2023/0565

Applicant: Mr Cyril Barnett

Proposal: Erection of a detached outbuilding to the rear of dwelling (Application for a Lawful Development Certificate for a Proposed Development)

Site address: 4 Burton Crescent, Monk Bretton, Barnsley, S71 2QD

Site Description

The application relates to the rear garden belonging to No4 Burton Crescent which is a semi-detached two storey house that is located 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 a similar type and appearance.

Planning History

The site has had 9 previous applications for a form of detached outbuilding in the rear garden - 7 of which were refused and 2 were 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
- 2021/0597 - 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
- 2022/0314 - Erection of outbuilding to rear of dwelling to be used as a store, games area and hobby workshop (Application for a Lawful Development Certificate for a Proposed Development) – Refused 07/04/2022.

The subsequent appeals of 2018/0616, 2020/0110 and 2021/0220 were dismissed by the Planning Inspectorate. The appeal made against the Council's decision to refuse 2022/0314 is on going with an appeal site visit arranged for 02/08/2023 making this an overlapping application.

Proposed Development

This is a repeat lawful development certificate application for a similar form of detached outbuilding in the rear garden as with the 5 previous recent lawful development certificate applications made in respect of the same application site (references 2020/0110, 2021/0220, 2021/0415, 2021/0597 and 2022/0314).

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 would have a floor area of approximately 42m^2, with eaves height of 2.25m and a ridge height of 3.3m above the concrete base.

Construction of the outbuilding has commenced, with officers from the LPA visiting the site on 12/03/21 and more recently on 24/03/2023. In addition, appeal site visits took place on 28th October 2020 and 6th September 2021 with a further appeal site visit scheduled to take place on 02/08/2023 in association with the appeal made against the Council's decision to refuse 2022/0314. The applicant has chosen to submit this application rather than wait for the appeal decision making this an overlapping application in addition to the 2 previous LDC appeals that have already been dismissed by the Planning Inspectorate.

Legal Context

The Town and Country Planning (General Permitted Development) (England) Order 2015 allows householders to extend their property or construct domestic outbuildings provided that certain criteria are 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.

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

None undertaken with 3rd parties. The National Planning Guidance states the following:-

There is no statutory requirement to consult third parties including parish councils or neighbours. It may, however, be reasonable for a local planning authority to seek evidence from these sources, if there is good reason to believe they may possess relevant information about the content of a specific application. Views expressed by third parties on the planning merits of the case, or on whether the applicant has any private rights to carry out the operation, use or activity in question, are irrelevant when determining the application.

The Local Planning Authority is of the view that the evidence presented is very similar to that in nature to that which accompanied the previous lawful development certificate applications, the appeal which was determined by Planning Inspector Elizabeth Pleasant BSc (Hons) DipTP MRTPI on 5th October 2021 and the live appeal associated with previous application 2022/0314. Consequently, there is no need to send notification letters to 3rd parties again for such a form of repeat application and because the planning merits are not relevant to the decision.

Legal services are aware of the long planning history and do not feel that a certificate can be granted taking into account the 2 previous Planning Inspectorate decisions which established the height of the ground level adjacent to the building, the contradictory and varying evidence provided on this and the previous applications. All of this means that the burden of proof test is not met and because 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 that mean that the height of the pre-existing highest ground level can no longer be verified.

The height measurement needs to be taken from the natural (not artificial or deliberately increased to meet the Class E limitation) land level which immediately abuts the building in question. That natural level is the level that subsisted before work on the building began and the developer can backfill up to that level where this reduces the natural level in carrying out the development. The “insert” between the building is a new piece of development being added to a building that is partially pre-existing and should be assessed as separate development from the building. The two possibilities are that it falls under Class E which has the raised platform restriction or class F which doesn’t have the raised platform restriction. But either way it represents additional development to the building whose sole purpose is to circumvent the limitation In Class E para E1 (e) (ii). In principle this is not any different from artificially raising the land level adjoining the building to bring it within the limit and is a complete contrivance.

The infill wall is a contrived addition therefore that would not form part of the building as such as they would not be housed within it. Nor would the base beyond the outer wall of the building constitute part of the building for the purpose of measuring the surface of the ground immediately adjacent to the building. They do not represent the natural level of the original land, but are new additions designed to subvert the rules in the Class E. Without those the proposed building remains in excess of 2.5m in height within 2 of the boundary meaning that it did not as a matter of fact and degree, satisfy the height limitations of Class E of Part 1 of Schedule 2 of the GPDO -para E1 (e)(ii).

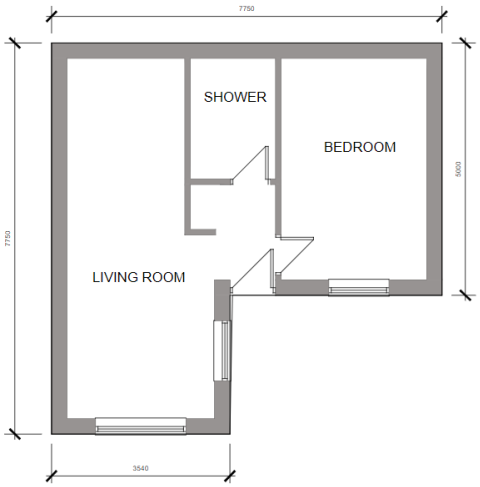
Assessment

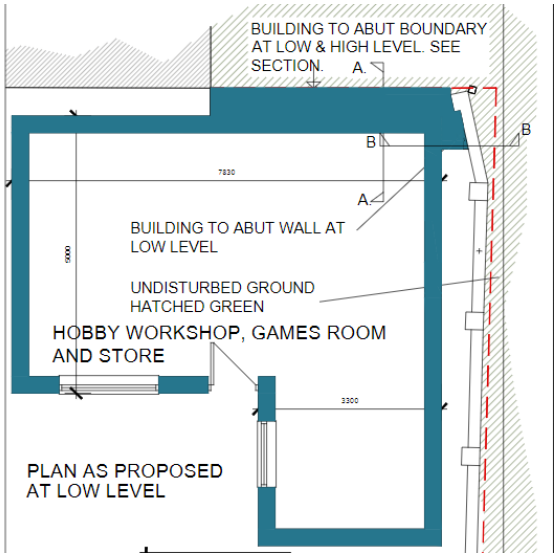
This is the 9th application for a form of detached outbuilding in the rear garden dating back to 2018. For 8 of those proposals the floorspace size is very similar with the main variations being in relation to the proposed heights but the other details being very similar.

A S78 appeal was made against the Council’s decision to refuse planning permission for 2018/0616 (erection of single storey outbuilding to form residential annex). That appeal was dismissed with Planning Inspector N McGurk BSc (Hons) MCD MBA MRTPI determining that the proposal would have the appearance of a small bungalow and that the proposal would result in harm to the living conditions of neighbouring occupiers with regards to privacy and would harm the character and appearance of the area (APP/R4408/D/18/3210579).

For 2019/1258 the size of the proposed outbuilding was reduced, and planning permission was granted by the Local Planning Authority. But then the applicant decided to change course making a series of lawful development certificate applications for similar versions of the proposed building to that which was refused planning permission and dismissed on appeal.

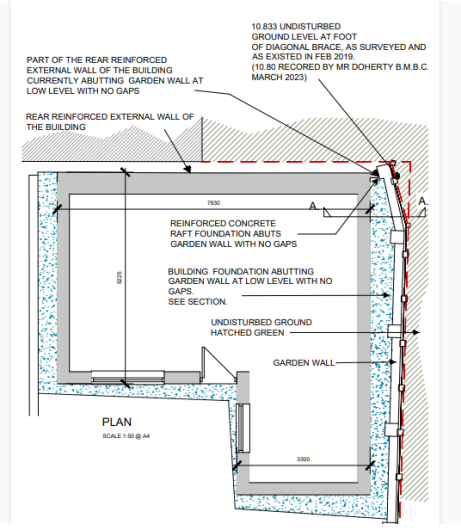
The stated reason for the development was changed from a residential annex to a store, games area and hobby workshop, but the amount of floorspace and location have stayed approximately the same throughout on all 6 of the subsequent lawful development certificate applications. That includes this latest proposal as can be seen from the floor plan comparisons below:-





Floor plan with dimensions for 2018/0616

Floor plan with dimensions for LDC app 2022/0314



Floor plan with dimensions for current LDC application 2023/0565.

Previous LDC applications 2020/0110, 2021/0220 and 2022/0314 were refused because the height of the proposed outbuilding exceeded 2.5m within 2m of the boundary meaning that it did not as a matter of fact and degree, satisfy the height limitations of Class E of Part 1 of Schedule 2 of the GPDO (para E1 (e)(ii).

The applicant had sought to argue that the adjacent ground level was higher than the concrete base that has been installed to accommodate the building which has also been partially constructed.

This issue was considered in detail in the 1st LDC appeal by Inspector John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI decision (appeal ref APP/R4408/X/20/3255825) on behalf of the Planning Inspectorate dated 6th November 2020:-

7. The issue of what is the relevant ground level for the purposes of applying the height limitations of Class E was considered in the case of McGaw v Welsh Ministers and the Council for the City and County of Swansea [2020] EWHC 2588 (Admin). This recent

judgement, though it concerned an appeal decision made by a Welsh Government Inspector, is relevant case law. It was held that the wording of Class E is "...expressly prospective and contemplates whether the height would exceed...(limitations)...after completion of the proposed development in accordance with the submitted plans–which showed that the site would be backfilled to raise the land to a pre-existing level beside the side walls of the proposed building".

8. "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 Inspector went 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".*

As such, the Inspector Braithwaite 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).

Since then, the LPA has had to contend with 5 subsequent LDC applications and 2 further appeals. With one of those the applicant submitted plans that took on board Inspector Braithwaite's ruling on the pre-existing ground level and that was approved (ref 2021/0415).

However, with 2021/0220 they disregarded Inspector Braithwaite's determination on the highest pre-existing ground level and sought to argue that the highest pre-existing ground level was 1.238m to enable them to construct a building that would have been 3.738m above the slab (0.79m above the pre-existing ground level established by Inspector Braithwaite). That particular application and appeal was accompanied by a topographical survey. However, the credibility of that topographical data was strongly in question given that it was dated December 2020 which is after Inspector Braithwaite's appeal site visit dated 28 October 2020 and his subsequent decision dated 06 November 2020 and as it ran contrary to his observations. Nor did it tally with the only two photos that exist dating back to before when the works took place in relation to the area of the site in question:-





Inspector Braithwaite also made the following observation concerning the brick base supported the old garden shed on the photo that post date the construction works:-

9. The Appellant maintains that ground levels were reduced around the shed and that, therefore, the floor level of the shed is the pre-existing ground level for applying the height limitations of Class E. But the aforementioned photograph, and another photograph in the Appellant's appeal statement, shows the shed to be on a brick base and not supported by the ground. That the shed was supported on a base is corroborated by Section B-B on application drawing no. 17-151 08 Rev. A which refers to 'shed base shown on photograph'. It is probable that the brick base was installed after ground levels were reduced in 2007 though why the shed was so supported, making access difficult, is not known.

In addition to that the applicants' topographical claims in the highest pre-existing ground levels have varied on most of those applications:-

- 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
- 2022/0314 – 818-833mm above concrete base
- 2023/0565 – 833mm above the concrete base.

This point was covered off by Planning Inspector Elizabeth Pleasant BSc (Hons) DipTP MRTPI in her decision on the 2nd of the LDC appeals (ref APP/R4408/X/21/3276280), dated 05 October 2021.

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 LDC, 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.*

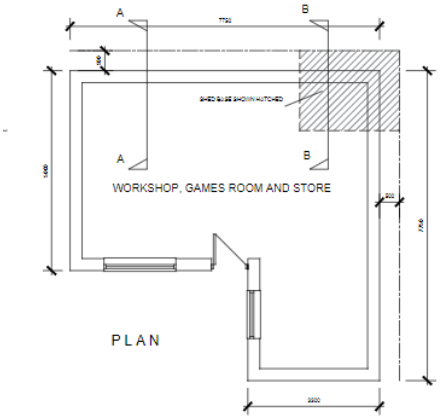
13. For the reasons set out above, the evidence produced by the Appellant does not demonstrate with any precision that the pre-existing site levels adjacent to the walls of the proposed building were 1.238m above datum. ***Furthermore, considering the works that have been undertaken on the appeal site, 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 probability, that the pre-existing ground level adjacent to the proposed building extended to a height of 1.238m above the survey datum.***

The text in bold also highlights one of the other main concerns of the LPA which is that 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 that the proposal fails the burden of proof test. That is because the necessary evidence on the pre-existing highest ground level adjacent to the building has not been proven and cannot be verified because it is too late in the day. Once again however the application is accompanied by the topographical survey dated December 2020, but that was post Inspector Braithwaite appeal site visit (date conduced 28th October 2020) and does not amount to new evidence as it was effectively disregarded by Planning Inspector Elizabeth Pleasant as recently as October 2021.

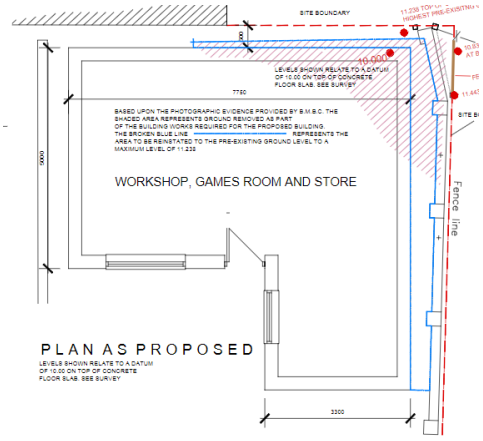
This latest proposal is very similar to the previous versions in respect of its ground floor footprint aside from the addition of a small area of walling to join the building with the boundary wall constructed on the boundary with No.6 Burton Crescent. Again, as with the additional two walls that were added to the rear and sides of the building to join it with the existing boundaries on those sides as part of previous application 2022/0314 there is no obvious construction reason why this is required apart from to contrive a situation where the building physically adjoins a neighbouring area of land.

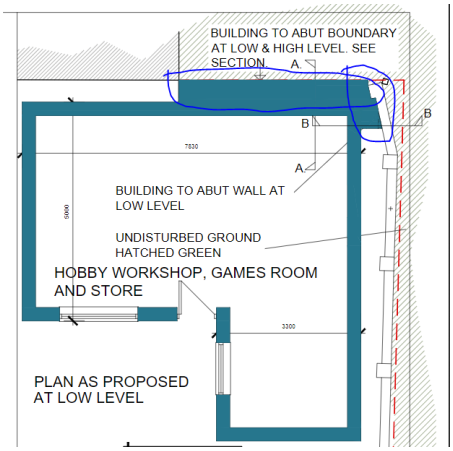
There is no apparent need for the additional walling that are ringed in blue on the plan below and they were not shown to be needed on the previous applications:-

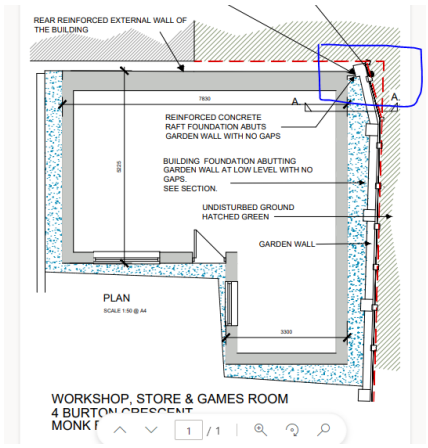
Layout plan for 2020/0110 (APP/R4408/X/20/3255825):-



Layout plan for 2021/0220 (APP/R4408/X/21/3276280)



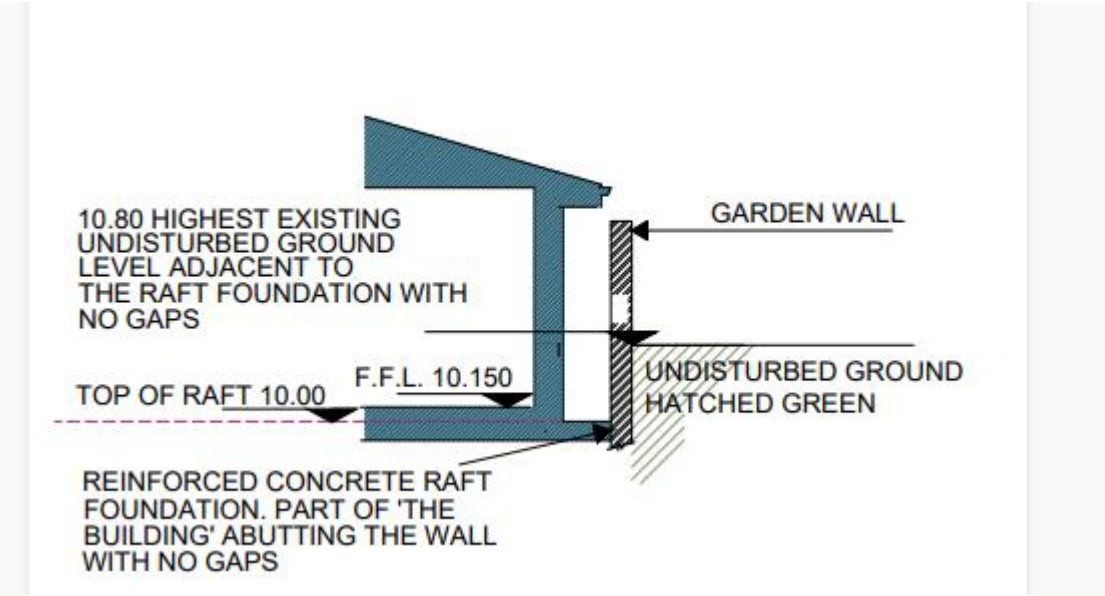




2 additional walls added for application 2022/0314 to the rear adjacent 426 Burton Road and side adjacent No.6 Burton Crescent

Additional wall link created for the current application 2023/0565 to the side adjacent No.6 Burton Crescent

The applicant has also included a cross section of the south west corner of the building adjacent the side boundary with No.6 Burton Crescent and has asserted that an area of part of the concrete base that is located beyond the outer wall of the building enclosure itself would form part of the building. That is not accepted with the applicants cross section plan showing a gap between the outer side wall and the garden wall as is illustrated below:-



In addition, the topographical survey does not amount to new evidence as a) it post dates the construction works and the site visit by Inspector Braithwaite as has already been explained in this report; and b) it is information recycled from the previous applications and so the same information was considered by Inspector Pleasant when she dismissed the 2nd lawful development certificate appeal.

Some further photos have been included within the applicants planning statement dated 23/03/2023. However also included is a photo from September 2019 which explains that nothing has changed in the manner that the building has been constructed in relation to its position in relation to the site boundaries. That being the case the information being presented in the recent photos is nothing new or different compared with the previous applications and Inspector Braithwaite and Pleasant considering that their appeal decisions were made on 6th November 2020 and 5th October 2021 respectively. Furthermore, many of the newer photos are close ups that be understood in context of the pre-existing ground levels that existed prior to works commencing and they do not tally well with the only two photos that exist dating back to before when the works took place in relation to the area of the site in question that are already included within this report.

Neither does the McGaw v Welsh ministers (2020) EWHC 2588 (Admin) dated 7/10/20 case amount to new evidence as that particular caselaw pre-dates Inspector Pleasant's decision on the most recent LDC appeal at this site which was made as recently as 05 October 2021. The footnote on page 2 highlights how she had regard for that decision before determining her own findings. This is not a new consideration, therefore.

Even with the McGaw judgement it is a well-established planning principle that each case should be decided on its own merits and with each being a question of fact and degree, for the planning authority and for the Inspector.

With this site the level base has already been formed and the proposal building is not proposed to be dug into a hillside/banking as is the case with the McGaw v Welsh Ministers and the Council for the City and County of Swansea [2020] proposal in Swansea. The Swansea proposal also has a flat roof with a lantern positioned on top which is different to this particular proposal that has a pitched roof that is 3.3m in height above the slab which will

be elevated in comparison with neighbouring properties that have similar ground levels to the application site that are not raised in the same way as the land at No.426 Burton Road.

It is accepted that Inspector Braithwaite determined that 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). But when that figure is applied the height of the proposed building is 2.85m and is within 2m of the boundary. It is therefore 0.35mm above the permitted development height threshold.

The infill wall is a contrived addition therefore that would not form part of the buildings as such as they would not be housed within it. Nor would the base beyond the outer wall of the building constitute part of the building for the purpose of measuring the surface of the ground immediately adjacent to the building. They do not represent the natural level of the original land, but are new additions designed to subvert the rules in the Class E. Without those the proposed building remains in excess of 2.5m in height within 2m of the boundary meaning that it did not as a matter of fact and degree, satisfy the height limitations of Class E of Part 1 of Schedule 2 of the GPDO (para E1 (e)(ii).

Planning Inspector Braithwaite did also state within paragraph 11 of APP/R4408/X/20/3255825 *''Another drawing submitted in evidence shows the proposed building abutting the boundary to the neighbouring property and in a planning statement submitted with the application it is stated that "The building will abut an existing retaining wall...". If this were to be the proposed building's relationship to the boundary, the height of ground outside the curtilage of the dwellinghouse cannot be used to assess the height of a building intended to be built within the curtilage of the dwellinghouse, against the height limitations of Class E''* and also cited having had regard to the McGaw v Welsh Ministers and the Council for the City and County of Swansea [2020] EWHC 2588 (Admin) caselaw in his decision making (para 7).

Overall, there is nothing that amounts to new evidence that is sufficiently precise and unambiguous to justify applying a higher surface ground level adjacent to the building than what was established by appeal APP/R4408/X/20/3255825. Neither was the 2020 topographical survey accepted by Inspector Pleasant as recently as October last year and because it does not tally with the pre works photos. Once again therefore the applicant's evidence is not sufficiently clear and unambiguous to determine that on the balance of probabilities that the pre-existing ground level adjacent to the proposed building extended to a height of 0.833m above the height of the base prior to the works commencing.

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 being approximately 0.35mm above the threshold. 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.

Recommendation

Refuse

1. 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 (as amended). The evidence contradicts previous supporting information regarding the pre-existing ground level, including that established within the previous applications and appeals and that used in support of an approved Lawful Development Certificate. 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. Overall, there is nothing that amounts to new evidence that is sufficiently precise and unambiguous to justify applying a higher surface ground level adjacent to the building than what was established by appeal APP/R4408/X/20/3255825. As such, the evidence is not clear and unambiguous and does not satisfy the burden of proof test.

2. The Local Planning Authority considers that the proposed building would be within 2m 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 that existed immediately adjacent to the building. Neither the garden wall nor the parts of the concrete base that are positioned outside of the outer wall of the building that have been constructed constitute part of the building for the purpose of measuring the surface of the ground immediately adjacent to the building. They do not represent the natural level of the original land, but are new additions designed to subvert the rules in the Class E and are the same details as was in situ at the appeal site visit made by Planning Inspector Pleasant when dismissing the appeal against application 2021/0220 (PINS ref APP/R4408/X/21/3276280). The proposed development is not thus permitted development.