



Appeal Decision

Site visit made on 12 November 2024

by David Jones BSc (Hons) MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 January 2025

Appeal Ref: APP/K2420/X/23/3320892

Kingfisher House, 6 Kingfisher Way, Sheepy Parva, Leicestershire CV9 3SW

- 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 Laurent Troger and Mrs Nicki Crossland against the decision of Hinckley and Bosworth Borough Council.
 - The application ref 23/00020/CLE, dated 9 January 2023, was refused by notice dated 6 March 2023.
 - The application was made under section 191(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 commencement of the construction of a greenhouse (incidental outbuilding).
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Decision

1. The appeal is dismissed.

Applications for costs

2. Applications for costs were made by Mr Laurent Troger and Mrs Nicki Crossland against Hinckley and Bosworth Borough Council, and by Hinckley and Bosworth Borough Council against Mr Laurent Troger and Mrs Nicki Crossland. These applications are the subject of separate decisions.

Preliminary Matters

3. The description of the existing development, in the banner header above, is taken from the application form but I have deleted all other wording given that it is superfluous and relates to the reason for making the application.

Main Issue

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

Reasons

5. The appeal site comprises a substantial detached dwelling (No. 6) located within a residential cul-de-sac. The dwelling is set within extensive grounds, including a surfaced driveway and lawn to the front of the property. Immediately to the rear of the dwelling is a small patio and lawned area, before a tributary of the River Spence runs through the site. To the north of the tributary are further lawned and landscaped areas, along with a former tennis court and a detached building. A bridge over the tributary provides access to this area.

6. No. 6 was constructed in around 2015 after planning permission¹ was granted on 15 September 2014 for the “*Erection of a live/work unit (revised proposal)*”. Whilst not determinative of the curtilage, the red line associated with this permission extended as far as the tributary, with the remaining land to the north being outlined in blue. The tennis court and detached building existed prior to the construction of No.6, having been granted planning permission² on 13 September 2001 for the “*Construction of tennis court and retention of fishing lodge*”.
7. It was clear from my site visit that the construction of an outbuilding had commenced on the former tennis court, with a brick base standing around eight brick courses high. The plans submitted with the application indicate that upon completion the building will be a greenhouse.
8. There is no dispute between the parties that the greenhouse shown on the submitted plans will meet the conditions and limitations set out in Class E, Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended (“the GPDO”). The matter in dispute is whether the partially constructed greenhouse is located within the curtilage of the dwellinghouse.
9. The term ‘curtilage’ is not defined in the 1990 Act nor in any other legislation, including the GPDO, and its meaning and application are derived from court judgements. Curtilage defines an area of land in relation to a building and is not a use of land. As it is not a use of land, there is no period of immunity for curtilage. Curtilage can change over time and is not reliant upon planning permission defining it. It must also not be confused with the planning unit, which may cover the same area on the ground although that will not always be the case.
10. The extent of the curtilage of a building is a question of fact and degree, and it is therefore a matter for the decision maker, subject to the normal principle of public law. There are several authorities on the matter of curtilage, many of which have been referred to by the parties.
11. In the relatively recent case of *Hiley*³, Mr Justice Knowles reaffirmed Lord Justice Andrews’ confirmation in the case of *Blackbushe Airport*⁴ that the test set out in *Methuen*⁵ was the correct one. The test is 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*”. It does not need to form a single enclosure.
12. Whilst concerning a listed building, but equally applicable to any building, *Calderdale*⁶ sets out three important factors that must be considered when identifying curtilage. These are:
 - (i) The physical layout of the building and land;
 - (ii) Ownership, past and present; and
 - (iii) Use or function, past and present

¹ Council Ref: 14/00536/FUL

² Council Ref: 01/00656/FUL

³ *Hiley v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 1289 (Admin)

⁴ *Hampshire CC & the Open Spaces Society & Others v SSEFRA & Blackbushe Airport* [2020] EWHC 959 (Admin), [2021] EWCA 398, [2020] JPL 1359

⁵ *Methuen-Campbell v Walters* [1979] 1 QB 525

⁶ *Attorney General, ex r Sutcliffe v Calderdale Borough Council* [1983] 46 P&CR 399

Physical layout of the building and land

13. The greenhouse that is under construction is located towards the northern end of the appeal site, at the far edge of the former tennis court. Consequently, it is situated a considerable distance from the rear elevation of No. 6 and several meters north of the tributary that runs across the site.
14. The appellants contend that the tributary is not active and as it features grass and landscaping within it, it is part of the garden. In addition, it is also considered that, notwithstanding the bridge, it is often possible to walk across the tributary as it only contains water after substantial rainfall. In the appellants view, the tributary does not therefore form a physical barrier that “splits” the appeal site and is no more than a change in ground level. The Council take the opposite view and consider that the tributary acts as a physical and visual barrier, with the land on the northern side of the tributary falling outside of the curtilage of the dwellinghouse.
15. At the time of my site visit there was a small amount of standing water in the tributary. Whilst it was possible, with care, to cross the tributary in certain places, I find it highly unlikely that occupants would choose this route as opposed to utilising the bridge when standing water is present. When water levels in the tributary are higher after periods of heavy rain, the only form of access to the northern part of the appeal site would be via the bridge.
16. I find no reason to dispute the appellants claim that following periods of dry weather, such as during the summer months, the tributary may be dry and that consequently it would be entirely possible to walk across the tributary to access the area of land to its north without utilising the bridge. Nevertheless, by virtue of its appearance, change in ground levels, and the gradient of its banks, I still find that the tributary contributes to there being a strong sense of separation between the dwelling and the land where the greenhouse is being constructed.
17. There is no doubt in my mind that, given the layout of the building and land, the landscaped garden areas that immediately adjoin the front, rear, and side elevations of the dwellinghouse are part and parcel of the dwelling and are intimately associated with the building. This is due to the proximity to the dwelling as well as boundary treatments and the tributary which give a sense of “separation” from other adjacent land.
18. However, the land to the north of the tributary has far less of a visual and spatial relationship with the building and does not appear to be intimately associated with the dwelling. With particular reference to the tributary that runs through the site, the physical layout results in there being a strong sense of separation between the dwelling and the immediately adjoining garden areas, and the land to the north of the tributary. The bridge that affords access over the tributary from one part of the appeal site to another only serves to add to this sense of separation.

Ownership

19. Turning to the ownership of the appeal site, it is not disputed that the appellants have owned all the land since their purchase of the site in 2017. No evidence has been provided that indicates that there have been any other owners since the dwelling was constructed in 2015.

20. As such, based on the evidence before me, No.6 and the surrounding land identified by the site edged red has been in the ownership of the appellants since late 2017. Whilst the entirety of the appeal site is under the ownership of the appellants, I do not consider that the period of time between their purchase of the land and the date of the LDC application to be significant.

Use or function

21. There is no tangible evidence before me to suggest that, prior to the construction of No. 6, the appeal site was in residential use or formed part of the curtilage of any building historically. The only available evidence in terms of previous use or function is that of the tennis court and fishing lodge situated on the land to the north of the tributary. Condition 2 of planning permission 01/00656/FUL suggests that these were for communal use by all residents of Kingfisher Way and were not confined to a specific property. The historic use of the land to the south of the tributary, where No.6 now stands, is particularly unclear.
22. In terms of its present use or function, during my site visit I observed that the land to the north of the tributary was being used for purposes incidental to the use of the dwelling. Lawned areas had been mowed and maintained, there were landscaping features, and the appellants evidence indicates that the land is been used for residential activities incidental to the enjoyment of the dwellinghouse, such as walking and social gatherings. The Council has not provided any evidence to contradict this version of events or otherwise make them less probable. The available evidence also indicates that the land has been used for this purpose since the appellants moved into the property and was the situation at the time that the LDC application was made. However, as noted in *Burford*⁷, the use of land as incidental to the enjoyment of the dwellinghouse does not necessarily make it curtilage.
23. As such, with specific regard to the area of land to the north of the tributary where the greenhouse is being constructed, I have no reason to doubt that the appellants have used this land for purposes incidental to the dwellinghouse since their purchase of the property. However, given the history of the site, this incidental use has not existed for a significant period of time.

Summary on curtilage

24. For the purposes of this appeal, it is not a necessary requirement for me to define the full extent of the curtilage. I only need to determine whether the greenhouse currently under construction falls within it.
25. The land is in the same single ownership and its present use or function is incidental to the residential dwellinghouse. However, given the history of the appeal site, that ownership and incidental use has not existed for a significant period of time. Furthermore, prior to the appellants ownership there is no evidence to link the appeal site to the curtilage of a building or any incidental residential use.
26. Nevertheless, I find that by virtue of its location a significant distance away from the dwelling, coupled with the tributary which provides a strong sense of separation, the physical layout of the building and land results in there being a lack of visual

⁷ *Burford v SSCLG & Test Valley BC* [2017] EWHC 1493 (Admin)

and spatial relationship between the land immediately to the front, side, and rear of the dwelling and the land where the greenhouse is being constructed.

27. Therefore, in my judgement based on the evidence before me the land on which the greenhouse is being constructed does not have an intimate association with the dwellinghouse. As such, I find as a matter of fact and degree, on the balance of probabilities, that this land cannot reasonably be treated as forming part and parcel of the dwellinghouse and it is not therefore within its curtilage. As a result, the operational development comprising the commencement of the construction of a greenhouse is not lawful.

Other Matters

28. Both parties have referred to parts of the appeal site being within Flood Zones. This matter though is not a determining factor in my assessment of whether the land concerned is within the curtilage of the dwellinghouse.
29. I also note that reference has been made to condition 2 of planning permission 01/00656/FUL which states "*Tennis court and associated building shall be used for the benefit of occupiers of Kingfisher Way only unless otherwise agreed in writing with the Local Planning Authority*". The Council alleges that the appellants are in breach of this condition and that enforcement action could be taken in relation to it. For the avoidance of doubt, whether the appellants are in breach of this condition is not a matter before me in this appeal.

Conclusion

30. 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 commencement of the construction of a greenhouse (incidental outbuilding) was well-founded and that the appeal fails. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act.

David Jones

INSPECTOR