For the attention of Mr Adam Birkett

This application is, of course, a resubmission of App. 3/2021/0528.

32021086

App. 3/2021/0528 was refused on the following two grounds:-

(1) the proposed rear extension would exceed 4m in height; and
(2) the Applicant had failed to adequately define the curtilage of the property so that compliance with A.1(i) of Schedule 2 Part 1 Class A could be assessed.

I attach the Report and the Decision Notice from that refused application for your assistance.

App 3/2021/0528 was prepared and submitted on my behalf by Architects, Stanton Andrews of Clitheroe.

Height

I concede that the proposed rear extension in App 3/2021/0528 did indeed exceed 4m in height. The proposal excluded the parapet wall from height - whereas it is clear that the 4m height limit must include any parapet wall.

The proposal has been revised (i.e. reduced in height) to correct this error. Please see the attached revised drawings from Stanton Andrews.

The overall height of the new proposal (including the parapet wall) does not now exceed 4m.

Curtilage

In addition, further information is now provided to adequately define the curtilage of the dwelling-house. A plan is attached showing the curtilage (as I submit it to be) edged in green – Curtilage Plan 1975/Ex03.

In addition, I now also provide the statement of a [redacted] dated 8/8/21.

He was the previous owner of Martin Top Farm. It is clear from his statement that the barn next to the house and the other areas enclosed in green on the plan have been in residential use for over 40 years. Its current use as a garage, furniture store, log store and potting shed can be clearly seen in the attached photographs.

I have also attached a photograph of the area between the house and the barn to remind you of the physical layout. This area is obviously in residential use (primarily as the main access/driveway and parking area) - it is attached to the house and forms part of one enclosure with it.

I realise, of course, that there is a difference in law between land that is in residential use and land that is within the curtilage of a dwelling-house.

However, even if the area enclosed in green is not accepted in full as the curtilage of the dwelling-house, I submit the curtilage is not, **on any view**, within 2m of the proposed **rear** extension.

App. 3/2021/0477 – the side extension

Please may I ask that the material I have now submitted also be accepted in support of my other application (App 3/2021/0477) which has yet to be determined.

It is now clear that the proposed side extension does not exceed 4m in height (including the parapet wall).

Furthermore, I submit that even if the curtilage plan is not accepted in full as the curtilage of the dwelling-house, the curtilage is not, **on any view**, within 2m of the proposed **side** extension (and, for that matter, the first floor rear extension).

Finally, if (notwithstanding all this further material), it is still not accepted that the rear and side extensions are 2m or more from the curtilage boundary, may I ask that you indicate at which precise point you assert the curtilage boundary falls within 2m of either the rear or side extension.

I would also be grateful if you could explain how, in coming to such a decision, you have applied the test as set out in the judgement of Supperstone J in Burford and Secretary of State for CLG (and Test Valley Borough Council) [2017] EWHC 1493 (Admin) – in particular at paragraphs 32-37.

It is clear from that judgement that three factors must be considered – (1) the physical layout of the land – is it attached to the house so it forms one enclosure with it? (2) ownership – past and present (3) use or function – past and present. It is not restricted in size. Nor is a curtilage boundary to be drawn arbitrarily simply to defeat a proposal.

Richard Gioserano
10/8/21

32021086 5P

I am [redacted]

My father, [redacted] bought Martin Top Farm from [redacted]

He bought the house and a number of other associated buildings including a large stone barn together with a croft and other garden areas. As the conveyance shows, this comprised one unit covering a total of 1.5 acres.

In addition, he also purchased two meadows (total 13 acres) and a pasture (nearly 37 acres). It was, at that time, still a working farm. However, my father was not a farmer and did not intend to farm at Martin Top. [redacted] Hence, he immediately sold 31 of the 37 acres of pasture to [redacted] who were local farmers. We kept the two meadows and the other 6 acres of pasture which he rented to a local farmer.

We lived at Martin Top as a family [redacted]

My sisters were mad about horses so my father put up a timber stable block next to the "croft". They also kept their horses in part of the barn – it was converted for this purpose. Over the years, the rest of the barn was used for a number of different things.

First, in the late 1970s, my father converted (with planning permission) the bottom end of the barn into a large garage which could take three cars. The rest of the barn (not in use as stables) was used as a workshop and a store for my father's hobby which was furniture restoration. In addition – he stored his garden machinery in it, including a number of "ride on" mowers. At one time, I had an off-road motorbike. My nephew's hobby was stock cars and he would sometimes keep and maintain his cars in it – the inspection pit is still there.

This was how the barn was used over the years – by our family for our own recreational purposes. Eventually, in the early 90s, my father decided to apply for planning permission to go one step further and convert it to a dwelling-house. This was granted in principal but it was never done. It continued therefore to be used in the same way – part garage, part stable, part recreational purposes (as set out above).

As for the "croft", we called it that but it was never used for agricultural purposes. As I have said, a local farmer rented the two meadows and our 6 acres of pasture but the "croft" was always walled one side and fenced on the other – separated from the surrounding farmland.

We never put livestock on it or used it for crops of any kind. However, we did use it as, in effect, a paddock and garden area.

As children, we played on it – a swing was put up for us in the far corner. My father would use the ride on mower to cut the grass and he also hired a gardener, [redacted] to help do this. My sisters would use it to turn out their horses - that helped keep the grass down.

There was already a fence between the "croft" and the other garden area when we arrived – we left the fence up so that when horses were in the "croft", they could not get out.

Eventually, my sisters and I grew up and we all left home. I was the last to leave. The barn and "croft" (or, as some of the family called it, the "paddock") remained in use in the way I have described until I left home. My sisters still kept horses there after they moved out. When we had children, they would visit their grandparents and play on it - just as we had done. This continued after my father died when my mother lived there on her own.

When the last of the horses died, there was no longer any need for the fence between the "croft/paddock" and the other garden areas. My mother wanted a sheltered patio so a short section of wall was built where part of the fence had been.

Apart from this short section of wall around the new patio, the "croft/paddock" became open to the other garden areas – as there were no horses to contain, this was not a problem.

When my mother died (some 8 years ago now), we did not want to leave the house vacant so my nephew first lived there before he moved to Manchester. We then tried to sell it but could not so we eventually rented it to [redacted] family – [redacted] They continued to use the barn and the "croft/paddock" in the same way we had – effectively as garden. Hence, their children played on it – they put up football goals – they kept the grass down etc. As well as garaging their cars, they stored furniture in the barn. [redacted] were at the house for nearly two years before we eventually sold it to Mr and Mrs Gioserano in 2020.

This statement, signed by me, is true to the best of my knowledge and belief.

Signed ...

[redacted]

Dated ...

[redacted]

210865

Here is an email from [redacted] about the side entrance - I hope this will do as a supplement to his statement dated 9/8/21.

[redacted]

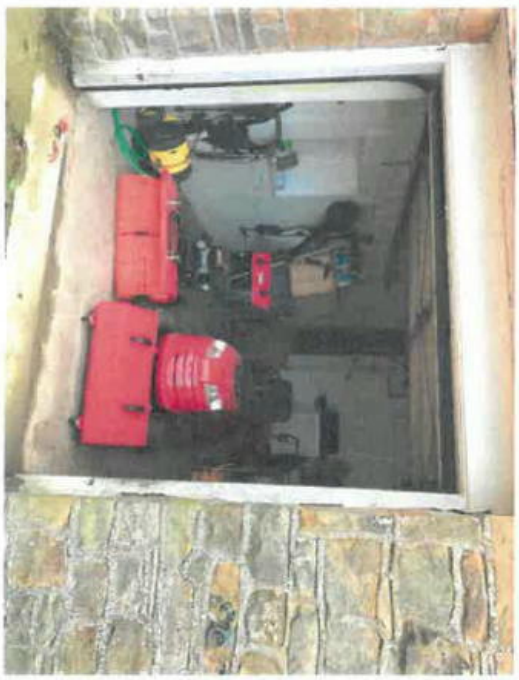
Hi [redacted]
Further to your enquiry as to the historic use of the house entrance/ access at Martin Top Fm...
Please see my statement below...

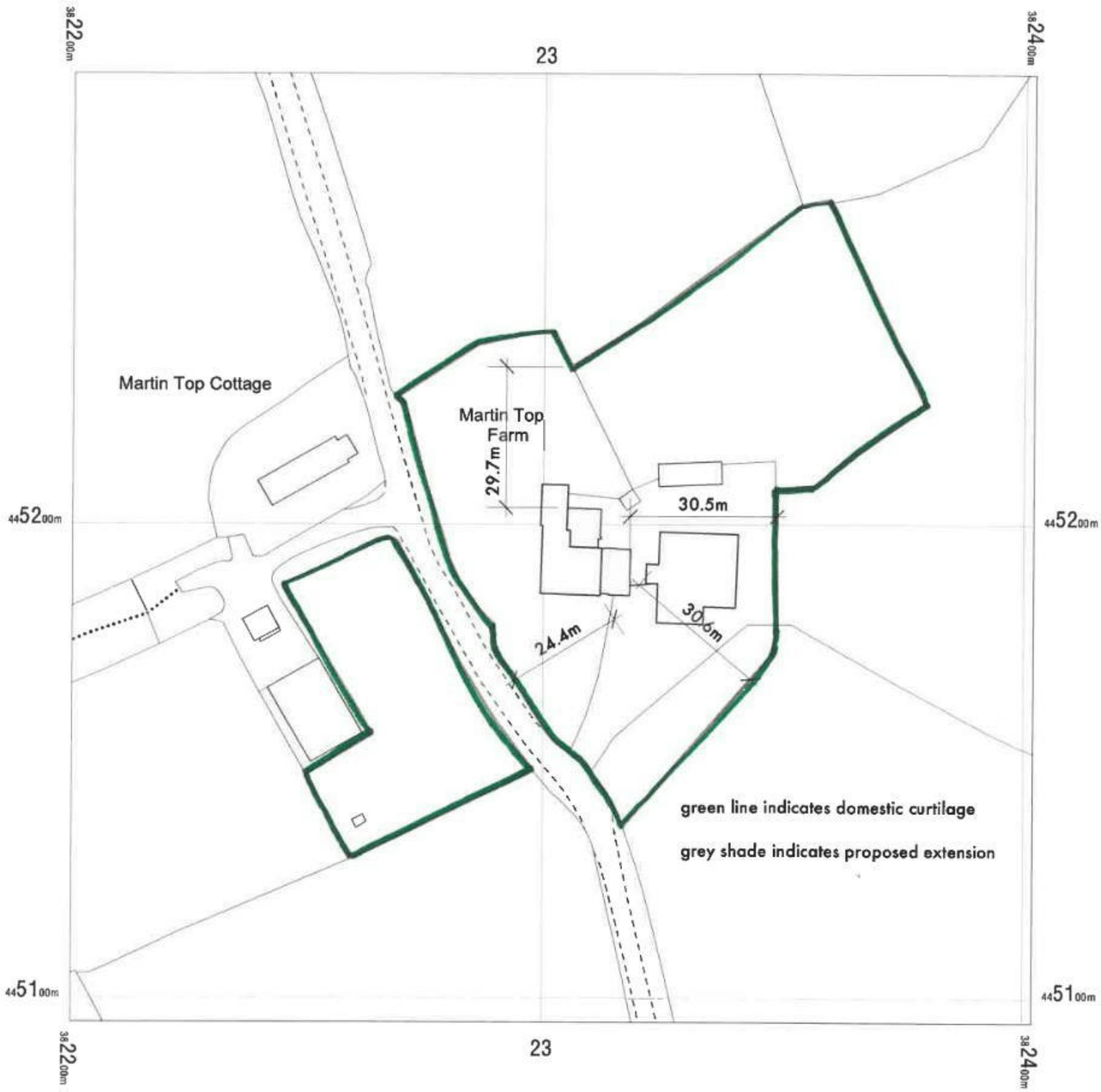
[redacted] ***can add this to my statement dated 9/8/21.***
Since we arrived at Martin Top Farm in 1978, the current main access was always used as the main access for the house. That is why my father, when he wanted a garage for his car, he converted the lower part of the barn to a garage in 1979. We hardly ever used the much smaller side gates - these were built for a horse and cart and are barely wide enough to admit a car".

Kind regards

[redacted]

3/2021/0865 Existing photos





N

0m 20m 40m 60m 80m 100m

scale

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Chartered Practice

project: Martin Top Farm

project number: 1975

drawing number: Ex03

name: curtilage plan

scale: 1 to 1250 @ A4

date: July 21

status: information

revision:

provisional

Neutral Citation Number: [2017] EWHC 1493 (Admin)

Case No: CO/6180/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
In the matter of an appeal under s.289 of the Town & Country Planning Act 1990

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2017

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

Between :

ADRIAN BURFORD	**Appellant**
- and -	
1. SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Respondents**
2. TEST VALLEY BOROUGH COUNCIL	

Daniel Stedman Jones (instructed by **Blake Morgan**) for the **Appellant**
Estelle Dehon (instructed by **Government Legal Dept.**) for the **First Respondent**
Ashley Bowes (instructed by **Head of Legal & Democratic Services, TVBC**) for the **Second Respondent**

Hearing date: 23 May 2017

Approved Judgment

Mr Justice Supperstone :

Introduction

1. This appeal is brought under s.289 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash the decision of the First Respondent's planning inspector, issued by letter dated 8 November 2016 ("the Decision") to dismiss the Appellant's appeals under grounds (a), (c) and (f) of s.174 of the 1990 Act against an enforcement notice ("the Enforcement Notice") in respect of land at Oakcutts, Kentsboro, Middle Wallop, Stockbridge, SO20 8DZ ("the Site").

2. The Enforcement Notice, issued by the Second Respondent on 27 November 2015, identified the alleged breach of planning control as being "the erection of a building in the approximate position marked with a 'X' on the plan attached to the Notice" ("the Building").

3. Permission was granted to the Appellant to bring the claim by Collins J on 17 January 2017.

The issues in the appeal

4. There are two issues in this appeal. The first is the Inspector's assessment of the curtilage of a dwelling known as "Oakcutts", which is located near the Site. The Appellant had argued that the Building was within that curtilage and was therefore lawful as permitted development under Class E of Schedule 2 of the General Permitted Development Order 2015 ("the GPDO"). The second is the measurement of the height of the eaves of the Building for the purposes of paragraph E1, Class E of Schedule 2 of the GPDO.

5. Mr Daniel Stedman Jones, for the Appellant, submits that the Decision should be quashed on two grounds:

   i) In determining the curtilage for the main dwelling house at the Site, the Inspector erred by:

      a) reaching a conclusion on the curtilage issue which is irreconcilable with the extant Certificate of Lawfulness ("CLEUD") granted by the Second Respondent in respect of the Site in December 2015; and/or

      b) failing adequately to have regard to the functional relationship between the dwelling house and the land on which the Building was constructed; and/or

      c) failing to provide adequate or intelligible reasons for his decision on the curtilage issue at paragraphs 18-20 of the Decision Letter ("the DL"), which was the principal and crucial issue between the parties in the appeal.

   ii) The Inspector erred by determining that the height of the eaves of the Building should be measured from the cut-out area on which the Building is erected as opposed to the adjacent ground upon which the operational development that created the Building was carried out.

The factual background

6. The dwelling known as "Oakcutts", as well as several ancillary buildings including an outbuilding to the rear and a garage, are to the south east of the site. Also to the south of the site is a block of stables. The site comprises a rectangular piece of land, at the north-eastern end of which is the Building, a storage shed and a mobile home. The Building was constructed and completed by September 2015.

7. On 28 October 2015 the Appellant applied to the Second Respondent for a CLEUD relating to the land encompassing the dwelling Oakcutts, the outbuildings and stables, as well as the Site. The application described the use "as garden".

8. In her report the Second Respondent's Planning Officer considered the evidence concerning the use of the land for "residential" purposes, including playing football, garden parties and football related events, as well as ancillary living accommodation, and advised that:

> "6.10 From the evidence provided, it is likely that in the relevant 10-year period the land to which the application relates has been used at various times for purposes that would be associated with a residential property such as garden parties… The parties, barbeques and football activities are considered to be activities that would be incidental to the enjoyment of the dwelling house as such."

9. The Officer went on to consider whether the keeping of two horses on the Site should also be treated as a use incidental to the enjoyment of the dwelling house. Having considered the evidence that the horses were kept for recreational purposes only and not as a commercial enterprise, the Officer advised that:

> "6.13 …it is considered that the keeping of horses for recreational purposes in this case would be a use incidental to the enjoyment of the dwelling house as such."

10. Following the Officer's recommendation a CLEUD was granted on 23 December 2015 for "use of the land and buildings within the land edged red on the plan for purposes incidental to the enjoyment of the dwelling house known as Oakcutts".

11. The Appellant appealed the Enforcement Notice, inter alia under ground (c), submitting that the Building benefited from permitted development rights under Class E of Schedule 2 of the GPDO because it is a building in the curtilage of the dwelling house and required for a purpose incidental to the enjoyment of the dwelling house.

The Inspector's decision

12. At DL6, the Inspector considered the relationship between the CLEUD and the ground (c) appeal and stated as follows:

> "All that the LDC [Lawful Development Certificate] confirms is that all of the land edged red (which is all within the ownership of the appellants) may be used for the purposes

> stated in the LDC; that may be garden-type use or it may be some other incidental use e.g. a paddock for horses, or it may be a mix of several incidental uses. Further, curtilage is not a land use at all and does not necessarily comprise all of the land in someone's ownership or all of the land forming a planning unit. What constitutes the curtilage of any dwelling is a matter that has been before the courts on a number of occasions and is a matter of law. Whilst I will make a determination on the curtilage in this decision, it is ultimately for the courts to determine in any given case."

13. The Inspector went on to record the parties' agreed position, that the use of the land falling within the CLEUD/LDC application was incidental to the residential use of the main building:

> "7. … There was no dispute between the parties that all the land forming the LDC application and decision was one planning unit or that its use was now residential; that it was a dwelling and other uses and buildings that were incidental to the residential use of that dwelling."

14. At DL12-17 the Inspector describes Oakcutts and the land surrounding it, the land adjacent to the stables and the Site, and he assesses their relationship.

15. The Inspector concluded on the curtilage issue at paragraphs 18-20 of the DL:

> "18. Elsewhere in the report the officer also stated that there was a trampoline, swing set, goals used for football, a garden table and chairs and other toys in various parts of the land. I acknowledge that the evidence at the time of the LDC appears to show activities incidental to the enjoyment of the dwelling as such taking place on the land and the Council accepted that sufficient had taken place in the 10 years prior to the application date to grant a certificate for residential use.
>
> 19. From the representations put forward, whilst that is now an accepted fact, it does not appear to me that the land was curtilage. That was confined to the clearly physically separate land immediately to the north, west and south of the dwelling and all the other land was physically separated from it by fences and hedges at least until November 2015. Prior to October 2014 there seems to have been just paddocks on the large area to the east and northeast of the dwelling except for the mobile home and other buildings close to the northern boundary. That use, albeit with others, may have continued until November 2015.
>
> 20. Whether looked at in terms of how it appears on the ground or the uses to which it was and is put, I do not consider, taking into account the way in which the courts have considered what is and what is not the curtilage of a building, that the large

> rectangular area that lies to the east of the dwelling can be described as curtilage. It seems to me that it was used as horse paddocks with the animals being kept separate from the much smaller garden area that constituted the curtilage."

16. The Inspector further concluded that, even if he was wrong on the subject of curtilage, the ground (c) appeal would still fail because the height of the eaves was more than 2.5m from the dugout area around the Building. As to the correct method of measuring the height of the eaves, he stated as follows:

> "21. … At the site visit when I asked the parties about where the measurement should be taken from the appellant's representative suggested it should be at the higher level of the land around the building.
>
> 22. In my view that is not correct; an area has been dug out and the land has been levelled and a building erected upon it. There is clearly a flat, fairly level area of land on which the building stands and it has ground around it on all sides; that is where the measurement should be taken from. Behind walls on two sides the land is considerably higher but in my view it would be artificial to take measurements from that land which is now clearly separate from the land on which the building stands."

The Legal Framework

Development and the requirement for planning permission

17. Section 57 of the 1990 Act sets out the general requirement that planning permission is required for the carrying out of any development of land, subject to certain specified exceptions.

18. By virtue of s.58(1), planning permission may be granted "by a development order".

19. Development is defined in s.55(1) as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change of use of any buildings or other land".

20. Section 171A provides that "carrying out development without the required planning permission… constitutes a breach of planning control".

21. Section 191 provides:

> "**191. Certificate of lawfulness of existing use or development.**
>
> (1) If any person wishes to ascertain whether—
>
> (a) any existing use of buildings or other land is lawful;
>
> (b) any operations which have been carried out in, on, over or under land are lawful; or

> (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,
>
> he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.
>
> (2) For the purposes of this Act uses and operations are lawful at any time if—
>
> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
>
> (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
>
> ...
>
> (6) the lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed."

Enforcement Notices

22. Section 172 of the 1990 Act empowers local planning authorities to issue enforcement notices in cases of breach of planning control:

> **"172. Issue of enforcement notice**
>
> (1) The local planning authority may issue a notice (in this Act referred to as an 'enforcement notice') where it appears to them—
>
> (a) that there has been a breach of planning control; and
>
> (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations. ..."

23. Section 174 (within Part VII) provides a right to appeal to the Secretary of State against an enforcement notice, on any of seven specified grounds (a)-(g). Ground (c) is relevant for the purposes of this appeal:

> **"174. Appeal against enforcement notice**
>
> (1) A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him.

> (2) An appeal may be brought on any of the following grounds—
>
> ...
>
> (c) that those matters (if they occurred) do not constitute a breach of planning control; ..."

24. Pursuant to s.177, the Secretary of State may grant planning permission in respect of the whole or any part of the matters alleged in an enforcement notice to constitute a breach of planning control or to determine whether any operational development was lawful:

> "**177. Grant or modification of planning permission on appeals against enforcement notices**
>
> (1) On the determination of an appeal under section 174, the Secretary of State may—
>
> (a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates;
>
> (b) discharge any condition or limitation subject to which planning permission was granted;
>
> (c) determine whether, on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to comply with any condition or limitation subject to which planning permission was granted was lawful and, if so, issue a certificate under section 191."

25. The power in s.177 to grant retrospective planning permission is part of the Inspector's "wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms"; (*Tapecrown Ltd v First Secretary of State* [2006] EWCA Civ 1744 at para 33).

Permitted Development

26. Article 3 of the GDPO provides:

> "(1) Subject to the provisions of this Order... planning permission is hereby granted for the classes of development described as permitted development in Schedule 2."

27. Schedule 2, Class E, para E, grants permission for a building within the curtilage of a dwelling house, as follows:

> "The provision within the curtilage of the dwelling house of—
>
> (a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwelling house as such, or the maintenance, improvement or other alteration of such a building or enclosure; …"

28. However, by virtue of para E1:

> "Development is not permitted by Class E if—
>
> …
>
> (f) the height of the eaves of the building would exceed 2.5 metres."

29. The definition of "building" in Article 2:

> "(a) includes any structure or erection and … includes any part of a building."

30. "Height" is defined under Article 2 as follows:

> "(2) Unless the context otherwise requires, any reference in this Order to the height of a building or of plant or machinery is to be construed as a reference to its height when measured from ground level; and for the purposes of this paragraph "*ground level*" means the level of the surface of the ground immediately adjacent to the building or plant or machinery in question or, where the level of the surface of the ground on which it is situated or is to be situated is not uniform, the level of the highest part of the surface of the ground adjacent to it."

31. The relevant Guidance of the Department for Communities and Local Government "the DCLG Guidance") dated April 2016, provided:

> "'Height' – reference to height (for example, the height of the eaves on a home extension) is the height measured from ground level (Note, ground level is the surface of the ground immediately adjacent to the building in question, and would not include any addition laid on top of the ground such as decking. 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)."

Definition of "curtilage"

32. In *Attorney General ex rel Sutcliffe v Calderdale BC* (1982) 46 P&CR 399 at 407, Stephenson LJ identified three factors which must be taken into account in determining what constitutes the "curtilage" of a building in any given case:

> "Three factors have to be taken into account in deciding whether a structure (or object) is within the curtilage of a listed building... whatever may be the strict conveyanging interpretation of the ancient and somewhat obscure word 'curtilage'. They are (1) the physical 'layout' of the listed building and the structure, (2) their ownership, past and present, (3) their use or function, past and present. Where they are in common ownership and one is used in connection with the other, there is little difficulty in putting a structure near a building or even some distance from it into its curtilage."

33. Lord Donaldson MR explained the approach to be taken to curtilage in *Dyer v Dorset CC* [1989] 1 QB 346, at 355B:

> "[The question of determining the extent of the curtilage] is a question of fact and degree and thus primarily a matter for the trial judge, provided that he has correctly directed himself on the meaning of 'curtilage' in its statutory context."

34. At 358B-G, Nourse LJ further discussed the meaning of curtilage by reference to the Oxford English Dictionary definition:

> "A small court, yard, garth or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its outbuildings."

35. He then accepted the proposition drawn from the authorities in that case that "an area of land cannot properly be described as a curtilage unless it forms part and parcel of the house or building which it contains or to which it is attached" (358D-E).

36. In *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] QB 59, the Court of Appeal noted that it is the relationship between the main dwelling and the land in question which is relevant when considering function/use. Furthermore, the concept of "smallness" is not relevant when determining the curtilage of a building. Robert Walker LJ said at 67:

> "I ... respectfully doubt whether the expression 'curtilage' can usefully be called a term of art... It is, as this court said in *Dyer's* a question of fact and degree".

Robert Walker LJ continued:

> "In the context of what is now Part 1 of the Act, the curtilage of a substantial listed building is likely to extend to what are or have been, in terms of ownership and function, ancillary buildings. Of course, as Stephenson LJ noted in the *Calderdale* case, 46 P&CR 399, 407, physical 'layout' comes into the matter as well. In the nature of things the curtilage within which a mansion's satellite buildings are found is bound to be relatively limited. But the concept of smallness is in this

> context so completely relative as to be almost meaningless, and unhelpful as a criterion."

37. In *Lowe v Secretary of State* [2003] EWHC 537 (Admin), Sir Richard Tucker reviewed the relevant authorities and commented:

> "21. Of the authorities cited to me, I derive most assistance from the decision of the Court of Appeal in *Dyer v Dorset CC*, and in particular the judgment of Nourse LJ in the passage already referred to at p.358F-G. The expression 'curtilage' is a question of fact and degree. It connotes a building or piece of land attached to a dwelling house and forming one enclosure with it. It is not restricted in size, but it must fairly be described as being part of the enclosure of the house to which it refers. It may include stables and other outbuildings, and certainly includes a garden, whether walled or not. It might include accommodation land such as a small paddock close to the house. But it cannot possibly include the whole of the parkland setting in which Alresford Hall lies, nor the driveway along which the fence was erected. It could not sensibly be contended that the site of the fence was attached to the hall, or that it formed one enclosure with it, or was part of the enclosure of it."

The Parties' Submissions and Discussion

Ground 1: Curtilage

38. The legal principles for determining what constitutes the "curtilage" of a building are not in dispute (see paras 32-37 above). What Mr Stedman Jones takes issue with is the application of the three factors to be considered (see *Calderdale* at para 32 above). It is at DL18-20, in particular at DL20, (see para 15 above) that, he submits, the Inspector fell into error.

39. He suggests that the Inspector appears to have assumed (at DL20) that a paddock for horses would not be capable of forming part of the curtilage of the dwelling Oakcutts. He notes that at DL19 the Inspector refers to the horse paddock area as "large" and "separate" by virtue of being partially fenced; and that at DL20 the Inspector states that he did not consider that "the large rectangular area" can be described as curtilage as it seemed to him that "it was used as horse paddocks with the animals being kept separate from the much smaller garden that constituted the curtilage". However Mr Stedman Jones submits the mere fact the large rectangular area was used as horse paddocks does not mean that it cannot be within the curtilage. Size does not matter necessarily (see *Skerritts* at para 36 above). There is no authority for the proposition that a paddock for horses, whether large or small, is incapable of being curtilage.

40. In reaching this conclusion, Mr Stedman Jones submits that the Inspector failed to weigh the CLEUD which provided conclusive proof that the land was used for purposes incidental to the dwelling house (see s.191(6) of the 1990 Act, at para 21 above). Having "acknowledged" that conclusion (DL18) the Inspector failed to attribute any weight to it when considering the function of the land, the third factor

required by the case law (see para 32 above). In relation to the third factor Mr Stedman Jones highlighted the following sentence in the judgment of Stephenson LJ in *Calderdale* at 407: "Where they [the listed building and the structure] are in common ownership and one is used in connection with the other, there is little difficulty in putting a structure near a building or even some distance from it into its curtilage".

41. Further the Inspector, Mr Stedman Jones submits, misdirected himself on the function of the land in this case by failing adequately to weigh the CLEUD in respect of the functional relationship of the land with the dwelling. The Inspector needed to consider the functional relationship of the paddock land to the main dwelling as part of his considerations as to whether the land should be described as curtilage. Once the Inspector weighed in favour of the land being curtilage the fact that the paddock was conclusively used in connection with, or incidental to, the enjoyment of Oakcutts as a dwelling house, a different balancing exercise would have had to have been undertaken before a conclusion could have been reached as to whether the land was curtilage or not.

42. Mr Stedman Jones submits that, equally, if the Inspector's conclusion was based on a finding that the horse paddock use was not for purposes incidental to the use of Oakcutts then that would also have been, in the light of the CLEUD, an impermissible conclusion.

43. Finally, Mr Stedman Jones criticises the Inspector for not giving any reasons as to why the large rectangular area cannot in law be considered curtilage. DL20 is, he submits, confusing. The Inspector refers to the separateness of the area, but he does not explain why it is not part of the curtilage; nor does he explain why if it was used as horse paddocks it still cannot be part of the curtilage. It is also, he suggests, not clear from the reasoning at DL18-20 how the Inspector has weighed and determined the issue of the function of the land in relation to the dwelling house. That being so there is, he contends, a substantial doubt as to whether the Inspector has erred in law (*South Bucks DC v Porter* [2004] 1 WLR 1953, per Lord Brown at para 36).

44. I reject the contention that the Inspector's conclusion concerning the curtilage of the dwelling house is irreconcilable with the CLEUD granted by the Second Respondent. As the Inspector correctly found at DL5-6, all that the CLEUD determined was that the Site may lawfully be used for purposes incidental to the enjoyment of the dwelling-house (see para 12 above). The CLEUD did not consider whether the land was within the curtilage of the dwelling house, nor did it accept that the land (including the Site) fell within the "garden" of the dwelling-house. I accept the submission made by Ms Dehon, on behalf of the First Respondent, supported by Mr Bowes, on behalf of the Second Respondent, that whilst the function of the land is relevant to the question of curtilage, it is not determinative. The CLEUD simply certifies that the land in question has been used "for purposes incidental to the enjoyment of the dwelling house known as Oakcutts". It is determinative only of one necessary condition of the Site forming part of the curtilage, and the Inspector treats it as such. It does not assist, in particular, to resolve the question of whether the land is attached to the dwelling house forming one enclosure with it (see *Lowe* at para 37 above).

45. Further I do not accept the Appellant's contention that the Inspector failed to have regard to the functional relationship between the dwelling house and the land on which the Building was constructed. It is clear from the Inspector's analysis at DL14-17 that he did so (see para 14 above).

46. The challenge to the Inspector's decision is essentially a rationality challenge, (as to which see *R (on the application of Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, per Sullivan J at para 6). Whether something falls within a "curtilage" is a question of fact and degree and thus primarily a matter for the decision maker (see *Dyer* at para 33 above, and *Skerritts* at para 36 above). It was for the Inspector to decide what weight should be given to each of the relevant factors (see *Lowe* at para 37 above). I am satisfied that on the evidence the Inspector was entitled to conclude that the land on which the building subject to the enforcement notice was not on land comprising curtilage of the dwelling house because it "was physically separated from [other land] by fences and hedges at least until November 2015" (DL19). The land was therefore unattached to the land surrounding the dwelling house and not forming one enclosure with it. "Curtilage" is an area of land "attached to" a house and "forming one enclosure with it" (see *Dyer* at para 34 above and *Lowe* at para 37 above).

47. I consider that the Inspector gave adequate reasons, explaining why the Site does not fall within the curtilage of the dwelling house, despite treating the CLEUD as determinative of the lawful use of the land.

Ground 2: the height of the eaves of the Building

48. I can take this ground more shortly, the Appellant having failed on ground 1. Mr Stedman Jones submits that the Inspector erred by measuring the height of the development from the cut-out area upon which the building sits as opposed to the immediately adjacent natural ground level to the south which was higher and is therefore the "highest part of the surface of the ground adjacent to it" (see para 31 above). It is, he contends, artificial to treat the platform which was cut out of the natural ground in order to enable the development as the adjacent ground level. It was only by virtue of the building operation to construct the Building that the platform was created as an artificial means of creating a level area upon which the Building could sit. That being so Mr Stedman Jones submits that it would be absurd to construe Article 2(2) as having been drafted in order only to apply to buildings with slanted or diagonal floors. Such buildings are rarely, if ever, with the possible exception of art installations, built as part of Class E development.

49. I do not accept that the Inspector misapplied the guidance, or that he applied it in a way that was "artificial". At DL22 (see para 16 above) he applied the guidance (see para 31 above) correctly. It was open to him to measure from the excavated ground level "adjacent" to the building, in particular where that ground level was produced to avoid the dwelling sitting on sloping ground.

50. The purpose of the guidance, as Mr Bowes submits, is to clarify that artificial changes to the ground level should not be permitted to serve to bring within the tolerances of the GPDO, development which was never intended to benefit from a deemed grant of permission. Accordingly, where, as here, the ground level has been excavated and levelled off, I consider it was plainly open to the Inspector to measure from the

excavated ground level "adjacent" to the building, in particular where that ground level was produced to avoid the dwelling sitting on sloping ground. At DL22 the Inspector recorded the finding that "There is clearly a flat fairly level area of land on which the building stands and it has ground around it on all sides; that is where the measurement should be taken from" (see para 16 above).

51. Further I reject the Appellant's contention that involves a wide meaning being given to the word "building". Mr Stedman Jones referred to the height of the "development". However paragraph E1 of Class E (and the definition of "height") refers to "building", not "development" (see paras 28 and 30 above). I agree with Ms Dehon that if the GPDO had intended to refer to "development" it would have done so. Further if the definition of "building" meant what Mr Stedman Jones suggests it does, it would not have defined a building as including "any part of a building".

52. Mr Stedman Jones submits that in any event, alternatives should have been considered (see *Tapecrown* at para 46) before dismissing the appeals in circumstances where there was a *de minimis* infringement of 0.037m, such as by lowering the building.

53. However the Inspector noted that "No lesser steps are suggested by the [Appellant] to remedy the breach" (DL33). The primary task of the Inspector is to consider the proposals that have been put before him; it is "not his duty to search around for solutions" (*Tapecrown* at para 33). As Carnwath LJ observed (at para 46) if it appears to the Inspector that "there is an obvious alternative which would overcome the planning difficulties at less cost and disruption than total removal, he should feel free to consider it". That is not this case. There were no "obvious alternatives" and none were suggested by the Appellant or their agents. The Appellant did not suggest reducing the height of the building as a lesser step. Moreover there is no evidence before the court as to the extent of works required to reduce the height.

Conclusion

54. In my judgment, for the reasons I have given, the Inspector did not err in deciding that the building did not benefit from the tolerances of Class E to the GPDO because (1) it was not "within the curtilage of the dwelling house", and (2) the height of the eaves exceed 2.5m above ground level.

55. Accordingly this appeal is dismissed.