The Planning Inspectorate

# Appeal Decision

Site visit made on 22 February 2022

**by Anthony J Wharton BArch RIBA RIAS MRTPI**

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

**Decision date: 7 March 2022**

**Appeal Ref: APP/H4505/X/21/3283980**
**Hillcrest, Stannerford Road, Ryton NE40 3SN**

- 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 Mr Ian Graham against the decision of Gateshead Metropolitan Borough Council (LPA).
- The application Ref DC/21/00525/CPL, dated 15 April 2021, was refused by notice dated 5 August 2021.
- 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: the erection of two single storey buildings within curtilage of existing dwelling to be used as games room and garden store.

## Decision

1. The appeal is dismissed. See formal decision below.

## Background information

*The appeal site, its surroundings and previous use*

2. The appeal site lies to the south and west of the bungalow 'Hillcrest' which, together with two other bungalows 'Inglehurst' and 'Howden Lea', front onto Stannerford Road, to the south of Clara Vale. It is bounded to the south-west by a bridleway. There are other houses to the west and a farm development on the opposite side of the road to the north-west. All of these are surrounded by open countryside and are within the Green Belt. The site lies outside of the built up areas of Ryton and Crawcrook. The land beyond the bridleway to the side and rear is open and undeveloped.

3. The site had previously been in use as a market garden and when this use ceased it started to be used as a garden area to the side of 'Hillcrest'. A previous application (DC/20/00485/OUT), to develop the land by the erection of a detached dormer bungalow, was dismissed on appeal in January 2021. In that decision the Inspector concluded that the land appeared more domestic than the neighbouring larger fields and, although not appearing to be developed, formed part of the garden to 'Hillcrest'.

4. From my own inspection of the site and its immediate surroundings, I agree with the previous Inspector. It is evident that the land has been used for residential purposes since the market garden use ceased (see history of site below). However, just because the land is in a residential use associated with 'Hillcrest' does not necessarily mean that it lies within the curtilage of the dwellinghouse.

## The main issue

5. The main issue is whether or not the proposed development would have been lawful at the time of the LDC application, by virtue of the two proposed single storey outbuildings being within the curtilage of the dwelling house, 'Hillcrest'.

## Reasons

*Introduction*

6. An appeal relating to a Certificate of Lawful Use or development (LDC) is confined to the narrow remit of reviewing the LPA's decision and Section 195(2) of the Act requires an assessment to be made as to whether the refusal of the application is, or is not, well-founded. The assessment is based on whether or not the proposed development, for which the certificate is sought, would have been lawful at the time of the application (15 April 2021). Irrespective of the fact that the site lies within the Green Belt, the planning merits of the development are not relevant and there is no planning application before me. The burden of proof lies with the applicant and the relevant test is *'the balance of probabilities'*.

7. Outbuildings fall under Schedule 2, Part 1, Class E of the General Permitted Development Order (Amendment) (No2) (England) Order 2008 (the GPDO). This permits, within the '*curtilage of a dwelling house*', any building which is incidental to the enjoyment of the dwelling house. It is common ground between the parties that all of the constraints and conditions in part E1 of Class E are satisfied. The only disagreement relates to whether or not the proposed single storey buildings lie within the '*curtilage of the dwelling house'*.

8. In relation to the Act, the word *'curtilage'* has not been defined and decision-makers have to rely on dictionary definitions and to the case law authorities set out over the years. The concept of '*curtilage*' is different to '*land use'* and '*residential curtilage'* is not a use of land as set out in the Use Classes Order (UCO). A residential/garden use of land does not necessarily equate to it falling within the '*curtilage of a dwelling house'*. The courts have held that whether or not land falls within the '*curtilage of a dwelling house'* is a matter of fact and degree in each particular case. This is how I have dealt with the facts in this particular case.

*The history of 'Hillside' and the appeal land*

9. In support of the appellant's case, the histories of the appeal site and the adjoining properties are set out. The previous owner and his family took ownership of the market garden and the three bungalows in 1975. The evidence then indicates that, following the ceasing of the market garden use, the land immediately to the rear of the bungalow(s) and the appeal site were all used as garden areas. The rear garden to 'Hillcrest' was used to grow flowers and the appeal site, which I shall refer to as the *'extended garden'* was alternatively used for growing vegetables and laid out as a residential grassed area. It is also indicated that, in the winter months, a friend's horse was allowed to graze the land in order to *'keep grass and weeds down'.*

10. By 1999, one of the previous owner's sons had become the owner of 'Hillcrest' and the appeal land continued to be used and maintained as an '*extended garden'* area adjacent to 'Hillcrest'. In 2011 the son sold 'Hillcrest' to the appellant and moved into the adjacent bungalow. Initially the appellant maintained the *'extended garden'* but, by 2016, he had purchased all of the land to the rear of the property, as well as the appeal site. There is photographic evidence, dating back from 1975 until 2007 to corroborate the above facts.

11. The photographs show the appeal land being cultivated (1975 and 1999); vegetables being grown on the land (1978); flowers being grown in the 'Hillcrest' rear garden (1980); the appeal site grass having been mown (2000) and the appeal site being used for the keeping of pet ducks (2007). This latest photograph shows a fence, now removed, separating the rear garden of 'Hillcrest' from the *'extended garden'*. Thus, there is considerable evidence to indicate that it has been used for general residential purposes since 1975. The LPA has not produced any evidence which substantially contradicts that of the appellant.

12. Having considered all of the evidence relating to the use of the appeal land since 1975, I consider that, 'on the balance of probabilities' the appellant has demonstrated that the land had been used continuously for residential use, as an extended garden area to 'Hillcrest' for more than 10 years prior to 15 April 2021. The LPA could not, therefore, take enforcement action against this change of use of the land from market garden to residential use. I conclude, therefore, that the lawful use of the *'extended garden'* area is residential and that this was the case at the time of the LDC application.

*The curtilage of the dwelling house*

13. As indicated previously, the fact that land might be lawful for residential use, does not necessarily mean that it lies within the *'curtilage of the dwelling house'* and I now turn to that question.

14. On my site visit I noted that there was a metal shipping container positioned to the front of the appeal site, adjacent to the road. Two cars were parked on the land. On the more open grassed area there was a trampoline and two small football goal posts. There was no fence separating the 'extended garden' from the rest of the 'Hillcrest' site.

15. Despite its residential use, I consider that the open appeal site is still perceived as being a distinctly separate physical area to the bungalow and its original rear garden and outbuildings. I consider that the physical characteristics of the two areas are noticeably different, with the former being perceived as a dwellinghouse with outbuildings plus an area of rear garden closely associated with the house. The latter, on the other hand, and despite its residential characteristics and use, is still seen as a large, separate, adjacent and more open site. In my view, it is more closely related visually and physically to the adjacent Bridleway and the immediate surrounding open countryside beyond.

16. When looking at that part of the garden immediately to the rear of the bungalow, it seems as though it is within and closely related to or an integral part of the 'Hillcrest' curtilage. When looking at the *'extended garden'* from the bridleway, despite the mown grass and residential paraphernalia, the opposite is the case.

17. There are certain criteria which should be applied in assessing what constitutes curtilage and these apply *'whatever may be the strict conveyancing interpretation' (Sutcliffe Rouse & Hughes v Calderdale BC (1983) JPL 310)*. These are the physical layout of the building(s); ownership past and present and use and function past and present. I have also taken into account all of the other factors relating to this case and relied upon by the parties. These include the planning history and previous applications relating to 'Hillcrest' and its immediate surrounding land.

18. It is evident that the garden area immediately to the rear of 'Hillcrest' meets the dictionary definition of being a *'piece of ground attached to the dwelling*

*house and forming one enclosure within it';* that is, part of the curtilage. There can be no doubt in my view that this land forms part of the true curtilage to the dwelling house 'Hillcrest'.

*The physical layout of 'Hillcrest' past and present*

19. The Council refers to planning applications which have been made in relation to 'Hillcrest'. Application (reference 604/98) granted planning permission for the demolition of a bungalow and the erection of a replacement bungalow with a detached double garage to the rear. The Council contends therefore, that in applying the principles outlined in the case of *Barnett v Secretary of State [2009] EWCA Civ 476,* the 1998 permission had established the domestic curtilage associated with the 'Hillside'. I agree that this was the case at that time.

20. It is further contended that because no subsequent permissions have been granted to alter that position, the curtilage of the dwelling house has not changed from that approved in 1998 and thus does not include the *'extended garden'.* The Council also indicates that all subsequent planning applications for 'Hillcrest' and the neighbouring properties have shown the land subject to this application to be physically and functionally separate from the curtilage of 'Hillcrest', which is consistent with the position established in 1998.

21. Having noted details of these applications, as well as the HM Land Registry titles for 'Hillcrest' (TY341745); its rear garden (TY512635); 'Howden Lea'(TY512636) and the appeal site (TY540282), I do not consider that the physical layout on the ground has changed significantly over the years. I accept that the appeal site has been used residentially as an *'extended garden'* but as outlined above, I consider that it is perceived as a large adjacent open site, rather than one which is within the defined curtilage of 'Hillcrest'. In my view it does not meet the dictionary definition of being a '*piece of ground attached to the dwelling house and forming one enclosure within it'.*

*Ownership past and present*

22. There have been several changes of ownership of 'Hillside', its rear garden and the appeal site (the former market garden) since 1975. The original owner transferred the property and land to his son, who then sold them to the appellant. When it was a market garden it would have been clearly recognisably different in character to its present use as a residential garden area. However, having seen the present situation, I do not consider that, physically, there has been any significant change as to how the two separate parcels of land (the curtilage to 'Hillside' and the *'extended garden'* have been perceived over the years and during the changes of ownership.

*Use and function past and present*

23. The original use of the appeal land was as a market garden and, although this use ceased, the former owner continued to use it for cultivating vegetables, albeit on a residential basis rather than on a commercial scale. However, I have already referred above to the fact that the *'extended garden'* is physically and visually different to the other garden areas at 'Hillside'. Physically, the appeal land is seen as being remote from the south-western boundary of 'Hillcrest'. In my view, the completely open nature of the appeal site adds to the perception of the areas being in two parts, rather than being one '*piece of ground attached to the dwelling house and forming one enclosure within it'*. It was clearly two separate pieces of ground initially and, in my view, is still perceived as such.

24. In relation to the dictionary definition of curtilage I consider that, as a matter of fact and degree, this area of *'extended garden'* forms a separate piece of ground which is outside of the main enclosure more closely associated with 'Hillcrest'. Despite its obvious residential use, with its mown grass and play equipment, it is still more akin to, and perceived as, being out in the open and more closely related to the fields beyond the bridleway, than to being part of the rest of the garden areas to 'Hillcrest'. I consider that it is still perceived as what it is: an adjacent and separate piece of land which was once part of the market garden land and which is now being used for residential garden purposes.

25. I acknowledge that the *'extended garden'* is now *'ground used for the comfortable enjoyment of the house'* and that, it now serves the purpose of the house *'in some necessary purpose or reasonably useful way'.* It can also be said to be now *'required for the comfortable enjoyment of the dwelling house'* (all typical characteristics of what constitutes 'curtilage'). However, although it is used in all of these ways for the enjoyment of the appellant, I do not consider that it forms *'an integral part of the same'* in terms of the *'curtilage of the dwelling house'*. In my view, the appeal site is separate as opposed to being integral with the rest of the 'Hillcrest' site.

26. I can understand the appellant and others being confused or perplexed by a situation where land can be considered lawful for residential purposes and yet found not to be within the *'curtilage of a dwelling house'*. But, as indicated above the word *'curtilage'* has not been defined and a residential/garden use of land does not necessarily equate to it falling within the *'curtilage of a dwelling house'*. In this case I have considered the appeal on the established case law basis that, whether or not the land falls within the *'curtilage of a dwelling house'* is a matter of fact and degree in each particular case.

*Overall conclusion*

27. For the above reasons, I conclude that the appeal land, the *'extended garden'*, lies outside of the *'curtilage of the dwelling house'* - 'Hillcrest'. I do not consider that, on 15 April 2021, the proposal for the erection of two single storey buildings on the appeal site to be used as a games room and a garden store would have been lawful. I do not consider that the appellant has shown 'on the balance of probabilities' that the opposite is the case. It follows that the two proposed buildings cannot benefit from permitted development rights; that I consider the LPA's decision to refuse a LDC was sound and that full planning permission would be required for the two proposed outbuildings.

**Formal decision**

28. The appeal against the Council's refusal to issue a LDC under section 195 of the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991, therefore fails, the appeal is dismissed and a certificate will not be issued.

*Anthony J Wharton*

Inspector