

The Ombudsman's final decision

Summary: Mr X complains the Council wrongly issued a Certificate of proposed lawful use for a car park. He says it wrongly determined the site was within the curtilage of the property and failed to properly consider relevant caselaw. There was no fault in how the Council made its decision.

The complaint

1. Mr X complained the Council had wrongly issued a Certificate of Lawful Use to allow use of a neighbour's garden as vehicle parking. He says the Council had not correctly followed the law by considering the land concerned to be within the main building's curtilage.
2. He says this flawed decision means his amenity and that of others is adversely affected by a vehicle park, any proposal for which should have been the subject of a planning application. He says fault by the Council means they have been denied the opportunity to raise their concerns through proper process.

The Ombudsman's role and powers

3. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word 'fault' to refer to these. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
4. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

5. I spoke to Mr X and considered the Council's planning case documents and complaint correspondence.
6. I have written to Mr X and the Council with my draft decision and given them an opportunity to comment. I considered Mr X's comments before making a final decision.

What I found

Permitted development

7. Not all development requires planning permission from local planning authorities. Certain developments are deemed permitted, providing they fall within limits set within regulations. This type of development is known as 'permitted development'.

Certificate of lawfulness of proposed use or development

8. It is possible to seek formal confirmation from councils that an existing or proposed development or use of land is lawful and so needs no planning permission. If the council accepts the evidence provided, it can issue a certificate of lawful use to the applicant.
9. This may happen where:
 - the council has already granted planning permission for the use or development;
 - a development is 'permitted development' and so deemed acceptable because it complies with limits in regulations;
 - the development was unlawful, but the time limit for enforcement actions has now passed.
10. The Town and Country Planning (General Permitted Development) (England) Order 2015 enables someone to find out whether;
 - Any proposed use of buildings or other land would be lawful; or
 - Any operations proposed to be carried out would be lawful.
11. This is a way of determining, for example, whether a proposal would be permitted development.
12. If a local planning authority is provided with information satisfying it of the lawfulness of the proposed use or operations, it must issue a certificate to that effect.
13. Evidence may be required to resolve disagreements over questions of fact, for example whether the proposal would be within permitted development rights, or whether it would be ancillary to the main planning use.
14. As part of their decision making, councils must decide whether the area for proposed use is within the curtilage of the existing land. Curtilage is not defined in law. Its plain English meaning is land around a building, associated with its day to day use. Caselaw has set out principles for councils to consider to make decisions about curtilage. Mr X, having regard to that caselaw, strongly disagrees that the land concerned in this complaint lies within the curtilage of the property. These decisions are a matter of planning judgment for the decision maker. The Ombudsman cannot question the merits of judgments made in decisions taken by councils having followed the correct process.
15. Councils do not consider the planning merits of a case when deciding whether to issue a certificate. Their decision to issue a certificate is made on the facts available and simply relates to the question of lawfulness. The council must decide whether the available evidence is enough to allow it to decide on the facts one way or another.
16. This council's scheme of delegation allows decisions about certificates of lawful use to be made by a senior officer.

Background

17. Mr X lives near to another property (Property Z) that has a garden that is not physically attached to it. It is nearby to the property but is separated by an access route. The Council says this arrangement is not uncommon in its area, where properties are separated from their gardens in this way. It usually regards such areas as within the curtilage of the property.
18. In 2018 the Council considered whether to issue a Certificate of Proposed Lawful Use to allow the garden area of Property Z to be used as parking for vehicles. The planning case officer report that considered the matter referred to the permitted development regulations. It noted the regulations allow provision within the curtilage of a dwelling house of a hard surface for any purpose incidental to the enjoyment of the dwelling house.
19. The case officer report noted the garden area proposed for parking was a separate parcel of land that fell within Property Z's curtilage. The Council decided the proposal to create off road parking was therefore permitted development and did not require an application for planning permission.
20. Mr X complained to the Council, challenging its decision, citing caselaw. The main grounds for his challenge was his understanding that this caselaw showed the Council should not have considered the garden to be within the curtilage of the property. This was because it was not attached to Property Z, forming one enclosure with it. He said it was clearly separate from it with a wall, lane and hedges between it and the property. He said it was therefore not in its curtilage.
21. He said the Council should not have issued a certificate of lawful use. It should, instead have invited a full planning application allowing Mr X and other interested persons to comment on it.
22. The Council replied saying it had considered the site's ownership, use and layout in making its decision. The garden was separated by a road but it considered it was close to the property. It had decided, having regard to this layout, it was within its curtilage. It said this was a judgement about fact and degree of the proposal. It had made the decision giving weight to all relevant factors. The Council explained why, in its opinion, the circumstances of this situation were different to those set out in the caselaw Mr X cited. It said the case came down to how much weight should be attached to the issue of separation compared with the functional relationship between the land and dwelling.
23. In the case, cited by Mr X, the judge confirmed the issue of what is within a curtilage is a matter of planning judgment for the decision maker. Its decision can only be challenged on the grounds of being so unreasonable that no reasonable decision maker could possibly reach the same decision. In that case the planning inspector found, based on the circumstances of that case, that land separated from a dwelling house was not in its curtilage because it was not attached to the dwelling house forming one enclosure with it. The judge found that inspector's decision was not unreasonable, having regard to the circumstances of that case.
24. Mr X continued to correspond with the Council, disputing the matter of whether the garden could be said to be within the property's curtilage. The Council responded that it had had regard to the caselaw concerned. It maintained, based on its assessment of the proposal, that this was markedly different to that case referenced by caselaw. In this case there was a clear, functional relationship between the property and the garden to be used as parking. The Council referred Mr X to its Monitoring Officer.

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25. Mr X continued to correspond with the Council and wrote to the Secretary of State who confirmed they could not intervene and referred Mr X to the Ombudsman.
 26. Mr X regards the Council's decision about the matter of curtilage as being wholly unreasonable and not taken in accordance with guidelines. He says this fault has denied him and other neighbours the opportunity to comment on the proposal through the planning process.
 27. The Council, in response to my enquiries, said that caselaw showed the identification of curtilage was a matter of planning judgment for it to make. It maintained the decision could only be legally challenged on the grounds that no reasonable decision maker, presented with the same facts, could possibly reach the same conclusion.
 28. The Council said it had been mindful of caselaw. It had considered that the garden and dwelling were physically separate, but the land was the only substantive garden serving the Property Z. This type of dwelling sometimes has part or all of its garden separated from the property but these areas are commonly regarded as within the property's curtilage.
 29. It said the case officer's report, though necessarily brief, showed it had properly considered the circumstances of the case, including the physical separation of the relevant piece of land. It no longer retained detailed notes as these have been deleted in accordance with its retention policy to delete paper files after six months.

My findings

30. We are not a planning appeal body or a court. Our role is to review the process by which planning decisions are made. Where we find fault in the decision-making process, we decide whether it caused an injustice to the complainant. To do this, we need evidence to show that, but for the fault, the outcome would have been different.
31. Because of this, we cannot make findings of lawfulness: this is the role of the courts. We look at whether councils have had regard to the law and guidance in making their decisions.
32. The Council considered the circumstances of this application and made its decision in light of those circumstances. It considered the location of the proposed car parking area in relation to the dwelling. It was aware of and had regard for the physical separation between Property Z and its garden. It decided, having regard to those facts, the garden was within the curtilage of the dwelling. It has followed the process we would expect and so this was a decision it was entitled to take.
33. The Council has explained how it has placed weight on the separation of the garden from Property Z. It has explained how it considered caselaw when making its decision. There is no fault in how the Council made its decision to issue the certificate or responded to Mr X's complaint.

Final decision

34. I have completed my investigation because there is no evidence of fault by the Council.

Investigator's decision on behalf of the Ombudsman