

Appeal Decision

Site visit made on 6 September 2025

by **A U Ghafoor BSc (Hons) MA MRTPI FCMI fCMgr**

an Inspector appointed by the Secretary of State

Decision date: 29th September 2025

Appeal Ref: APP/H1515/X/23/3321722

The Emblems, Mountnessing Lane, Doddinghurst CM15 0SP

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) (hereinafter the “1990 Act”) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr and Mrs McCarthy against the Brentwood Borough Council. The application ref 22/01299/S192, dated 12 September 2022, was refused by notice dated 23 March 2023.
 - The application was made under section 192(1)(b) of the 1990 Act. The use for which a LDC is sought is described in the application form as follows: *demolition of existing swimming pool and plant house, and construction of an enclosed swimming pool.*
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Decision

1. The appeal is dismissed.

Reasons

2. Section 192(2) of the 1990 Act as amended indicates that if, on an application under that section, the authority is 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.
3. An LDC is not the equivalent, in law, of a planning permission. The onus is on the appellants 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 case and relevant planning law.
4. The **main issue** is whether the Council’s decision to refuse the LDC was well-founded. This turns on whether the appellants have demonstrated on the balance of probabilities that the proposed construction of an enclosed swimming pool would constitute permitted development by virtue of the provisions of the Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) and would therefore be lawful. For clarity, I will refer to the proposal as “the outbuilding”.
5. In support of the LDC application, the bundle includes detailed plans and aerial images of the property some of which is historic. The application plans show the extent of the curtilage outline in red (for convenient shorthand, I will refer to this application site as the LDC application site), and the outbuilding’s size. It would comprise an enclosed swimming pool, plant house and gym. The reason for refusal of the LDC focuses on the concept of curtilage. The appellants’ statement of case, at length, seeks to show that the proposed outbuilding would meet with conditions and limitations set out in Class E to the GPDO. However, the Council has not advanced a case that the outbuilding would not be incidental, nor has it argued the physical tolerance would not be met. The reason or refusal is that the outbuilding

would not be located within the curtilage to the appeal dwelling, which is crucial to the basic criteria in Class E of the GPDO.

6. The appellants maintain that since they occupied the property from around 2017 onwards, the LDC application site has always been treated as curtilage and used as such and there were no physical barriers. However, the crux of the dispute between the parties concerning the proposed development is whether it would, on the date of the application, be erected on land within the curtilage of The Emblems. As such, the categorisation of the extent of the property's curtilage is not within the scope of the appeal before me.
7. In the context of this appeal, the important point to keep in mind is that curtilage defines an area of land in relation to a building and not a use of land. It is relevant to s55(2)(d)¹ of the 1990 Act and the GPDO. It is often the case that the concept of "curtilage" and "planning unit" are confused: they are distinct and separate. The planning unit is a concept evolved as a means of determining the most appropriate physical area against which to assess the materiality of change in the use of land. The two will sometimes cover the same area on the ground, but that will not always be the case and does not in any event mean that they are the same thing.
8. The leading authority on planning unit is the case of *Burdle*². Starting with the unit of occupation, the assessment turns on the concept of physical and functional separation. *Burdle* suggests three broad tests for determining the appropriate planning unit. The assessment is a matter of fact and degree, and as a useful working rule, it should be assumed that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.
9. The Emblems is a detached dwellinghouse with a loop driveway to the front, and a landscaped side and rear garden. There is a paddock and stable roughly positioned to the south of the property. The size and location of the latter suggest a main use of that part of the land. Probably, and based on the evidence before me, all the land forms a single unit of occupation, but it is in a mixed use comprising residential and the keeping of horses for recreational purposes.
10. There is no all-encompassing, authoritative definition of the term 'curtilage'. It derives from conveyancing law where it was and remains a term of art. 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 extensive grounds, it may be a large or smaller area. There is considerable case law on the interpretation and application of the term, and the appeal parties refer to some of these relevant authorities. There is no need for me to repeat or summarise these judgments, because the appeal parties are aware of the leading cases.
11. That said, the earlier case law goes back to *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195 and *Methuen-Campbell v Walters* [1979] 1 QB 525. The line of judgments thereafter, and the findings therein, serve to illustrate that determining the curtilage is a matter of fact and degree based on the circumstances and evidence presented

¹ The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land... the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such.

² *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.

in each case³. To my mind, there is a common thread and that is that for land to fall within curtilage, the claimed curtilage land must be so intimately associated with the building, that it forms part and parcel of the building.

12. There is no evidence to cast doubt over the claim that in the past, the LDC application site was used for incidental residential purposes. For example, the grass was mowed although the texture and quality are different. Nonetheless, the LDC application site is landscaped, and ornamental plants have been planted. The claim is that the curtilage extends over the expanded garden where the land was clearly capable of such use. Historic aerial imagery shows these areas were subdivided albeit with low-level hedgerow, and the area to the west contained a pond and pergola, which have been removed by the appellants due to safety reasons, and the agent claims are immune by reason of the passage of time, though that is not decisive of this appeal. In addition, the land to the west is used for recreation or sport by the family. Nonetheless, the use of land incidental to the enjoyment of a dwellinghouse is not determinative of land falling within curtilage: the LDC application site may well be used as residential garden without being part of the curtilage to The Emblems.
13. I agree that curtilage does not need to be confined to a small area. Nevertheless, the use of more land for garden related purposes, than may previously have been the case, does not automatically mean that additional land falls within the curtilage of the dwelling. In terms of the considerations of layout and function, proportionality may be relevant. The Emblems is a detached building, but the LDC application site extends over an extensive area. The dwelling is set some distance from the areas to the west and southern parts of the wider land. Arguably, some of the land immediately to the west of the dwellinghouse has some link or intimacy with the building. The area immediately close to the building can also be used to access the rear parts of the dwelling.
14. However, the LDC application site plan includes all the land to the west the proposed outbuilding would extend over. When considered in the context of the LDC application site and the dwelling, all the area to the west is not physically proximate to the dwelling – the further one protrudes into the western parts of the LDC application site, the less intimate it appears. The land may be used as garden or for an incidental purpose linked to the residential use, but I consider that it lies some way off the dwellinghouse, and it is visually disconnected and separate.
15. In addition, the LDC application site, especially the land to the west, appear as self-contained parcel. On the ground there are very little, if any, physical barriers demarking curtilage from other land under the appellants' ownership. Nonetheless, the extent of the area to the west described in the LDC application site plan cannot be reasonably described as forming one enclosure with land attached to or immediately around and about the dwellinghouse. Contrary to the agent's submissions, I find that the land to the west lacks a degree of association given the spatial and visual separation of the area from the building.
16. In my mind, these characteristics weakens the actual and perceived relationship with the property and land immediately around and about the building. It is reasonable to conclude that the size of the original curtilage was proportionate to the needs and function of this property. Conversely, taken together, the land claimed to fall within the curtilage form an

³ For example, *Attorney-General ex rel. Sutcliffe and Others v Calderdale Borough Council* [1983] 46 P&CR 399, *Dyer v Dorset CC* [1988] 3 WLR 213, *McAlpine v SSE* [1995] 159 L.G. Rev. 429, *R (oao Sumption) v Greenwich LBC* [2007] EWHC 2276 (Admin), *Challenge Fencing Ltd v SSHCLG* [2019] EWHC 553 (Admin), *Skerritts of Nottingham Ltd v SSETR (No. 1)* [2000] EWCA Civ 60, *Lowe v First Secretary of State* [2003] EWHC 537 (Admin), and *Burford v SSCLG* [2017] J.P.L.1300, and *Hampshire CC & the Open Spaces Society & Others v SSEFRA & Blackbushe Airport Ltd* [2020] EWHC 959 (Admin), [2021] EWCA 398, [2020] JPL 1359, and *Hiley v Secretary of State* [2022] (Admin) EWHC 1289.

expansive area. I am not persuaded that the size of the LDC application site and its useful function in relation to The Emblems are proportionate to the size and function of the property. There is not an association between what is essentially an additional piece of garden and the dwelling. In terms of past and present ownership and use or function, there is a degree of connection between the LDC application site and the dwelling. However, in my judgment and fatally for the appeal, this association is not of such a close relationship or at such an intimate level that all the area, especially the land to the west, form part and parcel of the dwelling.

17. Consequently, taking a reasonable view, in all probability and as a matter of fact and degree, I find that, at the date of the application, the land on which the development is proposed does not form part of the curtilage of the existing building and it would have failed the basic criteria of Class E to the GPDO.
18. My decision is likely to be disappointing, but I must determine the appeal based on the written submissions and my analysis and evaluation of the evidence before me. As the Planning Practice Guidance says at paragraph: 009 Reference ID: 17c-009-20140306, a refusal is not necessarily conclusive that something is not lawful, it may mean that to date insufficient evidence has been presented. In terms of evidence related to all the LDC application site falling within curtilage to the dwellinghouse, that is relevant in this appeal.

Conclusion

19. Drawing all the above threads together, I find that the quantum of the evidence presented does not clearly or unambiguously show that, if the proposed development had occurred on the application date, it would have been lawful for planning purposes. The decision to refuse the LDC application was well-founded. I conclude that the appeal should fail. I exercise accordingly the powers transferred to me in section 195(3) of the Act.

A U Ghafoor
INSPECTOR