

Appeal Decision

Site visit made on 28 October 2020

by John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI

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

Decision date: 06 November 2020

Appeal Ref: APP/R4408/X/20/3255825

4 Burton Crescent, Barnsley S71 2QD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Cyril Barnett against the decision of Barnsley Metropolitan Borough Council.
 - The application Ref 2020/0110, dated 28 January 2020, was refused by notice dated 14 May 2020.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended (the Act).
 - The development for which an LDC is sought is the erection of an outbuilding to be used as a store, games area and hobby workshop.
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Decision

1. The appeal is dismissed.

Reasons

2. 4 Burton Crescent is a semi-detached dwelling with a generally flat, rectangular, rear garden that has north-west, south-west and south-east boundaries to neighbouring residential properties. On the north-west boundary is a brick wall and on the south-east boundary is a fence. On the south-west boundary is part of the side elevation of a garage to the rear of 426 Burton Road and a retaining wall that supports ground to the rear of the garage. The proposed outbuilding would be built within two metres of the three boundaries.
3. The Appellant maintains that the proposed building is development permitted under Class E of Part 1 of Schedule 2 of The Town and Country (General Permitted Development) (England) Order 2015 (the GPDO). Class E sets out dimensional limitations for a building to be permitted development. One of these is that, if it is to be within 2 metres of the boundary of the curtilage of the dwellinghouse, the building must be no more than 2.5 metres in height. Technical Guidance to the GPDO states that the height of the building should be measured from the highest ground level immediately adjacent to the building.
4. The main issue is whether the Council's refusal to grant an LDC was well founded. The onus of proof falls on the Appellant and he must provide sufficient precise and unambiguous evidence to justify a conclusion, on the balance of probability, that the Council's refusal to grant an LDC was not well founded.
5. The Appellant commenced construction of the proposed L-shaped outbuilding in February 2019, believing it to be permitted development, by excavating the site

and installing a concrete raft foundation over blinding and hardcore topped by concrete screed on insulation. The concrete screed was seen at the site visit and extends up to the wall of the adjoining garage and the retaining wall. Following a site visit by Council Officers in March 2019, when they photographed the excavations, the Appellant was advised by those Officers that the building required planning permission. He subsequently ceased work on the outbuilding and, eventually, submitted the appeal LDC application.

6. An application for an LDC, made under section 192(1)(b) of the Act and if granted, establishes what would have been lawful on the date the application was made. This is made clear in section 192(2) which states that "...operations described in the application would be lawful if instituted or begun at the time of the application...". The Council maintains, for the purposes of applying the height limitations of Class E, that it is ground levels that existed on the date of the application that are relevant. The Appellant maintains that ground alongside the west elevation of the proposed building will be backfilled to a pre-existing level and that it is this level that is relevant for applying the height limitations.

7. The issue of what is the relevant ground level for the purposes of applying the height limitations of Class E was considered in the case of *McGaw v Welsh Ministers and the Council for the City and County of Swansea* [2020] EWHC 2588 (*Admin*). This recent judgement, though it concerned an appeal decision made by a Welsh Government Inspector, is relevant case law. It was held that the wording of Class E is "...expressly prospective and contemplates whether the height would exceed ...(limitations)...after completion of the proposed development in accordance with the submitted plans – which showed that the site would be backfilled to raise the land to a pre-existing level beside the side walls of the proposed building".

8. It is necessary therefore to establish the highest pre-existing ground level adjacent to any part of the external walls of the proposed building. A photograph in the Council's appeal statement shows the rear part of the garden before the excavations of February 2019 took place. The photograph shows a garden shed close to the west corner of the garden to be supported above the general level of the garden. The Appellant maintains that the base height of the shed corresponds to the height of the garden before remodelling works were carried out in 2007. The photograph does show excavations took place before 2019 because the brickwork of the garage is darker above where ground level used to be.

9. The Appellant maintains that ground levels were reduced around the shed and that, therefore, the floor level of the shed is the pre-existing ground level for applying the height limitations of Class E. But the aforementioned photograph, and another photograph in the Appellant's appeal statement, shows the shed to be on a brick base and not supported by the ground. That the shed was supported on a base is corroborated by Section B-B on application drawing no. 17-151 08 Rev. A which refers to 'shed base shown on photograph'. It is probable that the brick base was installed after ground levels were reduced in 2007 though why the shed was so supported, making access difficult, is not known.

10. The photographs do not show what existed between the shed and the property to the rear, but it is likely that the ground level of the garden of the appeal property extended up to the boundary. It is the height of this ground level that is the 'highest ground level for permitted development purposes'. There is no reason not to accept the Appellant's assertion that the pre-existing post 2007 ground level along the south-west elevation of the proposed building, before the

development that is the subject of the application was commenced, was 300mm above the floor level of the proposed building. But the highest part of the building, scaling off the application drawing because dimensions have not been provided, would be about 3.2 metres above floor level and therefore 2.9 metres higher than the pre-existing ground level immediately adjacent to the building.

11. Another drawing submitted in evidence shows the proposed building abutting the boundary to the neighbouring property and in a planning statement submitted with the application it is stated that "The building will abut an existing retaining wall...". If this were to be the proposed building's relationship to the boundary, the height of ground outside the curtilage of the dwellinghouse cannot be used to assess the height of a building intended to be built within the curtilage of the dwellinghouse, against the height limitations of Class E.

12. The Council's photographs taken in March 2019 show excavations over an area that corresponds to the footprint of the proposed building. These photographs clearly show the depth of the excavations, the spoil heap created, and that the excavations extended up to the neighbouring garage and unretained ground to the rear of the garage. The depth of excavations adjacent to the neighbouring garage was about 900mm and towards the front of the proposed building about 600mm. An excavation depth of about 600mm would be required to introduce the composite ground floor slab that has been introduced. The additional excavation work, next to the south-west boundary where ground levels rose by about 300mm, do not, as a matter of fact and degree, constitute a separate engineering operation that requires a grant of planning permission.

13. The proposed building would be within 2 metres of the boundaries of the curtilage of the dwellinghouse and would be more than 2.5 metres in height when assessed in relation to the pre-existing highest ground level immediately adjacent to the building. The building does not thus, as a matter of fact and degree, satisfy the height limitations of Class E of Part 1 of Schedule 2 of the GPDO. The proposed development is not thus permitted development.

14. For the reasons given above the Council's refusal to grant an LDC in respect of the erection of an outbuilding to be used as a store, games area and hobby workshop at 4 Burton Crescent, Barnsley was well-founded and the appeal fails. The powers transferred in section 195(3) of the 1990 Act as amended have been exercised accordingly.

John Braithwaite

Inspector