The Planning Inspectorate

Appeal Decision

Site visit made on 4 February 2014

by Alan Woolnough BA(Hons) DMS MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 3 March 2014

Appeal Ref: APP/G5180/X/13/2196279
Cookham Farm, Skeet Hill Lane, Orpington, Kent BR5 4HB

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mrs Sally Campbell against the decision of the Council of the London Borough of Bromley.
- The application ref no DC/12/03653/ELUD, dated 9 November 2012, was refused by notice dated 27 February 2013.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The existing use for which a LDC is sought is described on the application form in the following terms: 'Confirmation sought that the established residential curtilage of Cookham Farm is lawful and that outbuildings within this area have been used for purposes ancillary to the existing dwelling for in excess of ten years continuously'.

Summary of Decision: The appeal is dismissed.

Procedural Matters

1. The application now the subject of this appeal was incorrectly framed as, in law, the term 'curtilage' defines an area of land in relation to a building rather than a use of land. Insofar as open land within the appeal site is concerned, the application form does not describe a legitimate lawful use, as use of land as residential curtilage cannot be the subject of a LDC. However, section 191(4) of the 1990 Act as amended in conjunction with case law arising from *Panton and Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461 allows the terms of a section 191 LDC application (for an existing operation or use) to be modified by an Inspector on appeal.

2. I find that, in order to take the appeal forward, it is more properly interpreted as seeking a LDC for 'the use of land and outbuildings for purposes incidental to the enjoyment of a dwellinghouse as such'. This description best encapsulates the use summarised by the Appellant in her submissions in legitimate terms and I will therefore proceed to determine the appeal on that basis. No injustice arises in doing so, both main parties having addressed the concept of incidental use. Additionally, although I am not able to consider granting a LDC for *use* of land as residential curtilage, I shall nonetheless provide an informed conclusion as to whether, on the evidence before me, it has been demonstrated that the subject land and outbuildings fall within the lawful residential curtilage of Cookham Farm.

3. The Appellant draws my attention to what she considers to be a comparable application relating to Hazeldene in nearby Skibbs Lane, pursuant to which the Council granted a LDC for 'use of land as residential curtilage' (ref no 09/00139/ELUD). Notwithstanding the erroneous terminology of that approval, I am not familiar with the full circumstances relevant thereto. In any event, each LDC application/appeal must be determined primarily with reference to the particular circumstances of the case in hand. The consistency of the Council's decision making, and the Appellant's perception of unreasonable behaviour in this regard, are not matters for me. The decision in relation to Hazeldene has therefore played no part in my determination of the appeal.

The Cases for the Appellant and the Council (main points)

4. Mrs Campbell and her partner, Mr Holyoake, have only owned Cookham Farm since 2011. They therefore rely for the most part on the statements of others who have known the appeal site for longer for evidence of the use of the land and outbuildings over time. Mr King has rented paddocks which abut Cookham Farm since 2003. Mr Sparkes has lived opposite the property since 1987. Mr Wolfe has lived nearby since 1957, with a good view of the appeal site.

5. All of the above state that the site has been used solely for domestic/ residential purposes since at least 2003 or, in some cases, earlier, with no agricultural component. Mr Hadley is a planning consultant who first visited the property in 2007. His evidence supports the accounts of others. He also provides a report on the condition of the 'Annexe' building, located to the east of the dwellinghouse, which dates from 2007 and refers to its use at that time.

6. The Council relies in part on the fact that, in law, the onus of proof rests with the Appellant rather than the local planning authority. However, it also cites the Ordnance Survey plan of the area and aerial photographs as evidence of a smaller residential curtilage in the recent past than that now claimed. Additionally, it draws my attention to descriptions of the site's past use which refer to dilapidated vehicles, domestic waste and scaffolding having been stored within its confines.

Reasoning

7. In seeking a LDC, the onus of proof is firmly on the Appellant to demonstrate on the balance of probabilities that, by the time of the LDC application, the land and buildings in question had been used continuously for purposes incidental to the enjoyment of the dwellinghouse as such for a period of ten years (hereinafter referred to as 'the relevant period'). The material date is therefore 9 November 2002. Having said this, the judgment in *Gabbitas v SSE & Newham LBC* [1985] JPL 630 makes it clear that if the Council has no evidence of its own, or from others, to contradict or otherwise make the Appellant's version of events less than probable, there is no good reason to refuse to grant a LDC, provided the Appellant's evidence alone is sufficiently precise and unambiguous.

The planning unit

8. I turn first to consider whether the disputed land and buildings fall within the same planning unit as the dwelling at Cookham Farm. Tests for determining the extent of the unit are laid down in case law arising from the judgment in *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207. These focus

on whether there are separate units of occupation and the evident degree of physical and functional separation.

9. It is not disputed between the parties that the whole of the appeal site has been in the same occupation as the house itself throughout the relevant period. With regard to functionality, it is readily apparent that the Appellant and her partner have carried out a great deal of refurbishment to the land and outbuildings in question since taking up ownership in 2011. These were, at the time of my visit and in their entirety, put to purposes that appeared to be directly associated with the domestic occupation of the dwelling, albeit to varying degrees of intensity. The open land within the appeal site was being used primarily as a garden and for the parking of vehicles.

10. Apparent usage of the outbuildings ranged from the provision of residential accommodation, a home office and domestic storage (within the 'Annexe' to the east of the dwelling) to the low key storage of firewood and a caravan (within the open fronted barn towards the southern boundary of the appeal site). I have been given no reason to understand that the situation was otherwise when the LDC application was made and therefore find on the balance of probabilities that, by that time, a clear functional relationship between the whole of the appeal site and the enjoyment of the dwellinghouse as such had been established.

11. Nor is there a degree of physical separation between the dwelling and the rest of the appeal site that in itself denotes separate planning units or precludes the lawful use of the land and buildings as a whole for incidental purposes. The relevant part of the Appellant's land is not subdivided by fencing or other discernible barriers and essentially reads as a continuum so as to be part and parcel of a single residential garden. Moreover, the subject buildings are in close enough proximity to the house and each other to constitute a cohesive domestic grouping. Again, nothing before me suggests that the situation was otherwise at the time of the LDC application.

12. I thus find on the balance of probabilities that the land and outbuildings in question, as they appeared to me during my visit and in terms of their present function and proximity to the house, formed part of a single planning unit and were used for purposes either integral or incidental to the dwelling by the time the relevant period came to an end. However, my assessment of whether the planning unit and its use have changed over time, and thus whether such use of the appeal site is lawful, is necessarily informed by the regularity, frequency, intensity and continuity of use throughout the whole of the relevant period.

The use of the land and outbuildings over time

13. In discerning the history of the site over the relevant period, I attach only limited weight to the fact that lines drawn on the Ordnance Survey plan appear to sever some parts of the appeal site from others. The possible reasons for and meaning of such delineation are numerous and, this being so, they do not necessarily signify a distinction between land uses. Nor does the absence of fencing separating the appeal site from other land in the Appellant's ownership preclude, in itself, the use of the former in its entirety for purposes incidental to the dwelling.

14. I find the aerial photographs submitted by the Council, dating from 1998, 2001, 2006 and 2010, too indistinct to clarify with precision the way in which

the site has been used or subdivided over the years. They were taken from too great a height to reveal detail sufficient to provide a reliable interpretation to this end. Nonetheless, those taken within the relevant period show a spread of vehicles and general detritus within the appeal site far in excess of what would usually be termed incidental to the enjoyment of a dwellinghouse as such. Moreover, with the exception of land to the immediate north and west of the dwelling, I find nothing in these photographs that might be interpreted with reasonable certainty as depicting incidental domestic usage.

15. Turning to the Appellant's evidence, the accounts of events provided by Mrs Campbell and Mr Holyoake, who only took up occupancy in 2011, and Mr Hadley, who first visited the site in 2007, are of little assistance in determining the likely use of the land in the early part of the relevant period. Nor does the condition survey report relating to the Annexe building, also dating from 2007, assist in this regard. More pertinent are the accounts given by Messrs Sparkes, Wolfe and King, all of whom have known the property since at least 2003. All three assert that the whole of the appeal site was used solely for residential or domestic purposes during the period in relation to which they give evidence.

16. However, all three also refer to parts of the site having been used by previous owners of the property, the Beecham-Williams family, to store several vehicles, described variously as abandoned, derelict or in states of disrepair, between 2003 and 2010. The aerial photographs, together with Mr Hadley's account of his own findings, give credence to this. Moreover, the Whiteheads, who moved away from the property in 2003, are said to have used the same areas for storing scaffolding. This leads me to question whether Messrs Sparkes, Wolfe and King are familiar with the interpretation of the terms 'residential' and 'domestic' in the context of planning law, as the past usage they describe cannot usually, in my judgment and experience, be categorised thus. None of these statements is sufficiently precise or unambiguous to enable me to discern exactly what their author means by these terms.

17. The Appellant refers to the vehicular storage as 'misuse of the residential curtilage by the previous owners' and attributes this to a hobby pursued by one of them, but goes on to suggest that it did not amount to a materially different use. However, I am not so persuaded. In the absence of cogent evidence to the contrary, neither vehicle storage of this kind and scale nor the storage of scaffolding can reasonably be regarded as a use incidental to the enjoyment of a dwellinghouse as such. Nor would a hobby which involves outside storage of the kind described constitute a genuinely ancillary activity. Moreover, photographic evidence suggests that some of the debris and detritus stored on the site prior to the Appellant's occupancy may not have been domestic in origin.

18. I find on the balance of probabilities that these particular activities, whilst not necessarily commercial or industrial in nature, were nonetheless so distinguishable from the domestic occupation of the dwellinghouse as to have caused the planning unit to take on a new mixed use, resulting in a material change. On the evidence before me, this would have disrupted the continuity of the use for which a LDC is sought over a substantial part of the appeal site for a considerable portion of the relevant period. The fact that the Council did not take enforcement action at the time does not constitute cogent evidence to the contrary.

19. I acknowledge that not all of the land described as 'Area 2' on the aerial photographs attached to these statements, which includes the house itself, would have been so used. However, having regard to *Gabbitas*, the evidence before me lacks the precision necessary to enable me to distinguish the use of one part of this area from another. The aerial photographs dating from 2006 and 2010, being merely snapshots in time, are of little assistance in this regard.

20. The area of land to the west of the dwelling, annotated as 'Area 1', is described by Mr Wolfe as having been used by the children of the Beecham-Williams family for riding quad bikes. However, on the evidence before me it does not appear to have been garden land prior to the Appellant's occupancy and information as to the period and frequency of its use for the stated purpose is not precise enough for the purposes of *Gabbitas* to demonstrate an established incidental use.

21. Turning now to consider the use of the outbuildings over time, I note that Mr Sparkes refers to the 'home workshop building' (which in the absence of any indication to the contrary I assume to be the 'Annexe' to the east of the house) as having been used in association with the previous owner's vehicle-based hobby and, at some point during the relevant period, to have been adapted to make better use of it as a 'home workshop and office'. I have already concluded that the hobby in question would not have amounted to a use incidental to domestic activity, whilst it appears that any subsequent adaption to facilitate the latter appears to have taken place after the material date. Although the Appellant claims that this building was used historically for purposes ancillary to the dwelling, implying that it may have accrued lawful use to that effect before the material date, this is not supported by cogent evidence.

22. Mr Wolfe's account of the use of this building is a little different, suggesting that it was used primarily for storing excess household items and then later adapted to make fuller use of it for 'residential and home purposes'. Whilst this version of events is more supportive of continuous use incidental to the dwelling, it conflicts with Mr Sparkes' statement and introduces a degree of uncertainty as to which is the more accurate account. I am not able to determine which rendition of this building's history is the more accurate. Nor is it clear how familiar either witness was with the interior of this building over time and thus how either was able to formulate a reliable opinion of its long term use.

23. Cogent evidence relating to the use of other buildings within the appeal site during the earlier part of the relevant period is sparse. The open sided barn is described by Mr Wolfe as having been mainly used for firewood storage. However, the basis from which he distils this view is not made clear and the length of time for which such storage took place is not specified. Whilst he is more precise in referring to a caravan having been parked within this building for at least ten years, its purpose is not given and, particularly as it is currently wheel-less, uncertain. This being so, its continued presence is not in itself sufficient to demonstrate the building's lawful use for purposes incidental to the enjoyment of the dwellinghouse as such. No significant light is shed by any of these statements on the use over time of the smaller garage/shed to the south-east of the house.

24. I note the Appellant's comments to the effect that the LDC application received support at the Council's Planning Committee from the local ward member, who was also the chairman and, it is said, familiar with the appeal property's residential curtilage. However, he or she provides no statement that would enable me to attribute significant weight to that support.

Summary

25. In summary, whilst the Council provides little in the way of contradictory evidence, I find the version of events presented by and on behalf of the Appellant to lack the precision and unambiguousness necessary in the light of *Gabbitas* to fulfil the burden of proof. The Appellant has therefore failed to demonstrate on the balance of probabilities that the appeal site and the outbuildings within it benefitted from a lawful use for purposes incidental to the enjoyment of the dwellinghouse as such at the time of the application.

26. In the light of this conclusion I have considered whether I have seen sufficient evidence to enable me to determine whether a part of the appeal site might benefit from a lawful use of this kind, and so grant a LDC in relation to that part alone. However, I find that I have not. The Ordnance Survey plan, aerial photographs and my own observations on site suggest a greater likelihood that land to the immediate north and west of the house might so qualify. Nonetheless, the information on the historic use of this area throughout the relevant period is far from comprehensive and simply too sparse and imprecise to reasonably underpin such a conclusion on the balance of probabilities.

Residential curtilage

27. In the light of the above conclusion, I shall now address the concept of residential curtilage, clarification of which is sought by the Appellant. There is no statutory or authoritative definition of the term curtilage. In the absence of this, reliance is placed on a wealth of case law handed down by the Courts in interpreting its meaning. In *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195 it was held that for land to constitute curtilage 'it is enough that it serves the purpose of the house or building in some reasonably useful way'. Additionally, in *Methuen-Campbell v Walters* [1979] 1 QB 525 the Courts identified as a relevant criterion an 'intimate association with land which is undoubtedly within the curtilage'.

28. In *Attorney General v ex rel Sutcliffe & Calderdale BC* [1983] 46 P & CR 399 the Court of Appeal found that there should be some historical connection between the area of land in question and the principal building, whilst in *Dyer v Dorset CC* [1988] 3 WLR 213 it was held that the term 'curtilage' bears a restricted and established meaning, connoting a small area forming part and parcel with the house or building which it contained or to which it was attached. The Oxford English Dictionary (OED) definition of the time was endorsed as adequate for most present day purposes, namely: 'A small court, yard, garth, or piece of ground attached to a dwellinghouse, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwellinghouse and its outbuildings'.

29. A review of the relevant authorities was undertaken in *McAlpine v SSE & Wycombe DC* [1995] JPL B43, which defined the following characteristics of curtilage:
    - it is confined to a small area about a building;

- intimate association with land which is undoubtedly within the curtilage is necessary to make the land under consideration part and parcel of that undoubted curtilage land; and
- physical enclosure is not necessary.

30. More recently the matter was considered in the context of listed building enforcement by the Court of Appeal in *Skerritts of Nottingham Ltd v SSETR* [2000] 2 PLR 102, [2001] JPL 1025. While regarding the decision in *Dyer* as correct, it was felt that the Court in that case had gone further than necessary in expressing the view that the curtilage of a building must always be small, or that the notion of 'smallness' is inherent in the expression. This particular finding has implications beyond those pertaining specifically to listed building curtilage.

31. The essential thrust of current case law is therefore that determination of what constitutes a residential curtilage, including its geographical extent, is a matter of fact and degree dependent on the circumstances of the particular case and requires a judgment to be made. Whilst size remains one of a number of considerations in this regard, 'smallness' is not necessarily pre-requisite. Applying the above case law to the land and buildings within the appeal site, I am mindful that all lie in relatively close proximity to the dwellinghouse with easy and unobstructed access thereto.

32. Taken as a whole, the site is not so extensive as to preclude its categorisation as residential curtilage, bearing in mind the flexibility applied by the Court in *Skerritts* to the interpretation of the term 'small area about a building'. Moreover, I found the appeal site as it appeared to me during my visit, in terms of its present function and proximity to the house, to have clear potential to facilitate a use with an 'intimate association with land which is undoubtedly within the curtilage', even if the latter is taken to comprise the footprint of the dwelling alone. I can therefore conclude at this point, on the balance of probabilities, that the appeal site and all the buildings within it presently comprise the residential curtilage of the dwellinghouse and that such status is not precluded by physical or locational features.

33. However, this in itself is not sufficient to demonstrate that the residential curtilage 'lawful' such that, for example, the land or buildings could be used for purposes incidental to the dwellinghouse without the need for planning permission pursuant to section 55(2)(d) of the 1990 Act as amended or would benefit from permitted development rights[1]. To secure lawful curtilage status to this effect, the land or outbuildings must also benefit from a lawful use for purposes incidental to the enjoyment of a dwellinghouse as such. I have already concluded that this has not been demonstrated in this case. For the reasons previously given in concluding on the lawful use of the land and outbuildings I am not in a position, given the limited evidence before me, to define the lawful residential curtilage of Cookham Farm with reasonable certainty.

[1] Deemed planning permission to undertake development within the curtilage of a dwellinghouse granted by Article 3 of, and Part 1 of Schedule 2 to, the Town and Country Planning (General Permitted Development) Order 1995 as amended.

Conclusion

34. For the reasons given above I conclude that the Council's refusal to grant a LDC 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.

Formal Decision

35. The appeal is dismissed.

Alan Woolnough

INSPECTOR