



Appeal Decision

Site visit made on 7 February 2023

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 1st November 2023

Appeal Ref: APP/C2741/X/22/3297054

Cherry Tree Cottage, Millfield Lane, Nether Poppleton, York YO26 6NX

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Martin Reynolds against the decision of City of York Council.
- The application ref: 20/01601/CPU, dated 25 August 2020, was refused by notice dated 6 April 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 'We would like to define what is garden land within the curtilage of our property. We would like to replace a railway carriage with a willow craft and wood workshop with lean-to wood and log store in area 1. We would like to build a poultry shed in area 2 to replace 2 old poultry sheds currently situated in area 4 (Confirmed as not within our curtilage). We would like to site a new potting shed 8x6ft in our vegetable garden in area 3. In addition we would like to build a more secure fence around our property as have had several break ins and had property stolen over the years. This will be located around the area, or areas of our garden deemed to be within our curtilage, and would be constructed to dimensions that are allowed under class E of the GPDO 2015. In addition we would also like to build (pending finances in the future), a swimming pool of approx 10x5m in front of the summer house. This would be located within the area currently used as our badminton court. Further information, dimensions and plans are submitted with this application and can be found via the index page.'

Decision

1. The appeal is dismissed.

Procedural Matters

2. The appeal was made in the name of Mr Martin Reynolds, Mr and Mrs Reynolds. It was later confirmed that the appeal would proceed in the name stated on the application form, Mr Martin Reynolds.
3. The description of the proposal in the application form for which the Lawful Development Certificate (LDC) is sought includes both the carrying out of building or other operations, and a change of use of the land or building(s). However, the proposed 'change of use' relates to the appellant's desire to establish which areas of his land are considered to be within the curtilage of the appeal property, see below. Curtilage is an area of land in relation to a building and is not a use of land. Additionally, having regard to the amended description of the proposal as set out below, it is evident that the proposal concerns the carrying out of building or other operations. I therefore consider

that the application is properly described as being made under section 192(1)(b) of the 1990 Act as amended.

4. The description of the proposal relating to the carrying out of building or other operations set out in the heading above is taken from the application form. During the determination of the application the poultry shed was removed from the proposal¹. The description used by the Council in the decision notice and on which it determined the application is 'Certificate of lawfulness of proposed development comprising: removal of existing railway carriage; erection of workshop/woodstore, potting shed and boundary fencing and construction of swimming pool.' This is very similar to that used by the appellant in the appeal statement, namely, 'Proposed development comprising, removal of existing railway carriage, erection of workshop/woodstore, potting shed, boundary fencing and swimming pool.'
5. The 'removal of the existing railway carriage' does not constitute development for the purposes of section 55 of the 1990 Act as amended. Subject to the deletion of this element, I consider that 'erection of workshop/woodstore, potting shed and boundary fencing and construction of swimming pool' is a more accurate and concise description of the proposal and I have determined the appeal on this basis. I am satisfied that, in doing so, no injustice would be caused to the parties.
6. The appellant has requested that the appeal identifies the land which should be considered as the curtilage of Cherry Tree Cottage. However, an application under section 192(1)(b) of the 1990 Act as amended is to ascertain whether, on the relevant date, any operations proposed to be carried out in, on, over or under land, would be lawful. As such, the categorisation of the extent of the property's curtilage is not within the scope of the appeal before me. Moreover, to do so would fetter any future judgments of the Council.
7. The appellant cites the grant by the Council of an LDC² relating to the replacement of the existing garage with a wider side extension to the house that would extend into Area 1 by approximately 2m. However, this LDC has not been submitted and, from the limited information provided, it appears to relate to a different Class under Part 1 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). For these reasons I have not taken it into account in my determination of this appeal.

Main Issue

8. Section 192(2) of the 1990 Act as amended indicates that if, on an application under that section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or began at the time of the application, they shall issue a certificate to that effect. In any other case they shall refuse the application.
9. An LDC is not the equivalent, in law, of a planning permission. The onus is on the applicant/appellant to demonstrate on the balance of probabilities that the proposed development would be lawful. The planning merits of the matters applied for are not relevant. As such, my decision rests on the facts of the

¹ Email from appellant dated 23 March and confirmed in the Council's Officer Report.

² Application Ref: 21/00766/CPD.

case, which includes the outcome of the previous appeal on the site³, and relevant planning law.

10. The main issue is whether the Council's decision to refuse to grant an LDC was well founded. This turns on whether the appellant has demonstrated on the balance of probabilities that the proposed erection of workshop/woodstore, potting shed and boundary fencing and construction of swimming pool would constitute permitted development by virtue of the provisions of the GPDO and would therefore be lawful.

Reasons

11. Article 3(1) of the GPDO grants planning permission for the classes of development set out in Schedule 2 to the Order. It includes, at Part 1, Class E(a), The provision within the curtilage of the dwellinghouse of- (a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such, or the maintenance, improvement or other alteration of such a building or enclosure. This provision is subject to prescribed restrictions set out in E.1, E.2 and E.3 and the interpretation in E.4.
12. The proposed development comprises the erection of a workshop/woodstore 6.5m x 5.8m x 3.5m; erection of a potting shed 2.5m x 1.9m; construction of a swimming pool 10m x 5m; erection of fencing 1.8m tall⁴; and erection of fencing 1.4m or 1.0m tall⁵. In this regard, the appellant has submitted a number of plans showing the locations of the proposed development and a drawing of the workshop/woodstore.
13. The Council's reason for refusal of the LDC was that 'on a balance of probability, the proposed workshop, potting shed and swimming pool would be located on land outside the curtilage of the dwelling identified as Cherry Tree Cottage.' It does not specifically reference the proposed boundary fencing. I deal with this matter later in my decision.
14. In its evidence the Council has not advanced that the workshop/woodstore, potting shed and swimming pool would not meet the restrictions and interpretation of Class E and, from the evidence before me, I find no reason to take a different view. Therefore, the crux of the dispute between the parties concerning these elements of the proposed development is whether or not they would, on the date of the application⁶, be erected on land within the curtilage of Cherry Tree Cottage and would therefore be lawful.
15. The GPDO does not interpret the term 'curtilage' and there is no all-encompassing, authoritative definition. The Permitted Development Rights for Householders: Technical Guidance (2019) defines 'curtilage' for 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.'

³ Appeal Ref: APP/C2741/X/19/3233177 Decision Date: 7 April 2020.

⁴ The Council's Officer Report states 1.4m, but plan 2d states 1.8m.

⁵ The Council's Officer Report states 1.4m, but plan 2d states 1.4m or 1.0m

⁶ 25 August 2020 as taken from the application form.

16. The Courts have often addressed the meaning of 'curtilage'. The most recent is the *Blackbushe*⁷ judgment of the Court of Appeal, which is cited by both parties in their evidence. At paragraphs 25 and 26, Andrews LJ states that 'the curtilage of a building is a single concept, and...it does not have different meanings in different statutory contexts. There is in truth only one test, and that is the test articulated by Buckley LJ in *Methuen-Campbell*⁸.... The question whether the test is satisfied in any given case will depend on the facts and circumstances of that case.....The ambit (or physical extent) of the curtilage of a building in any given case will be a question of fact and degree.'
17. The test in *Methuen-Campbell* is cited at paragraph 61 of *Blackbushe*: 'In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter.' Andrews LJ goes on to state at paragraph 62 that 'this is as good an expression of the concept of curtilage as one is likely to find.'
18. As part of *Blackbushe* a number of other judgments on the matter of curtilage are extensively reviewed, including *Dyer*⁹, *Calderdale*¹⁰, *Skerritts*¹¹ and *Challenge Fencing*¹², to which I have had regard. I also note the findings of the additional caselaw of *Hampshire*¹³; *Burford*¹⁴; *Sumption*¹⁵; *Lowe*¹⁶ and *Sinclair-Lockhart's Trustees*¹⁷, cited by the appellant.
19. As stated at paragraph 116 of *Blackbushe* 'the conclusion to be drawn from the authorities is that they all illustrate different applications of the same test to the facts and circumstances of the specific cases. They demonstrate that the curtilage in a given case is a question of fact and degree....' As such, any determination is primarily a matter for the decision maker, taking into account the relevant considerations.
20. In that regard, the relevant date is the date of the application. Additionally, relevant considerations in any assessment include the physical layout, ownership, and use or function of the building and land, past and present. As such, I recognise that it is possible for the extent of curtilage to change over time. Cognisant of the most recent caselaw, central to any determination is that the land must be **so intimately associated with** the building, that it forms **part and parcel of** the building (my emphasis). I have approached the determination of the appeal on this basis and given careful consideration to the comprehensive evidence put forward by the appellant in support of his case.
21. The appellant has submitted a plan identifying the land upon which the proposed development would be sited, divided into four areas¹⁸. I reference Areas 1, 2, 3 and 4 in my reasoning.

⁷ *Hampshire CC & the Open Spaces Society & Others v SSEFRA & Blackbushe Airport Ltd* [2020] EWHC 959 (Admin), [2021] EWCA 398, [2020] JPL 1359.

⁸ *Methuen-Campbell v Walters* [1979] 2 QB 525.

⁹ *Dyer v Dorset County Council* [1989] 1 QB 346.

¹⁰ *Attorney-General ex rel Sutcliffe v Calderdale BC* (1983) 46 P&CR 399.

¹¹ *Skerritts of Nottingham Ltd v SSETR* [2001] QB 59.

¹² *Challenge Fencing Ltd v SSHCLG* [2019] EWHC 553 (Admin).

¹³ *Hampshire County Council v SSEFRA* 2020 EWHC 959.

¹⁴ *Burford v SSCLG & Test Valley BC* [2017] EWHC 1493 (Admin).

¹⁵ *Sumption & Sumption v London Borough of Greenwich* 2007 EWHC 2776.

¹⁶ *Lowe v First Secretary of State* 2003 EWHC 537.

¹⁷ *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195.

¹⁸ Map 2b - Location Map Identifying LDC garden areas for Cherry Tree Cottage.

22. Cherry Tree Cottage is a two-storey, semi-detached, residential property. It is located in a mainly rural area within the Green Belt. The land upon which Cherry Tree Cottage and the adjoining Laxton Cottage were built in the 1950s was divided and sold off from land relating to Cherry Tree Farm. The submitted evidence illustrates that when built, Cherry Tree Cottage was set back from the main road with a modest space to the front and linear garden to the rear which, it is common ground between the parties, formed the property's original curtilage¹⁹.
23. The appellant purchased Cherry Tree Cottage in 1995. He then bought the adjoining parcel of land in 1996 that forms Area 1 which was associated with Cherry Tree Farm and stated by the appellant to have not been used for agricultural purposes for over 50 years. Area 1 was granted an LDC in 2019²⁰ confirming that its use as a residential garden and for commercial storage was lawful due to the time elapsed since the start of continuous use for those purposes. The appellant purchased the land which forms Areas 2, 3 and 4 in 2005, adjoining the original curtilage and Area 1 and extending them to the south west. The submitted evidence confirms that the use of this land over the years has included a vegetable garden, grassed area and poultry run.
24. I observed on my site visit that Areas 1 and 2 and part of 4 comprised close mown grass with mature trees and areas of planting, all possessing a well-maintained appearance. This area also contained a brick storage building²¹, railway carriage, a metal storage container and a timber summerhouse. Area 3 possessed a post and rail fence enclosing an area of established raised beds and a greenhouse. The part of Area 4 which adjoins Area 3 comprised raised ground which was bordered by a combination of a small timber shed, chicken run and timber fences.
25. I note the outcome of the previous appeal on this site which concluded that the land on which a proposed poultry shed/store was to be erected within Area 4²² did not fall within the curtilage of Cherry Tree Cottage. Additionally, no development is proposed to be located within Areas 2 and 4 as part of this appeal apart from 1.8m boundary fencing which I assess below. I have therefore focused my considerations on Areas 1 and 3 and the land on which the proposed workshop/woodstore, potting shed and swimming pool would be located.
26. The appellant's evidence confirms that at the date of the application he had owned Areas 1 and 3 for a considerable number of years prior to the application. Moreover, even though Area 1 is the only area which possesses an LDC as being in use as a residential garden, the Council in its Officer Report accept that, 'on a balance of probability, the land appears to have been used as residential garden for a continuous period of ten years prior to the application being submitted.'
27. I accept that Areas 1 and 3 possess the characteristics of a residential garden and are used for purposes incidental to the enjoyment of the dwelling house, providing amenity space, storage space/buildings and a vegetable garden. I also acknowledge that they adjoin the original curtilage of Cherry Tree Cottage

¹⁹ As marked out and annotated on 1931 Ordnance Survey Map.

²⁰ Application ref. 18/02660/CLU. Certificate of lawfulness for use of land as residential garden and parking with 1no. brick building for storage. Certificate granted.

²¹ Benefiting from the LDC Application ref. 18/02660/CLU.

²² Area 2 in that application (Ref: 19/00880/CPD) and appeal (Ref: APP/C2741/X/19/3233177).

- and that, as indicated in *Dyer* and *Skerritts*, curtilage does not need to be confined to a small area.
28. Nevertheless, although the use of land can be relevant to the consideration of curtilage, they are still distinct concepts. The use of more land for garden related purposes, than may previously have been the case, does not automatically serve to bring that land within the curtilage of the dwelling. Furthermore, as found in *Challenge Fencing*, in terms of the considerations of layout and function, proportionality may be relevant.
29. It is reasonable to conclude that the size of the original curtilage to Cherry Tree Cottage, as shown on the submitted plans, was proportionate to the needs and function of this moderately sized semi-detached property. Conversely, taken together, Areas 1 and 3 form an expansive area. I am not persuaded that the size of the land and its useful function in relation to Cherry Tree Cottage are proportionate to the size and function of the property.
30. Whilst this factor may not be definitive in its own right, the 'test' reiterated in *Blackbushe* from *Methuen-Campbell* raises the important question of the degree of 'association' that the land in Area 1 where the proposed workshop/wood store and swimming pool would be located and the land in Area 3 where the proposed potting shed would be located, have with Cherry Tree Cottage. The spatial and visual separation of these locations from the dwelling, weakens their actual and perceived relationship with the property. This disconnect is slightly enhanced in Area 3 by the presence of post and rail fencing bordering the space.
31. I do not dispute that, in terms of physical layout, ownership, and use or function, there is a degree of connection between the land in Areas 1 and 3 where the proposed workshop/wood store, swimming pool and potting shed would be located, and Cherry Tree Cottage. However, in my judgment and fatally for the appeal, I find that this association is not of such a close acquaintance or at such an intimate level that these pieces of land form part and parcel of the dwelling.
32. Consequently, taking a reasonable view, as a matter of fact and degree, at the date of the application the proposed workshop/wood store, swimming pool and potting shed would not be erected on land which falls within the curtilage of Cherry Tree Cottage.
33. Turning to the proposed boundary fencing. The LDC application form includes reference to 'a more secure fence around our property' which would 'be located around the area, or areas of our garden deemed to be within our curtilage, and would be constructed to dimensions that are allowed under class E of the GPDO', that is, of Part 1 of Schedule 2.
34. However, whilst Class E(a) of Part 1 of Schedule 2 includes the provision within the curtilage of the dwellinghouse of 'any enclosure', in my judgement, the relevant part of the GPDO against which to assess the proposed boundary fencing is Class A, of Part 2 of Schedule 2 which concerns Minor operations – gates, fences, walls etc.
35. Class A of Part 2 of Schedule 2 of the GPDO allows for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure, subject to certain restrictions and interpretations.

Plan 2d²³ illustrates the location of the proposed fencing. The 1.4m or 1.0m tall fencing would border a section of Area 1 at the front of Cherry Tree Cottage and facing a highway, and the 1.8m tall fencing would border part of Areas 2 and 3 at the rear.

36. The provision of a 1m tall fence to the front of the property facing a highway would meet the restrictions set out in Class A.1(a)(ii). However, I note that on the plan the appellant has stated a height of 1.4m **or** 1.0m (my emphasis). This is not sufficiently precise or unambiguous in terms of what is proposed to allow an exact assessment of this element. Therefore, as a matter of fact and degree, I am unable to conclude that this section of boundary fencing would be one that complies with Class A of Part 2 of Schedule 2 of the GPDO and thus lawful at the date of the application.
37. The provision of a 1.8m tall fence to the rear of the property would meet the restrictions of Class A.1(b). However, given its location and extent, of itself, this section of fencing would not form what could reasonably be described as an 'enclosure'²⁴ around any of Areas 1, 2, 3 or 4, or the site as a whole. Therefore, as a matter of fact and degree, I am unable to conclude that this section of boundary fencing would be one that complies with Class A of Part 2 of Schedule 2 of the GPDO and thus lawful at the date of the application.
38. I accept that the previous appeal decision determined that the site of the proposed garage would fall within the curtilage of Cherry Tree Cottage. However, that land is immediately adjacent to the original curtilage of the property. Moreover, the decision was made prior to the most recent caselaw, and the Inspector acknowledges that the decision does not mean that all of the appeal land, which has been subsequently purchased by the appellant, now forms part of the curtilage of Cherry Tree Cottage.
39. As set out above, whether something falls within the curtilage of a dwellinghouse depends on a number of different factors. Therefore, that there may be similar properties in the area with large gardens has little weight in my consideration of this appeal.
40. Drawing the above together, the submitted evidence does not demonstrate, on the balance of probabilities that, at the date of the application, the proposed development would constitute permitted development by virtue of the provisions of the GPDO and would therefore be lawful.

Conclusion

41. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the erection of workshop/woodstore, potting shed and boundary fencing and construction of swimming pool 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.

F Cullen

INSPECTOR

²³ Plan 2d Location of Proposed Fences and Swimming Pool.

²⁴ Ordinary definition - A barrier that surrounds an area.