



Appeal Decision

Site visit made on 24 March 2017

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

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

Decision date: 07 April 2017

Appeal A Ref: APP/J9497/C/16/3155002

Bracken Ridge, Smokey Cross, Ilsington, Newton Abbot TQ13 9RS

- 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 Mrs Heather Walker against an enforcement notice issued by Dartmoor National Park Authority [NPA].
- The notice was issued on 9 June 2016.
- The breach of planning control as alleged in the notice is: Without planning permission, operational development consisting of: (a) the erection of a timber building in the approximate position shown marked 'A' on the Plan and as shown on the attached 'Photograph 1'; and (b) the erection of a timber building in the approximate position shown marked 'B' on the Plan and as shown on the attached 'Photograph 2'; and (c) the installation of an electric distribution and supply point on a vertical upstand in the approximate position between the points shown marked 'A' and 'B' on the Plan and as shown on the attached 'Photograph 3', together referred to as "the Development".
- The requirements of the notice are to permanently remove the Development from the Land, including all debris and materials.
- The period for compliance with these requirements is 90 days.
- The appeal is proceeding on the ground set out in section 174(2) (c) of the Act. As the requisite fees have not been paid the deemed application does not fall to be considered.

Appeal B Ref: APP/J9497/C/16/3158396

Bracken Ridge, Smokey Cross, Ilsington, Newton Abbot TQ13 9RS

- The appeal is made under section 174 of the Act.
- The appeal is made by Mrs Heather Walker against an enforcement notice issued by Dartmoor NPA.
- The notice was issued on 9 June 2016.
- The breach of planning control as alleged in the notice is: Without planning permission, a material change in use of part of the Land, as shown cross hatched on the Plan, from agriculture to use for recreation and for residential purposes as part of the garden of Bracken Ridge ("the Development")
- The requirements of the notice are to: (a) Permanently cease using the Land for recreation and residential purposes as part of the garden of Bracken Ridge; and (b) Restore the Land to its former condition as agricultural land.
- The period for compliance with these requirements is 90 days.
- The appeal is proceeding on the ground set out in section 174(2) (c) of the Act. As the requisite fees have not been paid the deemed application does not fall to be considered.

Both appeals: Formal Decision

1. The appeals are dismissed and both enforcement notices are upheld.

Procedural matters

2. The Appellant did not attend the site inspection at the appointed time, which I proceeded to do on an unaccompanied basis after discharging the NPA's Officer. Following the site inspection The Planning Inspectorate [PINS] wrote

to both main parties to check that they were happy for me to proceed to a decision on this basis. Neither main party has objected to this course of action.

Appeal A: Ground (c): *Has there been a building operation that has given rise to a building or buildings?*

3. Under this ground of appeal the Appellant needs to show that: "...*there has not been a breach of planning control*" [as per section E. (c) of the appeal form]. Section 55 of the Act says development, for the purpose of the Act, includes the carrying out of building operations on or over land. This determines that my starting point is to ask whether there has been a building operation.
4. The answer to question 10 of the response to the Planning Contravention Notice [PCN] confirms the objects, to use a neutral term, were: "*constructed on site*", as opposed to being brought ready-made onto the site. It would appear that the Appellant's son has constructed both objects on site in order to gain experience as a carpenter [as per answer to question 21 of the PCN].
5. Based on these admissions I am satisfied that that the process of constructing the objects on site involved a building operation. Based on my inspection and the evidence before me, it would appear that the objects have been assembled on site from a multitude of parts, including nails, screws and/or bolts, as well as lengths of wood that, adopting the balance of probability, have been cut to size on the appeal site. Amongst other things I note the working area within the larger object in one of the photographs and the pile of off-cuts, or similar, outside in another photograph. Although the grounds of appeal describe the Appellant's son as: "...*an inexperienced carpenter*", he would appear to be in training and the end product appears to be to a good standard of workmanship.
6. Even where there is a building operation that has to result in the creation of a building as defined in the Act. The term "*building*" is defined in section 336(1) of the Act to include "*any structure or erection*". The NPA has referred to judicial authority in order to identify the tests for whether something is a building, namely: (i) *Barvis v Secretary of State for the Environment* [1971] C.R. 710 QBD; and, (ii) *Skerritts of Nottingham Ltd v Secretary of State* [2000] J.P.L. 1025. These authorities¹ have held that the key tests in deciding whether something is a building are size, physical attachment and permanence.
7. Dealing initially with size, the Appellant has not disputed the measurements given in the NPA's statement for each object. The larger object, marked 'A' on the Plan attached to the notice, measures approximately 5.0 m long x 2.8 m wide and 2.0 m high. The smaller object, marked 'B' on the Plan attached to the notice, measures approximately 1.5 m long x 1.0 m wide and 2.0 m high. Although the former is materially larger than the kiosk in the High Court case cited by the NPA², it would appear that the latter is slightly smaller. In considering their size it is material that both objects are of a size that they have been constructed on site using timber, with cedar shingles for roof tiles.
8. Turning to the test of attachment it is common ground that both objects are on wheels and that they are not otherwise attached to the land, except by virtue of their weight. However the NPA's photographs appear to show 3 electric cables hanging down the end gable of the larger object. Even if that might be

¹ Incomplete citations are given for these legal authorities, but they are all well-known legal judgements.

² *R (oao Westminster City Council) v Secretary of State* [2002] J.P.L. 58.

wrong there appear to be 3 electrical points on the electric distribution and supply point on the vertical upstand. The grounds of appeal say: "*The larger shelter was intended to use in chick incubation/rearing...Heat & shelter are essential...*" [sic]. The Appellant's statement says that the electrical supply: "*...is an upgrade of the current supply in the garden and was intended to be covered by a timber cover to improve its visual impact. It is for use by the egg incubator...*". It follows that it is intended that the object, marked 'A' on the Plan attached to the notice, be connected to the electricity supply. This is a relevant consideration in terms of the object's attachment to the ground.

9. Turning then to permanence the Appellant has not disputed the NPA's claim that the objects were in the same position between the date of issue of the notice in June 2016 and when they were first inspected in August 2015, which is a period of over 9 months. It is material that in *Skerritts*, the Court of Appeal endorsed as reasonable a finding that where a marquee would remain in one particular location for just 8 months of the year that would be a sufficient length of time to be of consequence in the planning context. Permanence did not necessarily mean that the item must be on site for 365 days a year.
10. There is no evidence that the largest object, marked 'A' on the Plan attached to the notice, has moved in the 19 month period between the NPA's first visit and my inspection, or at all. Indeed the need to access the electric distribution and supply point strongly suggests that this building is intended to be a permanent feature of the particular site on which it has been erected. Taken together with its size, weight and albeit limited attachment, via electricity cables, I conclude, as a matter of fact and degree, that the process of constructing the larger object, marked 'A' on the Plan attached to the notice, involved a building operation that has given rise to a building as defined in the Act.
11. The position in respect of the smaller object, marked 'B' on the Plan attached to the notice, is not so clear cut because the grounds of appeal say it: "*...was not intended to stay in its current area after completion*"³. That is consistent with the fact that it had been moved at the time of my inspection. However there is no evidence before me as to how it was moved and I cannot rule out the possibility that it was dis-assembled, moved and then re-assembled in the garden. Moreover it is not disputed that it was in the same position for over 9 months and indeed the statement that it: "*...has been removed*"⁴, appears to be stapled to a letter from PINS dated 12 September 2016⁵. This might suggest that the smaller object was not moved for approximately 12 months.
12. In the circumstances it has not been shown that the smaller object, marked 'B' on the Plan attached to the notice, which has the appearance of a conventional wooden garden shed, does not have significance in the planning context⁶. In view of my clear finding that the process of constructing the smaller object involved a building operation, the Appellant has not shown that those works have not given rise to a building. I conclude, as a matter of fact and degree, that the object is to be regarded as a building as defined in the Act.

³ It is material that no comparable statement is made in respect of the larger object, which tends to confirm my rationale for holding that it is intended to be a permanent feature of the land on which it is sited.

⁴ In the Appellant's document entitled "*Reason for appeal of Enforcement 1 & 2*".

⁵ This appears to be the Appellant's copy of that letter, which she returned to PINS with her statement.

⁶ This is the relevant test arising from *R (oao Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council* [2012] EWHC 2161 (Admin). The NPA refer to this as a Court of Appeal judgement, but if the case did go to the Court of Appeal, and I am unsure it did, the judgement at first instance must have been upheld.

13. For completeness I record no claim is made that the installation of the electric distribution and supply point on a vertical upstand, as shown on Photograph 3 attached to the notice, is not a breach of planning control. In reaching this view I have noted the terms of the Appellant's statement, cited previously, but the photographs show it is fixed into the ground and it is not inconsequential.
14. The Appellant appears to argue that even if there has been a building operation that has given rise buildings, that such works are permitted development. However in order to test that claim I first need to assess the ground (c) in relation to Appeal B in order to ascertain what the lawful use of the land is. Amongst other things I note the grounds of appeal refer to the use of the building[s] for agriculture and whilst that is inconsistent with the claims made in respect of Appeal B it does potentially engage different parts of the Town and Country Planning (General Permitted Development)(England) Order 2015 [the GPDO]. For these reasons I shall return to this point after what follows.

Appeal B: Ground (c): *Is the alleged use for recreation and for residential purposes a breach of planning control?*

15. The NPA's statement deals with factual matters under this head⁷, but there is no ground (b), that the matters have not occurred as a matter of fact. Instead the Appellant again needs to show that: "*...there has not been a breach of planning control*" [as per section E. (c) of the appeal form]. I am dealing with this notice separately because the arguments are very different and I should add that I can only deal with the arguments put forward by the Appellant.
16. The appeal form, grounds entitled "*Reasons for appeal*" and subsequent letter entitled "*Reason for appeal of Enforcement 1 & 2*" solely relate to ground (c). There is however a hint of a ground (d) claim, which is reflected in PINS letter to the Appellant, dated 19 September 2016, that admitted ground (d) but said that this would require an Inquiry to be convened. Nevertheless PINS letter dated 3 October 2016 plainly records that: "*Ground (d) has been withdrawn...*", and the Appellant has not disputed that she withdrew that ground of appeal.
17. In that context, the Appellant says she considers the land concerned to be part of her garden because the area has been used for soft fruit since 1985. The first point is that there is no evidence, whether in the form of a statutory declaration or photographs, to support this claim⁸. However even if I were to accept it at face value it does not show the land has been used as garden. The definition of agriculture in section 336(1) of the Act includes "*fruit growing*" and it has not been shown the area has been used ancillary to the residential use.
18. The plan attached to notice (2) comprises an OS base and the cross-hatched area thereon lies to the west of a black line that in my experience is likely to denote a longstanding physical feature on the ground. My inspection revealed that feature to include a hedgerow and a line of trees, also evident from the aerial photograph supplied by the NPA. Paragraph 5.6 of the NPA's statement says the buildings have been constructed outside of the domestic curtilage and the strong inference is that it regards the curtilage of the dwelling to lie to the east of the black line adjoining the cross-hatched area on the OS base; I agree.

⁷ At paragraph 5.8 of its statement.

⁸ The Appellant's statement refers to a Google earth map 1999, but no copy has been provided.

19. There is a contrast between the curtilage and the open hillside on the aerial photograph, despite some evidence of the use of the former spilling out into the latter. There is no doubt that the cross hatched area, including the vicinity of what I have found to be buildings in the positions marked 'A' and 'B' on the Plan attached to notice (1), is beyond that black line as marked on the OS map. Although a post and wire fence, together with a 5-bar gate, appears to have been erected around what the Appellant refers to as a shelter belt, this does not accord with the boundary of the historic curtilage on the OS map.
20. In these circumstances, whilst I have reviewed all of the Appellant's submission I can detect no other basis on which it is claimed that the unchallenged use for recreation and residential purposes would not be a breach of planning control. The Appellant's letter dated 23 November 2015 does not dispute the terms of the NPA's letter dated 19 November 2015, which records that she described the use of the large building as a summer retreat and I have noted the photograph showing sanitary fittings. Together this indicates a materially different use from agriculture and so for all these reasons the ground (c) in Appeal B must fail.

Appeal A: Ground (c): *Are the buildings permitted development?*

21. In the context of my finding in respect of Appeal B, I return to consider what the implications are for reliance on permitted development rights. Firstly, in view of my finding that the land on which the buildings have been erected is not within the curtilage of the dwellinghouse there can be no reliance on Part 1 rights, which permit development within the curtilage of a dwellinghouse. However since the unchallenged use of the land is mixed, for recreation and residential purposes, this would be outside of the ambit of Part 1 rights in any event. In other words the use is not for a purpose incidental to the enjoyment of the dwellinghouse as such and so even if my finding as to the extent of the curtilage was wrong this would not justify any reliance on Part 1 rights.
22. The NPA has otherwise referred to Article 3(5) of the GPDO, which says that the permission granted by Schedule 2 does not apply if the existing use is unlawful. This is material to the Appellant's possible reference to agricultural permitted development rights. I repeat that the Appellant has made no claim that the mixed use of the land for recreation and residential purposes has not occurred as a matter of fact. Accordingly since the land on which the buildings were sited on the date the notice was issued was being used for an unlawful purpose, other than agriculture, this precludes any reliance on Part 6 rights.
23. Part 6 rights permit the carrying out of certain works on agricultural land which means land that is in use for agriculture before development permitted by Part 6 is carried out, and which is so used for the purposes of a trade or business⁹. The Appellant has not suggested that any use that might be so regarded, such as the keeping of chickens, goats and sheep, is for the purposes of a trade or business. To the contrary the Appellant's letter to the NPA dated 23 November 2015 indicates that she largely works in Cornwall and I have already noted her son's trade is as a trainee carpenter. Any agricultural use of the wider land as might have subsisted on the date the notice was issued therefore appears to have been of the nature of a hobby or interest, and not on a commercial basis.

⁹ See definition at Part D.1. to the GPDO.

Both Appeals: Overall conclusions on Ground (c)

24. For all of the reasons set out above I conclude that both ground (c) appeals cannot succeed because the Appellant has failed to show that there has not been a breach of planning control in respect of all matters in both notices.

Other matters

25. The Appellant has made a number of observations on the planning merits of the development, including that it is not visible from the moor. However in the absence of the deemed application fee having been paid I would exceed the terms of my jurisdiction if I were to express a view on the planning merits of the development that has taken place. I acknowledge that it is said that the works, including to the electrical distribution and supply point, are not finished but that only serves to confirm my earlier findings in respect of the ground (c) appeals, particularly in Appeal A.

Both appeals: Conclusion

26. For the reasons given, and having regard to all other matters raised, I conclude that the appeals should be dismissed and I shall uphold both notices.

Pete Drew

INSPECTOR