



Appeal Decision

Inquiry held on 14 December 2016

Site visit made on 13 December 2016

by A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 28 April 2017

Appeal Ref: APP/E2734/C/16/3147779

Land opposite The Old Chapel, Blubberhouses, Otley LS21 2PJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 [1990 Act].
- The appeal is made by Mr Simon Harrison against an enforcement notice issued by Harrogate Borough Council.
- The enforcement notice was issued on 4 March 2016.
- The breach of planning control as alleged in the notice is without planning permission the unauthorised material change of use of the land to domestic garden.
- The requirements of the notice are to:
 - (1) Cease the domestic use of the land.
 - (2) Remove all domestic structures placed on the land, including: the summer house, open fronted storage unit, water butt, garden furniture, paving and decking, and
 - (3) Reseed the land with grass seed.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2) (c) and (d) of the Town and Country Planning Act 1990 as amended¹. Since the prescribed fees have not been paid within the specified period, the initial appeal on ground (a) and 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.
- The Inquiry sat for 1 day.
- All of the evidence was given on oath or affirmation.

Summary of Decision: The appeal is dismissed and the enforcement notice upheld subject to corrections as set out in the formal decision at paragraph 29 below.

Background information

1. The plan appended to the notice identifies land to which it relates but the dwelling is actually known as 'The Old Chapel'. It is in the same ownership as two parcels of land situated on the opposite side of the dwelling dissected by an intervening private driveway. As the name suggests, The Old Chapel is a former place of worship in use as a single dwelling-house, authorised by a planning permission [for convenient shorthand, abbreviated as 'PP'] granted on 23 September 1999 for the conversion of the chapel to form one dwelling². For consistency, I will refer to this PP as 'the 1999 permission'. The land directly opposite The Old Chapel is currently in use as a residential garden and is the subject of enforcement action. For consistency, I will refer to it as *the notice land*.

¹ Arguments presented in the appeal fall within the context of an appeal on 174(2)(c). The latter was introduced at the Inquiry with the agreement of the appeal parties.

² Council reference is DCPEFULZ 99/02397/FUL.

Ground (c)

2. In pursuing an appeal on this ground, the onus of proof is squarely on Mr Harrison to show, on the balance of probabilities, that the matters stated in the notice do not constitute a breach of planning control. Essentially, his argument is a simple one, namely, that the matters stated do not constitute a breach of planning control. This is because all of the occupied land benefits from PP for residential use. It is contended that the notice land's use incidental to the enjoyment of the dwelling is permitted by operation of s55 (2) (d) of the 1990 Act³. Before I examine these arguments in some detail, I will first turn to a subsidiary point.
3. The submission is that Mr Harrison was baffled on receipt of the notice, because Mr Costar, investigating officer for the local planning authority ['LPA'], had informed him PP was not required back in July 2012. Officers' initial view was that the use was lawful due to the passage of time. The argument now is that the Council's approach to this matter and not taking action earlier, even though it had investigated potential breaches of planning control, was tantamount to a grant of planning permission by implication. For the following reasons, I do not accept those submissions.
4. Whether a breach of planning control has occurred is a matter of law. It is not influenced in any way, shape or form by whether the Council took action when it initially suspected a breach of planning control. Mr Cullen, on behalf of the Council, says his initial impression was that no breach of planning control had occurred because the residential use was gradual, intermittent and low-key. In about 2012 circumstances dramatically changed because operational development was undertaken on the notice land and residential use increased in scale. Mr Harrison indicated that he would submit an application for a lawful development certificate, but it did not materialise. Having regard to expediency, the Council decided to issue the notice. It should be borne in mind that s. 171B of the Act allows a period of time in which enforcement action can be taken.
5. The evidence presented does not indicate that Mr Harrison, who was professionally represented by a planning agent, had been led to believe the decision not to take initial enforcement action meant PP existed for the alleged residential garden use. An analogy might be to suggest that if the LPA decide not to take enforcement action on grounds of expediency for a suspected breach of planning control that will also grant PP – that clearly is not right. I do not believe any argument of legitimate expectation could be supported on the facts of this case. Not to take initial action is not sufficient to fetter the proper exercise of the Council's statutory duties under the planning regime.
6. There was some debate about the relevant planning unit ['PU']. In considering whether a material change of use of land ['MCU'] has taken place, it is necessary to identify the appropriate PU. First, whenever it is possible to recognise a single main purpose of the occupier's use of his/her land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time

³ Section 55(2)(d) of the 1990 Act reads - following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land - the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such.

to time but the different activities are not confined within separate and physically distinct areas of land.

7. Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit⁴. It should be borne in mind that the area covered by a PP is not necessarily determinative of the unit although it is a factor and may be a good starting point.
8. The residential use derives from the 1999 permission and it is possible for land beyond the curtilage, albeit in the same unit of occupation and not physically separate, to be used for a purpose ancillary to the primary residential use of the unit. Mr Harrison says his property comprises three titles registered at HM Land Registry, and believes all of his land constitutes a single residential planning unit. It follows, he claims, that the notice land could be used for a purpose ancillary to that main use. The Council submit that the notice land constitutes a self-contained PU. For the following reasons, I disagree with both parties.
9. Apart from a small portion of land used to access The Old Chapel, it does not possess any curtilage because the immediate land surrounding the building is in third party ownership. The physical boundaries of Mr Harrison's plot are defined by the building itself. The car park and notice land are situated on the opposite side of a private driveway and do not adjoin the dwelling. The area designated as a car park functions as curtilage to the dwelling since it provides occupiers with space to park motorised vehicles. The car park is not physically connected to the house, but in practice there is significant degree of co-ordinated pattern of land use that overcomes that physical separation. The lawful use of the car park derives from the 1999 permission.
10. The notice land is 14.8 m deep by 6.5 m⁵ and is physically separate from the dwelling because of its location. Although it adjoins the car park, there is a physical barrier. The area includes sewerage plant and oil tanks that serve the property nevertheless the area is self-contained enclosed. Before the conversion of The Old Chapel into a dwelling-house, the overwhelming evidence points in the probability that the notice land was in agricultural use and was part of a wider field.
11. In my assessment, Mr Harrison's land forms a single unit of occupation but with separate and distinct areas. It is in a mixed use comprising agriculture and residential, which are distinct uses substantially different and unrelated to each other. The residential element benefits from express PP, because the 1999 permission specifically relates to use of The Old Chapel and car park area. By the time enforcement action was taken the notice land comprised manicured lawn and ornamental plants as well as a raised patio and summerhouse. That is what I saw at the time of the Inquiry. The area was in use as residential garden during the period leading up to the notice's issue. The character of that use is significantly different from agriculture given the nature and scale of domesticity. This residential use has both on and off site planning consequences requiring assessment.
12. I therefore find that the notice correctly identifies the area where a MCU has occurred. However, the description is incorrect in that domestic garden is not a

⁴ *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.

⁵ Measurements agreed at the Inquiry site visit.

planning land-use. To accurately reflect the reality on the ground at the date of issue, the description of the allegation should state the following:

Without planning permission, the material change of use of the land from agriculture to residential garden use facilitated by the erection of a summerhouse, open fronted storage unit, water butt, garden furniture, paving and decking.

The requirements should flow from the corrected allegation, but they cannot require removal of the oil tank and sewerage system.

At the Inquiry, the appeal parties acknowledged they understood the issued notice's intent. The wording of the allegation and requirements has not misled Mr Harrison, given his substantive case. I am satisfied that no injustice arises from any of these corrections. I shall correct the notice.

13. Mr Harrison submits that, in effect, PP has already been granted for the residential garden use by virtue of the 1999 permission. In interpreting the effect of a PP, the intention of either the developer or the Council is immaterial. It is the content of the documents that were placed on the planning register that is relevant. Having regard to the line of authorities since *Ashford*⁶, in construing a planning permission which is clear, unambiguous and valid on its face regard may only be had to the PP itself, including conditions and the express reasons for those conditions. Only if there is an ambiguity in the wording of the PP it is then permissible to look at extrinsic material including, but not limited to, the planning application form and documentary evidence to resolve that ambiguity.
14. A simple comparison between the red edge site plan and approved plans reveal inconsistency in the area covered by the 1999 permission. The latter excludes the notice land from the area defined for residential use. There is therefore ambiguity as to whether the terms of the permission extend to the notice land. To resolve that ambiguity it is necessary to examine the application form and other relevant documentary evidence.
15. The application form together with the phraseology used in the permission document, as well as conditions and reasons, show that full PP for works of conversion to form a single dwelling-house had been granted. Of relevance is condition 2), which states that the development shall not be carried out otherwise than in strict accordance with the submitted details, as amended by letter and/or drawings received by the Council on the 16 September 1999. Condition 5) states that prior to the first use of the development, vehicle parking manoeuvring and turning areas indicated on submitted drawing 1334.B shall be provided. The reasons for imposing these conditions is to ensure that the development is carried out in accordance with the approved drawings, and to provide for appropriate on-site vehicle parking facilities, in the interests of highway safety and the general amenity of the development.
16. The plans submitted with the application show The Old Chapel and notice land depicted as a perfect rectangle edged red. Section 10 of the application form indicates a one two-bedroom dwelling will be created and drawing JW 1334

⁶ *R v Ashford Borough Council ex parte Shepway District Council* [1999] P&CR 12, *Barnett v Secretary of State for Communities and Local Government* and *East Hampshire District Council* [2009] EWCA Civ 476., and *Stevenage BC v Secretary of State for Communities and Local Government* [2010] EWHC 1289, *Trump International Golf Club Scotland Limited v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85, *University of Leicester v Secretary of State for Communities and Local Government* [2016] EWHC 476 (Admin) and *Dunnett Investments Limited v SSCLG and East Dorset District Council* [2016] EWHC 534 (Admin).

represents the proposed ground and first floor plan layout, external elevations and two car parking spaces. The notice land is shown as a parking area with an oil tank.

17. On 8 September 1999, the planning agent submits an amended plan showing location of the proposed car park on the other side of a mature tree, where it is currently located. The plan shows the oil tank within the notice land. However, a handwritten note states the following: '*14.9.99 rang JW [the agent] (1) move fuel tank into parking area (2) new red line area. He'll amend*'. A further amended drawing ref: 1334 B submitted on 16 September 1999 alters location of the lay-by and fuel tank. The site plan shows the dwelling and car park edged black, which represents extent of the residential area. Specific matters concerning curtilage, as indicated by the handwritten note, are clearly identified in the amendments. Evidently, drawing 1334 B supersedes the initial site plan and the car park layout is secured by condition 5). Given the wording of condition 2), the amended plan must prevail. These details override what is shown in earlier plans insofar as they cover the same matter and appear to have been implemented on the ground.
18. The planning officer's report and replies to consultation requests identify the extent of the residential area as an important planning consideration. This evidence suggests the amended scheme referred to in condition 2) was satisfactory to the LPA, because the resultant car park is inconspicuous and acceptable.
19. On the balance of probabilities, I consider that the residential area can be clearly deduced from the amended plan and that is limited to the dwelling and car park only, the latter being ancillary to the primary residential use. I have had regard to all of the deliberations above in resolving ambiguity in the effect of the 1999 permission. In my planning judgement, the nature and scale of the notice land's residential use does not fall within the scope of the 1999 permission and such a primary use amounts to a material change of use of land for planning purposes.
20. As I have already observed, apart from a small area of land permitting access into The Old Chapel, the dwelling-house does not possess land immediately attached to it. The notice land is set apart and disconnect from the dwelling-house. Visually, all of this area appears physically separate from the dwelling-house and car park given its location and positioning. It does not appear or seem to have a close association with the dwelling. Additionally, the evidence about the historic agricultural use shows that the area was distinctly disconnect and separate from The Old Chapel. As a matter of fact and degree, and on the circumstances of this particular case, I find that the notice land cannot be regarded as part of the curtilage to the dwelling-house. Mr Harrison cannot rely on the operation of s55 (2) (d) of the Act.
21. Drawing all of the above points together, I must therefore conclude that express planning permission is required for the alleged matters as corrected and it has not been obtained. Ground (c) is doomed to fail.

Ground (d)

22. In this appeal, the burden of proof in establishing that a period of immunity had accrued firmly falls upon Mr Harrison. It is well-established principle that, if the Council has no evidence of its own, or from others, to contradict or otherwise make his version of events less than probable, there is no good reason to dismiss the appeal, provided his evidence alone is, on the balance of probability, sufficiently precise and unambiguous.

23. At the risk of repetition, all of the evidence presented points in the probability that the notice land was in agricultural use before its physical separation from the field and subsequent use as residential garden. Nonetheless, Mr Harrison submits that it is too late to take enforcement action due to the passage of time. He needs to show that the alleged residential use occurred on or before 4 March 2006, which is the relevant date, and continued thereafter for a period of 10 years.
24. Before acquiring the property in about 2012, Mr Harrison viewed it on at least two or three separate occasions and saw the notice land's garden use. He was told the area was garden to The Old Chapel and no one said anything to the contrary. He says it was laid to lawn, included an oil tank and sewerage system, and it was physically enclosed by post and wire fence. After acquisition, he replaced the latter with a dry-stone wall. However, I find it astonishing that the sale particulars do not explicitly refer to the separate garden given the area's disconnectedness from the dwelling. I acknowledge improvements have been made to the area that include installation of decking and patio, nevertheless, he has no direct evidence of the past garden use or the nature and scale of residential activity. This is because he purchased The Old Chapel after the relevant date.
25. In support of his substantive case, Mr Harrison relies on statements made by interested parties. For example, Mr Pickard, the original developer, suggests that the garden use started in 2001. He maintains that occupiers of The Old Chapel used the area as garden and recreation. The builder, Mr Utley, says that use started soon after the conversion. A Daphne Wilson and David Braham confirm this. However, there is little by way of detailed explanation as to the type, nature and scale of residential use. There is lack of specificity as to when and how regular it was used. These witnesses were not called to give oral evidence and their statements have not been subjected to cross-examination and that affects the weight I attach to it.
26. The Council has produced contrary evidence, which, in my opinion, casts some doubt over the version of events presented in support of the immunity claim. For example, unchallenged aerial photography of 2002 and 2009 show the notice land in agricultural use. There is no indication of any domestic activity.
27. In addition to all of that Mrs Hall, whose property directly overlooks the agricultural field opposite The Old Chapel, gave oral evidence that was subjected to vigorous cross-examination. She told the Inquiry that staff working at the American air force base occupied the dwelling soon after its conversion. There was a car park but no garden during that period of occupation, and any residential use was low in scale. The tenants moved out and the property was put on the market for sale, but it did not sell. Her recollection is that, in about 2011, the previous owner marked out the notice land by placing post and wire fence. It was subsequently sold together with the dwelling as garden land. Mr Harrison took over in around 2012 and began developing the area for his own use as garden to The Old Chapel. I find the explanation given plausible and there is no evidence to make her version of event less than credible.
28. On the balance of probabilities, I find that there is insufficient clear and precise evidence to enable me to conclude that the change of use of the notice land to residential garden occurred on or before the relevant date. The evidence presented does not show, to my satisfaction, that the use continued for a period of 10 years thereafter. I am afraid the onus has not been discharged. My conclusion is ground (d) must fail.

Formal decision

29. It is directed that the enforcement notice be corrected by:

- (1) Delete text in section 2, the land affected, and substitute by the following text:

Land opposite The Old Chapel, Blubberhouses, Otley LS21 2PJ.

- (2) Delete text in section 3, the breach of planning control alleged, and substitution therefore by the following text:

Without planning permission, the material change of use of the land from agriculture to residential garden use facilitated by the erection of a summerhouse, open fronted storage unit, water butt, garden furniture, paving and decking.

- (3) Delete text in section 5, what you are required to do, sub-paragraph (i) to (iii) and substitute therefore by the following text:

- (1) Cease the use of the land for residential purposes,
- (2) Remove the summerhouse, open fronted storage unit, water butt, garden furniture, paving and decking, and
- (3) Reseed the land with grass seed.

30. Subject to the above corrections, the appeal is dismissed and the enforcement notice is upheld.

A U Ghafoor

Inspector

APPEARANCES

FOR THE APPELLANT:

Peter Dixon	Of Counsel, instructed by Savage Crangle
He called	
Simon Harrison	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Steve Pilling	Of Counsel, Principal Regulatory Lawyer
He called	
Pearl Hall	Local resident
James Cullen	Principal Enforcement Officer

DOCUMENTS HANDED IN AT THE INQUIRY

- 1 Letter of notification and those consulted.
- 2 Opening submissions by both appeal parties.
- 3 Right move extract by the Council.
Full microfiche copy of planning permission ref: 99/02397/FUL by
- 4 the Council.
- 5 Council tax record by the Council.