



Appeal Decisions

Site visit made on 20 October 2022

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 19 January 2023

Appeal A: APP/J1535/C/21/3272079

Land to rear of Field End, Oak Hill Road, Stapleford Abbots, Essex RM4 1EH

- 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 Vimal Pokar against an enforcement notice issued by Epping Forest District Council.
 - The enforcement notice was issued on 5 March 2021.
 - The breach of planning control as alleged in the notice is, without planning permission: A material change in the use of the land to domestic curtilage and the erection of buildings and the construction of a swimming pool.
 - The requirements of the notice are:
 - 1) Cease the use of the Land edged black as residential curtilage.
 - 2) Remove the buildings from the Land hatched on the attached plan.
 - 3) Remove the ground works, including the swimming pool, from the Land hatched on the attached plan labelled A.
 - 4) Remove all resulting debris from the Land.
 - The period for compliance with the requirements is 3 months after the date this notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c) and (d) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) and the prescribed fee has been paid, an application for planning permission is deemed to have been made under section 177(5) of the Act as amended, and falls to be considered.
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Appeal B: APP/J1535/W/21/3272094

Field End and Ralwyn, Oak Hill Road, Stapleford Abbots, Essex RM14 1EH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Vimal Pokar against the decision of Epping Forest District Council.
 - The application Ref EPF/3053/20, dated 22 December 2020, was refused by notice dated 17 February 2021.
 - The development proposal is described as *The erection of a building to be used for purposes which are incidental to the enjoyment of the occupiers of the dwellings at Field End and Ralwyn.*
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Formal Decisions

Appeal A

1. The enforcement notice is corrected, with its Section 3 ('The matters which appear to constitute the breach of planning control') reworded as follows:

'A material change of use of the land for purposes incidental to a residential use'

Requirement 1 in Section 5 ('What you are required to do') is reworded as follows:

'Cease the use of the land for purposes incidental to a residential use'.

Requirement 2 is amended to 'the building', singular.

Requirement 3 is deleted, as it is now superfluous.

2. Subject to these corrections, the appeal is allowed insofar as it relates to the the open-air swimming pool, and planning permission is granted on the application deemed to have been made under s177(5) of the 1990 Act as amended.
3. Otherwise the appeal is dismissed, the application deemed to have been made under s177(5) of the 1990 Act as amended relating to the unauthorised use of the land and the erection of the two buildings hatched on the attached plan is refused, and the enforcement notice is upheld.

Appeal B

4. The appeal is dismissed.

Matters concerning the Enforcement Notice

5. It would appear, although not mentioned specifically in the enforcement notice, that the buildings hatched on the plan attached are that of a steel-framed structure and also a pergola type structure. At the time of my site visit I noted that the former had been removed from the land. The latter, on the other hand, would appear to now be little more than an open frame, with bars between, and is without any form of roof. It was unclear to me whether the 'pergola', as termed, had been partly dismantled but as what remains is technically still a structure I will treat it, accordingly. The excavated swimming pool, as a fully identifiable feature, remains. That said, it is clearly not in use due to its apparent state of disrepair.
6. There are other buildings on the land within the site area ringed on the plan attached to the notice, which I shall refer to as 'the paddock', but only the two buildings mentioned were targeted.
7. The terms 'curtilage' and domestic 'garden' are not interchangeable. Curtilage defines an area of land in relation to a building, and is not a use of land. To put the notice on a proper footing I shall therefore re-word the allegation to refer, instead, to a change of use of land for purposes incidental to a residential use. Following on from this, Requirement 1 will be re-worded to reflect the allegation, accordingly.

Preliminary Matters

8. The proposed development, the subject of Appeal B, would effectively involve the erection of a single-storey, flat-roofed, timber clad building housing the swimming pool, a plant room, changing rooms, a small gym, and a garage to accommodate classic cars.

9. I understand that the paddock land was previously used for grazing and agricultural use. The Council, in refusing planning permission, considered this development as inappropriate in a Green Belt location, within which the paddock falls, and also that the building would be out of character with its surroundings.
10. Given that the issues on the two separate planning applications are the same for Appeals A and B I shall deal with these together, following my consideration of Appeal A in relation to the legal grounds put forward by the appellant.

Appeal A, on ground (b)

11. An appeal on ground (b) is that the alleged breach, which must firstly constitute development, was not occurring at the time the enforcement notice was issued, as a matter of fact.
12. Irrespective of my correction to the enforcement notice, given the reference to residential curtilage it is necessary to examine the definition of such and whether or not, as the appellant is claiming, the land on which the buildings have been erected can be considered as constituting this.
13. The term 'curtilage' is not defined in the 1990 Act nor in any other legislation, including the GPDO. Its meaning and application is derived, instead, from court judgements.
14. In terms of what can be reasonably considered as residential curtilage it was held in *Dyer v Dorset CC* [1989] that curtilage constitutes a piece of ground attached to a dwellinghouse and forming one enclosure with it; thereby the area attached to and containing a dwellinghouse and its outbuildings. The case of *McAlpine v Secretary of State for the Environment* [1995] did not depart from the above judgement save for the mention of it being constrained to a small area around a building, whilst the Court of Appeal in *SSETR v Skerritts of Nottingham* [2000] decided that the definition of a curtilage in relation to a building must remain a question of fact and degree in each case.
15. The essential point in the relationship of the dwelling to its curtilage must be functional, and not merely spatial. This was addressed in the judgement of *Methuen-Campbell v Walters* [1979] 1 QB 525 where it was held that for land to fall within the curtilage of a building there should be an intimate association.
16. The Council has provided a series of aerial photographs, flown in 2010, 2013, 2018 and 2021 to support its case. The 2010 photograph shows a barn type building present on the paddock land, towards the centre of the site reached via a track running between the dwellings, Field End and Ralwyn. The 2013 photograph shows the barn structure was still in situ, and the outline of a tennis court is evident. I observed the tennis court at my site visit, and noted that it had been subsequently marked out. The 2018 photograph shows that the barn had by then been removed, and the 2021 image indicates, for the first time, the excavated swimming pool, and the outline of the overlying steel-framed structure is also evident.
17. Clearly, on the basis of the above, the former paddock had, during the past few years been brought into use for purposes incidental to the primary residential use. At my site visit, apart from other substantial outbuildings evident - which have not apparently been enforced against - I noticed that a substantial area of the land leading from the side of Field End had been block-paved, children's

play equipment was in place, and tables, benches and seating were also in evidence.

18. Notwithstanding therefore, of whether the paddock falls within residential curtilage, I am satisfied that a breach of planning control had already occurred at the time that the enforcement notice was issued. Accordingly, the appeal on ground (b) does not succeed.

Appeal A, on ground (c)

19. An appeal on ground (c) is that the matters referred to in the notice, if they have occurred, do not constitute a breach of planning control. Class E, Schedule 2, Part 1 The Town and Country Planning (General Permitted Development) Order 2015, as amended, (the GPDO) allows for the provision within the curtilage of the dwellinghouse of any building or enclosure, swimming or other pool required for the enjoyment of the dwellinghouse, or the maintenance, improvement or other alteration of such a building or enclosure.
20. It should be borne in mind that permitted development rights under Part 1 only apply to development within the curtilage of a dwellinghouse and not the whole residential planning unit, if that is larger. Again, however, there are implications for GPDO cases from the findings in *Sumption* and *O'Flynn* that curtilage can potentially be extended.
21. In this connection I note that the application form relating to Appeal B referred to the Site Address as being Field End and Ralwyn. I also here turn to the Appellant's Planning Statement, submitted to accompany the planning application the subject of Appeal B. Paragraph 8 states, in part:
- "...In particular, it is considered that the proposed development falls within the residential curtilage of Field End and or Ralwyn and is of a size which complies with the relevant limitations in the GPDO. The case is set out in detail in the application itself."*
22. On this basis, whilst the appellant considers that Class E still applies the appellant is also undecided which of the two separate curtilages – to satisfy Part 1 it can only fall specifically within one – should be earmarked as accommodating the developments at issue. Realistically, given the access to the paddock is via the side of Field End, it could only be that of Field End, but I find here that the appellant's evidence is neither precise nor unambiguous.
23. Curtilage is not fixed for all time; its physical extent is readily capable of changing at any time. From the Court of Appeal's judgement regarding the case of *Sumption v LB Greenwich & Rokos* [2007] EWHC 2776 (Admin) it has become clear that land can very easily be incorporated into curtilage. However, land can only be treated as part of the curtilage of a building if its use, as part of the planning unit comprising the dwelling and the land occupied with it, is lawful. Until such time as its use becomes lawful this land cannot be regarded as coming within the curtilage of the house.
24. The 'planning unit' and curtilage are two separate and entirely different concepts, and one should not be confused with the other. It is important in the planning context that the word 'curtilage' is not used loosely to refer to the entirety of the surrounding land forming part of a property. The actual

curtilage of a house may cover only part of the land owned or occupied with that building.

25. If it is found in such a case that the site is or was outside of the residential planning unit, it follows from *O'Flynn v SSCLG & Warwick DC* [2016] EWHC 2984 (Admin) that the following questions arise; firstly, whether the evidence shows that, on the relevant date – in this instance, 5 March 2021 – the land was within the curtilage of the dwellinghouse and being used for a purpose incidental to the use of dwellinghouse as such. The relevance here is that s55(2)(d) provides that 'the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such is not 'development'. Secondly, if outside the curtilage, and there has been a material change of use of the land to residential garden, whether the use is immune from enforcement action under s171B(3)182. The material date for the latter would be ten years prior to the date the enforcement notice was issued ie 5 March 2011.
26. Accordingly, given the thrust of the enforcement notice, the appellant was required to demonstrate, on the balance of probabilities, that the land is in the curtilage of the dwellinghouse, given the tests set out above, and is used for purposes incidental to the enjoyment of the dwellinghouse. Incidental use is not determinative on its own of curtilage because it is only one test and it does not assist, in particular, to resolve the question of whether the land is attached with the dwellinghouse forming one enclosure with it.
27. Weighing all the evidence up, considering the size of the paddock, relative to Field End (the dwelling itself and its identifiable surrounding garden) I do not find that there is any intimate association between these two pieces of land. Further, it is an obvious disproportionate relationship. Although I acknowledge that the land has/is being used in part as an extension to the garden – more an 'outer garden' – due to the size of the paddock, and the fact that the land opens out substantially to abut the boundaries with the rear gardens of a number of neighbouring dwellings, there is no intimate relationship with the Field End dwelling. Moreover, to regard the land as residential curtilage would be wholly out of character with the other neighbouring dwellings and their respective curtilages in terms of both depth and expanse.
28. As regards the actual planning unit involved the leading case in which the planning unit was defined is *Burdle v SSE* [1972] 3 All E.R. 240. Here it was judged that there may be three possible situations which can be identified when considering the planning unit; one being where there is a single main purpose, to which any secondary activities are ancillary or incidental. The situation at Field End is such a case in point.
29. In such instances the whole unit of occupation is the planning unit, and I am satisfied here that whilst the paddock land cannot be seen as constituting residential curtilage, both pieces of land might be considered as forming a single planning unit. I reach this conclusion due to the development which has already taken place on the land and which has not been enforced against by the Council.
30. The planning position, as it now stands, is one for which the lines have been blurred. That said, in drawing the distinction between the so called 'intimate relationship' between the dwelling and its curtilage and that of the wider planning unit I have concluded that the paddock land has not been subsumed

into the curtilage of Field End, and the appellant's representations have not persuaded me otherwise.

31. No permitted development rights exist as Schedule 2, Part 1 of the GPDO does not apply, and the appeal on ground (c) therefore fails.

Appeal A, on ground (d)

32. The appeal on ground (d) is that, at the date the enforcement notice was issued, it was too late for the Council to take formal action as the development which constituted the breach of control had already acquired immunity from such in planning terms.
33. Taking into account the date of issue of the notice and, depending on whether the identified breach comprises operational development or a material change in the use of the land, the material date will be either four or ten years immediately prior to this.
34. The onus is on the appellant to prove his case, with the burden of proof being on the balance of probabilities. Such cases cannot take into account planning merits or impact and, as such, my decision has to be based on evidential fact and, where applicable, case law.
35. The appellant says that the land has been in the same use in excess of ten years prior to the enforcement notice's issue. The 2010 aerial photograph shows no evidence of the land being used for purposes incidental to the residential use, and neither does the operational development targeted by the notice satisfy the four year period immunity test.
36. With the photographic evidence available the appellant is unable to provide compelling evidence to show otherwise. The balance of probabilities falls in favour of the Council's case and the ground (d) appeal does not succeed.

Appeal A, on ground (a) – the deemed planning application (DPA) and Appeal B

Main Issues

37. The site lies within the Metropolitan Green Belt. As mentioned, the main issues in this case are virtually identical for both appeals. These are:
- 1) whether the development would be inappropriate development in the Green Belt for the purposes of the National Planning Policy Framework and, if so, the effect on the openness of the Green Belt;
 - 2) whether the development would create any other harm, with particular regard to the living conditions of neighbouring occupiers and persons using the nearby public footpath, and also, for Appeal B, the effects of the proposed building's design on the character and appearance of the surrounding area; and
 - 3) if it is inappropriate development, whether the harm by reason of inappropriateness and by reason of any other harm is clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify the development.

Reasons

Inappropriate development and Openness

38. All development in the Green Belt, be it uses of land or operational development, is inappropriate for the purposes of the National Planning Policy Framework (the Framework) unless it accords with the exceptions listed in paragraphs 149 and 150 of the document.
39. One of these relates to the provision of appropriate facilities for outdoor sport and recreation, so long as the facilities preserve the openness of the Green Belt. I consider that the excavated, sunken swimming pool, given its open-air nature, and likely limited degree of use would satisfy this proviso. Its use for recreation, like the tennis court on the land, would not adversely impact on the Green Belt's openness.
40. This particular exception would not though include the proposed building, the subject of Appeal B, which, of substantial size, would enclose and fully cover the swimming pool whilst also accommodating other facilities within.
41. I note that the appellant considers that it would represent a replacement building to that of the previously existing barn, would not be materially larger, and would be in the same use as the former barn. However, with regard to the latter point, I am unclear how such a sweeping, unsubstantiated claim can be made. Accordingly, in the absence of details to the contrary I find that there is little, if any, similarity (either physically, or in terms of their actual purpose) between the former and proposed building.
42. The appellant says that a Council planning official indicated the proposed building would be regarded as a replacement. I have no direct knowledge of such, but even if this was the case the Council would not be bound by any such advice; the responsibility is on the appellant to make his case for such.
43. The Framework states that an essential characteristic of Green Belts is their openness and that the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land within them permanently open, and that development should not compromise the purposes of including land in the Green Belt.
44. The Framework goes on to say that when considering any planning application substantial weight should be given to any harm to the Green Belt. Very special circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.
45. I therefore conclude that the proposed building would be inappropriate development which would undoubtedly be harmful to the Green Belt's openness. Here I refer to the 2020 court judgement (*Samuel Smith Old Brewery and others v North Yorkshire CC*) where it was held that matters relevant to openness in any particular case are a matter of planning assessment.
46. As mentioned, little remains of the targeted pergola structure which stands next to the tennis court. That said, it serves no recreational purpose, cannot benefit from permitted development rights for the reasons set out under the ground (c) appeal, and is beyond what could be termed as de minimis. As a

structure it also constitutes inappropriate development within the Green Belt, merely adding to what has seemingly become an attempt to develop the paddock land in a piecemeal fashion by stealth.

47. Both the proposed building and the pergola frame are therefore, harmful to the Green Belt and the Framework indicates that inappropriate development should not be approved except where very special circumstances can be demonstrated. Further, the development fundamentally conflicts with policies GB2A and GB7A of the Epping Forest adopted Local Plan and Alterations (LP) and also which, taken together, serve to guard against inappropriate development within the Green Belt, and also conspicuous development which affects its open character.
48. Moreover, and directly applicable to the development at the appeal site, LP policy GB4 says that the extension of the curtilage of a residential property which involves an incursion into the Green Belt will be permitted only where the Council is satisfied that it would not have an adverse effect upon the open character of the landscape, it would relate well to the curtilages of any adjoining residential properties, and it would not be excessive in size. For the reasons I have already set out the development is in conflict with all three provisos.
49. This affects not only the Green Belt's openness but also the character of the landscape. It thereby additionally conflicts with those policies cited by the Council which I find particularly applicable in this instance; namely LP policies LL1, LL2 and CP2, and also policy SP6 of the Council's Submitted Version Local Plan.

Any other identified harm

50. The Council considers that the design of the proposed building is out of character with the immediate area due to its size, mass, bulk and roof form. I agree, as the building would be of considerable size, and its expanse would be accentuated by its flat roof. Whilst the building, if sited elsewhere, might represent a satisfactory and functional design – and one that would integrate into its contextual setting – given that it would here stand in relative isolation, its obtrusiveness would be visually harmful to the outlook from the rear facing windows of the neighbouring dwellings along Oak Hill Road, detracting from the rural landscape beyond.
51. I therefore conclude that the proposed building would be in material conflict with LP policies DBE4, and DBE9, in particular.
52. The Council has also referred to the views from a local footpath, but as I did not see this, nor was provided with any details as to its location relative to the appeal site I have not drawn any conclusion in this regard.

Other matters

53. I have received letters of objection from certain interested parties which refer to the swimming pool increasing the likelihood of flooding, putting pressure on the drainage system, causing pollution due to chemicals used and spoiling the meadow. Admittedly, the pool is not in use but, even so, I have received no technical evidence to back up these claims, and I am satisfied that granting planning permission for the open-air pool would not give rise to any significant undue harm to interests of acknowledged importance.

Conclusions on the DPA

54. The use is inappropriate development in the Green Belt for the purposes of the Framework, is harmful to its openness and also the landscape, and is in material conflict with the development plan as a whole.
55. The very special circumstances necessary to outweigh the presumption against this development within the Green Belt do not exist. The appeals are therefore dismissed, planning permission is refused, save for the permission granted for the swimming pool and the enforcement notice is upheld.
56. Regarding the swimming pool, although the enforcement notice is upheld, the requirements of the notice will cease to have effect so far as inconsistent with the permission which I will grant by virtue of s180 of the Act.

Timothy C King

INSPECTOR