# Appeal Decision

Site visit made on 22 January 2008

**by Alan Langton** **DipTp CEng MRTPI MICE MIHT**

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

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**Decision date:**
**6 February 2008**

**Appeal Ref: APP/L3815/X/07/2054150**
**Land at 120 Third Avenue, Earnley[1], West Sussex PO20 7LB**

- 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 in part to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr and Mrs D Taylor against the decision of Chichester District Council.
- The application Ref E/07/02321/ELD, dated 1 May 2007, was refused in part by the Council by notice dated 16 August 2007.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is "use of land as part of residential curtilage of 120 Third Avenue."

## Decision

1. I modify the First Schedule of the certificate granted by the authority by;

   deleting "outlined in red on Chichester District plan E/07/02321/ELD" and substituting "outlined and hatched in black on Planning Inspectorate plan reference APP/L3815/X/07/2054150" and by

   adding "in association with the dwelling-house 120 Third Avenue."

   so that the modified First Schedule becomes:

   "The use of the land outlined and hatched in black on Planning Inspectorate plan reference APP/L3815/X/07/2054150 as garden land in association with the dwelling-house 120 Third Avenue."

2. I substitute the plan annexed to this decision (APP/L3815/X/07/2054150) for that attached to the certificate issued by the authority (E/07/02321/ELD).

3. Subject to that, I dismiss the appeal.

## Reasons

*The Plan*

4. It is agreed by both parties that the plan attached to the certificate issued by the Council has a minor but noticeable error in the alignment of the southern boundary of the subject land. The replacement plan submitted by the Council

[1] Earnley is used on the application and on the certificate issued by the Council. The locality has also been referred to as Batchmere and as Almodington

is still not quite right (with a small misalignment on the eastern boundary) and so I am substituting a plan reproducing the alignment correctly shown with the application.

*The Certificate*

5. There is little dispute regarding primary facts. Third Avenue is a narrow roadway within a locality characterised by detached dwellings and horticultural greenhouses, designated as the Almodington Area for Horticultural Development, within the Rural Area, by the Chichester District Local Plan. N$^{o}$ 120 is a long-standing detached chalet bungalow facing essentially south and sitting towards the south-eastern corner of a parcel of land that is roughly 65 metres wide by 80 metres deep. To the west of the house, and also towards the front of the parcel of land, is a detached U shaped outbuilding, incorporating a pair of garages, which has replaced or enlarged a building shown on the submitted Ordnance Survey based plans. Behind that is a stable block (or former stable block) and partially facing that was a portacabin. A drive serves the outbuildings with a side spur to the house. Most of the land is a lawn containing a few conifer trees, with outer boundaries of fencing and hedges. The north-eastern corner is a vegetable patch enclosed by internal fencing and including a small shed and cold frame. Nearby the lawn contained a child's 'Wendy' house structure and some play items.

6. The area subject to the application is the north-eastern part of the whole parcel of land, about 38 metres across (east-west) by 30 metres deep. It includes the vegetable patch and Wendy house and is otherwise lawn. There is a barely perceptible change in the level of the lawn at the southern edge of the application area, though this is little different from other minor undulations here and there in the lawn.

7. In April 2003 the Council granted a certificate of lawful proposed development for what is now evidently the U shaped outbuilding (ref E/03/00922/PLD). The plan supporting this application defined an area that did not extend to the whole parcel of land about 120 Third Avenue and excluded any part of the area subject to this current appeal. In April 2005 the Council refused planning permission for a replacement dwelling (ref E/05/00546/FUL). In April 2006 the Council granted permission for a replacement dwelling (ref E/06/00422/FUL), which has not been implemented. Plans supporting these applications defined an area larger than that supporting the 2003 LDC application but still not extending to include the area subject to this current appeal.

8. On the appellant's documented evidence, a horticultural greenhouse on the application land had been cleared by 1987. Incoming owners of 120 Third Avenue had the area ploughed and seeded to grass in 1988, and when that was established they used the land from 1990 until the present occupants took over in August 2002. The Council, following its own checks, says that although it is not clear exactly when the greenhouse was demolished, it is accepted that this was over ten years ago.

9. There is therefore clear, uncontested evidence, that the land in question has been used continuously as garden land associated with 120 Third Avenue for more than 10 years. There is no dispute that the certificate issued by the Council is well founded in its own terms subject to the clarification I am adding,

in line with the authority's representations, associating the use expressly with No 120. The question is whether the certificate should go further and recognise use as part of the residential curtilage.

10. As recorded above, the application was made under Section 191 (1)(a) of the amended 1990 Act, which may be used "If any person wishes to ascertain whether any existing use of buildings or other land is lawful …" It is well established practice that any certificate of existing lawful use should describe precisely the use demonstrated to be lawful. This might then establish a platform from which other rights could be claimed but the certificate itself should not speculatively pre-empt any such claim.

11. Both parties have referred to case law and the Planning Encyclopaedia regarding how land might be defined or precluded as being curtilage or more specifically residential curtilage. However, and as touched on by the Council, I take the view that curtilage describes the status of land rather than being a basis for describing its use. It is the "planning unit", not the curtilage, which is the basis for determining "use". Having regard to Burdle[2] I readily reach the view that the whole of the parcel of land, including the dwelling, outbuildings and garden, I describe above constitutes the planning unit in this case. However, a planning unit is not necessarily coterminous with a curtilage and may be larger.

12. In planning law, status as a curtilage carries with it development rights[3] under Class A Part 1 Schedule 2 of the General Permitted Development Order (GPDO) 1995 (as amended). A determination of lawfulness of the application land for use as residential curtilage would go beyond certifying a tangible and demonstrably existing use – as garden land – and require inferences to be drawn from that regarding the status of the land. Parliament made separate provisions in the 1990 Act: Part 191 to determine existing lawfulness and Part 192 to determine the lawfulness of a proposed use or development. The distinction in the present case may be a fine one but it should not be blurred in my view.

13. A certificate of lawfulness for use as residential curtilage would go beyond confirming the lawfulness of the existing use but effectively pre-determine not just a particular and defined possible future proposal but a whole class of potential proposals. Understandably, the agent is quite clear about this intention: "because it would influence what I could advise my clients that they could do with the land …" In my view this lies outside the scope of an application under Part 191.

14. I find support for my conclusions by linguistic considerations. In general the planning phrase "use as a" concludes with a noun having a connotation with a verb or verbs. Gardening and closely associated activities lead naturally to "Use as a garden". Shopping or retailing similarly lead to "Use as a shop or as a retail unit". Even where the verb and noun lack a common root, the link between the activity and the place will generally be obvious: storing, handling and trading in scrap leads naturally to "use as a scrap yard". It is evidence of

[2] Burdle v Secretary of State for the Environment [1972]
[3] Curtilage status for a Listed Building also imparts controls but this is not relevant to the present case.

the activities over a requisite period of years that can lead to a Certificate of Lawfulness commencing with "use as a".

15. In contrast, to my mind although the gardening activities that have taken place on the subject area of land are not incompatible with that area being part of the residential curtilage, the one does not follow the other in such a natural and obvious way as to justify a certificate of lawfulness for "use of land as part of residential curtilage of 120 Third Avenue". That requires inferences to the drawn from the evidential existing use: as garden land in association with 120 Third Avenue.

16. Section 3B-2055 (2) of the Encyclopaedia does include the sentence "Thus where other land has been unlawfully appropriated to the curtilage, there can be no reliance upon Part 1 [GPDO Schedule 2] rights, because the use of that land for the purposes of curtilage for a dwellinghouse is unlawful …, unless and until the period for taking enforcement action … has expired without such action being taken." I am conscious that this embodies the concept of "use" and "curtilage" and have taken it into account. However, although authoritative the commentary in the Encyclopaedia is not binding, and moreover taken in context the sentence seems directed to the question of reliance on a status as curtilage rather than a determination of the precise existing use.

17. Taken as a whole, and as its sub heading "What is the curtilage?" suggests, Section 3B-2055 approaches the question of curtilage as a property of the land rather than as a use in its own right. It commences: "This relationship between curtilage as ancillary land to the primary use of the dwellinghouse means that the curtilage boundary will also normally define the area of the planning unit. But the two are not necessarily the same. A curtilage relates to a building, and a planning unit to a use." I do not, of course, imply that a particular past use of land is other than a factor in determining whether that land *is* curtilage, simply that a determination of use *as* curtilage conflates two separate questions.

18. Having reached these conclusions it would be inappropriate for me to explore the parties' representations as to whether this particular piece of land does or does not have the status of residential curtilage. For the reasons I have set out I consider that such a determination would fall outside the scope of this application under Section 191 (1)(a) of the 1990 Act, and an exploration short of a full determination could prejudice possible future processes between the appellant and the Council. Subject to the small correction to the plan and clarification to the schedule I consider the certificate issued by the Council to be well founded in referring only to use as garden land.

*Alan Langton*

Inspector