

Appeal Decision

Site visit made on 6 July 2021

by Roy Curnow MA BSc(Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 6 August 2021

Appeal Ref: APP/P0119/X/20/3264878

1 Riverside Mill Lane, Frampton Cotterell, Bristol BS36 2AA

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Tim Draisey against the decision of South Gloucestershire Council.
 - The application Ref P20/19705/CLE was dated 8 October 2020.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is outbuilding within curtilage of residential dwelling.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Tim Draisey against South Gloucestershire Council. This application is the subject of a separate Decision.

Procedural Matter

3. The Council did not issue a decision prior to the appeal being lodged. However, its submissions set out why, in its view, the development is not lawful and the appeal should be dismissed. I refer to this as its 'deemed refusal'.
4. Following my site visit, copies of drawings from various planning applications that were referred to in parties' submissions were requested. I have taken these into account in making my decision and, where necessary, I refer to those drawings directly.
5. It is common ground that the appeal building is related to 1 Riverside Mill Lane, one of three dwellings that were formed from the conversion of a barn that lies close to the edge of the village of Frampton Cotterell. Several planning applications were made relating to the conversion of the barn and these are referred to below, as appropriate.
6. The site lies within the Bristol and Bath Green Belt (GB). However, as this appeal relates to an application for a certificate of lawfulness, neither the effects on the GB nor any other planning matters are relevant to my decision.

Main Issue

7. The main issues are:

- Whether the building was 'permitted development' when constructed, in the light of the terms of Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) ('GPDO'); and
- Whether the building is incidental to the use of 1 Riverside Mill Lane.

Reasons

Permitted Development

8. 1 Riverside Mill Lane is one of three dwellings in a short terrace that were formed from the conversion of a barn. The dwellings lie close to the edge of the village of Frampton Cotterell.
9. The building that is the subject of this appeal lies to the side of No1, between it and the River Frome. It is fairly large, with walls constructed from concrete blocks set under a flat roof. It is largely rectangular, with a small projecting element on its west elevation. The walls on three of its four elevations have been clad in timber boarding that has been stained to match the finish to Nos 1-3. Save for battens that have been fixed there, the blockwork on its north elevation, is unclad.
10. Class E sets out those circumstances where outbuildings benefit from permitted development rights and, therefore, do not require a formal planning application to be made before they are erected.
11. These Class E rights only apply where the building is constructed within the curtilage of a dwellinghouse. Therefore, it firstly needs to be established whether the building lies within the curtilage of the dwellinghouse.
12. The site plans¹ for applications PT17/11135/F and PT18/18728/F, which were submitted following my request for further plans, show those applications' site areas identified by a hatched red line. To the west of the barn that has been converted, the sites' northern boundary runs as a westward extension of the plane of the northern elevation of the barn.
13. The Site Plan Proposed for application PT18/18728/F, which the Appellant stated he implemented, identifies 'Private Amenity Space Plot 1' as the area to the west of the barn as far as the river. Again, its northern boundary runs as a westward extension of the plane of the northern elevation of the barn. Its southern boundary is less clear; it could run along the line of what has been annotated as a 'Hedging Fence' on the plan, this was not in place when I visited, or include land south of this. This plan also shows an area immediately to the rear of No 1 as being part of its amenity space.
14. For the sake of completeness, though it does not have red lines annotated on it, a plan² that was submitted as part of planning application PT17/5878/RVC

¹ 1655_P012 Revision B – Proposed Block Plan (0719-SK04 – Site Plan Proposed (

² 2017.13 4D 03 Hardscape Plan

- shows the same area to the west of the barn annotated as 'Private Amenity Space'.
15. The red lines I refer to, above, differ from that on the plan which accompanied the certificate application. This encloses additional land to the northwest of Private Amenity Space identified in application PT18/0440/F. At my site visit, save for an access to the adjoining agricultural field, that land was overgrown. It was not apparently in any use associated with No 1. I have not been presented with evidence to lead me to conclude, on the balance of probability, that this is within the curtilage of No 1. That it is the same ownership is not conclusive evidence in this regard.
 16. From the evidence before me, on a fact and degree basis I find that the outbuilding that has been erected lies within the curtilage of No1, but is within 2m of its north boundary. This latter point is, however, not determinative in my decision.
 17. The Council's submissions show that the planning permission it granted for application PT17/1135/F was subject to a condition that withdrew various permitted development rights from the three dwellings, including those allowed by Class E. Therefore, if the barn was converted under its terms, the appeal could not be allowed. However, the evidence shows that a subsequent application for the barn's conversion, PT18/0440/F, was made. Its description included the phrase 'Amendment to previously approved scheme PT17/1135/F', and this was approved. The evidence shows that this was a new stand-alone permission. This gave any developer of the site the option of converting the barn in accordance with either permission. In a statutory declaration that accompanied the application, the Appellant states that he developed the site in accordance with planning permission PT18/0440/F. I find that, on the balance of probability, this was the case.
 18. The evidence shows that the planning permission granted for PT18/0440/F did not contain a condition withdrawing permitted development rights. The Council describes the two permissions as being "linked", but that planning permission PT18/0440/F "did not explicitly remove permitted development rights". The removal of permitted development rights has to be explicit; there is no legal method in planning terms for this to be achieved in an implicit manner. Therefore, I find permitted development rights were intact for the erection of an outbuilding within the curtilage to No 1 under Class E.
 19. Class E sets out, in its paragraphs E.1, E.2 and E.3, that where certain parameters are not met its permitted development rights do not apply. The latter two relate to areas with certain landscape or historic designations, none of which are applicable here. The restrictions in E.1 are germane to all locations.
 20. To be permitted by the GPDO, the development has to accord with all of the relevant Class E parameters. It is for the Appellant to prove his case, on the balance of probability, that the building erected complies with the terms of the GPDO.
 21. Class E.1 (e) and (f) relate to height restrictions. I have found that the building is within 2m of the boundary of the curtilage of No 1. Therefore, E.1 (e) defines that the overall height of the building within 2m of the boundary should not exceed 2.5m. E.1 (f) sets out an eaves height restriction of no more than

- 2.5m, irrespective of its proximity to the boundary of the curtilage. As the building has a flat roof, its overall height and eaves height are the same.
22. Guidance on the measurement of building heights is given in 'Permitted development rights for householders Technical Guidance'³ (the 'technical guidance'). There have been several iterations of this, but, given that the Appellant stated in his statutory declaration that he commenced work on the outbuilding in October 2019, that dated September 2019 is relevant.
23. In respect of E.1(f), the technical guidance states that "*The eaves of a building will be the point where the lowest point of a roof slope, or a flat roof, meets the outside wall of the building*". It points to further guidance⁴ on calculating the height of outbuildings that is provided for Class A developments, for extensions and the like, as being relevant. It states that "*For the purpose of measuring height, the eaves of a house are the point where the lowest point of a roof slope, or a flat roof, meets the outside wall. The height of the eaves will be measured from the ground level at the base of the external wall of the extension to the point where the external wall would meet (if projected upwards) the upper surface of the roof slope*".
24. In its 'General Issues', the Technical Guide sets out how the height of a building should be measured. This should be from the ground level adjacent to the building and, where this is not uniform, such as where the land slopes, then ground level is to be taken as the highest part of the ground next to the building.
25. At my site visit, the height of the building was measured for me at various points by the parties who agreed on the resultant measurements. As the level of the land falls from north to south⁵, the higher land was on the building's north side. A measured survey⁶ of the site submitted as part of the applications for the conversion of the barn shows levels on the site. Although there are no levels shown for the area in which the building has been erected, it is nonetheless safe to extrapolate that there was a fall from north to south when the building was erected. This is shown as being about 1m between the front and rear of the barn and would probably have been similar where the building has been erected.
26. Therefore, using measurements taken on the building's north elevation accords with the approach advocated in the Technical Guide. Parties agreed that each measurement taken on this elevation gave a height from the eaves to the building's damp-proof course (dpc) of 2.51m. Given its purpose, the dpc would have been above ground level at the time of the building being erected. At the time of my visit, the dpc lay above ground level by some 2-3cms, dependent on where the measurement was taken. Given that the level of the roof, including its eaves, and that of the dpc are fixed, I do not find that rainfall since the building was erected would have had an effect on the measurements gained at my visit.
27. Therefore, albeit by a small margin, the height of the building to its eaves exceeded the maximum allowed under the terms of Part 1, Class E of the GPDO.

³ MHCLG September 2019

⁴ Page 12 of the technical guidance

⁵ As illustrated on 'Site Plan – Existing', Drawing No SK04 revision A

⁶ Topographical Survey 16033/01

28. Whilst the purpose behind the eaves' criterion might be to protect neighbours' living conditions, there is nothing in the GPDO to allow a higher eaves level where land adjoining a building is in the same ownership. Similarly, there is no allowance for a *de minimis* exceedance of its terms.
29. Three photographs were attached to the Appellant's submissions that purported to show that the building was in accordance with the GPDO. None of them clearly does so. One shows the tape at eaves level, but does not show the lower, ground level, point from which the measurement was taken. Another shows the end of the tape at ground level, but not its upper end at eaves level. The last shows a close-up of the very upper end of a tape that purports to show the eaves height to be at or just below 2.5m; however, its lower end is not shown. Given their shortcomings, these do not show that the height of the building to its eaves to meet the requirements of the GPDO.
30. I note that the Appellant's statutory declaration states that "The eaves of the Outbuilding do not exceed 2.5 metres". The agreed measurements taken at my site visit, however, show this to be incorrect. Although the Officer's Report to the Council's Planning Committee for P19/18728/F refers to the Class E requirement for a single storey building to have "a height of less than 4 metres", this was incorrect. However, this did not mislead the Appellant who was aware of the correct requirement for the building's eaves height, as evidenced in the 'Ten Criteria of Class E of the GPDO 2015'⁷ he refers to.
31. An appeal⁸, made under s78 of the Act, sought permission to use the outbuilding as a separate dwelling. That decision does not support the Appellant's position as the Inspector made it clear in paragraph 3 of their decision that *"It is not for me to determine under a s78 appeal if the building is lawful or not. There is a separate process for that under s191 of the 1990 Act"*. Notwithstanding this, the circumstances led him to assess the lawfulness of the outbuilding and concluded that *"In the above context, there is a significant degree of uncertainty regarding the lawfulness of the ancillary building"*. He did not, as is suggested by the Appellant accept that the height was 'within the criteria' of the GPDO.
32. It seems that the Council's assertion on the height of the building being in excess of the GPDO's parameters was based on drawings, rather than a site visit. I have not been told which drawing was used, nor where on the drawing the measurement was taken from, to support its finding that the building was 2.9m high. However, following the terms of the Technical Guide and GPDO, that figure was wrong. Notwithstanding this, its conclusion that the building was too high was sound.
33. Therefore, my finding on this first main issue is that both the overall height of the outbuilding and its height to eaves' level exceed 2.5m and, therefore, it cannot be considered to be permitted development in the light of the terms of Schedule 2, Part 1, Class E of the GPDO 2015 (as amended).
34. If I am wrong on the matter of the overall height of the building, that is to say in respect of the building's proximity to the boundary of the curtilage, this is not fatal to my decision given my finding on its eaves' height.

⁷ Pages 5 and 6 of the statement put forward in support of the s191 application P20/19705/CLE

⁸ APP/P0119/W/20/3251036

Whether incidental use

35. The assessment of this main issue has to be limited to the question of whether the building, which the Appellant's submissions show is for domestic storage purposes, is incidental to the enjoyment of the dwellinghouse. In respect of this issue, the deemed reason states that the size and scale of the outbuilding means that it could not reasonably be described as being incidental.
36. The case of *Emin v SSE* [1989] JPL 909 related to the matter of the erection of outbuildings for purposes incidental to the enjoyment of a dwellinghouse. Amongst other things, this decision addressed the physical size of an outbuilding.
37. It set out that the size of the dwelling should not dictate the size of an outbuilding. Whilst this might be part of that assessment, it is not by itself conclusive. It is necessary to answer the question as to whether the proposed building is genuinely and reasonably required or necessary in order to accommodate the proposed use or activity. As the judgement in *Emin* says, this is not a matter that is to be left to the whim of a landowner. The assessment is a matter of fact and degree and the nature of the activities carried on
38. The evidence shows that No 1 does not have an attic space or garage, to provide storage space. The Appellant's submissions also stated that there is no shed at the property. However, when I visited the site it was confirmed that a small shed in the garden to the rear of No 1 was used by its occupants. In respect of the need for storage space, I have been referred to the comments attributed to the Inspector in an appeal⁹ relating to an incidental garage. Although I have not been given a copy of the decision, I am told that it states that as there was no garage serving a dwelling, its provision could be said to be required for a purpose incidental to the enjoyment of the dwellinghouse. Given the lack of storage in No 1. that is a statement that has resonance here. Indeed, the Council agree that domestic storage *per se* would be incidental.
39. In support of his case for the requirement for the building that he has erected, the Appellant's statutory declaration speaks of his growing family's need for "some storage space". His initial application submission refers to the need to store various domestic items and states that what has been built is smaller than the storage that he says would be available to a notional 4-bedroom bungalow or house and that the building provides reasonable space.
40. I note the comment made by the Inspector that assessed the appeal into the proposed use of the outbuilding as a dwelling, that the outbuilding "appears unusually large for these purposes". It is undoubtedly a large building, and I have not been provided with sufficient evidence to show that such a large building is genuinely and reasonably required or necessary to provide "some storage space".
41. I have been referred to a number of cases where I am told that buildings of a commensurate size or larger have been granted permission. I have not, however, been given full details of these. Notwithstanding this, each decision has to be made on an individual basis.

⁹ PINS reference reported as APP/C3430/X/11/2146568

42. The reference to the intention of the Appellant, in the light of the earlier application¹⁰ for planning permission for the use of the building as a dwelling, is irrelevant to the assessment of the case before me. Whilst this was discussed in the Council's statement, it is not mentioned in its deemed reason for refusal.
43. On this main issue, I find that the Appellant has not shown, on the balance of probability, that the outbuilding is reasonably necessary for purposes incidental to the enjoyment of the dwellinghouse.

Conclusion

44. For the reasons given above I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of outbuilding within curtilage of residential dwelling was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Roy Curnow

Inspector

¹⁰ Council reference P19/18728/F