The Planning Inspectorate

Appeal Decision

Site visit made on 16 August 2022

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 January 2023

Appeal Ref: APP/W1525/C/21/3289935
Land at Tarlings, Pynnings Farm Lane, West Hanningfield, Chelmsford, Essex CM2 8UU

- 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 Brian Swift against an enforcement notice issued by Chelmsford City Council.
- The enforcement notice was issued on 23 November 2021.
- The breach of planning control as alleged in the notice is: Without planning permission, the construction of a hard surface, concrete base, and footings for a building.
- The requirements of the notice are to:
  1) Demolish the footings and break up and scrape clear the concrete base, shown outlined in blue at the approximate location on the attached plan.
  2) Break up and scrape clear the hard surface, shown outlined in green at the approximate location on the attached plan.
  3) Remove from the land all material resulting from the works carried out in 1) and 2).
  4) Restore the land by seeding the area affected by steps 1), 2) and 3) with grass seed.
- The period for compliance with the requirements is within three months of the effective date of the notice.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c), and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fee has been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Formal Decision

1. It is directed that the enforcement notice be corrected by deleting Requirement 1 and replacing it with the following wording:

   "Remove the brick courses and footings and break up the concrete base, shown outlined in blue at the approximate location on the attached plan."

   Requirement 2 is deleted. The words "and (ii)" are deleted from Requirement 3. Requirement 4 is deleted and reworded to read:

   "The land edged blue shall be restored to its former condition as existed prior to the breach taking place."

   The enforcement notice is also varied with the period for compliance increased from three months to six months of its effective date.

2. The appeal is allowed insofar as it relates to the the hard, gravelled surface, shown outlined in green at the approximate location on the attached plan, and planning permission is granted on the application deemed to have been made

under s177(5) of the 1990 Act as amended. Otherwise the appeal is dismissed and the enforcement notice is upheld.

Matters concerning the Enforcement Notice

3. Requirement 4, whilst its purpose is clear, is too vague. The wording *"by seeding the area with grass seed"* without anything more specific may go beyond what would be the land's restoration to its pre-development condition. Besides, grass seed comes in many varieties and the legislation stipulates that an enforcement notice cannot impose a positive requirement on the recipient. As the requirement, therefore, does not, and cannot, take the form of a planning condition with the approval of details I shall delete the said wording and require, instead, that the land be restored to its former condition prior to the breach occurring.

4. Subject to the said corrections and variation the enforcement notice is upheld. Regarding the hard gravelled surface, 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.

Background

5. Immediately to the rear of Tarlings, previously a bungalow, which has since been rebuilt as a two-storey dwelling, is a lawned area, the far end of which one would reasonably consider to be the extent of the residential curtilage.

6. Beyond this is a piece of land which, until relatively recently, was overgrown with heavy tree cover. It is understood that past occupiers of the neighbouring property, The Old Bakery, utilised the land – and it seems that its rear garden has since been foreshortened, with its boundary fence standing adjacent to the base of the concrete base. The land now falls under the freehold title of Tarlings and, upon its purchase in 2016, the appellant then began clearing the land, which also included old outbuildings, which were not required by the appellant, in order that it could be brought into use for purposes in connection with the wider residential use.

7. The appeal site's planning history since the appellant purchased the land is of relevance to the current planning position. Of particular importance is that planning permission (ref 16/02092/ was granted in 2017 for a replacement two-storey dwelling and detached double garage. The approved garage would have been accessed from Pynnings Farm Lane and would have been located within Tarlings' rear garden proper, close to the common boundary with The Old Bakery.

8. In April 2020 a lawful development certificate (LDC), under s191 of the 1990 Act was issued, confirming the lawfulness of the use of the cleared land to the rear for residential amenity and recreation purposes in connection with Tarlings.

9. Given that the replacement dwelling had been built differently to that approved an application for retrospective planning permission was submitted and subsequently approved in March 2021, taking in the dwelling's change in design. The scheme again incorporated a domestic garage adjacent to the boundary with The Old Bakery.

10. By now, however, with a vehicular access from Lower Stock Road having been opened up, reinstated and widened following the land clearance a substantial area of hardstanding within the site, as edged in green on the plan attached to the enforcement notice, had been laid. In the first instance this served to facilitate the construction of the replacement dwelling, but also since for parking purposes on the site, and particularly as a garage was now proposed on the land in the alternative location beyond The Old Bakery's rear fence.

11. Accordingly, a LDC application (ref 21/00989/CLEUD) under s191 was submitted in June 2021 for footings and a base for a domestic garage/store, an associated hardstanding area and vehicular access from Lower Stock Road. This piece of the land lying between Tarlings' rear lawn and the westernmost part, had effectively now been separated from the latter section which had been grassed.

12. The proposed layout is shown on submitted drawing no 2878/16/E, and the applicant (the appellant for the current appeal) claimed that the development would fall within the parameters of permitted development rights, as set out in the Town and Country Planning (General Permitted Development) Order 2015 as amended (the GPDO). The appellant was relying on the GPDO's Class E, Schedule 2, Part 1 which 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

13. The Council, however, refused the application in August 2021 on the overarching consideration that the application site fell outside Tarlings' curtilage, and would thereby require the benefit of planning permission.

14. In November 2021, as the said development was proceeding regardless with the garage's footings dug and a concrete base laid, the Council saw it expedient to issue an enforcement notice requiring for the development's removal.

15. The appeals lodged are not claiming immunity from enforcement action due to the passage of time. There was no appeal under ground (d) lodged. Instead, the appellant considers that the piece of land at issue does constitute residential curtilage but, should it be shown otherwise, planning permission should be granted to retain the development, but limited only to the gravelled hardstanding.

The appeal on ground (c)

16. An appeal on ground (c) is that the matters referred to in the notice do not constitute a breach of planning control.

17. 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.

18. 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. This understanding was touched upon in the judgement of *Blackbushe Airport Ltd v*

R (on the application of Hants CC) and Others [2021] EWCA Civ 398, as cited by the appellant.

19. The case of *McAlpine v Secretary of State for the Environment* [1995] did not depart from the Dyer 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.

20. 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.

21. 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.

22. 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.

23. 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, *w*hether the evidence shows that, on the relevant date – in this instance, 23 November 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 23 November 2011.

24. 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.

25. The appellant considers that Class E still applies, and it is therefore essential that he should demonstrate, on the balance of probabilities, that the land is within 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.

26. Weighing all the evidence up, and the extent of Tarlings' identifiable garden immediately to the dwelling's rear I do not find that there is any particular intimate association between the dwelling and the pockets of land directly beyond the rear lawn. Although I do acknowledge that the land has/is being used as an extension to the garden – more so an outer garden.

27. As regards the actual planning unit involved the leading case in which this was defined is *Burdle v SSE* [1972]. 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 Tarlings is such a case in point.

28. In such instances the whole unit of occupation is the planning unit but I am satisfied here that the land beyond the dwelling's rear lawn cannot be seen as constituting residential curtilage. I note that the appellant is attempting to draw a distinction between the area of land the subject of the enforcement notice and the grassed area beyond, indicating that the latter was not necessarily curtilage. However, with reference to the Council's aerial photographic evidence, these pieces of land were, until 2016, as one, with a former access point having become overgrown and, certainly for vehicular purposes, had been effectively discontinued. To my mind no divide or distinction can be reasonably made. Nonetheless, when taking the land in its totality - including also the dwelling and its rear lawn - this can be considered as forming a single planning unit.

29. The planning position, as it now stands, is one for which the lines have been blurred. The claim that no boundary enclosure or physical demarcation existed is not determinative in itself. I find instead that in this instance the rear land's previous character and condition is the overriding consideration. Post clearance, the so called 'intimate relationship' between the dwelling and its curtilage remains, but this does not include the wider planning unit which I have described. I therefore conclude, on the basis of fact and degree, that the rear land did not previously form part of Tarlings' curtilage, and has not subsequently been subsumed into Tarlings' curtilage. The appellant's representations and the contents of the various statutory declarations have not persuaded me otherwise.

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

The appeal on ground (a) and the deemed planning application (DPA)

Main Issues

31. The site lies within the Metropolitan Green Belt. The main issues in this case are:

    1) whether the development is 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 its effect on the The Old Bakery, which is a Grade II listed building, and also Lower Stock Road, which is a Non-designated Heritage Asset (NDHA); 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

32. 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.

33. One of these relates to the replacement of a building, provided that the new building is in the same use and not materially larger than the one it replaces. In this regard the appellant makes reference to certain outbuildings, now demolished, that were located in the wooded area towards the rear of the site, whilst a caravan was previously sited on roughly the area of land where the garage base is now.

34. First and foremost, although the appellant's intention to erect a garage on the concrete base is clear the DPA only allows me to grant planning permission for the development which the enforcement notice specifically targets. This comprises the footings dug, the concrete base and the gravelled hardstanding which has been laid from the vehicle access point, extending into the land for the purposes of serving the intended garage. It also opens out to provide on-site vehicular circulation space. Accordingly, in the circumstances, I am unable to make a full assessment of the garage building shown on the drawing no 2878/16/E which was submitted with the unsuccessful LDC application (ref 21/00989/CLEUD).

35. Notwithstanding this, I have no firm knowledge as to a size comparison between the footprints of any of the previously existing outbuildings and the concrete base now enforced against. I am, though, able to compare and contrast the size of the footprint with that of both the dwellings, Tarlings and The Old Rectory. Compared to both the footprint of the intended garage would be substantial, and drawing no 2878/16/E, although not directly relevant to the DPA, does provide an indication of the impact of such a building in its contextual setting.

36. 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.

37. The document 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.

38. I therefore conclude that the development enforced against is inappropriate development which is 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. The degree of harm to openness resulting from the development enforced against is not to a substantial extent, but it would conflict with the aims and objectives of policies S11 and DM6 of the Chelmsford Local Plan (LP), and also relevant advice within the Framework.

Any other identified harm

39. I have a particular duty under Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to consider the desirability of preserving the listed building's setting, along with its features of special architectural and historic interest. On balance, having considered its attributes and proximity, the setting of the statutorily listed Old Bakery is not reasonably affected to any significant undue extent from the extent of the development enforced against. The targeted area is located beyond its rear boundary fence, and the gravelled area is a common feature for a driveway and is not so obtrusive as to cause significant adverse impact in this regard.

40. Lower Stock Road, a rural lane, has been categorised by the Council as a NDHA. The vehicular access leading into Tarlings is readily visible by persons passing along the lane but the point of access appears as a break in the lengthy hedgerow boundary. A degree of visual harm has occurred, but this is less than substantial, especially given that parking private vehicles within the site, rather than by the side of the relatively narrow Pynnings Farm Lane and Lower Stock Road, aids highway safety and represents a public benefit.

41. I therefore conclude that the proposed building would not be in material conflict with LP policies DM13 and DM14.

Planning balance

42. The vehicular access from Lower Stock Road has been reinstated and, it appears, significantly widened from its previous form. The enforcement notice, though, makes no mention of the access itself as constituting a particular breach of control and, given that off-street parking is reasonably required due to the impracticalities for such practice along both Pynnings Farm Lane and Lower Stock Road, I consider that the hard gravelled surface serves a clear and much needed planning purpose.

43. However, I am also mindful that, given the site's recent history, the likelihood is that a new application proposing a garage building on the land will follow. The appellant has referred to the intended building as a garage and store, and with reference to drawing no 2878/16/E (purely for indicative purposes) I consider that the building proposed, particularly due to the footprint shown, would represent a sizeable building in its contextual setting. Nonetheless, this is conjecture on my part and, in the event of any such application, is obviously without prejudice to any decision that the Council might reach.

44. That said, I do feel that the intended siting is preferable to the location of the approved garage which, given its close proximity to the common side boundary with The Old Bakery, would have implications for both the living conditions within and also its setting. In this respect the effects of the approved garage's access off Pynnings Farm Lane would, in my opinion, be more than that which might result from the access point off Lower Stock Road.

45. I am, therefore, proceeding on the basis that a compromise might be reached through negotiation between the main parties so that the matter might be resolved, which would also allow for vehicles currently parked on the hardstanding to be garaged. I conclude that very special circumstances have here been demonstrated to override the harm arising from the inappropriateness in this instance, albeit partially. On the basis I must conclude that the material considerations involved outweigh the policy objections.

46. This approach, is intrinsically linked to my decision to grant planning permission for the hard gravelled surface laid, whilst upholding the enforcement notice in respect of the intended garage's concrete base and its footings due to the size involved. It also means that the Council retains control of any such proposed development.

47. The appeal therefore succeeds in part, and planning permission is allowed in respect of the retention of the hard, gravelled surface, on the application deemed to have been made under section 177(5) of the 1990 Act as amended. Otherwise, planning permission is refused and the enforcement notice is upheld.

The appeal on ground (g)

48. Appeals on ground (g) are that the compliance period stipulated to comply with the enforcement notice's requirements is unreasonably short. The appellant has requested that the three months specified should be increased to six months.

49. Given my reasoning above, and on the basis that a planning application may follow I shall increase the compliance period to six months which would potentially allow for the Council to reach a decision in the event. Should the Council refuse permission on any such proposal an appeal might, of course, ensue which could delay compliance, but the Council do hold powers to extend the period. That again, though, would be a matter for the Council's discretion.

50. Finally, my decision does in no way preclude the Council from taking enforcement action, should the authority consider it expedient, in respect of any further unauthorised development that may occur in direct relation to this case.

Timothy C King

INSPECTOR