



Appeal Decision

Site visit made on 10 January 2017

by **Pete Drew BSc (Hons) DipTP (Dist) MRTPI**

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

Decision date: 13 January 2017

Appeal Ref: APP/J1860/C/16/3155342 - Land at Mythe Bridge House, Ledbury Road, Bushley, Tewkesbury, GL20 6AA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 [hereinafter "the Act"] as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr B Curtis against an enforcement notice issued by Malvern Hills District Council.
 - The notice was issued on 28 June 2016.
 - The breach of planning control as alleged in the notice is without planning permission, the unauthorised erection of an outbuilding constructed of brick and white-framed glazing ("the Outbuilding") on the Land.
 - The requirements of the notice are: permanently remove the Outbuilding from the Land, including the lawful disposal of the resultant materials, and restore the ground to its condition before the breach took place.
 - The period for compliance with these requirements is one calendar month.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (f) and (g) of the Act.
-

Formal Decision

1. The appeal is 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 Act.

Ground (c)

2. Under this ground of appeal the Appellants need to show that: "*...there has not been a breach of planning control*" [as per section E. (c) of the appeal form]. This is based on the claim that the works are permitted development by virtue of Article 3 and Class E of Part 1 to Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015 [the GPDO].
3. Class E permits: "*The provision within the curtilage of the dwellinghouse of— (a) any building ... required for a purpose incidental to the enjoyment of the dwellinghouse as such ...*". E.1 says development is not permitted, amongst other things, if: "*(c) any part of the building, ... would be situated on land forward of a wall forming the principal elevation of the original dwellinghouse*".
4. The first issue is whether the Outbuilding is built on land with the curtilage of the dwellinghouse. The Council accepts that the Land has an established, or lawful, use as a garden. The Appellant relies on the definition of curtilage in DCLG's "*Permitted development rights for householders - Technical Guidance*" [the technical guidance], dated April 2016. It defines it as: "*...land which forms part and parcel with the house. Usually it is the area of land within which the house sits, or to which it is attached, such as the garden, but for some houses, especially in the case of properties with large grounds, it may be a smaller area*". This appears to reflect a range of cases including *Mc Alpine v SSE and*

- another* [1995] 1 PLR 16, upon which the Council relies which, insofar as it relates to size, might be said to have been qualified by subsequent case law.
5. The key area of dispute between the parties is whether the Land on which the Outbuilding has been constructed forms one enclosure [as per *Mc Alpine*] or is attached [as per the technical guidance] to the area of land within which Mythe Bridge House sits. My inspection confirmed that the respective areas of land, whilst sitting on opposite sides of the A438, can be accessed through some of the arches of the bridge. The list description records that at each abutment is a series of six tunnel vaults with pointed arches. Whilst I hope it is fair to say that 2 of those arches were relatively inaccessible, the remainder permitted connection and one of those was laid with a pathway that led to the door of the house in the elevation that faces towards the river. Given the Council's concession as to the use of the Land to the south of the road I therefore conclude, as a matter of fact and degree, that the Land as defined in the enforcement notice does form part of the curtilage of Mythe Bridge House.
 6. Turning to whether the Outbuilding contravenes E.1(c), the term "*Principal elevation*" is defined in the technical guidance. It says: "*...in most cases the principal elevation will be that part of the house which fronts (directly or at an angle) the main highway serving the house (the main highway will be the one that sets the postcode for the house concerned). It will usually contain the main architectural features such as main bay windows or a porch serving the main entrance to the house. Usually, but not exclusively, the principal elevation will be what is understood to be the front of the house*".
 7. When one looks at Mythe Bridge House I would find it impossible to conclude that the principal elevation is anything other than that which fronts onto the main highway [the A438] that passes across Mythe Bridge. It includes a main 2-storey gable with bay windows at both ground and first floor. This elevation also contains a door with a letterbox and to the left of the door is a sign "*Mythe Bridge House*". As a visitor on foot one is inevitably drawn to that door because of the existence of these features and because it is the elevation that faces the main road. I acknowledge that the internal layout might not be conducive to the Appellant's use of that doorway on a regular basis. By way of example a parking area lies to the west and there is a pathway that leads from that area to a doorway in that elevation. However that does not alter my view that the elevation that faces the road best fits the definition in the technical guidance.
 8. The technical guidance makes clear there will only be one principal elevation. I appreciate that there are doorways in the west and north elevations, the former facing towards the parking area, but the grounds of appeal make no case that either comprise the principal elevation. Instead the case is made that the east elevation is the principal elevation because it is most noticeable and prominent in public view; I disagree. My inspection, including from the footpath on the east bank, revealed that this elevation is largely hidden from view by existing trees, with the conifers partly screening it even in winter.
 9. I accept that there is a doorway in the eastern elevation but it is in the middle of 2 full height windows that, from the footpath on the other side of the River Severn, give the appearance of patio doors. The doorway in the east elevation is not prominent from the main road even in the immediate vicinity of the house and can only be seen by peering somewhat intrusively over the side of the bridge into the private garden, which lies at a much lower level than the

- deck of the bridge. Having regard to the definition in the technical guidance, I am satisfied that the east elevation of the house is not the principal elevation.
10. I have read the various decisions that have been referred to by the main parties. The appeal at Lock Cottage [Ref. APP/C3430/X/10/2138691] can in my view be distinguished on its facts insofar as the nearest public road was about 400 m away. In contrast the Council's unchallenged claim is that even if the building was constructed as a toll house for the collection of tolls from horse drawn barges using the path by the river, as is claimed, that elevation has now been subsumed within an extension permitted since 1969¹. Conversely the appeals relied upon by the Council² confirm my reading of the GPDO that the principal elevation must be that which exists at the time the works are constructed, provided it forms part of the original building. As the Council has observed the GPDO is in the present tense and what might have existed on a previous date, unknown, cannot therefore be germane to the assessment. It is material that even the grounds of appeal refer to the: "...*hypothetical line of the principal elevation*", and any such notion is at odds with the plain words in the GPDO. In any event it is material that my inspection confirmed that the Outbuilding is forward of that hypothetical line. It follows that the Outbuilding is not permitted because it fails E.1(c) of Part 1 of the GPDO.
11. For these reasons, despite my finding that the Land is part of the curtilage of Mythe Bridge House, I conclude that the ground (c) appeal must fail. The Outbuilding is not permitted development by virtue of Article 3 and Class E of Part 1 to Schedule 2 of the GPDO because it would be situated on land forward of a wall forming the principal elevation of the original dwellinghouse.

Ground (c): Postscript

12. The Appellant's final comments say that the Outbuilding is partly used as a facility for young rowers who appear to operate from the Land by virtue of the Appellant being the coach of the rowing club. They say: "*The structure in question is partly used as a shelter/waiting facility for rowers, and sometimes parents, in inclement weather, whilst waiting for rowers to finish on the river*". I acknowledge that the Council has not relied on this argument, but perhaps it was unaware of the use to which the Outbuilding is put; this was said at final comments stage and so the Council has not had a chance to comment upon it. Moreover the final comments also say: "*...some of the house domestic facilities are utilised to cater for some of the rowers' pre and post rowing requirements, changing, WC and shelter, whilst waiting for their turn to use the boats*".
13. In my view these comments raise more questions than answers. Based on what is said there must be a question as to whether there has been a material change in the use of the land. I do acknowledge that the activity is conducted on a voluntary basis but this is not determinative as to whether such use might be material in planning terms. The strong inference is that parents drop off and collect their children from the club. Such activity might give rise to comings and goings above that which might be expected of a single dwellinghouse. It might suggest the rowing activity might not be a purpose incidental to the enjoyment of the dwellinghouse as such. The prospect that the property might be in mixed use was reinforced by what I saw during my

¹ This date only being of relevance in this case because it is the date of the OS excerpt that has been provided.

² Appeal Refs: (i) APP/D0121/X/15/3140722; and (ii) APP/R3650/X/15/3124743 & 3124772.

inspection, including 6 indoor rowing machines in the lower room of the house and the floating pontoons, which are attached by 4 scaffold poles to the Land.

14. It is not my role to adjudicate on this matter but, by introducing this argument, the Appellant has raised a further basis on which it might be said that the Outbuilding is not permitted development. In short I cannot rule out the possibility that the planning unit is in a mixed use as a base for a rowing club and for residential. It is however unclear at what point any such use might have commenced and so, whilst I considered seeking the views of the parties on this issue, given my findings on ground (c) I have elected not to do so.

Ground (a), planning merits: *Preliminary observations*

15. At the time of my site inspection there was a large caravan immediately to the rear [west] of the Outbuilding as defined. My understanding is that following a flood planning permission was granted for a replacement dwelling³ and that the Appellant proposes to live in the caravan for the duration of the building works. That is clearly a matter between the parties but it is relevant to me insofar as the caravan dominates views of the Outbuilding at the present time. However it was agreed that for the purpose of my consideration of the ground (a) appeal that it would be appropriate to take the caravan out of the equation because it is a temporary feature that would not be permitted to stay in the long term.
16. The Appellant has lodged the appeal on, amongst others, grounds (a) and (f). However some of the arguments advanced under the latter ground, such as reference to landscaping or finish, could only be achieved by the imposition of conditions, which can only be delivered under ground (a). For this reason I have approached the deemed application holistically, taking account of some of the arguments raised under ground (f). This is line with the Act, which says that planning permission can be granted "*in relation to the whole or any part*" of the matters alleged in a notice and subject to conditions that meet the tests in paragraph 206 of the National Planning Policy Framework [the Framework].
17. The Development Plan [DP] includes the South Worcestershire Development Plan [SWDP], which was adopted in February 2016. The Council's appeal statement identifies a conflict with a number of SWDP policies but, because the Council did not originally allege a conflict with those policies on the face of the notice, I have not been sent copies of those policies with the Questionnaire.
18. Regulation 4 of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 says an enforcement notice issued under section 172 of the Planning Act shall specify...(b) all policies and proposals in the development plan which are relevant to the decision to issue an enforcement notice [my emphasis]. Since it is mandatory the Council cannot introduce new policies, colloquially, via the back door. Since a conflict was not alleged on the face of the notice and, as a direct consequence, I have not been sent a copy, I am unable to take the additional DP policies into account.

Main issues

19. I consider there are 2 main issues in this appeal. The first is the effect of the development on the setting of the nearby grade II* listed Mythe Bridge. The second is the effect of the development on the rural landscape.

³ Under the Council's reference 13/00077/FUL.

Reasons: (i) Listed building

20. The Council's statement says that Mythe Bridge is listed for what it describes as its technological interest rather than its aesthetic value. When viewed from the deck there might be some truth in the Council's assessment. However when viewed from other public vantage-points, such as the footpath on the east side of the River Severn, the single segmental arch, which the list description says has a span of 52m, is a striking feature that in my view has considerable aesthetic charm. So whilst the significance of the listed building derives from its engineering interest this does not mean that its setting is unimportant or that what the Appellant admits is a "*utilitarian structure*" would be appropriate.
21. The Framework defines the setting of a heritage asset⁴ as: "*The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral*". My inspection confirmed that Mythe Bridge is seen from a fair distance along the river in both directions. Whilst the east bank of the river has a number of quite significant buildings, associated with the Mythe Water Treatment Works [the water works], there are few structures along this stretch of the west bank. The single storey building at the western end of the Land, which is recorded on the plan attached to the notice, is set back from the listed bridge adjacent to the roadside trees and hedgerow. So whilst it is difficult to make a judgement as to the baseline, due to the existence of the caravan, the prominent siting of the Outbuilding gives a sound basis to make a clear distinction with that building.
22. In what is a largely pastoral context the Outbuilding is a conspicuous feature of a domestic character that harms the setting of the listed bridge. My inspection revealed that the Outbuilding is seen from the east river bank from the vicinity of "*Intake No 1*", which is perhaps two thirds of the way down the frontage of the water works onto the River Severn. It is particularly evident when climbing the metal stairways over the flood defence on the footpath. The polycarbonate roof, painted hardwood frame and blue brick⁵ contrast with the materials, and to a lesser extent their colour, that are most evident on the listed building, the list entry for which principally refers to cast iron and stone⁶.
23. Accordingly a condition to change the colour of the superstructure would not address all these concerns and, particularly given the extensive use of glazing, I am far from convinced that a scheme of landscaping could address its impact. There would be an inherent tension between the need to see out of the glazed structure and/or receive good levels of sunlight and/or natural daylight, and any landscaping proposed, which suggests that planting would be ineffective.
24. Paragraph 132 of the Framework determines that great weight should be given to the conservation of the significance of this listed building. The Appellant says the Council should have consulted Historic England because the structure is grade II* listed, but that only serves to underline the importance of the

⁴ The precise sequence is that a listed building is a designated heritage asset and a heritage asset includes a designated heritage asset, such that the quoted definition of setting is generically that of a heritage asset.

⁵ All as shown on drawing No B.C.2 that has been submitted as part of this appeal.

⁶ In terms of materials the list description also refers to a concrete slab, but this material is less obvious when the listed building is seen, by way of example, from the public footpath.

- structure. It is therefore material to note that paragraph 132 continues by saying that the more important the asset, the greater the weight should be.
25. In my view the Outbuilding makes a negative contribution to the setting of the listed building, but has resulted in less than substantial harm to its significance. I acknowledge that in issuing the notice the Council has referred to paragraph 133 of the Framework and hence appears to be saying that the development has led to substantial harm or a total loss of significance to the listed building. However I am unconvinced that the Council has substantiated that claim.
26. Paragraph 134 of the Framework says that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal. The Guidance says: "*Public benefits may follow from many developments and could be anything that delivers economic, social or environmental progress as described in the National Planning Policy Framework (Paragraph 7). Public benefits should flow from the proposed development. They should be of a nature or scale to be of benefit to the public at large and should not just be a private benefit*"⁷.
27. The only public benefit that has been identified by the Appellant is that the Outbuilding provides a facility for young rowers and promotes their engagement in a beneficial activity. I have no reason to doubt that the junior rowing club run by the Appellant has, according to the British Rowing Almanac 2016, a total of 85 wins in all competitions, which is a record unsurpassed by any other junior club or school in the country. However the Appellant's primary case, as evident from the reliance on Part 1 rights, is that this is a domestic outbuilding. I have also given reasons why the use of the land as a rowing club might be material and hence might represent a breach of planning control. Taken together, set against the finding that great weight must be given to the conservation of the significance of this grade II* listed building in the planning balance, I conclude that there are no public benefits that outweigh the identified harm.
28. For these reasons, on the first main issue, I conclude that the Outbuilding harms the setting of the listed building and, as such, I find a conflict with SWDP Policy SWDP24 A. and the Framework. There are no material considerations that outweigh the identified conflict with the DP.

(ii) Landscape

29. In the context of my consideration of the first main issue, I shall deal with this briefly. The Outbuilding is seen from the footpath and the deck of the bridge against the backdrop of what is identified as the Riverside Meadows Landscape Character Area [LCA], which is characterised as a secluded pastoral landscape. The unchallenged claim is that the management strategy for this area is one of restoration and conservation, which presumably informs the guideline to avoid building in the area. On the limited information before me the status of the "*Landscape Type Information Sheet*"⁸, as referred to by the Council, is unclear.

⁷ Source of quote: paragraph ID 18a-020-20140306.

⁸ The Information Sheet is not produced and whilst there is a footnote in the SWDP with a link to the Landscape Character Assessment that appears to be the evidence base for the SWDP rather than the Information Sheet. If the Council is going to rely on the Information Sheet in future appeals it might wish to exhibit a copy and explain its status to avoid the ambiguity that I am faced with.

However its content reflects what I observed during my inspection and hence it would be appropriate to attach the quotes from the document, the veracity of which are not challenged, significant weight in this appeal.

30. Whether viewed from the footpath or the road, the Outbuilding appears visually detached from Mythe Bridge House on what is otherwise a largely undeveloped riverbank. Whilst there are scattered farmsteads and dwellings in this view these sit comfortably in the established rural landscape, whereas the Outbuilding is highly conspicuous because of its siting near the riverbank and close to the main road. Since the deck of the bridge facilitates elevated public views down to the Outbuilding, landscaping could not address this concern.
31. For these reasons, on the second main issue, I conclude that the development would harm the rural landscape, contrary to SWDP Policy SWDP21 B. ii., which requires development to complement the character of the area and respond to the distinctive features of the landscape quality of the local area.

Other matters

32. The Appellant has referred to Article 1 of the First Protocol, Article 8 and Article 14 the European Convention on Human Rights, as incorporated into domestic law in the Human Rights Act 1998. However no reason is given as to why it might be said that there has been discrimination. Whilst there is reference to letters of support, it is acknowledged that these were submitted out of time. So although there has been no objection from third parties there is a public interest in taking enforcement action in accordance both with the law and the DP, noting that I have excluded from my consideration, in accordance with the relevant statutory instrument, those policies not cited on the face of the notice. In reaching this view it is material that the enforcement action poses no threat to the Appellant's home because it merely relates to an outbuilding, distinct from the main habitable accommodation within which the Appellant resides.
33. I also acknowledge that the Appellant and his family have been seriously affected by flooding but, in giving consideration to implementation of the planning permission, they are at an early stage of the process of providing a long term solution to that problem. So whilst the Outbuilding has been sited on a portion of land that does not flood neither this, nor any other factor that has been raised in the written submissions, outweighs the harm and conflict with the DP that I have identified in my consideration of the main issues.

Overall conclusion on the planning merits of the development

34. For the reasons given above and having regard to all other matters raised in the representations I conclude overall that the ground (a) appeal, the deemed planning application, should fail.

Ground (f)

35. The only reasonable interpretation of the requirements of the notice is that the Council's objective in issuing it was to remedy the breach of planning control. The wording relates back to section 173(4)(a) of the Act, namely remedying the breach by restoring the land to its condition before the breach took place. In this instance that would appear to have been land without the Outbuilding, as shown in the Google 'Streetview' image in the Council's appeal statement.

36. Although the site has changed considerably since that undated image was taken I was able to identify the position from which it had been taken during my inspection because the railings over the bridge are continuous. This image, which includes the stone pillar at the end of those railings, is therefore unique in terms of the position from which the photograph was taken. On this basis it is clear the condition of the Land before the Outbuilding was erected is known: it was a grass bank that ran down to the river at a gentle incline. As such the Appellant's grounds of appeal under this head are wrong as the condition of the Land is known and the photo is evidence of the same.
37. The Appellant's grounds of appeal claim that the Outbuilding is not injurious to public amenity. This statement appears to be a reference to section 173(4)(b) of the Act. However since that was not the objective that underpinned the requirements of the notice and there are no obvious alternative lesser steps, there is no basis to vary the requirements. In the circumstances I conclude that no reason is advanced as to why the requirements of the notice exceed what is necessary to remedy the breach which, for the reasons explained, is the limited scope of the ground (f) appeal. As such, the ground (f) must fail.

Ground (g)

38. The Appellant says that 28 days is dictated by the notice, but the notice says one calendar month which, depending on the timing of this decision, that being outside of my control at the time of writing, may or may not be the same thing. Beyond that the Appellant has not specified what time period is being sought.
39. The reasons for seeking an extension to the period for compliance are difficult to discern. If it is being said that it will take longer than one calendar month to demolish the Outbuilding, I disagree. As the Council observe, the Outbuilding is of relatively basic construction and would not be difficult to demolish. The allied requirement to dispose of its constituent elements would merely require it to be arranged for a skip to be positioned on the Land. There is no reason to find that this could not be arranged in a matter of days. It is unlikely to be essential to engage contractors to undertake the demolition but if the Appellant chose to instruct a firm that too could reasonably be arranged within a month.
40. The final comments say that "*the rooting of grass*" might take more than the time allowed; I agree. However there is no express requirement to that effect. The Land does need to be returned to its original level and grass seed, or turf, laid on the re-profiled surface. However if the Appellant chooses to lay seed, whilst it might be necessary to mark off the area to ensure that it takes, it is not essential that the grass should have seeded within a calendar month. For these reasons the ground (g) fails on the basis upon which it was advanced.

Conclusion

41. For the reasons given, and having regard to all other matters raised, I conclude that the appeal should be dismissed and I shall uphold the enforcement notice. I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the Act.

Pete Drew
INSPECTOR