The Planning Inspectorate

Appeal Decisions

Hearing held on 14 December 2016

Site visit made on 14 December 2016

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

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

Decision date: 4 January 2017

Appeal A: APP/X1355/C/16/3142407
Land at 7 Whitfield Brow, Bollihope, Frosterley, Bishop Auckland, County Durham, DL13 2SZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Allan McCowie against an enforcement notice issued by Durham County Council.
- The enforcement notice, numbered EN/15/00901, was issued on 15 December 2015.
- The breach of planning control as alleged in the notice is without planning permission the material change of use of the Land to a mixed use for residential purposes and for the keeping of horses and the erection of a two bay timber stable building.
- The requirements of the notice are:
  (a) Permanently cease the equestrian use of the site for the keeping of horses; and
  (b) Dismantle and permanently remove the timber stable building.
- The period for compliance with the requirements is 8 weeks after the notice takes effect.
- The appeal 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.

Summary of Decision: The appeal is allowed subject to the enforcement notice being corrected in the terms set out below in the Decision.

Appeal B: APP/X1355/C/16/3142408
Land at 7 Whitfield Brow, Bollihope, Frosterley, Bishop Auckland, County Durham, DL13 2SZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mrs Judith McCowie against the same enforcement notice as that referred to in appeal A above, but is proceeding on the grounds set out in section 174(2)(c) and (f) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed in part and the notice is corrected in the terms set out below in the Decision

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Appeals A and B

The appeals on ground (c)

Main issue

1. To succeed on ground (c), the appellants must prove on the balance of probability that the matters alleged in the notice do not constitute a breach of planning control.

Reasons

2. The keeping of horses within the curtilage of a dwellinghouse can be incidental to the enjoyment of the dwellinghouse as such and thus excluded from the definition of development by section 55(2)(d) of the 1990 Act. There is no dispute that the horses are kept within the curtilage of No 7 Whitfield Brow and I see no reason to take a different view. They are kept within a clearly defined and modest area of land attached to the dwelling house, which is able and intended to be used as a garden in conjunction with the house.

3. Whether a use remains incidental or whether there has been a material change of use is a question of fact and degree in any given case. The appellants drew 2 other appeal decisions to my attention; one concerning a site in Hitchin[1] and the other a site in Thurmaston[2]. In both cases, the Inspectors indicated that, to be incidental, the uses in question had to be subordinate to the dwellinghouse use. This accords with my understanding, but I also accept that, having regard to *Croydon LBC v Gladden* (1994) 1 PLR 30, the concept of incidental use must also embrace an element of reasonableness.

4. In relation to permitted development (PD) rights for buildings within the curtilage of a dwellinghouse, paragraph E.4 of Class E, Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 (the GPDO) states that a ""purpose incidental to the enjoyment of the dwellinghouse as such" includes the keeping of…pet animals…or other livestock for the domestic needs or personal enjoyment of the occupants of the dwellinghouse." This definition is explicitly "for the purposes of Class E" and the 1990 Act contains no similar definition of general application. Nevertheless, the appellants say that they keep their 2 horses as pets. Nothing I have seen or heard contradicts that and it is clear that normal residential activity can include the keeping of family pets. Though the horses are also ridden by the appellants' grown-up daughters when they visit, this does not prevent their being kept for the personal enjoyment of the occupants of the dwellinghouse. The horses are not there for members of the general public to ride or for any commercial purpose.

5. The horses are only kept on site during the winter months and in the summer they are put out to graze on land elsewhere. However, the appellants refute the Council's suggestion that the purpose of keeping them on the appeal site is to avoid the costs of winter livery, rather than for purposes incidental to the enjoyment of the dwellinghouse. They say that it is much easier to go riding in winter when the horses can simply be taken from the stables at home, rather than retrieved from a remote muddy field, and this greatly enhances their enjoyment of the dwellinghouse. That is a reasonable response and I am not persuaded that the fact that the horses are not on site throughout the year somehow means that the use is not incidental to the enjoyment of the dwellinghouse as such.

6. As far as the nature and scale of the use is concerned, the majority of the appeal site is devoted to ordinary residential purposes. A timber and block garage building at the front of the site is used to store haylage and bagged manure and sawdust bedding, pending disposal, and hard feed is kept in air-tight containers in a lean-to structure at the front of the property. There is a

[1] Hearing document 2.
[2] Hearing document 3.

paved courtyard, workshop and coalhouse/store to the front of the house and, immediately to the north-east and north-west are raised patio areas. The land then slopes away to the north-west and a flower bed and shrub border extend along the north-eastern boundary wall, between an old generator outbuilding and the timber stables.

7. The 2-bay stable structure measures some 7.4m wide by 3.6m deep and now 2.5m high[3]. Between this structure and the boundary wall separating the site from the moor there are tall conifers. To the west of the stables, there is a sizeable area of lawn and planting, which is separated from the stables by a strip just wide enough to enable the horses to access them. At the far end of the garden, beyond some trees there are fenced sand and "turn-out" paddocks. These are modest areas for use by the horses and, together with the stables, they are subordinate in terms of scale, area and appearance to the combined areas of lawn, planting, patios, house and domestic outbuildings. When concluding that the use was incidental, the Inspector in the Hitchin appeal found that the area used to house the ponies was less than half the total garden area available. That is the case here.

8. However, the Inspector in the Hitchin appeal also noted that the two miniature ponies were themselves "small in scale, akin to a large dog", whereas the appeals before me involve the keeping of 2 much larger cob horses. The Council accepted that this could still constitute the keeping of pets, but did question whether a site of this size is suitable for the keeping of 2 large horses. This is arguably relevant to the issue of reasonableness. However, the Council tendered no expert evidence on this point, whereas Mrs McCowie does have relevant expertise. She was formerly Head of the Department of Equine and Animal Care at Northumberland College for 13 years and is still employed by the college as a lecturer in Equine Studies. Though an injury now prevents her from taking part in competitive eventing or handling top flight competition horses, Mrs McCowie is able to ride the sturdy cobs kept on this site. She is also a British Horse Society instructor and judge and an examiner for riding clubs in relation to both riding and stable management.

9. Mrs McCowie explained how the appeal site is perfectly adequate for these horses when relying on supplementary feeding, rather than grazing, and with a regular exercise regime involving riding out on local bridleways, together with "long reining", "ride and lead" and Pilates within the site. I accept that evidence and therefore the keeping of 2 horses on this site is not inherently unreasonable by virtue of animal welfare issues.

10. Whether a use is incidental or involves a material change is a question of fact and degree and, as indicated in the Thurmaston appeal decision, any impact of the activity on neighbours' living conditions can be relevant to that question. The appeal property is in a row of 6 dwellings, but is otherwise isolated in the remote countryside of the North Pennines Area of Outstanding Natural Beauty (AONB). Although one neighbour wrote to say he had no objection to the use and stables, 2 others submitted written objections saying they had experienced problems since the use was introduced 3 years ago. The issues raised concern rats, flies, odour, the burning of manure and waste straw, horse droppings on the access road, and the blocking of the access road/turning circle by deliveries of hay.

[3] It has been reduced in height by some 35cm since the service of the enforcement notice.

11. None of the neighbours attended the hearing to elaborate on their concerns. The appellants say a large pond was removed from the garden in order to provide the paddock areas. This disturbed some extensive rat-runs which created a problem for a time. However, proper rodent control was put in place, with advice from the Council's Environmental Health Officers and to their satisfaction. Feed is properly stored and no manure heap is kept. Waste is put in sealed bags, stored in the garage and removed to a local farm every 2 – 3 days using a 4x4 vehicle, which is an essential requirement in this remote, hillside location. In the circumstances, there is no reason why the presence of 2 horses should be causing or exacerbating a vermin problem.

12. The appellants say the horses are only kept on site from approximately 1 November to 31 March the following year and in the summer, they are put out to graze on land elsewhere. In view of this and the regular removal of waste, odour and flies should not be a problem. The Council had no evidence of its own to counter these points and I saw nothing on site to suggest any significant problems at present. In the absence of more detailed evidence from neighbours, I am not persuaded that the use on the scale described has significantly affected neighbours' living conditions through odour, or encouraging the presence of rats and flies.

13. Whilst denying suggestions in written objections that they had ever burnt waste on the moor, the appellants acknowledged that, in the first year, they did initially burn used straw and manure on an area of hard standing just to the east of their property. However, that ceased when they substituted saw dust for straw bedding and started regularly bagging and removing waste. That arrangement had been in place for some time when the enforcement notice was issued. There was no muck heap on or near the site when I visited and no evidence of waste being stored other than in bags within the garage. There was similarly no evidence of horse droppings on the access road and the appellants say they clear these straight away. Whilst I accept that this issue may have arisen from time to time, it is not indicative of a material change in use of the land.

14. The appellants acknowledged that the access road or turning circle has occasionally been blocked when haylage has been dropped off in the wrong place by the delivery driver. There is space for this to be deposited in front of the appellants' garage without causing an obstruction and, in the absence of any neighbours at the hearing to explain otherwise, I am not persuaded that this has been a frequent or significant problem.

15. The Council also referred to general disturbance, in terms of visits to the garden area and stables to muck out, feed, groom and exercise the horses, along with visits to the storage buildings used for feed, bedding and tack. The Council also pointed out that head torches are used at night. However, whilst the next door neighbours would have oblique views of them from their first floor rear windows, the stables are located on the far side of the plot, away from neighbours. The small paddocks are at the end of the garden, partially screened by trees within the site, as well as boundary screening. Disturbance was not a concern raised by neighbours and the appellants only use head torches to avoid more intrusive fixed lighting. I am not convinced that that the horse related activities create significant disturbance.

16. Other impacts on the environment could be relevant to the fact and degree assessment. Though this point was only raised for the first time at the hearing, the Council suggested that the use of a rear access from the site over the moor could disturb the Special Protection Area's moorland breeding bird habitats[4]. However, the appellants only suggested, during the course of the appeal, that they could use that rear access to avoid taking the horses along the main access road, to the front of objecting neighbours' houses. They are happy to use that main access as they did when the notice was issued and I see no problem in them doing so. Furthermore, the rear access is via a pre-existing gate in the boundary wall, which could have been used by occupants of the house, for example to take dogs across the moor. The evidence before me is insufficient to indicate that the current use has any significant additional impact on moorland breeding bird habitats.

17. On the evidence before me, the scale of activities associated with the keeping of horses on the appeal site has not reached a level sufficient to change the character of the use from residential to the mixed use alleged. In view of that and the limited area of the overall site taken up by those activities, the horse related use remains subordinate to the residential use. The appellants have proved on the balance of probabilities that their use of the site for the keeping of horses is reasonably incidental to the enjoyment of the dwellinghouse as such. It might be that if the horses were to be kept on site all year round, the impact on neighbours could increase, such that a material change occurs, but I can only base my judgement in relation to ground (c) on the pattern and scale of use that has occurred to date. (It is also worth noting that if a statutory nuisance were to arise through odour, flies and so on, other powers exist to address this).

18. For the reasons given, the appeal succeeds on ground (c) in relation to the use, but I must also consider this ground in relation to the stables. The appellants' case is that the provision of the stables did not amount to operational development because they are not a building. They accepted during the hearing that, if the stables do constitute a building, they could not have benefitted from PD rights under Class E of the GPDO, because they are sited within 2m of the dwellinghouse curtilage and exceeded 2.5m in height. Though their height has since been reduced to 2.5m, PD rights cannot be claimed retrospectively and the position must be judged at the date the development was carried out.

19. Section 336 of the 1990 Act defines a building as "any structure or erection" and for greater assistance one has to look to case law. The parties agreed that the basic principles which arise from *Cardiff Rating Authority v Guest Keen* [1949] 1 KB 385 and *Skerritts of Nottingham Ltd v SSETR and Harrow LBC (No 2)* [2000] JPL 1025, to which I drew their attention, can be summarised as follows:

- Whether or not something is a building is a question of fact and degree, having regard to its:
    - size;
    - permanence; and

[4] The Council explained that these habitats are the reason for the SSSI designation.

- degree of physical attachment, though

none of those three factors is decisive.

20. The size of the 2 bay stable structure is such that it could be delivered to a suitable site ready-made but, as a matter of fact it has been constructed and assembled on site by Mr McCowie. This involves bolting and screwing together 2 rear sections, the sides, the roof sheets and 2 front sections and attaching the doors. Mr McCowie is not a builder, but it takes him a day to erect the structure using hand tools. The appellants say it was sold to them as a mobile structure and I saw that it has a metal sub-frame and towing eyes at the corners, so that chains or ropes could be attached and it could be dragged across a field by a tractor. However, though I am told that the stables have been dismantled and re-erected 3 times, they have never just been moved within the site.

21. Furthermore, the site is somewhat constrained and given the change in levels, the ground has been built up with stones under one end of the structure and it is effectively cut into the ground at the other end, where it abuts the flower beds. I am satisfied that there was never any intention to move the stables around the site, even if that were practical. Furthermore, had the Council not requested them to do so, it is unlikely that the appellants would have dismantled them each year in the past. I discount the fact that the appellants did not remove the stables during the 2016 summer, because the enforcement notice and pending appeal left them unsure of what they should do and they wanted the stables in place for any appeal site visit. Nevertheless, the stables have been in place for periods of 7 and 8 months in previous years and, in the *Skerritts* case, a marquee sited in the grounds of a hotel for 8 months of the year was held to have a sufficient degree of permanence to qualify as a building. In the context of planning control, permanent does not necessarily mean everlasting.

22. The stables are not physically attached to the ground. They have no floor and are not connected to services. Nevertheless, in their current sheltered location, their own weight is sufficient to anchor them to the ground and the appellants indicated that it was simply unnecessary to fix them more securely.

23. In all the circumstances, notwithstanding, their limited size and degree of attachment, the stables have a significant degree of permanence and they effect a physical change in the characteristics of the land. Though sold as mobile, they are not mobile on this site and, as a matter of fact and degree, I am satisfied that they constitute a building and accordingly their erection on this site was operational development requiring planning permission.

24. The appeals on ground (c) therefore succeed in relation to the change of use but fail in relation to the operational development. I cannot therefore quash the notice but, in order to properly define the scope of the deemed application for planning permission, it is necessary to correct the allegation by deleting reference to the change of use. Whilst my decision on this ground in relation to the use of the site inevitably leaves certain matters unregulated, the description of what has occurred so far at least provides a baseline position against which materiality of any future change could be assessed.

Appeal A only

The appeal on ground (a)/the deemed application for planning permission

25. In view of the correction I am making to the allegation as a result of the partial success on ground (c), the ground (a) appeal and deemed application now relate solely to the erection of the 2 bay timber stable building.

26. Given that, in the circumstances described, I have found the keeping of horses to be incidental to the enjoyment of the dwellinghouse as such, if this stable building were removed, the appellants could immediately replace it with an identical building as PD under Class E of the GPDO. There is every likelihood that this would happen and this fall-back position carries very substantial weight.

27. In any event, the Council raised no objection to the stable building as such; its concern was that its erection was intrinsically linked to the use of the land for the keeping of horses. The appearance of the stables is not detrimental to the character and appearance of the rural location, the landscape qualities of the AONB, or the host dwelling. In this regard, I find no conflict with saved Policies GD1 and ENV2 of the Wear Valley District Local Plan (LP), adopted March 1997 or with the National Planning Policy Framework (the Framework).

28. In its statement, the Council expressed concern that waste disposal and drainage arrangements could have an indirect detrimental effect on the adjacent Bollihope, Pikestone, Eggleston and Woodland Fells Site of Special Scientific Interest (SSSI). However, its other written comments specifically related to the SSSI indicated that:

    "The stable building as constructed in its current location has not directly affected the fauna or flora.

    There is potential for indirect impact from the waste disposal arrangements, which remain a concern, however Natural England are the appropriate authority for dealing with that particular issue if it arises and therefore this does not represent sufficient conflict with Local Plan Policy ENV10 to find it unacceptable in this respect."

    I heard nothing during the hearing to indicate that this was not a fair assessment. I have already described the arrangements for the storage and disposal of manure and the appellants do not wash out the stables, as they have no floor; they simply sweep up the absorbent saw dust.

29. In all the circumstances, I find that the erection of the stables causes no material harm and complies with the development plan. Despite their age, there is no suggestion that the development plan policies referred to are out of date and the Framework therefore indicates that planning permission should be granted without delay. Having regard to this and the fall-back position, I am satisfied that the appeal should succeed on ground (a), planning permission should be granted for the erection of the stables and the corrected notice should be quashed. Ground (f) does not therefore fall to be considered.

Conditions

30. Conditions concerning: the storage and disposal of waste; drainage and washing down of the stables; the months during which the horses could be

kept on site; and use of the rear access to the site were suggested and discussed at the hearing. However, they were considered primarily in the context of the deemed application for permission for a change of use of the overall site. I have found that there has been no material change of use requiring planning permission, as the use is incidental to the enjoyment of the dwellinghouse as such. I have also noted that, against that background, an identical stable building could be erected as PD under Class E. In that event, no conditions would be attached and I am therefore unable to conclude that any of the suggested conditions is reasonable or necessary.

31. However, by virtue of section 75(3) of the 1990 Act, in granting planning permission for the erection of the stable building, I will be granting planning permission to use the building for the purpose for which it is designed. In other words, there is a built-in application for a change of use of the land and it is likely that the extent of the land would be ascertained by reference to the plan attached to the enforcement notice. However, section 75(2) of the 1990 Act provides that the purpose of a building may be specified. In order to avoid the unintended grant of unrestricted planning permission for a change of use of the appeal site for stabling horses, it is necessary to impose a condition specifying that the stable building shall only be used for purposes incidental to the enjoyment of the dwellinghouse as such. This mirrors the terms of Class E of the GPDO referred to above and would allow for the building to be used for other incidental purposes, if the keeping of pet horses on the site were to cease.

Decisions

Appeal A: APP/X1355/C/16/3142407 and

Appeal B: APP/X1355/C/16/3142408

32. The enforcement notice is corrected pursuant to appeals A and B by the deletion of the following words from the allegation in section 3: "the material change of use of the Land to a mixed use for residential purposes and for the keeping of horses and".

33. Subject to this correction appeal A is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made on appeal A under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the erection of a two bay timber stable building on the land at 7 Whitfield Brow, Bollihope, Frosterley, Bishop Auckland, County Durham, DL13 2SZ, subject to the following condition:

    1) The stable building hereby permitted shall only be used for purposes incidental to the enjoyment of the dwellinghouse as such.

J A Murray

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Stephen Barker MRTPI DMS BSc(Hons)	Prism Planning
Judith McCowie British Horse Society Intermediate Instructor BA (Hons) Education and Training	Appellant
Allan McCowie	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Susan Porter	Senior Enforcement Officer, Durham County Council
Adrian Caines MRTPI BSc (Hons)	Principal Planning Officer, Durham County Council

DOCUMENTS SUBMITTED

1	Notice of hearing
2	Appeal Decision Ref 2114057 re Hitchin Road, Stotfold, Hitchin
3	Appeal Decision Ref 2100987 re Westdown Drive, Thurmaston
4	Map showing the relationship of the appeal site with the SSSI
5	Drawing Ref Map01 purporting to show the area used for the keeping of horses coloured green[5]

[5] This drawing was submitted by the appellants with my agreement following the close of the hearing. It is not agreed by the Council, who consider that it does not accurately show the size of the area where the stables are sited, or the area immediately in front of the stables which the horses use to gain access. However, aside from this, I am satisfied that the area coloured green on that drawing provides a fair representation of the proportion of the appeal site given over to the keeping of horses.