
Appeal Decision

Site visit made on 6 September 2021

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 October 2021

Appeal Ref: APP/R4408/X/21/3276280

4 Burton Crescent, Monk Bretton, 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 2021/0220, dated 14 February 2021, was refused by a notice dated 16 March 2021.
 - The application was made under section 192(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 erection of outbuilding to be used as a store, games area and hobby workshop.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Barnsley Metropolitan Borough Council against Mr Cyril Barnett and vice versa. These applications are subject to separate decisions.

Procedural Matter and Background

3. The Appellant commenced construction of an outbuilding in February 2019, believing it to be permitted development. The site was excavated, and a concrete raft foundation and floor installed extending up to the wall of the adjoining garage and retaining wall. Following a visit by Council Officers in March 2019, where the Appellant was advised by those Officers that the building required planning permission, he submitted an LDC application¹. The application was refused by the Council and subsequently dismissed on appeal².
4. I noted on my site visit that walls to that outbuilding have now been partially constructed. However, it is not clear whether the works on site relate to the building which is the subject of the LDC. The works on site include a new retaining wall to support the adjoining garden of 426 Burton Road. However, the proposed development the subject of the LDC, as shown on Drawing No 11, Ref: 17-151, dated January 2021 shows that earth will be backfilled to the claimed previous land levels. I have made my decision based on the details

¹ Local Planning Authority Ref: 2020/0110.

² APP/R4408/X/20/3255825.

and drawing submitted with the application for the LDC the subject of this appeal.

Reasons

5. Section 192(2) of the Town and Country Planning Act 1990 as amended (1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect. In any other case they shall refuse the application. The planning merits of the proposed development are not relevant in this appeal and the main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development was well founded. The onus of proof falls on the Appellant to provide sufficient evidence to justify a conclusion, on the balance of probability, that the Council's decision to refuse to grant an LDC was not well founded.
6. The proposed development is a single storey detached building with a hipped roof for use as a workshop, games area and store on land at 4 Burton Crescent, which is a semi-detached dwelling. The outbuilding is shown on the application drawing as being some 500mm from the site's rear boundary where it adjoins the garage/garden area of 426 Burton Road. The provision within the curtilage of a dwellinghouse of any building or enclosure, swimming pool or other pool required for purposes incidental to the enjoyment of the dwellinghouse as such, or the maintenance, improvement or other alteration of such a building or enclosure is permitted by Class E, Part 1, Schedule 2, Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended (GPDO), subject to the restrictions set out in E.1, E.2 and E.3.
7. Class E.1 (e) (ii) requires that the building should not exceed 2.5m in height where it is within 2 metres of the boundary of the curtilage of the dwellinghouse. Technical Guidance³ states that the height of the building should be measured from the highest ground level immediately adjacent to the building. Considering recent case law⁴, it is therefore necessary to establish the highest pre-existing ground level adjacent to any part of the external walls of the proposed building.
8. It is the Appellant's case that the pre-existing land level adjacent to the proposed building was 1.238m above the concrete slab which has been installed. In support of the application a site survey⁵, photographic evidence and correspondence from neighbouring residents and contractors have been provided.
9. The survey was conducted after the site was excavated and the concrete slab installed. Consequently, whilst it provides a datum for the slab and finished floor level, it does not provide any evidence of what the pre-existing ground levels were within the site or adjacent to the proposed building. Furthermore, it shows the land levels in the neighbour's garden at No 426, behind the newly constructed retaining wall, to be between 735mm and 834mm above the

³ Permitted development rights for householders, Technical Guidance, dated September 2019. MHCLG

⁴ *McGaw v Welsh Ministers and the Council for the City and County of Swansea* [2020] EWHC 2588 (Admin)

⁵ Site Survey Ref S1517, dated December 2020 conducted by Turnbull Surveying

- datum. That level is significantly less than the 1.238m shown on the application drawings.
10. Photographs included on the application drawing and taken by the Council and the Appellant in March 2019 show excavated land within the north western corner of the site. The height of the remaining earth abutting the common boundary fence with No 6 Burton Crescent is shown at 833mm above the survey datum. However, it is the Appellant's case that the pre-existing ground level adjacent to the proposed building corresponded with the level of the earth mound shown in the Appellant's photograph at 1.238m above datum. He believes that this higher level is supported by correspondence from local residents and contractors who worked on the site. In addition, it is claimed that this height is supported by photographic evidence produced by a resident at 428 Burton Road who used to garden for the Appellant and helped to demolish the garden shed that had occupied part of the site where the building is now proposed.
 11. The Appellant's photograph, taken in March 2019, does not show the pre-existing land levels that would have been adjacent to the proposed outbuilding (i.e. 500mm from the flank wall of the neighbouring garage). Instead, it shows the level of an earth mound on land at No 426 which abutted the site boundary. In addition, the photographs produced by the occupier of No 428 showing the concrete base of the former shed once it was demolished, not only confirm that the shed was supported on a concrete base above the surrounding garden level, but they also indicate that the base was similar in height to the base of the neighbour's timber fence and concrete post which are shown with a datum height of 10.833m. These photographs do not therefore support the assertion that the pre-existing land levels were 1.238m above datum.
 12. I have taken into account third party correspondence in support of the Appellant's case. However, that evidence is not in the form of formal statutory declarations and I attached limited weight to this evidence. Furthermore, the details in the previous application for the LDC which was dismissed on appeal, and evidence provided to support the Appellant's subsequent applications to the Council for an LDC⁶, is not consistent. The conflicting evidence casts doubt on the accuracy of the information produced to support this appeal. Whilst I appreciate that not all of this conflicting evidence was before the Council when they made their decision at application stage, I am obliged to consider any relevant fresh evidence advanced at appeal. The purpose of the LDC provisions is to enable the making of an objective decision based on the best facts and evidence available when the decision is taken.
 13. For the reasons set out above, the evidence produced by the Appellant does not demonstrate with any precision that the pre-existing site levels adjacent to the walls of the proposed building were 1.238m above datum. Furthermore, considering the works that have been undertaken on the appeal site, and neighbouring land, it is now difficult to accurately establish the pre-existing ground levels adjacent to the proposed walls of the building. Taking into account the previous Inspector's findings, and noting that he was able to view the site when it was less developed than it was when I conducted my visit, then considering all the evidence before me in this appeal, the Appellant's evidence is not sufficiently precise for me to determine, on the balance of

⁶ Council's Statement of Case, Appendix 6 & 6a LPA Ref: 2021/0597.

probability, that the pre-existing ground level adjacent to the proposed building extended to a height of 1.238m above the survey datum.

14. The proposed building would be within two metres of the boundaries of the curtilage of the dwellinghouse and on the balance of probability would be more than 2.5m 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.

Conclusion

15. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development for erection of outbuilding to be used as a store, games area and hobby workshop at 4 Burton Crescent was well founded and the appeal fails. I will exercise accordingly the powers transferred to me in Section 195(3) of the 1990 Act as amended.

Elizabeth Pleasant

INSPECTOR