



Appeal Decision

Site visit made on 11 December 2023

by H Davies MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 January 2024

Appeal Ref: APP/F0114/X/23/3326454

Leigh Cottage, Sharpstone, Freshford, Bath BA2 7UA

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (the Act) against a refusal to grant a certificate of lawful use or development.
 - The appeal is made by Ms & Mr Katharine & Robert Pottinger & Kilgour against the decision of Bath and North East Somerset Council.
 - The application ref 22/03581/CLPU, dated 8 September 2022, was refused in part, by notice dated 8 March 2023.
 - The application was made under section 192(1)(b) the Act 1990.
 - The development for which a certificate of lawful use or development is sought is the proposed erection of outbuilding and alterations to existing fenestration.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. Section 193(4) of the Act provides that a certificate of lawful use or development (LDC) may be issued for the whole or part of the land specified in the application, and, where the application specifies two or more uses, operations or other matters, for all of them, or one or more of them. Application 22/03581/CLPU relates to two distinct proposed operations, on which the Council reached a split decision. The Council concluded that the proposed alterations to existing fenestration would be lawful, but that the erection of an outbuilding would not be lawful. They issued an LDC accordingly. Consequently, this appeal relates only to the proposed erection of an outbuilding, for which the Council refused to issue an LDC.
3. The onus is on the appellant to make their case to the standard of the balance of probabilities, or whether something is more likely than not. Issues of planning merit are not relevant. 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.

Main Issue

4. The main issue is whether the Council's decision to refuse to grant an LDC for the proposed erection of an outbuilding was well founded.

Reasons

5. Leigh Cottage is a two-storey detached dwelling located on a hillside. There is an associated area of land at the same level as the dwelling, with a further area of land at a lower level. The proposed development, as set out in the submitted drawings, is for an outbuilding to be located on the lower land.

6. The application sought to demonstrate that the proposed outbuilding 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). Class E 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.
7. The Council accepts that the development would be for a purpose incidental to the enjoyment of the dwellinghouse as such. They also accept that the dimensions of the proposed outbuilding would meet the criteria listed at E.1, E.2 and E.3 of Class E, in so far as they are relevant. Having considered the submitted plans, I have no reason to disagree and I do not need to consider these matters further.
8. Therefore, the matter which remains in contention is whether the proposed location is within the curtilage. For the proposal to be lawful, the land on which the proposed outbuilding would be sited, must be within the curtilage of the dwellinghouse at Leigh Cottage.
9. There is no all-encompassing, definition of the term curtilage. The Technical Guidance¹ defines curtilage for Schedule 2, Part 1 purposes as land which forms part and parcel with the house. Established case law² indicates that to support a conclusion that land forms part and parcel of the dwelling, and hence falls within the curtilage, an area of land must be intimately associated with the dwelling and must serve it in some necessary or reasonably useful way. Regard must be had to physical layout, ownership and use (past and present). Physical enclosure is not necessary, but the degree to which the area falls within one enclosure is relevant as an aspect of the test of physical layout. The size of the curtilage relative to the dwelling may be relevant, but it is not determinative and need not be confined to a small area.
10. Despite providing the above considerations, case law has also established that interpretation of the word curtilage is not a matter of law. Rather it is a judgment for the decision-maker, and a matter of fact and degree.
11. The dwelling is set just below road level and has an area of relatively flat, well maintained land used as garden³ (subsequently referred to as the garden) adjoining it. The garden is predominantly mowed grass, with shrubs in borders and some modest trees along the road boundary. This area of garden is bounded to the northwest by a stone wall to the road. To the northeast, a section of wall separates the garden from neighbouring land. The eastern and southern edge of this area of garden is defined by a retaining wall. The retaining wall projects only a small amount above the level of the garden, with a drop of around a metre and a half beyond it.
12. The stone wall which forms the boundary with the road wraps around to meet one side of the dwelling and has an opening which provides vehicle access from

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

² Sinclair-Lockhart's Trustees v Central Land Board [1950] 1 P&CR 195; 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; Skerritts of Nottingham Ltd v SSETR (No.1) [2000] EWCA Civ 60; Burford v SSCLG & Test Valley BC [2017] EWHC 1493 (Admin); Challenge Fencing Ltd v SSCLG & Elmbridge BC [2019] EWHC 553; Hampshire CC v SSEFRA & Blackbushe Airport Ltd [2021] EWCA 398; Hiley v The Secretary of State for Levelling Up, Housing and Communities & Anor [2022] EWHC 1289 (Admin).

³ There is no dispute that this area is used as garden and is within the curtilage.

the road to the dwelling. This wall forms a clear and defined boundary. Just beyond this boundary is a separate access point to a path which runs along the side of the dwelling. A short way along, this path splits to lead to other parcels of land. The path then follows the line of the retaining wall, in a narrow strip bounded on the other side by a hedge on neighbouring land. The path provides access to the area of land where it is proposed to site the outbuilding (henceforth referred to as 'the land').

13. The land is at a lower level than the area of garden adjacent to the house. From the path at the base of the retaining wall, it slopes down steeply, with a few small terraces, the first of which is accessed by stone steps and contains a modest shed. At the time of my visit, the land appeared unmaintained. The land is bounded by the retaining wall along one edge, with open post and rail fencing and vegetation along the other edges.
14. In terms of physical layout, the land is accessed separately to the dwelling and garden. To get from the dwelling to the land it is necessary to pass through the clear and well defined boundary of the stone wall to the front, pass along the side of the house on a section of shared path, and then follow the path within the site to the land. Contrary to the claims in the appellant statement, there is no direct stepped access from the land to the garden above. Access other than via the path would involve climbing up the sheer retaining wall.
15. Physical enclosure is not an essential element of determining the extent of the curtilage, but it is part of the consideration of physical layout. The extent of the dwelling and garden are clearly defined by stone walls which enclose it on all sides. I acknowledge that one of those walls is a retaining wall, which when viewed from the garden does not provide much visual enclosure. Despite this, due to the height of the retaining wall, and the drop from the garden to the land beyond, in practice the retaining wall provides a clear and distinct physical barrier which I consider to be part of the enclosure around the dwelling and garden. Contrary to the claims in the appellant statement, the stone wall which divides the side of the garden from neighbouring land does not extend down beyond the retaining wall. The retaining wall provides a clear and distinct division between the garden and the land on which the outbuilding is proposed. By contrast, the land is divided from plots beyond it only in an open and informal way.
16. Size is also a relevant part of considering physical layout. The size of the garden and the land together is not excessive by comparison to the house. I do not consider size to weigh either for or against the proposal in this case.
17. I acknowledge that due to the hillside location, terracing is a common feature in the area. Notwithstanding this, the physical layout, including the means of enclosure, indicate that while the garden is intimately associated with the dwelling, the land beyond it is not. I have reached this conclusion based on an overall assessment of the factors and not simply because the land is at a lower level than the dwelling and garden.
18. I have no reason to question that the land is in the same ownership as the dwelling, but this does not mean that it is automatically considered to be within the curtilage. In terms of the use of the land, it contains a shed which the appellant says is used for domestic storage and garden tools. From my site visit and the submitted evidence I have nothing to back up the appellant claim that the land is used for growing flowers and vegetables.

19. Other than the shed (for which I have no planning history) it does not seem that the land is used with any frequency or serves the dwelling in any necessary way. In my assessment, the fact that the land is in the same ownership and does serve the dwelling in some modest way, does not outweigh the significant issues identified regarding physical layout.
20. In summary, while in the same ownership, there is no direct access from the dwelling and garden to the land on which the outbuilding would be sited. The land is outside of the stone walls which clearly define the limits of the dwelling and garden. The way in which the land is used is materially different to the rest of the site. Therefore, having considered all relevant factors, on balance, I find that while the land may serve the dwelling in some modest way, it is not intimately associated with it.
21. The appellant has not presented clear or convincing evidence that on the date of the LDC application, the land on which the proposed outbuilding would be sited could be considered to be part and parcel with the house. 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 the dwellinghouse, so the proposed outbuilding 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 outbuilding would have been development, without permitted development rights or planning permission, so could not be lawful.

Other Matters

22. During my site visit I noted a range of structures on neighbouring plots. I have not been presented with information on their planning history. As this appeal relates to an LDC, planning merits and any precedent are not up for consideration.
23. The submission make reference to an application for planning permission at nearby Sharpstone House. A planning application is fundamentally different to an application for an LDC, so it has no direct relevance to this appeal. I am informed that a site location plan provided with a previous application did not encompass the access path or the land where the outbuilding is proposed. This is not determinative of what is or is not curtilage. In my analysis, the Council made their decision based on the available facts and their reasoning was guided by appropriate case law.

Conclusion

24. 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. For the reasons given, the Council's refusal to grant an LDC for the proposed erection of an outbuilding was well-founded and the appeal fails. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

H Davies

INSPECTOR