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# Appeal Decision

Site visit made on 3 April 2013

**by Sara Morgan LLB (Hons) MA Solicitor**

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

**Decision date: 12 April 2013**

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**Appeal Ref: APP/Y3615/X/12/2184465**

**Brookwood House, Queens Road, Brookwood, Woking GU24 0NX**

- 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 John Klintworth against the decision of Guildford Borough Council.
  - The application (Ref.11/P/01018), dated 27 May 2011, was refused in part by the Council by notice dated 19 October 2011.
  - 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 construction of outbuildings for incidental residential use and swimming pool.
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## Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed operation which is considered to be lawful.

## Preliminary

2. The Council in its decision on the appeal application issued a lawful development certificate in respect of "the proposed swimming pool, pool house and U-shaped outbuilding" as falling within the planning permission granted by Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) Order 1995 as amended (GPDO). However, it refused to issue a certificate in respect of "the proposed games room/garage and stables building" on the grounds that, although that building was required for purposes incidental to the enjoyment of the dwelling house, it would exceed 4 m in height and part of it fell outside the residential curtilage.
3. The parties both agree that the reference to "the U-shaped building" in the certificate issued by the Council is in fact an error, as it is the U-shaped building which is the proposed games room/garage and stables building referred to in the Council's refusal. I shall deal with the appeal on that basis.

## Main Issues

4. The main issues are whether the proposed games room/garage and stables building would fall in part outside the curtilage of Brookwood House, and whether it would exceed 4 m in height as measured in accordance with the GPDO.

## **Reasons**

### *The curtilage*

5. Whether or not an area of land is within the curtilage of a dwelling is a question of fact and degree. To fall within the curtilage of a building, it is enough that land serves the purpose of the building in some necessary or reasonably useful manner, even though it need not be marked off or enclosed in any way<sup>1</sup>. In *McAlpine v Secretary of State for the Environment*<sup>2</sup> three relevant characteristics of a curtilage were identified: 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; physical enclosure is not necessary but the land in question needs at least to be regarded in law as part of one enclosure with the house.
6. The Oxford English dictionary definition was approved in *Dyer v Dorset County Council*<sup>3</sup>: "a small court, yard, garth or piece of ground attached to a dwelling house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling house and its outbuildings." However, "small" has to be judged by reference to the size of the dwelling; the larger the dwelling, the larger is likely to be the curtilage.
7. Brookwood House is a large detached property standing in its own grounds. The land to the west of the rear elevation of the house is partly divided by a post and rail fence which was erected in 2003 and which originally extended for the full width of the property and ran immediately behind two outbuildings; that part of the fence closest to these outbuildings was blown down and has not been replaced. According to the appellants, who have owned the property since 1999, the fence was erected to provide a safe play area for their children to play in without adult supervision.
8. The proposed building would be constructed on the area of land partly occupied by the two outbuildings, which would be demolished. But it would be constructed partly outside what was the fence line before the fence blew down. The Council argues that this fence line marks the edge of the curtilage of the dwelling.
9. The land beyond the fence and the outbuildings was, at the time of my site visit, grassed, and a children's trampoline was sited on part of it. In visual terms it appeared little different from the grassed area on the other side of the fence. It is not far from the dwelling house (it is all within a 50 m radius of the dwelling, and the area being questioned by the Council is within 10 m of the rear of the dwelling, according to the appellants). The fence, which is not particularly prominent visually, is not a significant visual barrier between the land immediately adjacent to the dwelling and the land beyond the fence. The land beyond appears to form part of one enclosure with the dwelling.
10. The land has been used as a garden area since at least 1999<sup>4</sup>, and all the evidence suggests that it has served the purposes of the dwelling as such in a

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<sup>1</sup> *Sinclair-Lockhart's Trustees v Central Land Board* (1950) 1 P&CR 195

<sup>2</sup> [1995] 1 PLR 16

<sup>3</sup> [1989] 1 QB 346, quoted in *McAlpine*

<sup>4</sup> According to the appellants' representations, historic evidence indicates that it has always been part of the garden of the house, but their personal knowledge of course only dates to 1999. An aerial photograph dating from 1937, although unclear, appears to show the land laid out with vegetable or flower beds.

reasonably useful manner throughout that time. 2003 photographs show a children's party on the land, and an aerial photograph from 2004 shows mown grass, with a children's pool on the land close to the outbuildings. A climbing frame seen in a 2003 photograph is still in place in a 2008 photograph, albeit damaged by a fallen tree.

11. The Council has argued that the application site (which encompasses a larger area than that under consideration here) is too large to be considered as "a small area around the building". It is likely that the application site represents the planning unit, but the planning unit is not necessarily the same as the curtilage of the dwelling and here the appellants do not argue that the whole of that land forms part of the curtilage.
12. The land where the proposed building would be constructed is not that far from the dwelling, even that part of it behind the existing outbuildings and which would have been beyond the fence before it blew down. It is easily accessible, and visible, from the dwelling. The dwelling is a large detached house which could be expected to have a larger curtilage than a smaller dwelling, and in this case there is an intimate relationship between the house, the garden immediately adjoining the house, and the site of the proposed building.
13. The Council has also argued that the land to the north west of the dwelling is very definitely and obviously separated from the rest of the appellants' land and has the characteristics of a separate self-contained enclosure. But that is not the impression I gained from the site visit. There was little to distinguish the areas on either side of the fence. In contrast, there was a clear visual distinction between the grassed area to the south of the house and the wooded area beyond the stream, which although within the planning unit would not be within the curtilage.
14. The Council has referred to the Court of Appeal decision in *Methuen-Campbell v Walters*<sup>5</sup>, in which an area of land described as a paddock and "rough pasture" which at all material times was separated from the dwelling by a fence was held not to be within the curtilage of the dwelling, but the facts of that case do not appear to be on all fours with this one. In any event the extent of the curtilage of a building is a matter of fact and degree in each case.
15. There is no evidence that the land has been used for anything other than garden. An aerial photograph of 2009 appears to show at the time the photograph was taken a somewhat different mowing regime for the land immediately to the west of the outbuildings than for other parts of the garden (although that is not consistent throughout the area beyond the fence), but I am not satisfied that it indicates a less intimate association between that land and the dwelling than would be expected for curtilage land.
16. Taking all these factors into account, I conclude that, as a matter of fact and degree, the whole of the land on which the proposed building would be sited forms part of the curtilage of Brookwood House.

### *Height*

17. Development is not permitted by Class E if the height of the building (in the case of a building with a dual pitched roof, as is proposed here) would exceed 4 metres. Measurements of height for the purposes of the GPDO are taken from

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<sup>5</sup> [1979] 1 QBD 525

the highest part of the ground adjacent to the building, and the measurement should be taken from the "natural" ground level.<sup>6</sup>

18. Immediately next to the existing outbuildings there is a steep bank, and the proposed building would be constructed into that bank. It is clear from the drawings that the side elevation of the building would be cut into the bank, and the ridge height of the building when measured from the highest part of the adjacent land would be less than 4 metres.
19. The Council has argued that the bank is not a natural formation, but has been engineered "at some point in time". The Council does not support this assertion with any evidence, and does not suggest when this engineering may have taken place. It is clear from what I saw on site that, if indeed the ground levels have been altered, that did not happen recently. Close to the highest point of the bank there is the ivy-covered stump of a tree which the appellants claim was at least 30 years old; I consider that claim to be quite likely from what I saw on site. It clearly indicates that the height of the bank has not been significantly altered for many years, if at all. My conclusion is that on the balance of probability the top of the bank is the "natural" ground level from which the height of the building should be measured.
20. Taking into account all these matters, and on the basis of the evidence of the tree stump, I conclude that the height of the proposed building when measured in accordance with the GPDO would not exceed 4 metres.

*Overall conclusions*

21. For these reasons, and having regard to all matters raised, I consider that the proposed games room/garage and stables building described in the appeal application would be permitted development by virtue of Class E. I therefore conclude, on the evidence now available, that the Council's refusal in part to grant a certificate of lawful use or development in respect of the construction of outbuildings for incidental residential use and swimming pool was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

*Sara Morgan*

INSPECTOR

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<sup>6</sup> GPDO Article 1(3) and Circular 9/95 paragraph 36.



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# Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192  
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)  
ORDER 2010: ARTICLE 35

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**IT IS HEREBY CERTIFIED** that on 27 May 2011 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The operations would be permitted development by virtue of Article 3(1) of, and Schedule 2 Part 1 Class E to, the Town and Country Planning (General Permitted Development) Order 1995 as amended.

Signed

*Sara Morgan*  
INSPECTOR

Date 12.04.2013  
Reference: APP/Y3615/X/12/2184465

## ***First Schedule***

Construction of outbuildings for incidental residential use and swimming pool as described in application reference 11/P/01018 dated 27 May 2011 and the plans and supporting statement submitted therewith.

## ***Second Schedule***

Land at Brookwood House, Queens Road, Brookwood, Woking GU24 0NX.

## NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



# Plan

This is the plan referred to in the Lawful Development Certificate dated: 12.04.13

by **Sara Morgan LLB (Hons) MA Solicitor**

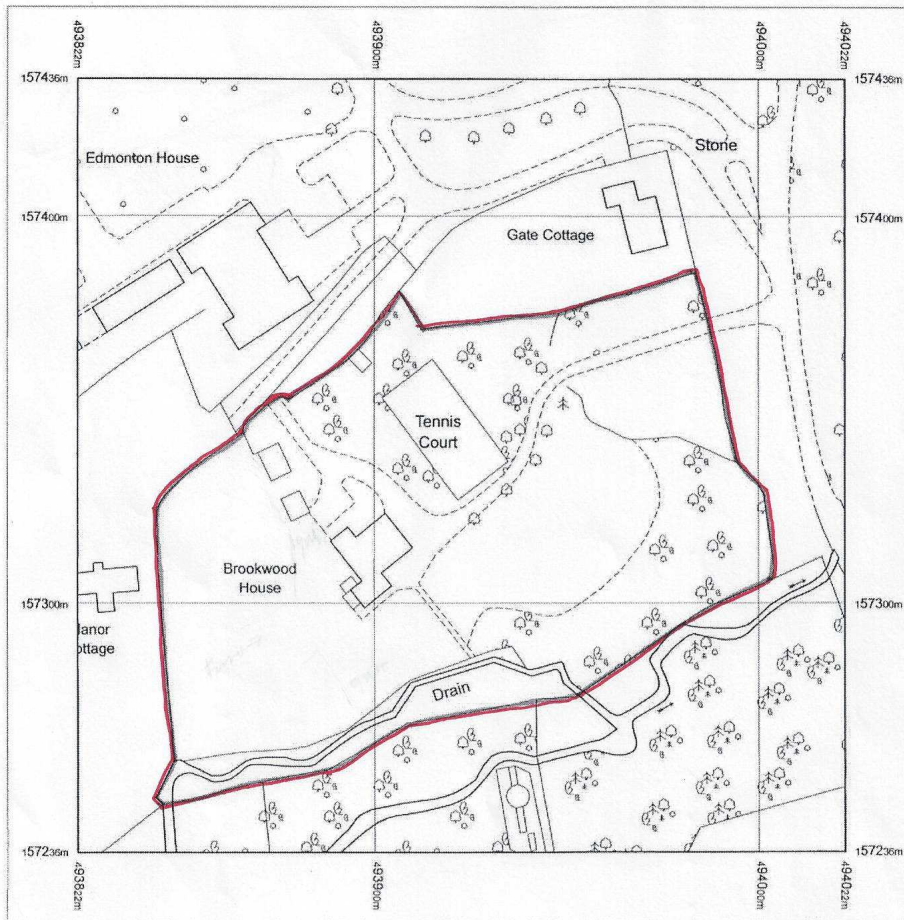
**Land at: Brookwood House, Queens Road, Brookwood, Woking GU24 0NX**

**Reference: APP/Y3615/X/12/2184465**

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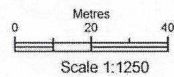
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