
Appeal Decisions

Site visit made on 6 December 2016

by Chris Preston BA(Hons) BPI MRTPI

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

Decision date: 6 February 2017

Appeal A Ref: APP/P1805/C/16/3158428

Appeal B Ref: APP/P1805/C/16/3158429

**Land at Little Grinsty, 1 Broad Green, Tardebigge, Bromsgrove,
Worcestershire B60 1LW**

- 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 Mark Robinson (Appeal A) and Ms Sarah Kelly (Appeal B) against an enforcement notice issued by Bromsgrove District Council.
 - The enforcement notice, numbered 2015/0153/ENF, was issued on 10 August 2016.
 - The breach of planning control as alleged in the notice is: Without planning permission the erection of a brick built, single storey building in the approximate position shown hatched blue on Plan 1 attached to the enforcement notice ("the building").
 - The requirements of the notice are: EITHER (i) Reduce the height of the building so that it does not exceed a height of 4 metres when measured from natural ground level; and (ii) Reduce the length of the building to 8.52 metres as indicated by green hatching on Plan2* attached to the enforcement notice; OR Remove the building in its entirety from the Land.
 - The period for compliance with the requirements is three months after the notice takes effect.
 - The appeals are proceeding on the grounds set out in section 174(2) (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decisions

1. The enforcement notice is varied by the deletion of the words "3 months after this notice takes effect" in relation to the time period for compliance and the substitution of the words "within 6 months from the date this notice takes effect". Subject to this variation the appeals are dismissed and the enforcement notice is upheld.

Procedural Matter

2. Two appellants were named on the appeal form; Mr Mark Robinson and Ms Sarah Kelly. The appeal by Mr Robinson is referred to as Appeal A in the banner heading above and the appeal by Ms Kelly as Appeal B. The grounds of appeal are identical and I have determined both appeals together within this decision letter.

The Appeals on Ground (c)

3. An appeal on ground (c) is made on the basis that there has not been a breach of planning control. In this case, the alleged breach of planning control relates to the construction of a building within the garden of Little Grinsty, a semi-detached dwelling on the edge of the village of Tutnall. The parties dispute
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whether the building represents development that is permitted by the terms of Class E, Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 (the GPDO). In particular, the Council contends that the height of the building exceeds 4 metres, such that it fails to conform with the terms of paragraph E.1(e)(i) of Class E. More fundamentally, the Council contends that the building has not been designed for a purpose that would be incidental to the enjoyment of the existing dwellinghouse, thereby taking the development outside of the scope of Class E permitted development rights.

4. Aside from those two issues, the Council is satisfied that the building would comply with the limitations of Class E and I find no reason to disagree.

The Height of the Building

5. The building is constructed on a level base but that level has been set into the hillside which slopes up to the top corner of the garden away from the house. The photographs provided by the appellant clearly show the extent of the excavation at the point at which foundations were being dug. A small retaining wall surrounds the western end of the building. In response to a Planning Contravention Notice (PCN) served by the Council, the appellant stated that the natural ground level had been dug out by 0.6m in the south-west corner and by 1.4m in the north-west corner. Slightly different figures were presented on a diagram, also submitted with the PCN, which indicated that the ground had been dug out by 310-315mm in the south-west corner and 1.05m in the north-west corner. Whilst it is difficult to gauge precisely what the former level was, judging by the degree of the slope on my site visit, and the size of the retaining wall, I consider that the slab level in the north-west corner is at least a metre below natural ground level, as defined by the retained bank immediately adjacent to the building.
6. The maximum height of the building, when measured from the base of the wall to the top of the ridge is estimated to be 4390mm by the appellant in his response to the PCN. The general height of the ridge is lower but the ridge tiles at each end are slanted upwards, presumably to deflect water back onto the roof. However, the base of the wall does not represent natural ground level which is much higher, being set behind the adjacent retaining wall.
7. The Technical Guidance¹ published by the Government provides advice on the measurement of height in the context of the GPDO stating that: *references to height (for example, the heights of the eaves on a house extension) is the height measured from ground level. (Note, ground level is the surface of the ground immediately adjacent to the building in question, and would not include any addition laid on top of the ground such as decking. Where ground level is not uniform (for example if the ground is sloping), then the ground level is the highest part of the surface of the ground next to the building.)*
8. More advice is provided specifically in the context of Class E where the Technical Guidance states that: *the height of the building, enclosure or container should be measured from the highest ground level immediately adjacent to the building, enclosure, or container to its highest point.*

¹ Permitted Development Rights for Householders, Technical Guidance, DCLG (2016)

9. The Technical Guidance does not specifically state how to measure such buildings in situations where ground level has been altered as in this case. The ground level immediately adjacent to the building has been excavated and there is a gap between the side and rear wall and the retaining wall and un-retained bank. If measured from that artificial ground level, immediately adjacent to the building, the height of the building is more than 4 metres.
10. However, it seems to me that the intention of the guidance is that height should be measured from the highest natural ground level next to or adjacent to the building. Rather than use the small retaining wall, it would have been possible for the appellant to use the external walls of the building as a retaining wall and continue the natural ground level up to the base of the wall. If constructed in that way, the height measured from the top of the gable to the base of the wall would have been well under 4 metres, considering that the natural ground level is at least a metre higher than the artificially created ground level at the base of the wall. Although a gap has been provided between the building and the retaining wall in this instance, the effective height is no different than if the ground level had been continued up to the base of the wall. In those circumstances it seems reasonable in my view to take ground level as the natural level of the ground next to the building, as represented by the original level behind the retaining wall and bank.
11. Taking that as a starting point, the height of the roof, when measured from the highest adjacent ground level is well below four metres. The Council has provided no explanation as to how it has measured the height of the building relative to adjacent ground level and I am satisfied that the building is within the limits set out at paragraph E.1(e)(i) of Class E.

Whether the Building Would be for a Purpose Incidental to the Enjoyment of the Dwellinghouse

12. Class E of the GPDO applies to a building that is 'required for a purpose incidental to the enjoyment of the dwellinghouse as such'. Paragraph E.4 of Class E states that purposes incidental to the enjoyment of the dwellinghouse includes the keeping of bees, poultry, pet animals, birds or other livestock for the personal needs or enjoyment of the occupants of the dwellinghouse. However, the Technical Guidance advises that "... the rules also allow, subject to the conditions and limitations below, a large range of other buildings on land surrounding a house. Examples could include common buildings such as garden sheds, other storage buildings, garages, and garden decking as long as they can be properly be described as having a purpose incidental to the enjoyment of the house. A purpose incidental to a dwelling house would not, however, cover normal residential uses, such as separate self-contained accommodation nor the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen."
13. The Court in *Emin v SSE*² confirmed that regard should be had to the use to which it was proposed to put a building and to consider the nature and scale of that use in the context of whether it was a purpose incidental to the enjoyment of the dwellinghouse. The physical size of the building in comparison to the dwellinghouse might be an important consideration but was not by itself conclusive. It was necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwelling and answer the question as to

² *Emin v SSE and Mid Sussex CC* 58 P&CR 416

whether the proposed buildings were genuinely and reasonably required or necessary in order to accommodate the proposed use or activity and thus achieve that purpose. In an appeal on ground (c) the onus of proof is on the appellant to show that, on the balance of probability, what is proposed is reasonably required for a purpose incidental to the use of the dwellinghouse.

14. In this case, the building is largely complete in terms of its exterior but the internal fitting out is yet to be completed and it did not appear to have been occupied at the time of my visit. Most of the walls had been dry lined, electric heating radiators were in place in a number of rooms, windows had been fitted, electricity had been provided but the space was largely devoid of any fixtures and fittings and the flooring and walls were in an unfinished state. Save for the use of the garage at one end for storage and the storage of some gym equipment within one of the internal rooms the building was largely empty.
15. The room sizes are of a domestic scale and the outward appearance is also residential in character, particularly the design of the windows and entrance door. However, the building is within the residential curtilage of Little Grinsty and it is not surprising or unusual for outbuildings to have a domestic scale or appearance given that residents will often design such buildings to fit into their surroundings. Thus, the appearance of the building does not, of itself, suggest that the use would not be incidental to the enjoyment of the dwellinghouse.
16. The appellants set out how the building is intended to be used within their appeal statement and in their response to the Council following the service of a Planning Contravention Notice (PCN). The indicative layout plan provided in response to the PCN was used by the Council and appended to the enforcement notice. That plan shows how the internal layout is subdivided and, whilst not to scale, the plan broadly corresponds with how the internal space was set out at the time of my site visit. There is no reason for me to doubt that the information provided by the appellants is a true reflection of how they intended to use the building at the time the appeal was made. The Council does not dispute the intentions of the appellant in that regard but disputes whether some of the proposed uses would be incidental.
17. However, the appellants also suggest that the building could be used to accommodate a range of different uses which may not necessarily include those indicated within the grounds of appeal. In order to determine whether the building would be 'required for a purpose incidental to the enjoyment of the dwellinghouse' it is necessary to make a judgement on what the use of the building would be. Having regard to that point, the onus, in an appeal on ground (c), is on the appellants to demonstrate their case. The relevant test is the balance of probability. I cannot assess whether an unspecified future use (or uses) would be required for a purpose incidental to the enjoyment of the dwellinghouse. It seems to me that I can only make a judgement on the basis of the information currently before me based on the suggested range of uses put forward by the appellants and by taking account of the design and layout of the building.
18. The range of proposed uses, as indicated on the plan and the within appellants' grounds of appeal, include a garage, gym, hot tub and sauna, storage, a sun lounge, shower room/ bathroom and a bedroom for one of the appellants' daughters who lives at home for 3 or 4 nights a week. The precise layout in terms of which element would be within which room is less clear.

19. There is also a suggestion that part of the building could be used to house two small vintage tractors at some point in the future. I note that a steel lintel has been added as part of the construction to enable the installation of a garage door at some future point. However, the frontage is presently bricked up and houses a window at that point. The internal fit out of the room is also of a domestic standard, with dry lined walls and electrical connections, such that it does not appear to have been designed for use as a garage to store tractors at the point of first use. In judging whether the building would be provided for a purpose incidental to the enjoyment of the dwellinghouse I must assess how it would be first used and not how it may be used at some future point. It is clear that the building is not designed to store tractors at the point of first occupation.
20. Taking the uses identified on the plan the garage within the end section of the building is of a domestic scale and it is reasonable to conclude that it would be required for a purpose incidental to the enjoyment of the dwellinghouse, whether for general storage or the parking of a vehicle.
21. The two rooms at the western end of the building, adjacent to the garage, are indicated on the layout plan to be used as a gym room with hot-tub and a sauna. Mr Robinson has nerve and spinal injuries resulting from a car accident and the use of those facilities would no doubt benefit his health. It seems to me that the gym, hot tub and sauna uses are not basic facilities that are commonly found as primary accommodation within most homes but that they would be incidental uses that would be subordinate to the enjoyment of the dwellinghouse itself, particularly in this instance having regard to the medical needs of Mr Robinson.
22. In a similar vein, the proposed sun lounge is intended to be used as a space for meditation, associated with the medical needs of Mr Robinson. The use of a quiet space for that purpose, within the relatively tranquil environs of the garden, would amount to an incidental use in my view. In fact, the rationale for such a use, which requires a degree of tranquillity, would indicate that a location outwith the primary accommodation of the dwellinghouse was required. The sun lounge does not appear to be excessively large for its intended purpose and, similarly, the gym is of a reasonable scale, considering the need to affix equipment and provide circulation space around it.
23. As an alternative layout, the appellants have suggested that the area indicated to contain a gym, hot tub and sauna on the plan may instead be used as an occasional bedroom for one of their daughters, with the sauna being utilised as a bathroom. In that scenario, the 'occasional bedroom' shown on the submitted plan would accommodate gym equipment. In either scenario, a bathroom would be provided that would be accessed directly from the bedroom.
24. As set out above, The Technical Guidance identifies that 'primary accommodation' such as a bedroom or bathroom would not normally be considered as incidental to the enjoyment of a dwellinghouse. The reason being that such uses form part of the normal living accommodation provided within a dwelling as opposed to a use that is incidental. Thus, the provision of a bedroom would, in effect, be an extension of the primary living accommodation within the dwelling and would not represent an incidental use.

25. It is possible, from the information provided, that appellants intend to provide two bathrooms within the building. If the room identified on the plan as 'gym and hot tub' was used as a bedroom, the sauna would be used as a bathroom. In that case, the grounds of appeal indicate that a bathroom would also be created adjacent to the sun-lounge. I can understand that the appellants may wish to shower after using the gym equipment and such an arrangement would, to my mind, be associated with the incidental use. However, I can see no reason why two bathrooms would be required within an outbuilding and the suggested arrangement indicates that a bathroom would be provided specifically to serve the proposed bedroom. In that sense, the bedroom and the bathroom would appear to be an extension of the primary accommodation.
26. Whilst the plan indicates that the bedroom would be for 'occasional use' the grounds of appeal suggest that one of the appellants' daughters would use the bedroom for three or four nights a week. No information has been provided as to where she would reside for the remainder of the week. In my view, that level of use would be regular rather than occasional and much more consistent than, for example, temporary use of space to accommodate visiting friends or relatives. To my mind, a sibling living within a household for four nights a week would remain part of the household as opposed to an occasional guest. Many people, Planning Inspectors included, travel and work away from home on a regular basis but the fact that they may be required to stay away from home regularly does not mean that they cease to be part of the household. Consequently, from the information provided, the use as a bedroom with an associated bathroom would not constitute an incidental use but would amount to the provision of additional primary accommodation.
27. The appellants suggest that the space is intended to be used flexibly and that plans and uses may evolve in future. However, I can only base my decision on the information provided and, in any of the scenarios presented, a bedroom and associated bathroom would be provided. It is clear that the building has been designed to accommodate those uses. Consequently, I cannot conclude that the building would be provided for a purpose that would be incidental to the enjoyment of the dwellinghouse. Part of the building would be used to house primary accommodation and that would take the development outside the scope of any permitted development rights granted under Class E, Part 1 of Schedule 2 of the GPDO. Accordingly, planning permission would be required for the building. No planning permission exists, the development represents a breach of planning control, and the appeals on ground (c) fail to that extent.

The Appeals on Ground (f)

28. An appeal on ground (f) is made on the basis that the steps required by the notice to be taken, or the activities required to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by the breach.
29. The Council has not specified whether the aim of the notice is to remedy the breach of planning control or to remedy any injury to amenity. However, having regard to the terms of the notice and the Council's appeal statement it appears to me that the aim is to remedy the breach of planning control either by demolishing the building in its entirety or by demolishing part of it and reducing the height so that it would, in the Council's view, conform to the

- requirements of Class E, Part 1 of schedule 2 and thereby benefit from planning permission granted by the GPDO.
30. Those aims would appear to accord with section 173(4)(a) of the Town and Country Planning Act 1990 (the Act) which states that the steps required by an enforcement notice may seek to remedy the breach by: *making any development comply with the terms (including conditions and limitations) of any planning permission that has been granted in respect of the land.....or by restoring the land to its former condition.*
31. Clearly, the removal of the building in its entirety would remedy the breach of planning control. The alternative to demolition provided for within the notice is to reduce the height to no more than 4 metres when measured from natural ground level and to reduce the length to no more than 8.52 metres, as indicated by the green hatching on the plan attached to the notice. For the reasons given, I am satisfied that the building is less than 4 metres high when measured from ground level and the structure already complies with that element of the requirement.
32. The appellant contends that the requirement to reduce the length to 8.52 metres is arbitrary and goes beyond what is required to remedy the breach. On the face of the notice alone, the requirement to reduce the length of the building to 8.52 metres does appear arbitrary. However, that length is a combination of the width of the garage, the gym and hot tub room, and the gym and storage room, as shown on the plan submitted by the appellant.
33. The Council consider that a building of that size would be sufficient to accommodate a garage, gym, sauna and hot tub such that it would be incidental to the enjoyment of the dwellinghouse and would comply with the terms of Class E such that it would benefit from planning permission granted by the GPDO, in line with the aims of section 173(4)(a) of the Act. The appellant does not dispute that point. Consequently, in terms of the appeal on ground (f) the requirement to reduce the length of the building does not go beyond what is necessary to remedy the breach of planning control and cannot be considered as excessive.
34. No alternative lesser steps have been put forward by the appellant that would remedy the breach of planning control. The building is unauthorised and, in the absence of a ground (a) appeal, it is not open to me to consider whether planning permission should be granted or to impose conditions that would seek to limit the scope of any future use. Moreover, the enforcement notice is directed at the building operations that have taken place. Given that the use has yet to commence it is not open to me to vary the terms of the notice to require any use to cease. For the reasons given, planning permission is required for the building and the steps required by the notice do not exceed what is necessary to remedy the breach. In the absence of any suggestion to the contrary I can think of no lesser steps that would remedy the breach of planning control.
35. I note that a former garage appears to have been subsumed into the new development. However, very little visible evidence of that garage remains and, given the extent of works to the building I conclude that what has been erected amounts to a new building. In any event, the option of partial demolition provided for within the notice would enable that section of the building to

remain and reference to the former garage does not alter my conclusions in relation to ground (f).

36. For the reasons given above, the appeals on ground (f) must fail.

The Appeals on Ground (g)

37. The time period for compliance as set out within the notice is three months from the date the notice takes effect. However, the Council has stated that it would be agreeable to an extension of that period to six months, given that the appeal is likely to be determined in the winter months. The appellant has requested that a period of six to twelve months be allowed to the need to work within the winter period.

38. No estimates of how long the work would take to complete have been provided but, judging by the nature of the requirements I would anticipate that two to three months would be sufficient, once a builder was engaged. To enable the work to be organised and to avoid working in the depths of winter I consider that a six month period is reasonable and the appeals on ground (g) succeed to that extent. I have amended the terms of the notice accordingly.

Chris Preston

INSPECTOR