



Appeal Decision

Site visit made on 21 September 2021

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 November 2021

Appeal Ref: APP/Q9495/C/21/3276612

Land at Low Birker Farm, Boot, Holmrook CA19 1TH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Hua Yun Da Petroleum Services (Bahamas) against an enforcement notice issued by Lake District National Park Authority (the LPA).
- The enforcement notice was issued on 13 April 2021.
- The breach of planning control as alleged in the notice is, without planning permission, operational development consisting of the partial erection of a detached pitched roof building in the approximate position marked with a cross on the attached plan.
- The requirements of the notice are:
 1. Demolish the partially completed building; and,
 2. Remove from the Land all building materials, rubble and debris arising from compliance with the first requirement above.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (a) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld in the terms set out below in the Formal Decision.

Appeal on ground (c)

1. In an appeal on ground (c), it is for the appellant to demonstrate, on the balance of probabilities, that the alleged breach of planning control stated in the notice does not constitute a breach of planning control.
2. Article 3(1) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) grants planning permission for the classes of development described as 'permitted development' in Schedule 2. Class E(a) of Part 1 of Schedule 2 sets out that buildings within the curtilage of a dwellinghouse are permitted development. Development is not permitted by Class E if it meets any of the limitations under E.1.
3. The development subject of the notice comprises a building to the rear of the farmhouse at Low Birker Farm. The LPA states that the building is not within the curtilage of the dwellinghouse and does not therefore fall within the parameters of Class E.

4. The GPDO does not define the term 'curtilage' for the purposes of Class E. The Technical Guidance¹ makes clear that the term 'curtilage' is understood (in the context of the GPDO) to mean: "*land which forms part and parcel with the house. Usually it is the area of land within which the house sits, or to which it is attached, such as the garden, but for some houses, especially in the case of properties with large grounds, it may be a smaller area.*"
5. Interpretation of the word curtilage is not a matter of law but a judgement for the decision-maker given the ordinary meaning of the word². Indeed, in *Burford*³ the High Court found that whether something falls within the curtilage is a question of fact and degree and thus primarily a matter for the decision maker. The Court went on to make clear that it was for the Inspector to decide what weight should be given to each of the relevant factors.
6. Case law⁴ has established that to fall within the curtilage of a building, it is enough that land serves the purpose of the building in some reasonably necessary or useful manner, even though it need not be marked off or enclosed in any way. For land to fall within the curtilage of a building, it must be intimately associated with the building to support the conclusion that it forms part and parcel of the building.⁵
7. Relevant considerations include the physical layout of the building and the land said to be the curtilage; the past and present ownership; and, past and present use or function.⁶
8. Whilst it was found in *Skerritts*⁷ that curtilage does not need to be confined to a small area as suggested in *Dyer*⁸, the size of the curtilage relative to the building may be relevant⁹. Moreover, although physical enclosure is not necessary, the degree to which the building and curtilage fall within one enclosure is relevant as an aspect of the test of physical layout¹⁰.
9. The appellant claims that the curtilage of the house comprises the entire area of land to the south and east of the farmhouse, as far as the wall that bounds the public footpath. It is said that historically, the land and farmhouse have been in the same ownership and contained by the same wall. The appellant indicates that, whilst there was a small area to the rear of the farmhouse which was fenced off, this was only done to act as a windbreak to a small seating area. Otherwise, it is said that there has always been unrestricted access from the house to the rest of the land. The appellant points to historical photography showing domestic paraphernalia on the land, but it is not before me. It is also indicated that there was previously a well at the eastern edge of the land which provided water to the house, albeit that is no longer the case.
10. The LPA has provided a plan which marks the extent of the land which it believes to form the curtilage. Whilst it is difficult to ascertain with any reasonable degree of precision the extent of the curtilage put forward on the

¹ Permitted Development Rights for Householders Technical Guidance published by the then Ministry of Housing, Communities and Local Government, September 2019.

² *Brutus and Cozens* [1973] AC854 and *Dyer v Dorset CC* [1988] 3 WLR 213

³ *Burford v SSCLG & Test Valley BC* [2017] EWHC 1493 (Admin)

⁴ *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195

⁵ *Methuen-Campbell v Walters* [1979] 1 QB 525

⁶ *HM Attorney-General ex rel Sutcliffe & Rouse & Hughes v Calderdale BC* [1983] JPL 310

⁷ *Skerritts of Nottingham Ltd v SSETR (No. 1)* [2000] EWCA Civ 60, [2001] JPL 1025

⁸ *Dyer v Dorset CC* [1988] 3 WLR 213

⁹ *Challenge Fencing Ltd v SSCLG & Elmbridge BC* [2019] EWHC 553

¹⁰ *R (oao Sumption) v Greenwich LBC* [2007] EWHC 2276 (Admin);

plan, it nevertheless seems to me that the majority, if not all, of the building subject of the notice falls within it.

11. In any event, I saw from my site visit that the land on which the building is sited is tightly knit to the rear of the house with only a narrow space between the building and the rear wall of the property. I have no evidence from the LPA to contradict that of the appellant that historically the land has been in the same ownership, nor indeed that it has, over time, been used for domestic functions. Furthermore, the LPA indicate that to facilitate the building, a previous smaller outbuilding was demolished. A smaller building is outlined on the Ordnance Survey map which forms the base for the plan attached to the notice. All of this suggests a degree of intimate association between the property and the land upon which the building is sited.
12. Moreover, taking into account just the land on which the building is sited, it seems to me that the scale of that land is commensurate with the house. Indeed, its arrangement in size and layout almost reflects the front garden of the property. As a result, on the evidence before me, it seems to me that the land on which the building is sited forms part of the curtilage of the dwelling.
13. It is therefore necessary to turn to the limitations within E.1 of Part E of the GPDO. E.1(e) states that development is not permitted if the height of the building would exceed: 4m in the case of a building with a dual-pitched roof; 2.5m in the case of a building within 2m of the curtilage of a dwellinghouse; or, 3m in any other case. E.1(f) states that the building is not permitted if the height of the eaves would exceed 2.5m.
14. Prior to the erection of the building, the land sloped upwards away from the house. In order to facilitate the building, it is said that the embankment was excavated to provide a level area at the same level as the house. That level area was provided with a concrete base.
15. The LPA have taken the appropriate measurement of height from the level ground on which the building is sited. In contrast, the appellant argues that the measurement should be taken from the highest point of the sloping land adjacent.
16. The Technical Guidance defines 'height' for the purposes of the GPDO as the height measured from ground level. It notes that 'ground level' is the surface of the ground immediately adjacent to the building in question. It goes on to say that 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.
17. If the measurement is to be taken from the adjacent part of the appellant's land which comprises a driveway, then the eaves height and overall height will be lower than the maximum limitations in E.1(e) and (f).
18. However, this is not a case where the ground level upon which the building actually sits is sloping. Rather, it seems to me that the land upon which the building is sited is uniform in level due to the excavation works. The fact that the surrounding land is not level is a moot point. Thus, the advice in the Technical Guidance on instances where ground level is not uniform is irrelevant. Ultimately, for the purposes of assessing the height of the building in question, the GPDO requires height to be measured from ground level. The

evidence here leads me to conclude that ground level at the time of the building's construction, was the level base upon which it sits.

19. Neither party has presented the eaves or overall height of the building taken from ground level. The LPA does indicate however that the eaves exceeds 2.5m and the overall height exceeds 4m from this point. There is no evidence from the appellant to the contrary.
20. I conclude, therefore, that the development fails to meet the limitations within E.1(e) and E.1(f). As such, the development is not permitted development under Class E of Part 1 of Schedule 2 of the GPDO and consequently is not granted planning permission by Article 3(1) of that Order. The development will therefore not have been lawful at the date the notice was issued and thus constitutes a breach of planning control.
21. The appeal on ground (c) fails.

Appeal on ground (a)

Preliminary Matters

22. The enforcement notice refers to policies within the Lake District National Park Core Strategy (Local Plan Part One) (the CS) which formed part of the development plan at the date the notice was issued. The notice also refers to policies within the emerging pre-adoption Lake District Park Local Plan. The Lake District National Park Local Plan 2020-2035 (the LP) was subsequently adopted on 19 May 2021 and now forms the development plan, superseding the policies in the CS. The parties had the opportunity to comment on the adoption in their submissions since the appeal was submitted on 8 June 2021. I have therefore had regard to the relevant policies in the adopted LP as required by statute.
23. Likewise, the parties have also had the opportunity to address the revised National Planning Policy Framework (the Framework) published in July 2021 at both the appeal statement and the final comments stage of this appeal. Again, it is the July 2021 Framework to which I will have regard.

Main Issues

24. The main issue is the effect of the development on the character and appearance of the area.

Reasons

25. The appeal site lies within the Lake District National Park. One of the statutory purposes of National Parks is to conserve and enhance their natural beauty, wildlife and cultural heritage. Paragraph 176 of the Framework states that great weight should be given to conserving the landscape and scenic beauty in National Parks. Similarly, the site lies within the English Lake District World Heritage Site (WHS) which is recognised as a landscape of exceptional beauty. The WHS is a designated heritage asset for the purposes of the Framework and for which regard is to be had to the effect of the development on its Outstanding Universal Value.
26. The appeal site lies in the Eskdale Valley area of the National Park. This part of Eskdale is characterised by the verdant and tranquil 'U' shaped valley through which runs the meandering River Esk. The valley sides are punctuated by large

swathes of dense woodland, craggy hills and a sense of sparseness due to an isolated, small scale settlement pattern and relative lack of human intervention. Where there is built form, it is broadly limited to vernacular farmsteads, dry stone structures and modest stone cottages.

27. In contrast to the prevailing character of built form in the area, the building subject of the notice is substantial in size and scale, with a height close to that of the adjacent dwelling. Moreover, the building measures 10m by 10m, with a footprint similar in scale to the dwelling itself. As such, it does not appear as a subservient outbuilding associated with the farmhouse. Rather, it appears as a dominant and incongruous addition to the existing collection of buildings.
28. Furthermore, the building is sited on higher ground as the valley sides begin to rise to the south. The building can thus be seen from several vantage points, including public rights of way close to the site. Whilst the building is seen in the context of the adjacent collection of buildings, it nevertheless appears as a dominant and obtrusive element within the landscape. As a result, the development fails to conserve the landscape and scenic beauty of the National Park. In addition, due to the harm to the landscape, the development will unduly affect the significance of the WHS and result in a loss of its Outstanding Universal Value.
29. I consider the harm to the designated heritage asset to be less than substantial given its scale in the context of the WHS. Therefore, in accordance with paragraph 202 of the Framework, that harm needs to be balanced against the public benefits of the development. However, there are no public benefits to the development which have been advanced by the appellant.
30. I conclude, therefore, that the development will have a harmful effect on the character and appearance of the area. As such, it will conflict with LP Policies 1 and 5 which seek to support developments which are consistent with the purpose of the National Park and conserve and enhance the landscape. In addition, the development will conflict with Policy 6 of the LP which seeks to achieve design excellence in all development and LP Policy 7 which aims to conserve and enhance designated heritage assets.

Alternative Development

31. Under the appeal on ground (f), the appellant has suggested an alternative form of development which would involve removing the pitched roof and retaining the building as a flat roof structure with a grassed roof. Whilst this would reduce the scale and massing of the building, it would retain its large footprint. Thus, it seems to me that it would still remain as a large, dominant element of built form close to the existing buildings and would still be visible from public vantage points within the area. As a result, the alternative would not overcome the planning harm I have identified.

Conclusion

32. For the reasons given above, and have considered all matters raised, I conclude that the appeal on ground (a) should not succeed and planning permission should be refused on the deemed application.

Appeal on ground (f)

33. An appeal on ground (f) is made on the basis that the requirements of the notice are excessive. Section 173(4) of the 1990 Act is clear that a notice can have one of two purposes. They are either to remedy the breach of planning control or, as the case may be, any injury to amenity which has been caused.
34. The notice alleges development consisting of the partial erection of a detached pitched roof building. It requires that the partially completed building is demolished and any materials, rubble or debris arising from the demolition are removed from the land. On that basis, it seems to me that the purpose of the notice is to remedy the breach by restoring the land to its condition before the breach took place under section 173(4)(a) of the Act. Consequently, any lesser steps that stop short of complete demolition would not remedy the breach of planning control.
35. It is nevertheless incumbent upon me to consider any obvious alternatives to complete demolition that would overcome the planning difficulties at less cost and disruption to the appellant. Given my findings in respect of the alternative put forward by the appellant as set out in the appeal on ground (a), I conclude that the alternative would not overcome the planning difficulties. There are no other obvious alternatives apparent to me nor advanced by the appellant.
36. On that basis, I find that there are no lesser steps that would remedy the breach of planning control and as a result, the requirements of the notice are not excessive. The appeal on ground (f) therefore fails.

Formal Decision

37. The appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

J Whitfield

INSPECTOR