

2021/0597

Mr Cyril Barnett

*Erection of outbuilding to be used as a store, games area and hobby workshop
(Application for a Lawful Development Certificate for a Proposed Development)*

4 Burton Crescent, Monk Bretton, Barnsley, S71 2QD

Site Description

The application relates to a semi-detached dwelling located off Burton Road in Monk Bretton. The property is of a red-brick construction with a concrete tile hipped roof. To the front is a hard-standing area that provides off-street parking and to the rear is a modestly sized garden that backs onto properties that sit on Burton Road itself. To the southern boundary is a timber panelled fence. A brick wall has been erected along the boundary with the dwelling to the North.

The area is predominantly residential, with Burton Crescent itself characterised by other semi-detached dwellings that are of an identical design and material construction.

Planning History

The site has had seven previous applications, five of which were refused and two approved

- 2018/0064 – Erection of single storey outbuilding to form residential annex – Refused
- 2018/0616 – Erection of single storey outbuilding to form residential annex (Resubmission) – Refused
- 2019/0960 – Outbuilding to be used for domestic storage purposes – Refused
- 2019/1258 – Erection of detached outbuilding to rear for domestic storage purposes – Approved
- 2020/0110 – Erection of outbuilding to be used as a store, games area and hobby workshop (Application for a Lawful Development Certificate for a Proposed Development) – Refused
- 2021/0220 – Erection of outbuilding to be used as a store, games area and hobby workshop (Application for a Lawful Development Certificate for a Proposed Development) – Refused
- 2021/0415 – Erection of outbuilding to be used as a store, games area and hobby workshop (Application for a Lawful Development Certificate for a Proposed Development) – Approved

The subsequent appeals of 2018/0616 and 2020/0110 were dismissed by the Planning Inspectorate. An appeal has been lodged against the LPA's refusal of 2021/0220.

Proposed Development

The application is made under S192 of the Town and Country Planning Act for a certificate of lawfulness for a proposed form of development for the erection of a detached outbuilding to be used as a store/game's room/workshop.

The 'L' shaped building will have a floor area of approx. 48m², with eaves height of 2.25m and a ridge height of 3.31m from the concrete base.

Construction of the outbuilding has commenced, with officers from the LPA visiting the site on 12/03/21.

Supporting photos from various stages of the development have been included with the application. On 25/05/21, an additional photograph was submitted.

Legal Context

The Town and Country Planning (General Permitted Development) (England) Order 2015 allows householders to extend their property provided certain criteria is met. Under Class E of Part 1 of Schedule 2 of this act, development is permitted for the provision within the curtilage of the dwellinghouse of:

- a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such, or the maintenance, improvement or other alteration of such a building or enclosure; or
- b) a container used for domestic heating purposes for the storage of oil or liquid petroleum gas.

Development is not permitted by Class E if:

- a) permission to use the dwellinghouse as a dwellinghouse has been granted only by virtue of Class M, N, P or Q of Part 3 of this Schedule (changes of use);
- b) the total area of ground covered by buildings, enclosures and containers within the curtilage (other than the original dwellinghouse) would exceed 50% of the total area of the curtilage (excluding the ground area of the original dwellinghouse);
- c) any part of the building, enclosure, pool or container would be situated on land forward of a wall forming the principal elevation of the original dwellinghouse;
- d) the building would have more than a single storey;
- e) the height of the building, enclosure or container 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, enclosure or container within 2 metres of the boundary of the curtilage of the dwellinghouse, or
 - iii. 3 metres in any other case;
- f) the height of the eaves of the building would exceed 2.5 metres;
- g) the building, enclosure, pool or container would be situated within the curtilage of a listed building;
- h) it would include the construction or provision of a veranda, balcony or raised platform;
- i) it relates to a dwelling or a microwave antenna; or
- j) the capacity of the container would exceed 3,500 litres.

There are other limitations on the permitted development rights for outbuildings however; these do not apply to the application site.

For the purposes of Class E, a purpose incidental to the enjoyment of the dwellinghouse includes the keeping of poultry, bees, pet animals, birds or other livestock for the domestic needs or personal enjoyment of the occupants of the dwellinghouse. Other examples include common buildings such as garden sheds, other storage buildings, garages, and garden

decking as long as they can be properly be described as having a purpose incidental to the enjoyment of the house. A purpose incidental to a house would not, however, cover normal residential uses, such as separate self-contained accommodation or the use of an outbuilding for primary living accommodation such as a bedroom, bathroom, or kitchen.

This is set out in the supporting text of the 'Permitted development rights for householders – Technical Guidance', a supplementary document to the General Permitted Development Order 2015

Consultations

Legal Services – The building does not meet the requirements of Class E of Schedule 2, Part 1 of the GPDO

Ward Councillors – No comments received

Ten letters of support have been received. These claim that the land in question has remained undisturbed since 2007 and that the proposal is permitted development.

Assessment

The application property has had two planning applications for a similar sized building refused, with one dismissed at appeal. A reduced sized outbuilding was refused in 2019 but not appealed. In December 2019, a much smaller outbuilding was granted planning permission.

An application for a Certificate of Lawfulness for a version of the proposal very similar to that refused planning permission and dismissed on appeal under S192 of the T&CPA was applied for in 2020, but not granted, as the building did not comply with the limitation set out para E1 (e)(ii) of Class E of the GPDO. The subsequent appeal against the LPA's decision not to grant the Certificate of Lawfulness was dismissed, with the Inspectorate finding that the LPA's decision to refuse to grant the lawful development certificate were well-founded.

The applicant has subsequently made two subsequent lawful development applications since the failed LDC appeal. One version abides by the Inspectors appeal decision and was approved by the Council earlier this year. The other was refused as it sought to assert that the pre-existing ground level was higher than that previously determined by Planning Inspector John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI.

Applications for certificates of lawfulness are evidence rather than judgement based. The burden of proof rests solely with the applicant, who must present clear and unambiguous evidence that the proposed development is lawful. As such, the application must be considered as it stands.

In Paragraph 8 of the appeal decision for 2020/0110, Planning Inspector John Braithwaite states that *"it is necessary therefore to establish the highest pre-existing ground level adjacent to any part of the external walls of the proposed building"*. The Inspectorate goes onto state in Paragraph 10, *"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"* and again in paragraph 12 when explaining the part of the decision why the excavation works undertaken did not in his professional opinion amount to a separate engineering operation that requires the grant of planning permission *'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’.

As such, the Inspectorate established that the highest ground level that could be used as the starting point for measuring the height of the building was 300mm above the finished floor level of the building, 450mm above the base of the concrete slab (150mm finished floor level +300mm pre-existing ground level).

The submitted plans have disregarded the above statement, with a land level of 818mm above concrete base of the building being claimed as pre-existing (no finished floor level is provided on the plans).

This application represents the fourth application for a certificate of lawfulness and each time, a different land level is claimed as pre-existing.:

- 2020/0110 – 800mm above concrete base
- 2021/0220 – 1.1m above concrete base
- 2021/0415 – 500mm above concrete base
- 2021/0597 – 818mm above concrete base

Three of these applications were submitted after the appeal for 2020/0110 was dismissed, with the Inspector stating that the highest level is 300mm above finished floor level, 450mm 500mm from the concrete base.

The survey submitted shows a different land level to other applications and it is claimed that the site was surveyed in December 2020. However, that date postdates the Inspectors site visit that was carried out in relation to the failed LDC appeal. In addition, that date postdates the construction of the concrete base and all of the associated excavation work. It therefore cannot be relied upon to demonstrate what the pre-existing ground levels were prior to any of the construction works being undertaken. Furthermore, the fact that application 2021/0220 has been appealed shows that the applicant is trying to claim two different land levels are ‘pre-existing’. This constantly changing story of what constitutes the pre-existing ground level and the different stages that it has arrived at including when transformative construction works have taken place in the area of the site in question makes it very difficult for the evidence that has been presented by the applicant to be accepted.

Cont...

The survey also contradicts the plans submitted during previous applications:

Figure 1. Extract from plans submitted for app. 2021/0220

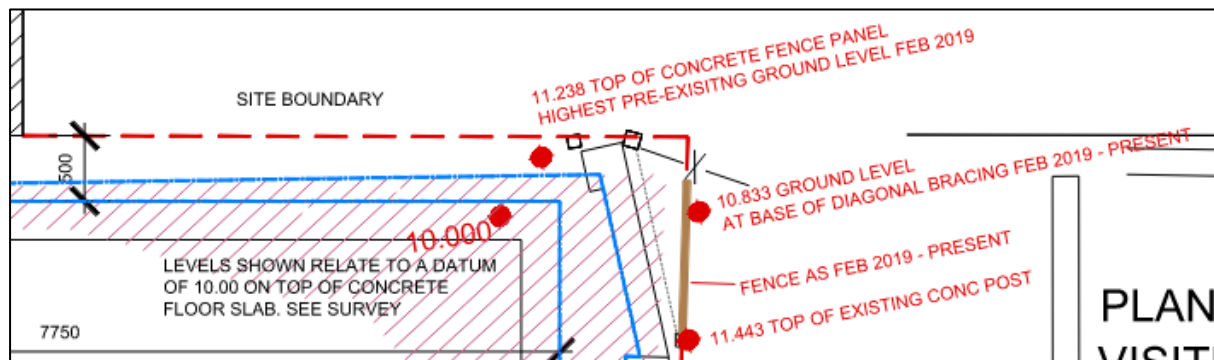
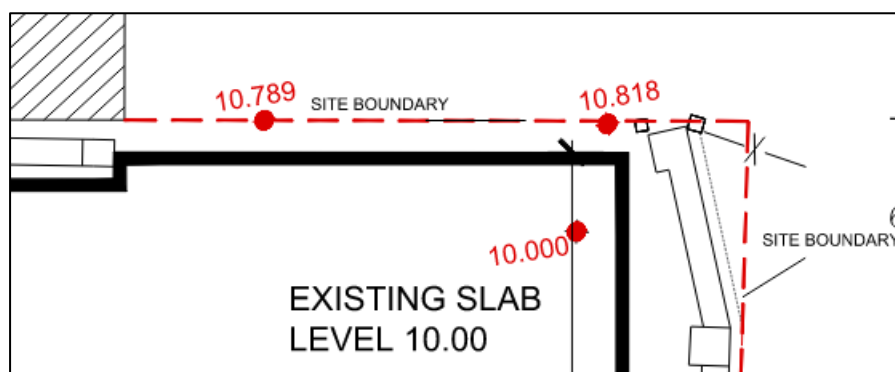


Figure 2. Plans submitted for app. 2021/0597



The plans for 2021/0220 were created after the survey is claimed to have been undertaken. This would suggest that, according to the applicant, the pre-existing land level has increased up to 2019 and subsequently decreased between 2019 and 2020. This contradicts the submitted statements that the land has remained unchanged for 14 years.

Part of the applicants claim regarding pre-existing land level is that part of the land within the curtilage of 4 Burton Crescent is at the same level as that at 426 Burton Road, which sits to the rear of the site, outside the curtilage of 4 Burton Crescent and not in control of the applicant. In para. 11 of the appeal decision for 2020/0110, the Inspector firmly stated that land outside of the curtilage couldn't be used to determine the pre-existing ground level.

From photograph below (taken by LPA officers on 12/03/21), it is clear that a retaining wall has been erected adjacent to the boundary with 426 Burton Road and projects into the garden at 4 Burton Crescent. This has subsequently been backfilled with earth and levelled to match what is present at 426 Burton Road.

Figure 3. Photo taken by LPA on 12/3/21



Looking closer at the applicants' submitted photos, the supporting text for Photograph 9 states that this parcel of land to the rear – claimed as pre-existing – is within the curtilage of No.4 Burton Crescent (the piles of earth, the fences, the vegetation and the plastic bin). Whereas on the submitted plans all of those features would sit within the curtilage of No.426 Burton Road. The below plan extract shows the boundary line to be level with the outer wall of the garage that is part of No.426 Burton Road:

Figure 4. Extract of site survey submitted for 2021/0597

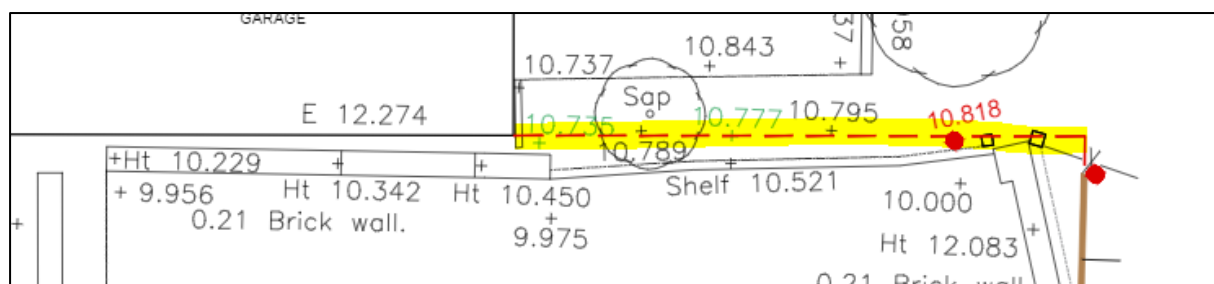


Figure 5. Photo 9 from supporting document



Site boundary, according to submitted plans (Ref 17-151 Drawing No. 10 Rev. C)

Photograph 11 and a photo from an LPA site visit in 2018 (below) do not show a higher land level behind the previously existing wooden shed, which was erected on a brick plinth – which the applicant had previously attempted to claim as a pre-existing higher level, but the Inspectorate dismissed this argument.



As such the erection of a retaining wall and subsequent infilling to bring it up to the level of the land at 426 Burton Road demonstrate that the pre-existing ground level has been altered and raised in the critical area of the site.

Looking at the photographs submitted, it should be noted that the only date provided is that of the LPA's visit in March 2021. However, from the stages of development shown in these images, it can be ascertained that:

- Photos 1-3 are post construction works commencing from after the LPA's enforcement visit in 2019, but likely before the Inspectorates visit in Oct 2020. Most of the features on the photos including the fences, the vegetation and the plastic bin are located at the side of the garage belonging to No.426 Burton Road and therefore sit outside of the application red line boundary which runs level with the outer wall of the garage.
- Photos 4, 5 & 8 are from the LPA's site visit earlier this year. It is noted that the ground levels bare no relation to the pre-existing ground levels indicated on photograph 11 and the 2018 site photos on the previous page of this report.
- Photos 6 & 7 are from the LPA's enforcement visit in 2019 and appear to show darker excavated soils piled on top of the lighter coloured excavated areas.
- Photos 9 & 10 are from after the LPA's enforcement visit in 2019, but likely before the Inspectorates visit in Oct 2020 and again show land located outside of the application site boundary which is shown as level with the outer wall of the garage on this and all of the previous applications.
- On the amended document, Photo 11 claims to show the pre-existing land level in 2007. Important details with this photo are that Planning Inspector John Braithwaite determined that the shed base could not be used to determine the pre-existing ground level. In addition, it is the land to the rear at No.426 Burton Road that is slightly raised as evidenced by the trellis fence that is still in existence today and is on the up to date photos outside of the application site.

Images 6 & 7 were sent to the Planning Inspectorate as part of the appeal for 2020/0110 and photo 11 formed part of the applicants' statement for that appeal. Photos 1-3 and 9 & 10 would show the land as the Inspectorate would have seen in Oct 2020. As such, this evidence has been seen by Planning Inspector John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI and would have been considered during the determination of the appeal, where the pre-existing ground level was established.

In the supporting statement submitted with the photographs, the applicant is seeking to disregard recent case law – *McGaw v Welsh Ministers and the Council for the City and County of Swansea [2020] EWHC 2588 (Admin)* – that they relied upon in the previous application. Instead, this application seeks to use comments from the LPA which pre-date the previous appeal and High Court decision as justification for using land outside the curtilage as the highest adjacent land. This completely ignores both the Inspectorates decision and recent relevant case law. Again, this contradicts the previous application (currently under appeal), which sought to benefit from the McGaw decision, by claiming that the land would be backfilled to the argued higher level.

Appeal decisions related to similar development proposals on the same site as well as relevant case law are always applicable to any subsequent application. It is not for applicants to pick and choose whether they agree or disagree, dependent on the argument they are presenting. If the applicant was of the view that the Inspector had got his facts

wrong during the last appeal the avenue that was open to them was to seek to challenge the decision in the High Court.

The McGaw decision, referenced above, allows for the excavation and subsequent backfilling of land up to a genuine pre-existing level. This application ignores an up to date legal precedent and relevant High Court decision, instead claiming that the building height should be taken from the highest adjacent land level measured in December 2020 which is after it had been interfered with via various excavation and construction works.

As such, the submitted survey is not accepted because it shows the land level as it currently stands, rather than what was pre-existing. In addition it does not tally with the observations about the pre-existing ground level that are indicated photograph 11 noting that Planning Inspector John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI determined that the raised brick base for the shed could not be used to determine the pre-existing ground level –

Turning to the submitted statements from 3rd parties, these claim that the land in question has remained undisturbed for a period beginning in 2007 up to the present day. These also claim that the highest land level is at least 800mm above the concrete base. No supplementary evidence such as photographic evidence is provided to support these statements. Furthermore, it is apparent that construction works have been on-going (intermittently) for a duration of 2 ½ years This is blatantly not the case, therefore.

In addition, the statements would appear to contradict arguments presented at previous applications, including the recently submitted appeal against the LPA's decision to refuse application ref. 2021/0220 – in which the applicant is claiming that the highest land level is actually 1.1m, but now presents an argument that it is actually 800mm – which calls into question how much weight should be afforded to these statements, some of which have been provided by parties with either a personal relationship or vested interest in the site and development. Other submitted statements are from different individuals who live at different addresses but use identical wording. Therefore, it is questionable as to how impartial these statements are. The statements give no supporting evidence and amount to mere assertion and or anecdotal statements at best and do not satisfy the burden of proof test.

Conclusion

The pre-existing land level has been established by the Planning Inspectorate as being 300mm above the finished floor level of the building which was shown to be 200mm above the base on previous LDC application 2021/0415 (500mm above the concrete base in total)

The judgement of Planning Inspector John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI has been disregarded by the applicant who seeks to claim a higher level at more than 0.8m higher than the shed base as the highest ground level adjacent to the building to begin the measurement of height. However, this is based upon a survey from December 2020 which postdates the construction period. Those levels are disregarded therefore as the previous LDC appeal determined that it is necessary to establish the pre-existing ground level in line with the High Court judgement of McGaw v Welsh Ministers and the Council for the City and County of Swansea [2020] EWHC 2588 (Admin). The various photographs taken at various stages of the development, prior to commencement to the most recent show that the land has been considerably interfered with and altered as a result of the excavation and construction works in order to facilitate the development. The application therefore fails the burden of proof test that would have required definitive evidence to show that those

ground levels existed prior to construction works starting. Instead photograph 11 and the one from 2018 showing the shed in situ do not indicate that the pre-existing ground levels were as purported. Furthermore based upon the site boundary plan used for this and for the previous applications the majority of the land at the rear including earth, the fencing, the vegetation and the plastic bin sit outside of the red line boundary and therefore curtilage of the application property on the basis that the site boundary is shown to be level with the outer wall of the garage that belongs to No 426 Burton Road.

The application represents a fourth change of stance by the applicant. The constantly shifting position of the applicant, the reusing of previously assessed evidence and the submission of anecdotal statements to retroactively establish a previous land level suggests an attempt to benefit from multiple possibilities when only one can be chosen. As such, this does not satisfy the burden of proof which an applicant must clear in order for a certificate to be granted.

To reiterate, the appeal decision for 2020/0110 was not challenged by the applicant, and therefore the time period to challenge those findings has elapsed. As such, to claim that a pre-existing land level is above what has been established by an independent inspector is incorrect and takes the development outside the limitations set out in Para. E1 (e)(ii) of the GPDO.

Therefore, the height limitation set out in para E1 (e)(ii) must be assessed by taking measurements from established land levels. When measurements are taken from the land level established by the Planning Inspectorate, the proposed building will have a ridge height that is 2.83m above this level. Therefore, the overall height would be greater than 2.5m within 2m of the boundary of the curtilage of the dwelling. As such, the evidence submitted does not demonstrate that the proposal complies with the limitation set out in para E1 (e)(ii) of Class E of Part 1 of Schedule 2 of the GPDO 2015; and a certificate of lawfulness cannot be granted.

Recommendation

Refuse

The proposed development referred to on the plans ref 17-151 Drawing No. 10 Rev. C does not constitute Permitted Development under Schedule 2, Part 1, Class E of the Town and County Planning (General Permitted Development) Order 2015 (as amended) for the following reason:

1. The Local Planning Authority considers that the proposed outbuilding is within 2m of the boundary and the height of the building would exceed 2.5m as measured from the surface of the pre-existing ground level immediately adjacent to the building.
2. The evidence submitted does not demonstrate that the proposed outbuilding complies with the limitations of Class E of Part 1 of Schedule 2 of the Town and County Planning (General Permitted Development) Order 2015. The evidence contradicts previous supporting information regarding the pre-existing ground level, including that used in support of an approved Certificate of Lawfulness. As such, the evidence is not clear and unambiguous and does not satisfy the burden of proof test.

3. The site boundary set by this and previously related applications and the photographic evidence strongly indicates that the land claimed as the highest pre-existing land level sits outside of the residential curtilage of the dwellinghouse and therefore cannot be used as a basis to measure the overall height of the proposed outbuilding. Furthermore, the land in question has been so altered during the excavation and construction works carried out to facilitate the proposed development since the beginning of the construction period which means that the proposal fails the burden of proof test as the necessary evidence has not been proven and cannot be verified.