

**IN THE MATTER OF AN APPLICATION FOR A CERTIFICATE OF LAWFULNESS UNDER
SECTION 191 TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)**

NOTE

A. INTRODUCTION

1. This Note accompanies the application (“the **CLEUD Application**”) by Christopher and Alice Snell (“the **Applicants**”) to Havant Borough Council (“the **Council**”) pursuant to s.191 Town and Country Planning Act 1990 for a Certificate of Lawful Use or Development (“**CLEUD**”).

2. The application has four elements:

- Element 1, based on 10 years’ user: change of use of Woods Cottage and its environs (as A above) into leisure / tourism use for the purposes of holiday lettings and camping and as a commercial event venue for the purposes of both holidays and the holding of weddings and events and the utilisation of any ancillary buildings and structures that may be required as necessary for such uses.
- Element 2, based on more than four years having elapsed since they were substantially completed: a log cabin (“**the Log Cabin**”) and adjoining deck (“**the Deck**”).
- Element 3, based on more than four years having elapsed since it was substantially completed: a Victorian-style gazebo structure (“**the Gazebo**”).
- Element 4, based on more than four years having elapsed since it was substantially completed: a marquee (“**the Marquee**”).

3. This Note speaks to material legal considerations relating to Elements 1 and 4. References to **EB** are to the paginated “Evidence Base” exhibited to Mr Snell’s witness statement. It is accompanied by two Annexes, which are intended to assist the Council when considering the **CLEUD** Application and, in particular, Section C below:

- Annex 1: plan showing the area that is the subject of the **CLEUD**, annotated to cross-refer to the schedule of photographs comprising Annex 2.
- Annex 2: schedule of photographs of Wood Cottage and its environs.

B. FRAMEWORK AND CONTEXT OF APPLICATION

4. Element 1 of the Application is made in respect of Woods Cottage (as the central locus of the relevant activities on the Tournembury Woods Estate) and its “environs”, which is used as a neutral term, but synonymously with what, in our submission, is its “curtilage”, properly understood as a

matter of fact and law. The area is shown shaded on the plan at **EB0878**. Element 4 relates to operational development on land that is the subject of Element 1 of the Application.

5. As Mr Snell makes clear at paras.6 and 8 of his witness statement, the land that is the subject of Element 1 of the Application (and on which the Log Cabin, Deck, Gazebo and Marquee sit) does not comprise the whole of the Tournerbury Woods Estate (ie, the entire landholding that comprises Land Registry titles title numbers SH14945 and HP584230); rather, it is a limited part of it. Relevant activities which have taken place in whole or in part in Tournerbury Wood / the Bury, Tournerbury Plantation and Tournerbury Foreshore and mudlands are not germane to the Council's consideration of the CLEUD Application, though they are material in the Council's determination of Mr and Mrs Snell's application for retrospective planning permission APP/18/00943 ("the **Planning Application**").

6. To set out the framework for consideration of the CLEUD Application:

6.1 The primary consideration for the Council as to Element 1 is whether, on the evidence, there has been a change of use through 10 or more years' user for the purposes set out at para.2 above.

6.2 Although we have framed Element 1 of the CLEUD Application in terms of the environs or curtilage and addressed the issue of curtilage below, the secondary consideration is the extent of the land whose user has changed. If the Council does not agree that there has been a change of use of the entire shaded area on the plan at **EB0878**, the CLEUD Application does not fail; rather, the relevant consideration for the Council is in relation to what area has been there been a change of use?

6.3 The shaded area on the plan at **EB0878**, rather like the "red line" area for the Planning Application, does not depict the access for the area that is the subject of the CLEUD Application. As with the Planning Application, the access is pursuant to a comprehensive right of way (legal easement) reserved through title HP342493.

7. What is not the subject of the CLEUD Application falls to be considered for determination within the context of the Planning Application.

C. AREA OF CHANGE OF USE: CURTILAGE

8. In March 2019 in *Challenge Fencing Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 553 (Admin), Mrs Justice Lieven undertook a comprehensive review of the authorities on what constitutes the curtilage of a building. Her considered summary at para.18 of the judgment was as follows:

"From these cases I draw the following propositions:

i) The extent of the curtilage of a building is a question of fact and degree, and therefore it must be a matter for the decision-maker, subject to normal principles of public law;

ii) The three Stephenson¹ factors must be taken into account;

a) Physical layout;

b) The ownership past and present;

c) The use or function of the land or buildings, past and present.

iii) A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration. Skerritts² p.67;

iv) Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration, but it is not a legal requirement that the claimed curtilage should be ancillary; Skerritts³ p.67C;

v) The degree to which the building and the claimed curtilage fall within one enclosure is relevant, Sumption⁴ at para 17 and the quotation from the OED of curtilage as "A small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it". In my view this will be one aspect of the physical layout, being the first of the Calderdale factors.⁵

vi) The relevant date on which to determine the extent of the curtilage is the date of the application; but this will involve considering both the past history of the site, and how it is laid out and used at the time of the application itself; Sumption at [27]. It appears from Sumption that the Judge considered future intended use of the land or buildings may be relevant, but in my view some care would be needed in applying this proposition to the facts of a particular case. A developer cannot change the curtilage simply by asserting that s/he intends to use the site in a particular way in the future."

9. Here, the starting consideration, logically and chronologically, is that the building whose curtilage is in consideration for the purposes of Element 1 is Woods Cottage.

10. Mr Snell at para.8 of his witness statement of 6 December 2019 summarises the topography and backdrop to the CLEUD Application and, indeed, the Planning Application:

¹ Per Stephenson LJ, in *AG ex rel Sutcliffe v Calderdale BC* (1982) 46 P&CR 399 at 407.

² *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] QB 59.

³ *Ibid.*

⁴ *Sumption v Secretary of State* [2003] EWHC 537 (Admin).

⁵ See footnote 1.

“8.1 ... The environs/curtilage of Woods Cottage comprise large lawns and rougher grass areas both stretching in all directions from Woods Cottage. It is important to note that Woods Cottage is not surrounded by the lawns with the rougher grass areas beyond the lawns, as you might get with traditional parkland: both types surround the Cottage itself. The tree cover and ground flora is much thinner and more akin to a domestic garden in the curtilage/environs of Woods Cottage than it is in Tournembury Wood and Tournembury Plantation.

8.2 The curtilage is demarked by the edge of Chichester Harbour itself to the south; boundary fences and hedges with the neighbouring title to the east and north; Tournembury Wood to the north-west; and the more densely planted Tournembury Plantation broadly to the west. Those are more or less clear delineations on the ground, but there are no fences, hedges or walls intersecting and dividing the curtilage of Woods Cottage itself.

*8.3 My family and I have viewed and used the environs/curtilage as I have described it above and as shown shaded on the plan at **EB0878** as our “garden” or, as I saw it as a teenager and as our children have seen it, area to play in as an adjunct to Woods Cottage. Although Woods Cottage is a relatively small house (it only has four bedrooms), it does not, in its landscape context, have a small “garden” or curtilage. To put it another way, the curtilage and, indeed, the wider Tournembury Woods Estate, could accommodate a much larger house at its heart without being overshadowed by that house.”*

11. As Mr Snell hints at para.8.3 of his witness statement, Woods Cottage, set in the Tournembury Woods Estate, is a highly unusual property. It is the only house within a substantial landholding, and exclusive enjoyment of that landholding goes with it: a material and fundamental characteristic of place, here, is the privacy of Woods Cottage. It does not have a small, distinct garden, delineated from the other parts of the Estate; rather a wide area in its immediate vicinity which is much less heavily wooded than the Bury and Tournembury Plantation on the landward side. A further, distinct characteristic is that Woods Cottage is close to and faces into Chichester Harbour, has views of the Harbour, and its immediate setting extends on the south side to the water’s edge.

12. The Tournembury Woods Estate has been within the same family ownership for nearly 90 years. Aside from the sale of Tournembury Farm in 1987, the physical layout, including Woods Cottage and its curtilage, has been substantially unaltered since the early 1930s. Woods Cottage and its curtilage has been available for use by that family in the way described by Mr Snell at para.8.3 of his witness statement and for the subsequent use for events, with Woods Cottage at its centre. There has been organic growth in the number of events, but without any fundamental change to the position of Woods Cottage within its environs / curtilage.

13. As Lieven J acknowledged, a curtilage does not have to be small, albeit that she qualified that with the observation that the relative size between the building and its claimed curtilage is a relevant consideration. She went on to say at para.29 of her judgment that:

“My analysis of the law on this point, is that the Court of Appeal in Skerritts made clear that there is no test that a curtilage has to be small, and to the degree something different was being suggested in Dyer it was wrong. Therefore, a small bungalow with a large garden may well have a large curtilage. However, that is an entirely different proposition from the one being advanced by Mr Clay, that the relative size is an irrelevant consideration.” (Emphasis added)

14. Woods Cottage may not be Wentworth Woodhouse, but, as explained above, its immediate setting is much larger than that which a house of its size would usually have and which would usually be enjoyed in connection with it. That is the basis of the Applicants’ submission, not, for the avoidance of doubt, that the relative size is an irrelevant consideration.

15. As to discerning the curtilage by the limits of enclosure (the point in *Sumption*), see Mr Snell’s witness statement at para.8.2: the Harbour’s edge to the south and the boundary edges to the north and east are distinct. To the north-west, there is a discernible change (the woodland and cover become much more dense) in the Bury, albeit not such a distinct boundary as the Harbour’s edge. To the west, Tournerbury Plantation is a distinct area of woodland, different from the Bury and different from the curtilage of Woods Cottage, but, as with the Bury, there is no fence-line which easily delimits one from the other.

16. In our submission, the curtilage of Woods Cottage is as shaded on the plan at **EB0878**, and that is the correct “red” or “boundary line” for the purposes of Element 1 of the CLEUD Application.

17. If, however, that is an incorrect submission, as a matter of fact and law, because the Log Cabin with the Deck and the Marquee are, as a result of being present for four or more years (and regularised for planning purposes), structures with their own curtilages, then we do not believe that the outcome is materially different for the purposes of Element 1 of the CLEUD Application: the uses that have been made of the environs of Woods Cottage and, subsequently on that analysis, of the environs of the Cabin with Deck and of the Marquee have been contiguous.

D. CONTINUITY OF MARQUEE

18. At Section G of his witness statement, Mr Snell describes the Marquee (as defined), which was erected in July 2013 on a gravel base. It has stood in the same position since July 2013, save for a relatively short period when the superstructure was taken down for cleaning, with the gravel base still in place.

19. Section 171B(1) TCPA 1990 provides that:

“Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.”

20. The operations were substantially completed in July 2013: ie, more than four years before the date of the CLEUD Application. As to the proper approach when considering the relatively brief period when the superstructure was taken down for cleaning, *Westminster City Council v Secretary of State for Communities and Local Government* [2013] EWHC 23 (Admin) provides helpful guidance, from the analogous perspective of continuity in the context of change of use (10 years).

21. There, the question was whether there was continuity of use for 10 years by a restaurant which used the pavement outside the restaurant for al fresco dining, placing table and chairs on it. The evidence was that the tables and chairs were present on the pavement during the summer months only, not the colder months of the year; and that, even during the summer months, the tables and chairs were removed from the pavement and stored overnight, so that they were not present 24 hours a day. The clearing finding of the Administrative Court was that that constituted continuous user for the purposes of a change of use.

22. By strong analogy here, there has been continuity since the operations were substantially completed in July 2013, notwithstanding the cleaning of the superstructure. The presence of the permanent base lends significant weight to that analysis.

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