**14 GREENAWAY GARDENS, LONDON NW3 7DH**

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**A D V I C E**

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1. INTRODUCTION

1.1. I am asked to advise as to the lawfulness of works proposed in the garden of the dwellinghouse 14, Greenaway Gardens, in the London Borough of Camden.

1.2. The intention is to submit an application for a Certificate of Lawfulness of Proposed Use or Development ('CLOPUD') and I understand that this Advice will form part of the submission.

1.3. The proposed designs have been developed having regard to the permitted development rights for householders granted by Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015, as well as the requirements of the new owner of the property who intends to occupy it as his principal family residence. Accordingly, this Advice analyses the proposals against the general requirements of Article 3 and the particular provisions of Class E of Part 1 of Schedule 2 of the Order.

1.4. The current baseline against which the proposals are to be considered comprises:

(i) the settled planning status of the dwellinghouse Number 14, which was in existence and in use as a single dwellinghouse on the Appointed Day;

(ii) planning permission (No.2021/5768/P) for demolition of a pool house and hard and soft landscaping works, which is being implemented; this permission authorises 3 new terraces as well as a net increase of trees and shrub planting;

(iii) planning permission (No. 2021/6257/P), authorising extensions and alterations to the house with landscaping of the rear garden, including a ramped access to the terraces.

1.5. I understand that, prior to the development currently underway pursuant to these planning permissions, the areas comprised within Permission No. 2021/5768/P were part of the garden of No.14, occupied by a domestic tennis court, swimming pool, sheds, BBQ terrace and lawn. It is this area which is the main focus of the proposed works the subject of the CLOPUD application, with a small part coming within the area covered by Permission No. 2021/6257/P.

## 2. <u>RELEVANT LEGAL PROVISIONS AND CASELAW</u>

2.1. S.192 Town and Country Planning Act ("TCPA 1990") provides as follows:

> *"(1) If any person wishes to ascertain whether—*
>
> *(a) any proposed use of buildings or other land; or*
>
> *(b) any operations proposed to be carried out in, on, over or under land,*
>
> *would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.*
>
> *(2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.*
>
> *(3) A certificate under this section shall—*
>
> *(a) specify the land to which it relates;*
>
> *(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);*
>
> *(c) give the reasons for determining the use or operations to be lawful; and*
>
> *(d) specify the date of the application for the certificate.*
>
> *(4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness."*

2.2. S.59 TCPA 1990 provides for the Secretary of State to grant general planning permission by Order. The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), accordingly grants planning permission for a wide range of developments in many contexts, including within the curtilage of a dwelling house (Part 1 of Schedule 2 to the Order). The Applicant's architects have paid careful attention to the detailed provisions of Class E of Part 1 and I shall consider

each proposed element of development against the requirements of the Order. Firstly, however, I consider some general points.

2.3. Art.2(1) or the Order provides that, for all purposes relevant to this Advice, 'dwellinghouse' 'does not include a building containing one or more flats, or a flat contained within such a building'. I am instructed that No.14 has been, since its construction in the 1920s and is intended to remain, in single family occupation and is not internally subdivided into flats.

2.4. No.14 lies within a Conservation Area but is not a listed building. There is no relevant direction under Article 4 of the Order in existence.

2.5. Art.2(2) and (3) provide as follows:

> *"(2) Unless the context otherwise requires, any reference in this Order to the height of a building or of plant or machinery is to be construed as a reference to its height when measured from ground level; and for the purposes of this paragraph "ground level" means the level of the surface of the ground immediately adjacent to the building or plant or machinery in question or, where the level of the surface of the ground on which it is situated or is to be situated is not uniform, the level of the highest part of the surface of the ground adjacent to it.*
>
> *(3) The land referred to elsewhere in this Order as article 2(3) land is the land described in Part 1 of Schedule 1 to this Order (National Parks, areas of outstanding natural beauty and conservation areas etc)."*

All measurements referred to in the Architect's submission forming part of the Application have, I am instructed, been taken from the highest parts of the adjoining ground.

2.6. Article 3, paragraphs (1), (4) and (9) provide as follows:

*"(1) Subject to the provisions of this Order and regulations 73 to 76 of the Conservation of Habitats and Species Regulations 2010 (general development orders), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.*

*(4) Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order.*

*(9) Except as provided in Classes B and C of Part 11, Schedule 2 does not permit any development which requires or involves the demolition of a building, but in this paragraph "building" does not include part of a building."*

There are no relevant planning conditions and no demolition of any building is proposed as part of the proposed works the subject of the CLOPUD Application (though, as I have said, some demolition of buildings has already been authorised by planning permission granted by the Council under Part 3 of the TCPA 1990).

2.7. Class E of Part 1 of Schedule 2 to the Order provides as follows:

*"E. The provision within the curtilage of the dwellinghouse of—*

*(a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such, or the maintenance, improvement or other alteration of such a building or enclosure; or*

*(b) a container used for domestic heating purposes for the storage of oil or liquid petroleum gas.*

*Development not permitted*

*E.1 Development is not permitted by Class E if—*

*(a) permission to use the dwellinghouse as a dwellinghouse has been granted only by virtue of Class G, M, MA, N, P , PA or Q of Part 3 of this Schedule (changes of use);*

*(b) the total area of ground covered by buildings, enclosures and containers within the curtilage (other than the original dwellinghouse) would exceed 50% of the total area of the curtilage (excluding the ground area of the original dwellinghouse);*

*(c) any part of the building, enclosure, pool or container would be situated on land forward of a wall forming the principal elevation of the original dwellinghouse;*

*(d) the building would have more than a single storey;*

*(e) the height of the building, enclosure or container would exceed—*

*(i) 4 metres in the case of a building with a dual-pitched roof,*

*(ii) 2.5 metres in the case of a building, enclosure or container within 2 metres of the boundary of the curtilage of the dwellinghouse, or*

*(iii) 3 metres in any other case;*

*(f) the height of the eaves of the building would exceed 2.5 metres;*

*(g) the building, enclosure, pool or container would be situated within the curtilage of a listed building;*

*(h) it would include the construction or provision of a verandah, balcony or raised platform;*

*(i) it relates to a dwelling or a microwave antenna; ...*

*(j) the capacity of the container would exceed 3,500 litres ; or*

*E.2 In the case of any land within the curtilage of the dwellinghouse which is within—*

*(a) an area of outstanding natural beauty;*

*(b) the Broads;*

*(c) a National Park; or*

*(d) a World Heritage Site,*

*development is not permitted by Class E if the total area of ground covered by buildings, enclosures, pools and containers situated more than 20 metres from any wall of the dwellinghouse would exceed 10 square metres.*

*E.3 In the case of any land within the curtilage of the dwellinghouse which is article 2(3) land, development is not permitted by Class E if any part of the building, enclosure, pool or container would be situated on land between a wall forming a side elevation of the dwellinghouse and the boundary of the curtilage of the dwellinghouse.*

> *Interpretation of Class E*
>
> *E.4. For the purposes of Class E, "purpose incidental to the enjoyment of the dwellinghouse as such" includes the keeping of poultry, bees, pet animals, birds or other livestock for the domestic needs or personal enjoyment of the occupants of the dwellinghouse."*

2.8. Paragraph E.2 does not apply. Paragraph E.3 does not need to be considered further because, although the site is Art.2(3) land, none of the proposed development is to be positioned to the side of the dwellinghouse. I turn, therefore to consider the development permitted by Class E and the applicability of the limitations imposed by Paragraph E.1, in relation to the proposals.

2.9. The first phrase to consider is *"within the curtilage of the dwellinghouse"*. I have dealt with the use of No.14 as a dwellinghouse and now turn to the question of curtilage.

2.10. "*Curtilage"* is not defined in the Order, nor is it defined in the TCPA 1990. It is a concept which is relevant to various areas of law but in the recent decision of *Blackbushe Airport Ltd v Hampshire County Council* [2021] EWCA Civ 398 the Court of Appeal gave the issue comprehensive consideration and sought to reconcile the caselaw. *Blackbushe* concerned commons legislation and the very different factual context of an operational airport, but the principle enunciated by the Court was both simple and relevant to Town and Country Planning. At paragraph 25 of their judgment the Court said:

> *"The curtilage of a building is a single concept, and … it does not have different meanings in different statutory contexts. There is in truth only one test, and that is the test*

*articulated by Buckley LJ in Methuen-Campbell,… The question whether the test is satisfied in any given case will depend on the facts and circumstances of that case."*

They highlighted the *Methuen-Campbell* test at [20], namely whether the land is:

*"so intimately connected with [the building] as to lead to the conclusion that the former forms part and parcel of the latter."*

At [61], the Court quoted more fully from Buckley LJ's judgment, as follows:

*"What then is meant by the curtilage of the property? In my judgment it is not sufficient to constitute two pieces of land parts of one and the same curtilage that they should have been conveyed or demised together, for a single conveyance or lease can comprise more than one parcel of land, neither of which need be in any sense an appurtenance of the other or within the curtilage of the other. Nor is it sufficient that they have been occupied together.* ***Nor is the test whether the enjoyment of one is advantageous or convenient or necessary for the full enjoyment of the other.*** *A piece of land may fall clearly within the curtilage of a parcel conveyed without its contributing in any significant way to the convenience or value of the rest of the parcel. On the other hand it may be very advantageous or convenient to the owner of one parcel of land also to own an adjoining parcel, although it may be clear from the facts that the two parcels are entirely distinct pieces of property.* ***In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter****.*

*There can be very few houses indeed that do not have associated with them at least some few square yards of land, constituting a yard or a basement area or passageway or something of the kind, owned and enjoyed with the house,* ***which on a reasonable view could only be regarded as part of the messuage,*** *and such small pieces of land would be held to fall within the curtilage of*

> *the messuage. This* ***may extend*** *to ancillary buildings, structures or areas such as outhouses, garage, driveway, garden and so forth.* ***How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending*** *must depend on the character and the circumstances of the items under consideration.* ***To the extent that it is reasonable to regard them as constituting one messuage or parcel of land****, they will be properly regarded as all falling within one curtilage; they constitute an integral whole. [Emphasis supplied.]"*

2.11. Reviewing five other cases in different legislative concepts did not cause them to depart from the *"intimate association"* test. In the context of development control, the Court endorsed the non-exhaustive, non-prescriptive approach of Lieven J in *Challenge Fencing v SoSCLG* [2019] EWHC 533 (Admin) and the fact that planning unit and curtilage are not necessarily contiguous.

2.12. Applying the *"intimate association"* test to this case, I note, first of all, that the whole of the T-shaped area to the rear of the dwellinghouse has clearly been in single ownership and occupied by domestic recreational facilities for some time. The former changing rooms for the swimming pool were the subject of a planning application dated January 1966, which was granted on 6th April 1966 (ref. CTP/E5/14/2/T580/PO/:LK). The same application/permission also included alterations to the garage and *"front entrance"* of No.14. It appears, from the Heritage Statement submitted in support of the recent successful application for alterations to the house, that the tennis court and pool, together with pool house, were built in the 1970s, to designs by different architects from those permitted by the 1966 permission, after the purchase of the two arms of the 'T', so it is possible that they were erected in reliance upon the then permitted development

rights. This development history is consistent with the Land Registry information which assigns different title numbers to the central and norther parts of the ‘T’ on the one hand and the southern arm of the ‘T’ on the other, although the entire area was in the single ownership of the Lord of the Manor until the 1920s. The differing conveyancing histories, however, are not determinative of curtilage, as Buckley LJ recognised. The subsequent authorities cited in the judgment in *Blackbushe* where *Methuen-Campbell* was followed included *Dyer v Dorset_CC* [1989] 1 QB 346, where Nourse LJ recognised that *“the size of the curtilage may very somewhat with the size of the house and building”* (*Blackbushe* [75]). All the judgments also recognise that curtilage will often include ancillary buildings.

2.13. In my opinion, the whole of No.14’s garden, the ‘T’ shaped area of land to the rear of it, falls within its curtilage. The house is a substantial and high quality one and it is therefore entirely natural for it to have a sizeable garden containing structures used for the recreation of the inhabitants and, doubtless, their guests. The precise nature of these ancillary facilities has varied over the years, with fashion, and reflecting the particular pastimes enjoyed by successive owner occupiers. The land in question, however, has been *“intimately associated”* with the house so that it *“in truth forms part and parcel of the latter”*.

2.14. Paragraph (a) of Class E lists the relevant categories of permitted development as follows:

> *"any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such, or the maintenance, improvement or other alteration of such a building or enclosure;"*

The purposes of the proposed structures are:

- a new swimming pool plus enclosure
- a new games hall and gallery building
- a new gym building
- two new sheds to house plant equipment

Paragraph E.4 (set out above) is a non-exhaustive, inclusive provision, rather than an exhaustive definition, focusing on the keeping of animals. This does not exclude other domestic purposes, as is clear from many decisions. The proposed purposes are clearly incidental to the enjoyment of the dwellinghouse as a family home and clearly fall within paragraph (a).

2.15. Paragraph E.1 (a) and (b) do not apply. As I have said, the dwellinghouse was in residential use on the Appointed Day.

2.16. Paragraph E.1(c) is also irrelevant, since the proposals are all to be sited at the rear of the dwellinghouse, as is paragraph E1.(g), since the relevant dwellinghouse is not listed.

2.17. Paragraph E.1(h) must be applied having regard to the baseline established by implemented planning permission No. 2021/6257/P, which authorises certain areas of raised hard surfacing. These features do not, therefore, form part of the proposed works and do not engage paragraph (h).

2.18. Paragraph E.1(i) is, superficially, difficult to interpret, given the overall requirements in relation to curtilage and purpose. The intention must be, however, to exclude development which might constitute the extension etc. of a dwellinghouse, which is the subject of other Classes within Part 1 of Schedule 2, and this interpretation is confirmed in the Government guidance.[1]

2.19. The other paragraphs specify dimensional and design tolerances which are addressed in the architectural materials submitted with the Application. I advise on the basis that these physical requirements are satisfied, as has certainly been the intention of the designers.

## 3. CONCLUSION

3.1. To the extent that the relevant matters are ones of law, I am of the opinion that the proposed works do not require a grant of planning permission under Part 3 of the TCPA 1990 because they would constitute permitted development, therefore a CLOPUD should be issued confirming their lawfulness.

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5. xii. 2022

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[1] Permitted Development rights for householders, Technical Guidance, MHCLG, September 2019, p.44.

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