



Appeal Decisions

Hearing held on 8 November 2022

Site visit made on 8 November 2022

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 December 2022

Appeal A Ref: APP/B9506/C/21/3287552

Appeal B Ref: APP/B9506/C/21/3287553

Land at Bramshaw House (Formerly Branksome), Penn Common Road, Bramshaw SO43 7JL

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mr Robert Bull and Appeal B is made by Mrs Alison Bull, against an enforcement notice issued by New Forest National Park Authority.
 - The enforcement notice, numbered 20/0032, was issued on 11 November 2021.
 - The breach of planning control as alleged in the notice is: Without planning permission the erection of a building in the approximate location shown shaded green on the plan attached to this Notice.
 - The requirements of the notice, set out in its paragraph 5, are:
 - 5.1 Permanently demolish the building shown in the approximate location shaded green on the plan attached to this Notice to ground level.
 - 5.2 Remove all debris and material resulting from compliance with 5.1 from the land affected.
 - The period for compliance with the requirements is 8 months.
 - Appeal A and B are proceeding on the grounds set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended.
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Appeal C Ref: APP/B9506/X/21/3287565

Bramshaw House, Penn Common Road, Bramshaw SO43 7JL

- 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 Robert Bull against the decision of New Forest National Park Authority.
 - The application Ref 21/00684, dated 20 July 2021, was refused by notice dated 23 September 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 described as: The construction of an outbuilding to be used for purposes incidental to the enjoyment of the residential property by the owners and occupiers of the site.
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Decisions

1. Appeal A and B are dismissed and the enforcement notice is upheld.
2. Appeal C is dismissed.

Preliminary Matters

3. Under section 192(1) of the 1990 Act, if any person wishes to ascertain whether any operations proposed to be carried out in, on, over or under land, would be lawful, they may make an application for the purpose to the local planning authority specifying the land and describing the operations in question.
4. Under section 192(2), if, on an application under this section, the local planning authority are provided with information satisfying them that the operations described in the application would be lawful if begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
5. In a lawful development certificate appeal and in a ground (c) enforcement notice appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.
6. As set out in Planning Practice Guidance (PPG), the applicant is responsible for providing sufficient information to support an LDC application and they need to describe the proposal with sufficient clarity and precision to enable a local planning authority to understand exactly what is involved¹.
7. At the Hearing I sought to clarify which drawings are the subject of the LDC appeal. I have been provided with 5 drawings, prepared by 'Drawing by Design', which are labelled as 'Page No' 1-5 respectively. At the Hearing, the appellant indicated that there are other drawings that should have been considered as part of the LDC application. But it is not clear what all of these drawings are and they have not been provided.
8. At the Hearing, The New Forest National Park Authority (the Authority) said that it would object to further drawings being submitted by the appellant for the LDC appeal. Given the specific nature of each of the disputes between the main parties, detailed below, the provision of further drawings to deal with the dispute about the roof would not change the outcome of the appeals overall. So I have not invited the provision of further drawings and none were offered.
9. Whilst the LDC application has been made under section 192 of the 1990 Act (ie 'proposed development'), in respect of what has been constructed on the site the appellant said at the Hearing that what is there matches the drawings provided for the LDC application. In effect, this means that the appeal development in each of the appeals is the same and this is consistent with the Authority's case.
10. I have no reason to believe this is not so, notwithstanding that the structure that has been built is not complete, and I have dealt with the appeals on this basis, distinguishing between them in my reasoning where necessary. However, I do not have the agreement of both main parties to determine the LDC appeal under section 191 (ie 'existing development') rather than section 192, despite the development having been begun, so I have not done so.

¹ Lawful development certificates – Paragraph: 006 Reference ID: 17c-006-20140306

11. The PPG is clear that planning merits are not relevant at any stage in a lawful development certificate application or the appeal process for such an application².
12. In addition, no ground (a) appeal has been made for the enforcement notice appeals. So there is no deemed application for planning permission before me, meaning that I cannot take planning merits into account in the enforcement notice appeals either.
13. Planning merits include the appearance of the appeal development, the effect of the appeal development on the character and appearance of the area, on natural light and on light pollution, whether it complies with planning policies or design guidance and examples of other outbuildings elsewhere.

Main Issues

14. The main issue in Appeal A and B is whether the matters stated in the enforcement notice constitute a breach of planning control, ie the ground (c) appeal.
15. The main issue in Appeal C is whether the decision of the Authority to refuse the lawful development certificate was well-founded or not.

Reasons

16. In considering both of the above main issues, the decision in each appeal turns on whether the appeal development is 'permitted development', pursuant to The Town and Country Planning (General Permitted Development) (England) Order 2015 (the Order).
17. Subject to conditions and limitations, the Order grants planning permission for specified forms of development. Schedule 2, Part 1, Class E of the Order provides that the provision within the curtilage of a dwellinghouse of any building "required for a purpose incidental to the enjoyment of the dwellinghouse as such" is permitted development.
18. Specific limitations within Class E include the following:
 - E.1. Development is not permitted by Class E if—
 - (e) the height of the building would exceed—
 - (i) 4 metres in the case of a building with a dual-pitched roof,
 - (ii) 2.5 metres in the case of a building within 2 metres of the boundary of the curtilage of the dwellinghouse, or
 - (iii) 3 metres in any other case; and
 - (f) the height of the eaves of the building would exceed 2.5 metres;
19. Relevant to the above, at the Hearing the Authority summarised what it sees as the matters in dispute in these appeals. These are: the height of the eaves, the height of the building overall and the scale of the use. This is consistent with the Authority's written submissions.
20. From the above summary I consider the specific disputed matters are:

² Lawful development certificates – Paragraph: 009 Reference ID: 17c-009-20140306

- whether the scale of the use in the outbuilding means that the building is “required for a purpose incidental to the enjoyment of the dwellinghouse as such” or not; and
- whether the height of the building overall would comply with the relevant limitations set out in paragraph E.1 (e); and
- whether the height of the eaves of the building exceeds 2.5 metres.

Whether the scale of the use in the outbuilding means that the building is required for a purpose incidental to the enjoyment of the dwellinghouse as such or not

21. The floorplan provided is annotated to show that the outbuilding would accommodate a games room with a pool table and fold-up table tennis table; an art and hobby studio; a gym with a treadmill, cycle, rowing machine, cross trainer, bench press, free weights, floor exercise area and boxing bay; and a garden furniture, equipment and implement store.
22. The LDC application before me follows a previous LDC application which was refused by the Authority. In its written submissions the Authority states that the uses proposed within the outbuilding now are considered incidental but that concerns with regard to the scale of the proposed outbuilding remain.
23. Based on the information provided, the completed outbuilding would provide approximately 177 sqm of floorspace. By comparison, the existing detached dwelling on the site provides approximately 95 sqm of floorspace according to the Authority, and 125 sqm of floorspace according to the appellant, taking into account space within the roof, which the appellant indicated is for a fourth bedroom in addition to the 3 bedrooms I saw on the ground floor.
24. In respect of Class E buildings, *Emin v SSE & Mid Sussex DC* [1989] JPL 909 is relevant case law and both main parties have drawn on this in their submissions. From this case law several salient points arise which are relevant to these appeals, summarised below, notwithstanding the appellant’s view that the world has moved on since *Emin*.
 - The test to be applied is whether the uses of the proposed outbuilding, when considered in the context of the planning unit, are intended and will remain ancillary or subordinate to the main use of the property as a dwellinghouse.
 - The size of an outbuilding, in comparison to the dwellinghouse, may be an important consideration but it is not by itself conclusive. However, the physical size of buildings could be a relevant consideration in that they might represent some indicia as to the nature and scale of the activities to be carried on in the proposed building.
 - There must be a prospect that the nature and scale of activities could go beyond a purpose merely incidental to the enjoyment of the dwellinghouse as such and constitute something greater than a requirement related solely to that purpose.
 - The fact that such a building has to be required for a purpose associated with the enjoyment of a dwellinghouse cannot rest solely on the unrestrained whim of him who dwells there but connotes some sense of reasonableness in all the circumstances of the particular case.

- The word "incidental" connotes an element of subordination in land use terms in relation to the enjoyment of the dwellinghouse itself. Regard should be had to the use to which it is proposed to put the outbuilding and to the nature and scale of that use in the context of whether it is a purpose incidental to the enjoyment of the dwellinghouse.
 - It is necessary to identify the purpose and incidental quality in relation to the enjoyment of the dwelling and 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 and thus achieve that purpose.
25. The outbuilding is on a massive scale. The floorplan provided does not show precisely how it is to be laid out. The games room and art and hobby studio are particularly large, even taking into account the contents described for them, as is the store.
26. The store would be enclosed by large windows. At the Hearing I asked why a storage area such as this would require such large windows and the appellant said: "it is the way in" and that it would provide "storage for scaffolding to build a house on the site".
27. I am not satisfied the above constitutes an incidental purpose but, in any event, it has not been demonstrated why so much floor space is required for the use described, in an incidental building for the existing modest size dwelling. In my view, in land use terms, it is anything but subordinate in relation to the enjoyment of the dwellinghouse.
28. Taking all of the above into account, as a matter of fact and degree, on the balance of probabilities, I am not satisfied that the scale of the use in the outbuilding means that the building is required for a purpose incidental to the enjoyment of the dwellinghouse as such. Therefore the outbuilding in Appeal A, B and C is not genuinely and reasonably required or necessary in order to accommodate the uses proposed and so it is not permitted development.

Whether the height of the building overall would comply with the relevant limitations set out in paragraph E.1 (e)

29. No roof has yet been constructed on the appeal building on the site, so I cannot be certain it would comply with paragraph E.1(e) of the Order when complete without reference to the drawings provided (on the basis that the appeal development in each of the appeals is the same).
30. For the LDC proposal, the 5 drawings that were provided do not include a roof plan, and, as was made clear by the Authority at the Hearing, the elevation drawings depict the appeal building either obscured by or immediately in front of the existing main house or garage. As such, because of the way the drawings have been drawn, for the purposes of paragraph E.1(e) of the Order, it is impossible to tell from those 5 drawings whether the appeal building has a dual-pitched roof or not or whether it would comply with paragraph E.1(e).
31. At the Hearing, the appellant stated that the building would have a 1.5 degree dual-pitched roof. But it should not be necessary for a proposal to be verbally described to be understood. Moreover, it is not sufficient to simply say that the roof will be dual-pitched and not exceed 4 metres, it should be clear from the drawn description of the proposal and the 5 drawings provided do not describe

the proposal with sufficient clarity and precision to enable exactly what is involved to be understood.

32. My attention has been drawn to an image on the fourth pages of the appellant's final comments, submitted for this appeal. But this roof plan was not submitted to the Authority with this LDC application and it carries a date stamp that long precedes it.
33. I accept that it may have been the appellant's intension for this roof plan to have been submitted with this LDC application and, with the appellant's explanation, this roof plan clarifies what is proposed.
34. Therefore, I am satisfied that the overall height of the building in these appeals would comply with the relevant limitations set out in paragraph E.1(e) of the Order when complete. But in light of my findings on the other specific disputed matters, this makes no difference to my overall conclusion in these appeals.

Whether the height of the eaves of the building exceeds 2.5 metres

35. From the elevation drawings provided, it would appear that the height of the eaves of the LDC proposal would exceed 2.5 metres. But the appellant states that the drawings "do not show the 'slope' gradient of the site / ground land" and at the Hearing, the appellant was clear in his view that no ground level shown on these drawings.
36. It is not sufficient to simply say that the height of the eaves of a proposed building will not exceed 2.5 metres, it should be clear from the drawn description of the proposal. Moreover, if no ground level is shown on the drawings, then, in my judgement, the evidential burden for the LDC proposal has not been discharged in respect of this disputed matter.
37. In respect of what has been constructed, at the site visit I invited the appellant to measure the height of the eaves of the structure from ground level. It was apparent that the appellant was taking ground level as being a point some distance away from the building, on its eastern side.
38. But height must be measured from the surface of the ground **immediately adjacent** to the building in question and would not include any addition laid on top of the ground. This is consistent with the technical guidance³ that the Authority has drawn my attention to, which is an aid to interpretation and application of the Order.
39. The technical guidance states 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.) So at the site visit I invited the appellant to take another measurement, from where he believes the highest part of the ground to be, immediately adjacent to the building.
40. I am not satisfied that what I saw, measured by the appellant in the presence of the Authority, demonstrates that the height of the eaves of the building does not exceed 2.5 metres from ground level.
41. I have taken into account the appellant's comments that "soil will be returned so that the ground level will be 2.5 metres from the eaves". But from what I

³ Ministry of Housing Communities & Local Government, Permitted development rights for householders – Technical Guidance, September 2019

have seen on site (and bearing in mind where the burden of proof lies), I am not satisfied that the level that would be achieved from the above action will truly reflect what "ground level" is for the purposes of the Order.

42. At the site visit the appellant said that the ground height next to the building would need to be higher due to flooding. I recognise that in some areas flooding can be a problem but this does not make the appeal development lawful for the purposes of the Order.
43. Taking all of the above into account, I conclude that the height of the eaves of the building exceeds 2.5 metres in Appeal A, B and C and so the building is not permitted development.

Other Matters

44. My attention has been drawn to what is referred to by the appellant as a compromise. But this is not the development which is before me in any of these appeals and any application for an alternative scheme would need to be formally submitted to and considered by the Authority in the first instance.
45. My attention has also been drawn to disputes between the appellant and the Authority relating to a previous LDC application. But that is not before me in these appeals either.
46. Written submissions provided make reference to the character of the appellants. But this has no bearing on whether the appeal development in any of these appeals is lawful or not.
47. I have been referred to other appeal decisions. But these are not case law and each appeal will turn on its own facts. So the outcome in another appeal does not dictate the outcome of any of the appeals before me.

Conclusion

48. For the reasons given above, I conclude that Appeals A and B should not succeed. I shall uphold the enforcement notice.
49. For the reasons given above I conclude that the Authority's refusal to grant a certificate of lawful use or development in respect of: 'The construction of an outbuilding to be used for purposes incidental to the enjoyment of the residential property by the owners and occupiers of the site', was well-founded and that Appeal C should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

L Perkins

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Alison Bull Appellant

Robert Bull Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Carly Cochrane Planning Officer

Lucie Cooper Planning Enforcement Manager

INTERESTED PERSONS:

Susan Bennison Bramshaw Parish Council and local resident

Ian Grounds Representing local resident, Gary Loveless

Jenny Watts Bramshaw Parish Council

DOCUMENT

Written representation (Robert & Alison Bull 08/11/22 Incidental, Purpose & Scale)