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## Appeal Decision

Site visit made on 3 January 2017

**by Brian Cook BA (Hons) DipTP MRTPI**

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

**Decision date: 13 January 2017**

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**Appeal Ref: APP/X1118/C/16/3150381**

**Baggy Lodge, Croyde, Braunton, North Devon EX33 1PA**

- 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 Michael Cotton against an enforcement notice issued by North Devon District Council.
  - The enforcement notice was issued on 26 April 2016.
  - The breach of planning control as alleged in the notice is without planning permission and within the last 4 years, unauthorised Operational Development consisting of the erection of a chicken shed upon a supporting wooden platform (as more particularly shown edged blue on the Location Plan attached to the notice) and a structure enclosing a barbeque area and associated flue (as more particularly shown edged green on the Location Plan attached to the notice).
  - The requirements of the notice are:
    - i) Remove the chicken shed and supporting wooden platform from the land edged red on the Location Plan attached to the notice.
    - ii) Remove the structure enclosing a barbeque area and the associated flue from the land edged red on the Location Plan attached to the notice.
    - iii) Remove all rubbish and debris arising from compliance with Steps 1 and 2 above from the land edged red on the Location Plan attached to the notice.
  - The period for compliance with the requirements is 3 months.
  - The appeal is proceeding on the grounds set out in section 174(2) (c) and (f) of the Town and Country Planning Act 1990 as amended.
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### Decision

1. The appeal is dismissed and the enforcement notice is upheld.

### Procedural matters

2. The chicken shed was constructed in 2015. The appellant does not say when work started. The Council confirms that it was observed to be partially complete during a site visit in May 2015 in connection with another planning application at the property. The Town and Country Planning (General Permitted Development) (England) Order (GPDO) 2015 came into force on 15 April 2015. In the absence of any clear evidence to the contrary, I shall determine the ground (c) appeal for this structure against the 2015 GPDO.
  3. I consider that the appellant may have misunderstood the scope of the notice as it relates to the barbeque area. It relates only to the enclosing structure and the flue. It does not bite upon the concrete pad, the barbeque itself or the wood burner as the appellant appears to believe and says has been in place since 2006. The appellant says that the enclosing structure was 'added' in 2012 but does not give a date. He asserts that it is too late for the Council to
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take enforcement action in respect of this structure. However, there is no appeal on ground (d). For the contention to be made out evidence would have to be put forward to show, on the balance of probabilities, that the structure was substantially complete not later than 26 April 2012. No such evidence has been submitted. In the circumstances, I shall not consider this contention any further.

4. Nevertheless, the Council's evidence is that this structure was first brought to its attention in May and June 2013. When construction started therefore it was the predecessor GPDO that was in force. For the purposes of the ground (c) appeal in respect of the barbeque enclosure it is the GPDO 1995, as amended, that is the relevant statute.

### **The appeal on ground (c)**

#### ***Introduction***

5. The essence of the appellant's case on this ground of appeal is that both structures attacked by the notice are development permitted by Schedule 2, Part 1, Class E of the 2015 GPDO. The appellant therefore needs to show on the balance of probabilities that the property or some separate part of it was a dwelling house at the date when construction of each began. In addition, he must show that each was erected within the curtilage of the dwelling house and that each was reasonably required for a purpose incidental to the enjoyment of the dwelling house as such.
6. The Council's case is simply that the property is in a mixed use comprising dwelling house, guest accommodation, café and surf school elements. As such, no Schedule 2, Part 1 permitted development rights are available. Planning permission is therefore required for the two structures; none exists.

#### ***Background***

7. From the evidence it would appear that the original building dates from the 1880s. There is a long planning history which dates back to 1952. A series of planning permissions were granted in the 1980s. The first allowed a change of use from residential to tea garden with subsequent permissions permitting extensions of the area given over to that use. In 1987 an application for the proposed change of use of part of the dwelling to bed and breakfast accommodation was withdrawn prior to determination. There is no evidence of any further permission being sought or given for such a change of use. Plans have been submitted in evidence to identify the area changed from residential to tea garden<sup>1</sup> (the tea garden permission); the change of use of a garage to a covered tea room ancillary to the existing tea garden use<sup>2</sup> (the tea room permission); and the conversion and extension to part of the dwelling to form an extension to the existing tea rooms<sup>3</sup> (the second tea room permission).
8. In 2009, planning permission<sup>4</sup> (the 2009 permission) was given for extensions and alterations to the dwelling. This permission was an amendment of details granted permission previously in 2008<sup>5</sup>. These works were extensive and appear to be mostly complete. As I understand it, the implementation of the

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<sup>1</sup> Ref: 83/401/28/4

<sup>2</sup> Ref: 83/2046/28/4

<sup>3</sup> Ref: 84/1133/28/3

<sup>4</sup> Ref: 47804

<sup>5</sup> Ref: 44669

2009 permission gave rise to the physical arrangement of the building that I saw during my site visit. Again, the approved plans are not explicitly in the evidence.

9. In correspondence with the Council in June 2013 and June 2014 the appellant was insistent that the property was a single dwelling house and that, in summary, all the rooms used for the café operations and bed and breakfast trade were also used, sometimes on a daily basis, by the family. My understanding therefore is that at this stage the appellant was claiming that the primary use of the property was a dwelling house and all other activities were ancillary to that use.
10. The Council clearly did not accept that. It considered that the commercial operations at the property had expanded significantly since the 1980s. On 17 June 2013 an enforcement site visit report was prepared to that effect following a visit on 10 June 2013. In fact, in his further final comments letter sent by email dated 5 September 2016 the appellant accepts that this ‘...could be arguably true.’
11. The Council did not follow up its concern with an enforcement notice alleging as the breach of planning control the material change of use that it appears to have suspected as having taken place. Rather, the appellant sought to resolve the matter through the submission of a planning application. Planning permission<sup>6</sup> was granted on 1 August 2014 for “creation of underground parking area, definition and regularisation of dwelling house, café/guest house areas and surf school at Baggy Lodge, Moor Lane, Croyde, Braunton” (the 2014 permission).

### **Assessment**

12. At the heart of this appeal is whether or not there has been a material change in the use of the property from a dwelling house to a mixed use and, if there has been, how that mixed use is arranged. This is the nub of the dispute between the appellant and the Council. To resolve that matter an understanding of the planning unit(s) is necessary. It is also necessary to determine when those planning unit(s) were created since it is the position when the two structures attacked by the notice were constructed that is relevant, not the position when the notice was issued or now.
13. The arrangement of the property is now very complicated. This is exacerbated by the sharp change in levels across the site resulting from the steeply rising land to the immediate rear of the building. The arrangement of the rooms across the three levels is easier to understand than the configuration of the external areas.
14. On the ground floor level there are four en-suite bedrooms, a laundry and storage areas. One of these is used as a store for the surf school equipment. There are separate accesses from the road to the surf school store and, via a lobby, to one of the bedrooms (BD1). There is a further access from the road that leads into the other bedrooms (BD2, BD3 and BD4). Internal access between BD1 and BD 2 to BD4 has been blocked off. I understand this to have been done to give effect to the segregation of areas approved by the 2014 permission.

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<sup>6</sup> Ref: 57631

15. The majority of the accommodation is at first floor level and includes an en-suite bedroom (BD5), shower room (S1) and living area. Internal access between these rooms and the rest of the accommodation on this level has been blocked off, again to give effect to the 2014 permission segregation of areas. Access to these rooms is via internal stairs from the ground floor, an external entrance and from another external door from a terrace (T1). The remainder includes the tea room or café/dining room, what the appellant describes as the commercially fitted domestic kitchen, the bunk rooms and shower room (S2), the galley and conservatory/residents' lounge. The principal access to this area is from the vehicular access at the other end of the property from the surf school store.
16. At second floor level there is an en-suite bedroom (BD6) and a kitchen/dining area. Internal access to this level is via a very narrow and innovative design of stair way and from a roof terrace (T2).
17. What constitutes the planning unit is a fact and degree judgement following application of the principles established by *Burdle* to which both parties refer. Three arrangements of planning units are possible in this case. First, the property could be a single planning unit comprising a dwelling house and ancillary activities. This appears to be what the appellant was arguing in correspondence with the Council in June 2013 and June 2014.
18. Second, the scale of the café and guest house uses, if not necessarily the surf school use, has reached a level where the ancillary status has been lost and each has become a primary use in its own right. However, there remains one unit of occupation with little or no practical physical separation of the various primary uses. The property would therefore be a single planning unit in a mixed use. That is my understanding of the Council's position.
19. Third, there could be two planning units, one being a dwelling house, the other comprising the commercial activities, which are physically distinct from one another. That is my understanding of the appellant's position in this appeal and what he believes the 2014 permission achieves.
20. In my judgement, the 2014 permission does not achieve that. The 'creation of underground parking area' falls within the definition of development given in s55 of the Act. However, 'definition and regularisation of dwelling house, café/guest house areas and surf school' does not. It is the making of a material change in the use of any buildings or other land that constitutes development, not their mere use. The 2014 permission does not therefore assist the determination of this appeal. Nevertheless, as a matter of fact and degree judgment the third possible planning unit arrangement set out could still be found.
21. Applying the *Burdle* principles to the appeal property it is necessary to start with the unit of occupation. It seems to me clear from the evidence that the whole property is occupied as a single unit. There is no evidence that the commercial activities are owned by anyone other than the appellant and his family. Although I was introduced to someone who was said to be running the café, there is no evidence that it is let and run as a separate entity. There is no evidence that the bed and breakfast business is either. In fact, the appellant's evidence points the other way. In his letter of 20 June 2013 the appellant said this:

The B&B trade we have taken and the café operations all take place in our domestic home in rooms and areas that are also used by me and my family as our domestic dwelling. The main café room for instance is actually our dining room which we use as such every day. We very much live in community with our guests. Our rooms, whilst all advertised, are not always available for use; friends and family use them continuously (including my own room). Generally, we do not have more than 6 paying guests and on those occasions where we do, it does not amount to more than 28 days in one calendar year.

22. This is reinforced by the vehicular access and parking arrangements. In short, these are shared by the appellant and his family and any paying guests. Although given the location I consider it unlikely, there seemed nothing apart from a lack of space to prevent any users of the café parking on-site either.
23. Moreover, in his final comments letter dated 8 August 2016, the appellant confirms his understanding that when the property is sold, the business activities will cease and '...the whole property be reinstated into a dwelling house (subject to planning approval) as the value....is as a dwelling house not as a cottage industry.' That is suggestive on the balance of probabilities of his intention to sell the property as a whole and not as a going business concern or as two separate properties, namely a dwelling and a café/guest house.
24. The second *Burdle* principle to consider is functional separation of the uses within the unit of occupation. The appeal property is situated on the coast. A public right of way passes it. It is also very close to a National Trust car park. The Council's evidence, which is not disputed by the appellant, is that the café is open 'all day'. Nor is it disputed that the food sold includes full breakfasts and meals in addition to the more traditional cream teas. At the time of my site visit it appeared to be open although there were no customers. There is a commercial kitchen in which the food can be prepared. This is in addition to the domestic kitchen on the second floor level within what the 2014 permission delineates as the private area of the property and the galley at first floor level available for guests to make hot drinks, etc.
25. The evidence shows how this use has evolved. The tea garden permission merely changed the use of part of the residential garden to tea garden; no building operations were permitted. The tea room permission allowed the conversion of a garage to provide a tea room. The approved plans indicate that the 'teas' were provided by a tray service from the house. The second tea room permission appears to have added a kitchen and toilet although no alteration to the tea room itself appears to have been made.
26. It is clear from the appellant's evidence that the current café was established in October 2012 on completion of the 2009 permission development. I accept that it may also be used by the family and guests as explained by the appellant. However, on the balance of probability, I consider its primary function is to serve passing trade and that it operates on a more intensive basis than the tea room it has replaced. I am reinforced in that view by what amounts to the appellant's acceptance that it is at least arguably so [paragraph 10]. The ancillary link to the dwelling house facilitated by the three 1980 planning permissions referred to above has thus been broken. This use is therefore functionally separate from the residential and guest uses of the property.

27. The guest uses are more difficult to resolve. The appellant has produced no evidence in the form of, say, bookings data to support his contention that the use is, in fact, quite limited. However, the Council's evidence as to the intensity of the use appears to be based on a viewing of the appellant's web site. In my judgement, that evidence is not inconsistent with the appellant's characterisation of the use. In view of the lack of contrary evidence to dispute the appellant's version of events, I find on the balance of probability that the guest uses remain ancillary to and not functionally separate from the dwelling house use.
28. There is little evidence either way about the surf school use. However, given my conclusion on the functional separation of the café use I do not believe I need to come to a firm conclusion on this element.
29. I turn now to the final *Burdle* principle, physical separation of different uses. I consider the physical barriers to internal circulation put in place to give effect to the 2014 permission contrived. In one case it is simply bizarre. The conservatory/residents' lounge is part of the commercial area. It looks onto and has a number of doors to terrace T1. However, this terrace is supposed to be part of the private area of the property with the doors to it from the conservatory/residents' lounge being locked shut. It seems to me inconceivable that the terrace would be used as a private amenity area in those circumstances. Externally, there is almost no physical separation of the various areas of the property. There is some signage which in places is confusing and in other areas it is non-existent. There is no effective impediment to circulation around the whole of the property.
30. Drawing this together, I conclude that the whole property is a single unit of occupation with little or no physical separation of the various areas. That which does exist is somewhat contrived. There is no functional relationship between the café and the dwelling house uses although the ancillary link between the dwelling house use and the guest provision does, on the balance of probability, remain. Nevertheless, the finding with respect to the café is sufficient to conclude that the property is a single planning unit in a mixed use of dwelling house and café. That is the second of the three possibilities set out above [paragraph 18].
31. In my view, that use began no later than October 2012. It may even have begun on implementation of the second tea room permission since this made separate kitchen and toilet provision for the tea room. As such, no permitted development rights are available under Schedule 2, Part 1, Class E of the GPDO then in force after that date. There is no material difference in this respect between the wording of the 2015 GPDO and the predecessor statute.
32. As set out above, the chicken shed was constructed well after this date and is thus not permitted development. As also set out above, the appellant has provided no evidence to support the contention that construction of the barbeque structure and flue was started prior to October 2012. This development is also not permitted by the GPDO.
33. That conclusion is sufficient to dismiss the appeal on this ground. In the event that I am wrong on that the other two possibilities would need to be considered. I shall briefly review one of the other requirements for a building to be permitted by Schedule 2, Part 1, Class E of the GPDO, namely that the building must be within the curtilage of the dwelling house.

34. There is an extensive area of rising land at the rear of the property. At the time of my site inspection this had lines of fences and was given over to the keeping of various livestock. The chicken shed has been constructed in this area well away from the main building. Nearer to but physically detached from the main building is an area of grass with a summerhouse building (used in part as an office) with the barbeque area beyond. I believe this is the area of land whose lawful use was established by virtue of the tea garden permission. That lawful use was relinquished by the 2014 permission. However, that was after the barbeque enclosure was erected.
35. The curtilage of a dwelling house is not necessarily the same as the totality of the land associated with it. Its extent is determined as a matter of fact and degree judgement by the way land is used. The court has held that it will generally be confined to a small area about a building and there is likely to be an intimate association between the building and the curtilage land. Physical enclosure is not necessary; the area may be detached from the building it relates to.
36. Taking the appellant's position that there are two planning units [paragraph 19] first, I believe the curtilage of the dwelling would be limited to the two terraces T1 and T2. This is because the rest of the land is simply not intimately associated with the dwelling house part of the building. Neither structure would therefore have been within the curtilage of the dwelling house.
37. If the position was as argued by the appellant to the Council previously [paragraph 17] I remain of the view that the land on which the chicken shed has been erected is sufficiently divorced from the dwelling house as to be outside the residential curtilage.
38. The barbeque area is also somewhat detached from the building and appears to be given over to that use specifically rather than being part and parcel of a more established residential garden or other domestic use. There is no evidence either about the frequency with which barbeques have been held. At the time of my site inspection, the area was more devoted to storage for the animals although I accept that this was early January. I am however mindful of the lawful use which was explicitly not residential having been changed from that use to a tea garden by virtue of the tea garden permission. On balance therefore I do not consider that when the structure was erected it was within the curtilage of the dwelling.

### ***Conclusion on this ground of appeal***

39. For the reasons set out above I consider that the building is a single planning unit in a mixed use. Schedule 2, Part 1, Class E GPDO rights are not therefore available and planning permission is required for both of the structures that are the subject of the notice. If that conclusion is wrong and the building or part of it is, in fact, in a dwelling house use, for the reasons set out I have concluded that neither building has been erected within the curtilage of the dwelling. Given those two conclusions I do not believe that I need to consider whether or not either building is reasonably required for a purpose incidental to the enjoyment of the dwelling house as such.
40. The appeal on ground (c) therefore fails.

### **The appeal on ground (f)**

41. An appeal on this ground is that the steps specified exceed those that are required to remedy the breach of planning control which, as unauthorised operational development is alleged, is the Council's purpose in issuing the notice.
42. The appellant does not, in fact, put forward any lesser steps by which the Council's purpose could be achieved. Instead, the case made is largely one that should have been made under ground (d) in respect of the parts of each structure that are claimed, without any supporting evidence, to have been in place for more than four years when the notice was issued.
43. The statement that the chicken shed would be replaced by a number of portable units instead is not a lesser step but more akin to a fall back position which, it is implied, would have a similar effect on the landscape. That is an argument to be pursued on the planning merits which are not being considered here since there has been no appeal made on ground (a). In the absence of any further detail about the appellant's intentions, I have no reason to disagree with the Council that such a development may also be subject to planning control in any event. It is not therefore a lesser step that can attract any weight.
44. The appellant also argues without any supporting evidence that the flue which is required to be removed is a stand-alone structure and thus not subject to planning control. That is an argument more properly made under ground (c). In any event, that is not how it appeared to me. The design of the flue is that typically found on the roofs of buildings; which is where it is located. It was not especially tall but the shiny finish allied to the prominent elevated position of the structure means that it is highly visible in the landscape. I accept that once removed the wood burner may require another flue. However, that will be a matter for the appellant to take up with the Council as appropriate.
45. Finally, the term 'rubbish and debris' clearly means waste material. What is 'waste' is for the holder of the material to decide. If the appellant has a further productive use for any of the materials arising from the removal of the two structures it would not be waste and would not need to be removed. The Council has indicated that this is its pragmatic understanding of the requirement also. No variation of the final requirement is necessary.
46. The appeal on ground (f) therefore fails.

### **Overall conclusion**

47. For the reasons given above I consider that the appeal should not succeed.

*Brian Cook*

Inspector