
Appeal Decisions

Site visit made on 26 September 2016

by D E Morden MRTPI

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

Decision date: 08 November 2016

**Appeal Refs: (A) APP/C1760/C/16/3142742, (B) 3142743 & (C) 3142744
Oakcutts, Kentsboro, Middle Wallop, Stockbridge, SO20 8DZ**

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr M Burford, Mrs M Burford and Mr N Burford against an enforcement notice issued by Test Valley Borough Council.
- The enforcement notice, reference 15/0009/REG, was issued on 26 November 2015.
- The breach of planning control as alleged in the notice is the erection of a building in the approximate position marked with an 'x' on the plan attached to the Notice.
- The requirements of the notice are to (a) demolish the building including all respective footings and associated development to serve the building; including septic tank and all associated drainage associated [*sic*]; and (b) remove all the resulting materials arising from compliance with step (a) from the land affected.
- The period for compliance with the requirements is three months.
- Appeal A is proceeding on the grounds set out in section 174(2)(a), (c) and (f) of the Town and Country Planning Act 1990 as amended and Appeals B and C are proceeding on grounds (c) and (f) only.

Summary of Decisions: The appeals are dismissed and the notice is upheld with a variation as set out in the Formal Decisions at paragraph 33 below.

Applications for costs

1. An application for costs was made by Test Valley Borough Council against the appellants. An application for costs was also made by the appellants against the Council. These applications are the subject of a separate Decision.

Procedural Matters

2. The Notice contains a typographical error in that the word 'associated' is contained three times in paragraph 5(a) with the last occasion being in error as the phrase makes no sense unless it is deleted. I will vary the Notice to delete the last occurrence of the word 'associated' in that paragraph.
3. The Council questioned the fee paid regarding the ground (a) appeal (£770) which is the appropriate fee when a case is concerned with the erection of a dwelling. The Council stated that if the appeal concerned a building outside the curtilage of the dwelling the fee should be £3080. The relevant Fees Regulations set down that the fee payable is that which is set out by the Council in the explanatory note that accompanies the notice (£770) and there is no provision for the Council to re-assess it once the Notice has been issued.

The appeals on Ground (c) – Appeals A, B and C

4. The appellants' case on this ground is that the building is permitted development under Class E of Part 1 in the General (Permitted Development)

Order 2015 (GPDO) which concerns buildings within the curtilage that are for purposes incidental to the enjoyment of a dwelling house as such. In order to be permitted development the building has to be within the curtilage of a dwelling and if so, it has to satisfy the various criteria applicable to Class E.

5. The appellants stated that a Lawful Development Certificate (LDC) - granted on 22 December 2015 - covered all of the land in the appellants' ownership. It set out that the use of the land and buildings edged red on the application plan for purposes incidental to the enjoyment of the dwelling house known as Oakcutts was lawful on that day. The appellants have then gone on, incorrectly in my view, to stipulate that that means that all of the land within the red line is (a) garden and (b) also forms part of the curtilage of the property.
6. All that the LDC confirms is that all of the land edged red (which is all within the ownership of the appellants) may be used for the purposes stated in the LDC; that may be garden type use or it may be some other incidental use e.g., a paddock for horses, or it may be a mix of several incidental uses. Further, curtilage is not a land use at all and does not necessarily comprise all of the land in someone's ownership or all of the land forming a planning unit. What constitutes the curtilage of any dwelling is a matter that has been before the courts on a number of occasions and is a matter of law. Whilst I will make a determination on the curtilage in this decision, it is ultimately for the courts to determine in any given case.
7. There was no dispute between the parties that all the land forming the LDC application and decision was one planning unit or that its use was now residential; that it was a dwelling and other uses and buildings that were incidental to the residential use of that dwelling. There are some stables and outbuildings but there is no commercial use of any part of the site and has not been since the builders yard type use ceased in the mid-1990s. From the information in the representations and from what I saw at the site visit I have no reason to disagree with the parties' conclusions on those particular matters.

Curtilage

8. Dealing with the first of the points set out in paragraph 4 above the parties disagreed about whether the building was within the curtilage of Oakcutts. In *Dyer v Dorset CC [1989] QB 346*, the Court of Appeal held that in the absence of a definition anywhere in any Planning Act or subsidiary legislation, the word curtilage bore its restricted and established meaning connoting a small area forming part and parcel with the house or building which contained it or to which it was attached. It was a matter of fact and degree.
9. Nourse L.J. in that ruling endorsed as 'adequate for most present day purposes' the definition contained in the Oxford English Dictionary. That definition stated as follows: 'A small yard, or 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.' An earlier court decision of 1950 (*Sinclair-Lockhart Trustees v Central Land Board [1950] 1 P&CR 195 Court of Sessions*) had ruled that it need not be an area that is marked off or enclosed in some way; 'it is enough that it serves the purpose of the house or building in some reasonably useful way.'
10. In *McAlpine v SSE [1994] EGCS 189*, the court, from a study of the authorities existing at the time identified three relevant characteristics of a curtilage. They

are:- (a) it was confined to a small area about the building, (b) an intimate association with the land which was undoubtedly within the curtilage was required to make the land under consideration part and parcel of that undoubted curtilage land and (c) it was not necessary for there to be physical enclosure of that land which was within the curtilage, but the land needed to be regarded in law as part of one enclosure with the house.

11. Since that time, as stated by the appellant, the Court of Appeal in *Skerritts of Nottingham v SSETR* [2000] JPEL 789, has stated that curtilage is not necessarily 'small'; it is a matter of fact and degree. That case concerned a listed building with extensive grounds and as the court stated, ownership and functions of various outbuildings and ancillary outbuildings were relevant. The Court recognised that even the *Dyer* decision stated that it was a matter of fact and degree.
12. In this case Oakcutts is an approximately 'thick L-shaped' plot about 60 metres wide on the Old Stockbridge Road frontage for a depth of about 50 metres whilst the rear part of approximately 65m depth is about 40m wide. Oakcutts is situated on the front, wider part of the site towards the south west corner. The dwelling has a well-defined manicured and planted 'garden' to the north, west and south (the latter being the front lawn area between the dwelling and the road). It has flower beds, well-tended lawns and various out buildings and other structures to the west and south of the property. On the rear of the property is a single storey extension that projects a long way down the 'garden' visually cutting off the land to the east. Just to the rear of the 'garden' fence adjoining its north east corner is a stable building further separating, visually, the land to the east.
13. Except when turning off the road and into the driveway, from where one can access a rectangular grassed area to the east of the house on foot (and if the ground is hard enough, some vehicles), the dwelling and its immediate surrounds has physical boundaries with a mixture of fences, trees and hedges on all sides. To the north east (right, when viewed from the site entrance) of the driveway entrance is a grassed area that has some tree planting. There is a tall mature hedge across the north (rear) of this area that runs east to west across the site at a point approximately in line with the rear main wall of Oakcutts. There is also mature hedge along the road frontage giving some degree of privacy within this grassed area.
14. The basically rectangular area to the rear of the east to west running hedge and east of the rear dwelling extension is another large grassed area with some mature trees within it (although they are mainly along the eastern boundary with Broad Road that runs north to south alongside the property boundary). It contains the stable building (containing several stables) immediately adjoining the north east corner of the 'garden' (with a post and rail wooden gate into the garden) and at the northern end of the field is the building the subject of the appeal and fixed mobile home, which has a permanent extension on one side of it and there is also a double width vehicular access. A small rather dilapidated building lies between the appeal building and the eastern site boundary.
15. In the site survey plan by the appellant's agents (attached to the appeal papers) dated October 2013, which accompanied the application for a new dwelling on the current appeal site, a post and rail fence is marked with a gate in it to the east of the stables and there are more fences elsewhere to separate

the land to the rear of the east to west running hedge from the rest. The land to the rear of the hedge is also clearly marked as paddock in two places. Also in the appeal decision (APP/C1760/A/14/2222806) that followed the refusal of planning permission for the dwelling, the inspector described the appeal site as follows in paragraph 3, second sentence, 'Paddocks used for equine grazing separate the appeal site from the nearby bungalow of Oakcutts.' That was, therefore, still the situation in October 2014 when the site visit for that appeal took place.

16. A later plan from the same company in October 2015 (that was possibly submitted with the LDC application and entitled 'Site Plan and Boundary Treatment') no longer shows some of the internal post and rail fences that split up the land to the east of the dwelling. It still shows a post and rail fence between the driveway and grassed area to the east and this is confirmed in the officers report to the committee which at the bottom of the first page still refers to a site visit on 27 November 2015 showing 'a grassed area east of the driveway, separated from the driveway by a post and rail fence and a gate'.
17. The officer also referred to horse manure located in several places on the large grassed area to the rear of the east to west running hedge and areas where hay had been deposited. The report listed that electric tape had been used to take the place of a small gap in the fencing immediately adjoining the dwelling on the east side of the extension (it was still there at the time of my site visit).
18. Elsewhere in the report the officer also stated that there was a trampoline, swing set, goals used for football, a garden table and chairs and other toys in various parts of the land. I acknowledge that the evidence at the time of the LDC appears to show activities incidental to the enjoyment of the dwelling as such taking place on the land and the Council accepted that sufficient had taken place in the 10 years prior to the application date to grant a certificate for residential use.
19. From the representations put forward, whilst that is now an accepted fact, it does not appear to me that the land was curtilage. That was confined to the clearly physically separate land immediately to the north, west and south of the dwelling and all the other land was physically separated from it by fences and hedges at least until November 2015. Prior to October 2014 there seems to have been just paddocks on the large area to the east and north east of the dwelling except for the mobile home and other buildings close to the northern boundary. That use albeit with others may have continued until November 2015.
20. Whether looked at in terms of how it appears on the ground or the uses to which it was and is put, I do not consider, taking into account the way in which the courts have considered what is and what is not the curtilage of a building, that the large rectangular area that lies to the east of the dwelling can be described as curtilage. It seems to me that it was used as horse paddocks with the animals being kept separate from the much smaller garden area that constituted the curtilage.

Class E building

21. Even if I am wrong on the curtilage question, I do not consider that the building would be permitted by Class E of the Town and Country Planning (General Permitted Development) Order 2015 (GPDO). The eaves of the

building are more than 2.5m in height measured from the ground and there is no tolerance in the GPDO; it is an exact measurement that cannot be exceeded. Although the amount is small and was checked on site, it means the structure cannot be permitted development. At the site visit when I asked the parties about where the measurement should be taken from the appellants' representative suggested it should be at the higher level of the land around the building.

22. In my view that is not correct; an area has been dug out and the land has been levelled and a building erected upon it. There is clearly a flat fairly level area of land on which the building stands and it has ground around it on all sides; that is where the measurement should be taken from. Behind walls on two sides the land is considerably higher but in my view it would be artificial to take measurements from that land which is now clearly separate from the land on which the building stands.

Conclusion on Ground (c)

23. Taking all these factors into account the appeals on ground (c) must fail. It is not necessary in these circumstances for me to consider the arguments about the building's intended uses (whether they are primary residential uses or incidental uses), about which there is minimal and contradictory information in any event, even within the appellants' representations or about its size and whether that is a relevant consideration in this instance.
24. It is also not necessary for me to consider whether what is being constructed so far (it is not complete) is designed as a dwelling rather than a building to be used for purposes incidental to a dwelling. The provision and location of service connections in the building, the positioning of sockets and fused sockets, switches, tv aerial sockets, frosted glass windows etc as well as other aspects of the internal layout are as one would see in any dwelling designed as such rather than an incidental building. That is unclear in the representations submitted and the appellants (bearing in mind the onus is on them to prove their case – on the balance of probability – could not show therefore that what is being constructed would be a Class E building.

The appeal on Ground (a) - Appeal A

Main Issue

25. The main issue in this appeal, having regard to the prevailing policies in the adopted development plan are the effect of the development on the character and appearance of the area including the effect of the development on the nearby mature trees.

Reasoning

26. There was an appeal that was dismissed in November 2014 (ref in para 15 above) for a dwelling in approximately the same position as the building now under construction. That building did have some rooms in the roof and was a therefore a little higher than what is now being constructed. The current building has a larger footprint however, being about 12% larger than that proposed for the dwelling. The current building also has a wide elevation facing north which is very prominent as one approaches the site along Broad Road.

27. It is very visible as one travels south along that road and it appears residential in character rather than some sort of agricultural building. It is also clearly visible from the entrance to the site from that same road. It is a detached building well away from Oakcutts and is highly intrusive in an otherwise rural area and detrimental to its rural character and appearance. Policy E2 in the Test Valley Borough Revised Local Plan (RLP), adopted in January 2016, is one of restraint in the countryside. The building is not for any rural use or appropriate in the countryside under any other policies in the RLP nor is it essential that it is located in the countryside. It is therefore contrary to policy COM2 in the RLP.
28. Policy COM11 does allow for extensions to dwellings and ancillary domestic buildings subject to three criteria. Criterion (a) requires that the building is used for purposes incidental to the enjoyment of the dwelling (which is what the appellant claims the building is) and whilst no particular use has been mentioned other than the general phrase (incidental use) it would comply with that criterion if that is the case.
29. It does not in my view satisfy the other two criteria however. As stated above I consider that the building is visually intrusive in the landscape so does not satisfy criterion (b). Criterion (c) requires that the design of any building is in keeping with the existing dwelling. The building is of a substantial size and scale and has a footprint over 10% larger than the dwelling which is a bungalow with some very small dormer windows in its roof. It does not appear as an ancillary building as required by the policy. It is about 60m away from it and looks like a bungalow in its own right with its own access on to Broad Road. In my view it is contrary to criterion (c) of the policy.
30. I acknowledge that there is some tree and hedge cover along the site boundary that would partially screen the development from those approaching from the south but it would appear as an isolated and sporadic development in the countryside detracting from the character and appearance of the area. No formal assessment of the impact of the development on the trees has been provided and whilst this building is slightly lower than the one refused in 2014, it is still likely to result in substantial lopping of the mature trees nearby due to their proximity to the building. That in turn would add to the harmful effect the development would have on the character and appearance of the area.
31. The appellant's views were based on the assumption that it was within the curtilage of the dwelling and that it was therefore futile to refuse it as it could be re-erected as permitted development. He also claimed that the building was in keeping with the existing dwelling and was not of a size that was intrusive. I have dealt in the ground (c) appeals with the status of the land and why it could not be permitted development. I have also stated above that bearing in mind its size which is larger than the existing dwelling, I consider that it is intrusive. It is too large and with its boarded finish above a plinth it is of a very different appearance to the brick built dwelling already on the site.

Overall conclusion

32. Taking all these factors into account I conclude that the development materially harms the rural character and appearance of the area. It does not comply with the policies for the control of development in the countryside and there are no material considerations that would outweigh the objections in this instance. I do not consider that landscaping would ameliorate the effects of the

development sufficiently to make it acceptable in this location. In these circumstances the appeal should not be allowed and I shall uphold the Notice.

The appeals on ground (f) – Appeals A, B and C

33. On this ground the appellant relied upon his view that it was pointless to require the building to be demolished as something could be re-erected again the next day. I have already determined that I do not agree with that view in determining the ground (c) appeal and deciding that the land is not within the curtilage of the dwelling. In those circumstances there is no permitted development that would permit the erection of a building without permission. No lesser steps are suggested by the appellants to remedy the breach and the appeals on this ground accordingly fail.

Formal decisions – Appeals A, B and C

34. I hereby direct that the enforcement notice be varied by deleting the word 'associated' from paragraph 5 a), line three. Subject thereto the appeals are dismissed and the enforcement notice is upheld; planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended in respect of Appeal A.

D E Morden

INSPECTOR