which allowed a change of use of land to residential use extended only to siting of the outbuilding and extensions, on their direct footprint, rather than the entirety of the red edged area shown on plans/site plans supporting those applications. They were not applications seeking to add existing non-residential use land to the domestic garden of the dwellinghouse. Nor was the application that led to the 7 August 2020 19/1693M planning permission seeking a change of use of the former A3 and B1 uses to a C3 use.
16. Planning permission 19/1693M issued on 7 August 2020 was for the erection of a 2 storey rear extension, a single storey glazed link, a porch and for the conversion of an existing outbuilding to residential living space (C3) together with a detached garage. Location plan PL01 and Proposed location plan PL03A attached to that decision show a red line in the same position and extent as that attached to the current certificate application plan. That is, the larger square approximately 50m x 50m area that encompasses the application project proposals. In my view, a plain reading of that planning permission leaves little doubt that either the red lined area was already in a lawful residential use or that the 19/1693M decision granted or confirmed that area of land as having a residential use. Nothing in that decision indicated the red line area surrounding the operational development granted permission would not be in a lawful residential use but would remain to an A3/B1 use when the permission was implemented. The 19/1693M permission has been implemented and the red line area is clearly used in association with the residential use of the house and its buildings.
17. In the case of *Sinclair-Lockhart's Trustees v Central Land Board* (1950) 1 P&CR 195, it was held that '*The ground used for the comfortable enjoyment of a house or other building may be regarded as being within the curtilage of the house or building and...an integral part of the same even though it has not been marked off in any way... It is enough that it serves the purpose of the house or building in some necessary or reasonably useful way.*'. Also, in *Sumption* it was said that once garden use was confirmed, even though it had not been formally approved, it would be well-nigh impossible to contend the land did not fall within the curtilage of the dwelling. What mattered was the use being made of the land, and the situation at the application date.
18. Applying the tests in the case of *Burford v Secretary of State for Communities and Local Government & Anor* [2017] EWHC 1493 (Admin), which were the physical layout of building and attached land, ownership, past and present and their use or function, past and present, I conclude that, on balance, the appeal project development would lie within the residential curtilage of the dwellinghouse at No. 9 Lees Lane and that the plan attached to the appeal application correctly shows the boundary of the curtilage to the house at No. 9 Lees Lane. Permitted development Order concessions are therefore available to the lawful development certificate application land.

Reason for refusal 2. – required for a purpose incidental to the enjoyment of the dwellinghouse

19. The lawful development certificate proposal was described as cinema, gym, garage space, workshop and garden storage plus external swimming pool. The 18m x 12m 'L' shaped building at the south-western corner of the garden would consist of a single space 5 car garage, (Elevation drawings show a possible 4 car/store area use of the garage), a cinema room with indicated seating for up to about 8 persons, a changing room, a gymnasium and shower with w.c. room. A 10.4m x 5.4m outside swimming pool would be constructed close to the ancillary building. Mr Sleddon said he collected cars. He intended to store them safely at home. The gym and swimming pool were also to be used incidentally to the dwelling at No. 9.
20. Class E at E.4. to the Order says that for the purposes of Class E, "*purpose incidental to the enjoyment of the dwellinghouse as such*" includes personal enjoyment of the occupants of the dwellinghouse. Examples could include common buildings such as garden sheds, other storage buildings, garages and garden decking as long as they can be properly be described as having a purpose incidental to the enjoyment of the house. A purpose incidental to a house would not, however, cover normal residential uses, such as separate self-contained accommodation or the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen. The Collins English Dictionary says: "*If one thing is incidental to another, it is less important than the other thing or is not a major part of it.*".
21. In the case of *Emin v Secretary of State for the Environment and Mid-Sussex County Council* QBD 1989 58 P&CR, it was said that an outbuilding must be 'required for some incidental purpose' to be permitted development under Class E, but its size is not relevant. It is necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwellinghouse, and whether the building is genuinely and reasonably required to accommodate the use and thus achieve that purpose. Whether a building is required for a purpose associated with the enjoyment of a dwellinghouse "*cannot rely on the unrestrained whim of he who dwells there*". It was also held that the term incidental connotes an element of subordination in land use terms in relation to the enjoyment of the dwelling itself. Reference is made to the need to consider whether, in the context of the planning unit, "*the uses of the proposed buildings are intended and would remain ancillary or subordinate to the main use of the building as a dwellinghouse.*".
22. The *Emin* judgment helps to show that the relationship between the size of the proposed building and the size of the dwellinghouse itself is not, of itself, determinative. The Class E concession neither mentions such a size relationship nor does it fix a limit on the size of an outbuilding. However, the words incidental to the enjoyment of the dwellinghouse as such impart some consideration of a relationship between the house and its outbuilding.
23. Those principles were reiterated in *LB Croydon v Gladden* [1994] 1 PLR 2 and *Holding v FSS & Thurrock BC* [2004] JPL 1405. The term 'required' is therefore interpreted for the purposes of applying Class E as meaning 'reasonably required'. Other judgments clarify that in each case it has to

remain a matter of fact and degree as to whether facilities were, or were not, an integral part of the ordinary residential use of the primary unit, (*Peche D'or Investments v SSE* [1996] JPL 311), and that the facilities could not be something for the provision of a primary dwellinghouse purpose, (*Rambridge v SSE & East Herts DC* [1996] QBD). The case of *Wallington v SSW & Montgomeryshire DC* [1990] JPL 112; [1991] JPL 942 showed it is necessary to consider whether the relevant purpose is incidental to the particular dwellinghouse in question rather than any dwellinghouse.

24. I need to consider whether Mr Sleddon's building would be reasonably required or would be wholly used for purposes incidental to the enjoyment of the dwellinghouse. Whether or not a use is incidental for the purposes of s.55(2)(d) must be considered with regard to the primary residential use and the type and size of the dwellinghouse and its curtilage, as well as the scale and nature of the claimed incidental activity. Carrying out a hobby and/or working from home may be incidental, but there must be a normal functional relationship between the incidental and the residential use.
25. The Council referred to an earlier application, (ref: 21/0895M) for ancillary accommodation to the dwelling at No. 9. In that, the internal facilities proposed in the outbuilding included a bedroom, bathroom and kitchen area. They said the internal layout of the outbuilding was the only element that had now changed. Where a bedroom had been proposed a 'changing room' was now indicated; where a kitchenette/bar was proposed, a 'bar' was now shown and the shower room was now to be a w.c. The Council justifiably questioned the true intent of the occupants of the dwelling as to the use of the outbuilding's rooms. I would also have doubts that the proposed cinema room would meet the tests set out in Ministry of Housing, Communities and Local Government guidance in Permitted development rights for householders Technical Guidance on Class E at p. 41 which states that a purpose incidental to a house would not cover normal residential uses, such as separate self-contained accommodation nor the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen. That is, if the use of a space was fundamental to the ordinary day-to-day functioning of the dwelling it would not be incidental but part of the primary accommodation. The proposed cinema room for watching films and television might be used as an extension to the primary accommodation, as an additional lounge, rather than an incidental use.
26. I also consider that the appeal proposal would be an excessively large building, capable of use by several persons at a time. Notably large even when compared to the main house it purports to serve, it might suggest that the real purpose of the proposed building would not be an incidental use. In my view it would not be subordinate to the main dwellinghouse. By virtue of its scale in relationship to the house, it would seem unusually large for its reasonable needs and use by occupiers of the house. Together with the 19/1693M permission garage, the application project would bring the total car garaging capacity of the property to 8, (7 if one bay was used for storage). I agree with the Council that would be in excess of the number reasonably required for the enjoyment of the dwelling. The outbuilding's use is unlikely to be incidental to the enjoyment of the main dwellinghouse. Its construction and use would not benefit from the concessions in Class E.(a)

to the Order. It would require planning permission. Whilst it may be that the proposed swimming pool, in isolation, might satisfy the Class E Order limitations, it appears that it would be used in association with the changing room in the large 'L' shaped building, (para. 28 below). I find that no separable part of the project can benefit from the Order concessions.

Reason for refusal 3. – Compliance with Class E - E.1(e)(ii)

27. Mr Sleddon accepted that the height of part of the proposed 'L' shaped building would be higher than 2.5m within 2m of the boundary, (the edge of the redefined curtilage). Consequently, the appeal project would not comply with limitation E.1(e)(ii) of the Order. Mr Sleddon said the drawings could be revised and agreed. However, I can only consider the details before me. There is no equivalent power to that set out under s.191(4) of the Act for the Local Planning Authority, Secretary of State or Inspector to modify the terms of a lawful development certificate application made under s.192 of the Act.
28. The details contained in the application must show that all concession conditions and limitations are satisfied. A scheme either precisely complies with the limitations of the Order or it does not. Also, where any part of the scheme does not comply, none of the development is granted planning permission by the Order. The case of *Garland v MHLG* [1968] 20 P&CR 93 is authority for that position.
29. My conclusion on this point may appear unduly rigid. But Order concessions are not concerned with matters of planning merit or whether any failure to comply with a condition or limitation is large or small.

Conclusion

30. I found in favour of the Appellant on the curtilage question. The small non-compliance with Class E - E.1(e)(ii) to the Order could be surmounted by a compliant modified application. The need to demonstrate that the application project be "*required for a purpose incidental to the enjoyment of the dwellinghouse as such*" was not met.

FORMAL DECISION

31. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful development for the erection of ancillary accommodation within the curtilage of the existing dwelling to include cinema, gym, garage space, workshop and garden storage plus external swimming pool at No. 9 Lees Lane, Newton, Mottram St Andrew, Cheshire SK10 4LJ was well founded and that the appeal should fail. I exercise the powers transferred to me by s.195(2)(a) of the Act accordingly.



INSPECTOR