The Planning Inspectorate

Appeal Decision

Site visit made on 13 February 2017

by Brian Cook BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 21 February 2017

Appeal Ref: APP/T0355/C/16/3157195
Land between Lightlands Lane and Strande View Walk and Strande Lane, Cookham SL6 9DN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Samuel Driver against an enforcement notice issued by Council of the Royal Borough of Windsor and Maidenhead.
- The enforcement notice was issued on 21 July 2016.
- The breach of planning control as alleged in the notice is without planning permission the erection of a building.
- The requirements of the notice are:
    i) Remove from the Land the building in the approximate position shown with the blue coloured cross on the plan attached to the notice; and
    ii) Remove from the Land all materials associated with the building.
- The period for compliance with the requirements is 14 days.
- The appeal was made on the grounds set out in section 174(2) (a), (b), (c) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended does not fall to be considered.

Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Procedural matters

2. The appellant believed that he had paid to the Council the fee required to pursue the appeal made on ground (a). However, he was unable to provide any evidence to confirm that. Confirmation that the deemed planning application had therefore lapsed and that the ground (a) appeal would not be considered was given by the Planning Inspectorate by email dated 17 November 2016. It is clear from the appellant's final comments dated December 2016 that this is accepted as he acknowledges that he cannot prove payment. The appeal is therefore proceeding on grounds (b), (c) and (g) as confirmed by a correction email from the Planning Inspectorate dated 24 November 2016.

3. The appellant also refers to the Council decision to decline to determine a planning application[1] (the 2016 application) using its powers under s70C of the Act. While I note the appellant's criticisms that is not a matter for me in this appeal. The appellant does however query the validity of this notice given that

[1] Ref: 16/03340

decision by the Council. The basis for doing so is that in declining to consider an application on a different part of the land to which the notice relates suggests that the blue cross on the notice plan is in the wrong place.

4. First, the 2016 application development is wholly within the land edged red on the notice plan. S70C of the Act refers to '…the whole or any part of the land to which a pre-existing enforcement notice relates…'' in setting out how the power conferred may be exercised. Second, the blue cross on the notice plan denotes, as set out in the summary details above, the approximate position at that date of what the Council considers to be a building but the appellant argues is a mobile structure. It may not therefore represent its permanent position. Finally, there is no evidence that the appellant is in any way confused about the structure to which the notice relates. In the absence of any further explanation by the appellant for the contention that the notice is invalid I shall not consider this further and move to determine the grounds on which the appeal is proceeding.

The appeals on ground (b) and (c)

5. An appeal on ground (b) is that the matters alleged as constituting the breach of planning control have not occurred as a matter of fact. An appeal on ground (c) is that, if they have, there has not been a breach of planning control in any event.

6. The appellant considers these two grounds of appeal together. The gist of the case made is that the use of the land for the keeping of laying hens for the production of eggs falls within the definition of agriculture set out in s336 of the Act. The use of land for agriculture is not development by virtue of s55 of the Act. The structure that is the subject of the notice is mobile and would be moved every 75 weeks. It is therefore part of the agricultural use of the land and thus not development requiring planning permission.

7. The Council's view is that the structure is a building that cannot be permitted development by virtue of Schedule 2, Part 6 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) due to the small size of the unit. In support of its case the Council draws on several very well-known judgements that have established the principles against which the fact and degree assessment of whether something is, or is not, a building must be made. The appellant also refers to some of these judgements (and another that the Council does not cite) and confirms that these have, by implication, been considered in relation to the degree of permanence and the frequency of moving the shelter.

8. I shall deal with these two grounds together, as has the appellant, since the appeal on ground (c) is to a degree contingent on the outcome of the appeal on ground (b).

9. The development that has been carried out has resulted in a poly-tunnel type structure that, on the Council's evidence, measures some 32m long, 3.5m at the highest point and 7.6m wide. The appellant explains that although it weighs around 3 tonnes, it is essentially a lightweight but strong structure that can be towed around the site by a single tractor. The internal layout is described in detail and comprises a mesh floor and rest boxes and perches. The outer cover is reinforced PVC.

10. The strength of the unit derives from its modular construction. Each section is some 2.1m long and has four augur and pin anchors. From the brochure provided it appears that the floor is suspended from four points within each section adding to the rigidity. The length of the structure is thus determined by the number of sections. The appeal structure has 16.

11. In *Barvis,* which the Council cites, the court said that the first question to ask is whether what has been done has resulted in the erection of a building; that goes to the ground (b) appeal. If so the court "…should want a great deal of persuading that the erection of it had not amounted to a building or other operation." This is a reference to development as defined in s55 of the Act; that is the substance of the appeal on ground (c). The courts have then held that the three primary factors that are relevant to the question of 'what is a building' are size, permanence and physical attachment to the ground although the latter is rarely conclusive on its own.

12. All of these factors were reviewed by Lang J in *Save Woolley Valley.* This is the judgement cited by the appellant but not by the Council. The judgement is referenced extensively in the Encyclopedia of Planning Law and Practice[2] where the definition of "building" is discussed. In that part of the judgement (it covered other matters) Lang J followed and applied *Skerrits* and *Hall Hunter* (both of which are referred to by the parties). She concluded that the local planning authority did not have regard to the relevant authorities when it concluded that the units were chattels and not buildings because they were capable of being moved around the site. Furthermore, she also found that it did not direct itself correctly in law on the issue of permanence.

13. That case also concerned poultry units. They are described as follows:
    (a) the poultry units would house 1,000 laying hens, each weighing 2kg;
    (b) each unit was approximately 20 metres by 6 metres by 3.5 metres high;
    (c) the units were not fixed to the ground, but were on metal skids to allow them to slide along the ground when pulled by a tractor;
    (d) if extreme winds were forecast they could be held down with metal spikes;
    (e) each unit would weigh about 2 tonnes (in addition to the 2 tonne flock of hens);
    (f) each unit would be in a fenced paddock of 1-2 acres and would stay in the paddock;
    (g) the units would be moved within their paddock regularly (approximately every 8 weeks) by being dragged by a tractor or 4x4;
    (h) each unit could be assembled by a 'skilled' team from metal hoops, metal skids, uPVC planks, polythene and insulation in 'a couple of days'. If the metal hoops were not taken apart then the shed could be dismantled in 3-4 hours;
    (i) the units had slatted floors, manually operated conveyor belts, drinkers, feeders and integral lighting. They were powered by an onsite generator;
    (j) the units were supplied with mains water by means of a hosepipe connection to standpipes located alongside the access track.

[2] At P55.14

14. On a general level, it can be seen that the similarities with the appeal case are remarkable. On most of the three factors however the appeal development is, respectively, larger, more permanent and exhibits a greater degree of attachment to the ground. Specifically, these points are addressed in turn.

15. With respect to size, the appeal structure is longer and slightly wider (point (b)) and houses almost twice as many hens (point (a)). It is at least half as heavy again (point (e)) although this can go to physical attachment (through sheer weight) as well as size.

16. Turning to permanence, the appeal scheme is intended to be in one place for 75 weeks; far longer than point (g) although the means of moving the structure would be very similar.

17. Finally, it is a little unclear how the appeal structure is fixed to the ground although it appears that there are 64 anchor pins (4 for each of the 16 sections). In contrast, points (c) and (d) confirm that, other than in extreme weather, the *Save Woolley Valley* structures are not attached to the ground at all.

18. In my judgement those differences, which are all in one direction, would be sufficient to put a finding that the appeal structure was something other than a building at odds with the settled case law. However, the following extract from the judgement of Lang J is conclusive in my view. At paragraph 72 she said this:

> I accept the Claimant's submission that the Council did not direct itself correctly in law on the issue of permanence. Permanence has to be construed in terms of significance in the planning context. In *Skerritts* Schiemann LJ said of permanence: 'in situ for how long, to which I would answer: for a sufficient length of time to be of significance in the planning context' (at 1034). For the polytunnels in *Hall Hunter* to remain in one particular location for three months was found by the Inspector to be sufficient to be of consequence in the planning context (at [19]). In this case, the units were permanently in their field, and there was no limit on the length of time they would remain there – they could be there for years. The ability to move them around the field did not remove the significance of their presence in planning terms. The visual and landscape impact of the units was not affected to any material extent by any periodic changes to their position in the field.

19. In this case, the structure would be in one place for 75 weeks before being moved elsewhere within what is not a large field. That is a longer period in a single location than in either of the cases cited in the extract above and in *Save Woolley Valley.* It must therefore be considered as a permanent feature in the field having a significance in the planning context. As there is no deemed planning application I do not have to consider the planning merits of that significance; it is enough for this purpose to recognise that it exists. Applying the cited authorities I conclude that the structure is therefore a building within the meaning of s336 of the Act.

20. The appeal on ground (b) therefore fails.

21. The method of on-site construction is not entirely clear from the evidence. However, the essential structure is not dissimilar to that described at point (h) and so it is not unreasonable to assume that similar methods and timings would be involved. Again, applying *Save Woolley Valley* (paragraph 73) I conclude that the works carried out to construct the units are capable of falling

within s55(1)(A)(d) "other operations normally undertaken by a person carrying on business as a builder". Indeed, the appellant's argument under the ground (g) appeal that '…dismantling will need a specialist contractor…' supports the view that similar skills would have been required to erect it in the first place.

22. Applying *Barvis* I therefore conclude that the development alleged as the breach of planning control is development requiring planning permission under s57 of the Act. No such permission has been granted and it is no part of the appellant's case that it is deemed to be granted by the GPDO.

23. The appeal on ground (c) therefore fails.

The appeal on ground (g)

24. An appeal on this ground is that the period allowed for compliance with the requirements of the notice is too short. In this case that period is 14 days which the Council asserts is long enough to take down the building and remove the debris from the land.

25. In fact, the case for the appellant on this ground does not dispute the period allowed on the grounds that the building cannot be dismantled and removed in that time. Rather, the case is one of animal welfare since the flock would have to be found an alternative home part way through the 70 week laying cycle. Where the flock will be on that cycle at the date when this decision is issued is unknown. On that basis the appellant suggested a period of 'up to' nine months.

26. An appellant is entitled to assume an appeal will be successful. The Council's criticism that the appellant has not provided any evidence of the steps taken to re-house the flock is not therefore well-founded.

27. The issue of animal welfare is important. However, there is no evidential basis for any particular alternative period to that specified in the notice. The Council has the power under s173A(1)(b) to, among other things, extend the period for compliance if circumstances indicate that it should do so. It seems to me that the use of this power would enable the Council to balance the issues of animal welfare and planning interests as necessary and appropriate if a change in circumstances is brought to its attention.

28. The appeal on ground (g) does not therefore succeed.

Conclusion

29. For the reasons given above I consider that the appeal should not succeed.

Brian Cook

Inspector