



Appeal Decision

Site visit made on 7 August 2023

by H Davies MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 06 September 2023

Appeal Ref: APP/P0119/X/22/3308729

31 Cavendish Road, Patchway, South Gloucestershire, BS34 5HL

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development.
 - The appeal is made by Mr Guiseppe Sutera against the decision of South Gloucestershire Council.
 - The application ref P22/04261/CLP, dated 29 July 2022, was refused by notice dated 9 September 2022.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is described as 'Proposed detached outbuilding'.
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Decision

1. The appeal is dismissed.

Application for Costs

2. An application for an award of costs was made by Mr Guiseppe Sutera against South Gloucestershire Council. The application is the subject of a separate decision.

Preliminary Matters

3. The application sought a certificate of lawfulness for a proposed development. The burden of proof rests with the appellant and the appropriate test of the evidence is the balance of probabilities. The planning merits of the proposed development are not relevant to this appeal.
4. The Council decision notice referred to the proposal as 'Erection of incidental outbuilding'. However, I have used the description of development taken from the application form.

Main Issue

5. The main issue is whether the Council's decision to refuse to grant certificate of lawful use or development (LDC) was well founded.

Reasons

6. 31 Cavendish Road is a two storey terraced dwelling. The proposed development, as set out in the submitted drawings, is a single storey detached building on land to the rear of No 31. The application sought to demonstrate that the proposed building would be development permitted by Article 3(1) Schedule 2 Part 1 Class E of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO).

7. Class E(a) of the GPDO permits the provision within the curtilage of a dwellinghouse, of any building required for a purpose incidental to the enjoyment of the dwellinghouse as such, subject to conditions and limitations. Under s191(4) and s192(2) of the Act, the relevant date for ascertaining whether the proposed development would be lawful, is the date of the LDC application. Therefore, for the proposal to be lawful, the site of the proposed building would need to be within the curtilage of the dwelling house at No 31, and the proposal would need to be capable of being instituted or begun, on the date the LDC application subject to this appeal was made.
8. At the time of the application and at the time of my visit, the site contained an existing building in the same approximate location, and of the same approximate dimensions, as the proposed building. The proposal states that this existing building would be demolished prior to the construction of the proposed building, but this has not yet taken place.
9. An enforcement notice was served on the site on 17 December 2019, in relation to the existing building. It alleged a breach of planning control consisting of the erection of a motor vehicle workshop. The notice required the demolition of the workshop building and restoring of the land to its condition before the breach took place. The notice was not appealed within the required timescale so came into effect on 18 January 2020. Issues with the notice that were alleged in the application do not impact on its validity. The notice has not been complied with and the workshop building remains on site.
10. Key to my consideration of this appeal is whether the proposed building could be said to be within the curtilage of the dwelling at No 31. There is no all-encompassing, definition of the term curtilage. The Technical Guidance¹ defines curtilage for Part 1 purposes as land which forms part and parcel with the house. Established case law² indicates that curtilage is generally considered to be an area of land with an intimate association with a building and must serve the building in some necessary and useful way, with regard to be had to physical layout, ownership and use. However, case law has also established that interpretation of the word curtilage is not a matter of law, but rather a judgment for the decision-maker, and a matter of fact and degree.
11. In their reasons for issuing the notice, and in their application report and appeal statement, the Council set out that the existing workshop building had been separated off from the residential garden of 31 Cavendish Road by fencing, and was being used as a motor vehicle workshop, with no physical or functional link to the dwelling. The appellant concedes that the workshop building was used for purposes that were not incidental to the dwelling and that this resulted in physical and functional separation of the site. The appellant asserts this was a brief interruption that did not change the lawful status of the garden land but has provided no evidence to support this assertion.
12. During my site visit I noted that any fence separating the amenity space for No 31 from the existing workshop building had been removed. However, as set out above, the relevant date on which lawfulness must be demonstrated is the date of the LDC application and the burden of proof rests with the appellant.

¹ Permitted Development Rights for Householders: Technical Guidance, September 2019.

² *Methuen-Campbell v Walters* [1979] 1 QB 525; *HM Attorney-General ex rel Sutcliffe & Rouse & Hughes v Calderdale BC* [1983] JPL 310; *Dyer v Dorset CC* [1988] 3 WLR 213; *Mc Alpine v SSE* [1995] JPL B43A; *Burford v SSSLG & Test Valley BC* [2017] EWHC 1493 (Admin); *Hampshire CC & the Open Spaces Society & Others v SSEFRA & Blackbushe Airport Ltd* [2020] EWHC 959 (Admin), [2021] EWCA 398, [2020] JPL 1359.

13. The appellant has not presented clear or convincing evidence that on the date of the LDC application, the land on which the proposed new building would be sited had an intimate association with the dwelling at No 31 or served it in any way. I find that the existence of the workshop building and the physical separation between it and the dwelling would have prevented this from being the case. Consequently, in my judgement, as a matter of fact and degree, the land where the proposed building would be sited could not be considered to be within the curtilage of a dwellinghouse, so the building could not benefit from permitted development rights under Schedule 2 Part 1 Class E of the GPDO. Therefore, at the time of the application, the proposed building would have been development, without permitted development rights or planning permission, so could not be lawful.
14. In addition to issues in relation to curtilage, on the date the application was made, there was an existing building on the site, subject to an enforcement notice which had not been complied with. Regardless of the definition set out under s56 of the Act, it would not have been possible on that date for the proposed building to have been instituted or begun, as the existing unlawful building would have prevented this.
15. I conclude that on the balance of probability, taking the evidence as a whole, the appellant has not demonstrated that the proposed building would have been lawful if instituted or begun on the date the application was made.

Other Matters

16. The parties disagree about whether the proposed building would comply with the height limitations set out under Schedule 2 Part 1 Class E of the GPDO, as there are questions about whether ground level has been raised. They also disagree about whether the proposed building would be of a size that could be said to be reasonably required for purposes incidental to the enjoyment of the dwellinghouse. However, as set out above, I have found that the proposed building could not be lawful at the time of the LDC application subject to this appeal. It is therefore not necessary for me to reach a conclusion on other matters, which would not alter the outcome of this appeal.
17. The Council make reference to case law and an appeal in their statement of case. I do not consider it unusual or unreasonable to refer to such matters in an appeal statement and the appellant has had the opportunity to respond to any matters raised.

Conclusion

18. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a proposed detached outbuilding was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

H Davies

INSPECTOR