



Appeal Decision

Site visit made on 7 October 2024

by A Walker MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 October 2024

Appeal Ref: APP/R0660/X/24/3339764

Penn House, Altrincham Road, Wilmslow, Cheshire East SK9 4LY

- 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 (LDC).
 - The appeal is made by Mr Syed Maududi against the decision of Cheshire East Council.
 - The application ref 23/4677M, dated 11 December 2023, was refused by notice dated 6 February 2024.
 - 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 the erection of outbuilding to be used ancillary to the main dwellinghouse.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of the development as set out in the LDC application form is the 'erection of outbuilding to be used ancillary to the main dwellinghouse'. Whilst the terms 'ancillary' and 'incidental' are often used interchangeably, they are distinctly different. An incidental use is one which is functionally related to the primary use. By definition, an incidental use cannot be one that is integral to or part and parcel of the primary use. An ancillary building is typically used as an extension of the primary use. For example, an outbuilding within the same planning unit as the dwellinghouse in use for the provision of additional living space.
3. Therefore, I have determined the appeal on the basis that an LDC is sought for a building required for purposes incidental to the dwellinghouse, not an ancillary building. This is clearly the basis on which the appellant makes their case and on which the Council determined the application.

Main Issue

4. The main issue is whether the Council's decision to refuse to grant an LDC is well-founded.

Reasons

5. There is no dispute between the parties that the proposed building would meet the conditions and limitations set out in paragraph E.1, Class E, Part 1 of Schedule 2 of the Town and Country (General Permitted Development) (England) Order 2015 (the GPDO). The matters in dispute between the parties are whether the proposed outbuilding would be located within the

curtilage of the dwellinghouse and, if so, whether it would be required for a purpose incidental to the enjoyment of the dwellinghouse.

Curtilage

6. Curtilage is not defined within the GPDO. However, it is not a use of land but an area delineated through its physical association with a building. I have been referred to various case law on the matter of curtilage. In the case of *Burford*¹ the three tests laid down by Stephenson LJ² were affirmed and applied. The judge identified relevant factors to be '(i) the physical layout of the building and structure; (ii) the ownership past and present and (iii) the use or function of the land or buildings, past and present'. In *Lowe*³ v SoS [2003] EWHC 537 Admin curtilage 'connotes a building or piece of land attached to a dwellinghouse and forming one enclosure with it. It is not restricted in size, but it must fairly be described as being part of the enclosure of the house to which it refers'. The test is whether the land is so intimately associated with a building that the land forms part and parcel of the building.
7. The appeal site comprises a large, two-storey dwelling with a large, detached garage and smaller outbuilding set within extensive grounds. In 2023, an LDC was granted for the northern area of the site for use as a domestic garden ancillary to the main dwellinghouse at Penn House⁴. Therefore, there is no dispute that the lawful use of the land within which the buildings sit, including the area to the north of the buildings, is domestic garden associated with Penn House.
8. The Council correctly identify that curtilage is not a use of land; it is a legal concept. However, they misdirect themselves by saying 'If a planning application does not confirm the increase in curtilage, then the curtilage remains the same as the original.' This is not the case, as evidenced in the extensive caselaw on the matter. Curtilage can change over time and is not reliant upon planning permission defining it. As it is not a use of land, there is no period of immunity for curtilage.
9. The Council's case on the matter of whether or not the northern area of the appeal site forms part of the curtilage of Penn House is based on the historical maps for the property. The Tithe Map and 1910 map clearly show the area of land in question separated from the southern part of the site by a black line. The 1971-73 aerial photograph appears to show some sort of physical boundary, perhaps a hedge, separating the two areas of land. The 1999-2003 aerial photograph is less clear as to whether they are physically separate.
10. The details of the LDC for the use of the land as domestic garden associated with Penn House are not before me. However, by reason that the Council granted the certificate, they must have been satisfied that the land was in use as a domestic garden associated with Penn House for at least 10 years prior to the date of the application of the LDC. Therefore, for the lawful use of the land to be domestic garden associated with Penn House there is evidently a functional link between the two.

¹ *Burford v Secretary of State for Communities and Local Government & Anor* [2017] EWHC 1490

² *HM Attorney-General ex rel Sutcliffe & Rouse & Hughes v Calderdale BC* [1983] JPL 310

³ *Lowe v SoS* [2003] EWHC 537 Admin

⁴ Council ref: 22/3629M

11. During my site visit, I observed the land in question was contiguous with the remaining garden of Penn House. It was mainly lawned and there was no physical boundary with the southern area of land. They were clearly read as one area of land. The land is located directly to the rear of Penn House and is now clearly read as part of its garden and forming one single enclosure with it, despite it historically being separate.
12. Overall, I find the use or function of the land has been associated with the dwellinghouse for many years. The two areas of land have fallen within the same ownership for a significant period. Although large in size, this is not indicative that the land falls outside of the curtilage in this instance. Therefore, I am satisfied that, as a matter of fact and degree, the land is within the curtilage of the dwellinghouse for Class E, Part 1 purposes.

Incidental use

13. Permitted development rights under Class E extend only to buildings required for a purpose incidental to the enjoyment of the dwellinghouse. The functional relationship with the dwellinghouse should be one that is normally found and not based on the personal choice of the user. Whether a building is required for an incidental purpose will depend on a fact and degree assessment.
14. *Emin v SSE & mid Sussex DC* [1989] JPL 909 established that regard should be had not only to the use to which the Class E building would be put, but also to the nature and scale of that use in the context of whether it was a purpose incidental to the enjoyment of the dwellinghouse. The physical size of the building in comparison to the dwellinghouse might be part of that assessment but is not by itself conclusive. It is necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwelling and answer the question as to whether the proposed building is genuinely and reasonably required in order to accommodate the proposed use or activity and thus achieve that purpose. The use of the building should be subordinate to the use of the house as a dwellinghouse.
15. It is a requirement of paragraph E.(a), Class E of the GPDO that the proposed development should be "required for a purpose incidental to the enjoyment of the dwellinghouse as such". The word "required" should be interpreted as genuinely and reasonably required or necessary in order to accommodate the proposed use or activity. The burden of proof in such matters is upon the appellant to show that the proposal is genuinely and reasonably required.
16. The Council contend that the footprint of the proposed building would be approximately 97% of that of the dwelling. However, size alone is not decisive. In assessing whether the building is genuinely and reasonably required for incidental purposes it is necessary to apply objective reasonableness in consideration of all the relevant facts and circumstances.
17. A gym, sauna, shower room, office and entertainment room could all be considered incidental uses to the enjoyment of the dwellinghouse. The office would be large enough to accommodate a desk, chair, office equipment etc that would be expected to be found in a home office. There is no dispute that its size would be unreasonable. Similarly, the sauna and shower room would also be reasonable in size.

18. However, the drawings indicate the gym would contain four items of gym equipment, with an expanse of space between and around them. There is no evidence why such a large floorspace is required for only four items of equipment.
19. With regard to the entertainment room, the drawings indicate that it would contain a snooker table, two chairs and a large corner sofa. Around these items is a substantial expanse of empty floor space. I note the Council's argument that the entertainment room should be regarded as a lounge and therefore would not be an incidental use as it would form part of the primary use of the dwelling. However, the inclusion of a snooker table in the room would result in it being more than simply a lounge. Nevertheless, the substantial size of the room would not be reasonably required to accommodate a couple of chairs, a snooker table and a corner sofa.
20. The appellant argues the size of the building and the uses within it are comparable to a building for incidental purposes that was allowed on appeal⁵. Whilst I do not have the details before me of what evidence was presented to the Inspector determining that appeal, Class E states '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.' The reference to uses incidental to *the* dwellinghouse, not *a* dwellinghouse, highlights that each case must be determined on its own circumstances in the context of its host dwelling. Whilst a building may be incidental to its host dwelling in one instance, it does not mean that elsewhere a similar building with similar uses may be incidental to its host dwelling. It is a matter of fact and degree based on the evidence.
21. I find therefore, there is no clear justification for the building of the size proposed and for the purposes described. Consequently, I am not satisfied that the building is genuinely and reasonably required or necessary to accommodate the proposed uses. As such, it would not be incidental to the enjoyment of the dwellinghouse and would fail to meet the requirements of Class E of the GPDO and therefore would not be permitted development.

Conclusion

22. 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 outbuilding to be used ancillary to the main dwellinghouse is 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.

A Walker

INSPECTOR

⁵ Appeal ref APP/Z0116/X/20/3265151