
Appeal Decision

Hearing held on 3 May 2017

Site visit made on 3 May 2017

by Sukie Tamplin DipTP Pg Dip Arch Cons IHBC MRTPI

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

Decision date: 11 May 2017

Appeal Ref: APP/Y9507/C/16/3154735

J & J Nurseries, Station Road, Soberton, Southampton, Hampshire, SO32 3QU

- 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 J A Kopinski against an enforcement notice issued by Winchester City Council on behalf of South Downs National Park Authority.
- The enforcement notice was issued on 12 May 2016.
- The breach of planning control as alleged in the notice is:
Without planning permission, change of use of the Land from agriculture to a mixed use comprising agriculture and residential use. ("the breach")
- The requirements of the notice are:
 - (i) Cease the residential use of the Land and remove the caravan(s) from the Land.
 - (ii) Remove from the land all domestic paraphernalia, debris, waste and building material together with all plant, equipment and machinery associated with step (i) above.
- The period for compliance with the requirements is two (2) calendar months after this Notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a),(c),(d) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed following correction of the Enforcement Notice in the terms set out below in the Formal Decision.

Applications for costs

1. At the Hearing applications for costs were made by Mr J A Kopinski against Winchester City Council on behalf South Downs National Park Authority. These applications are the subject of a separate Decision.

Procedural issues

2. Prior to the Hearing the Council conceded that the Notice required correction and variation. With the agreement of the appellant it was proposed that the allegation should be corrected to "Failure to comply with Condition 1 of planning permission reference 10/00101/FUL granted on 28 April 2010"(the 2010 pp). Consequently and in accordance with my powers in S176 of the Act¹ I consider the Notice as proposed to be amended in my decision.
3. Condition 1 of the 2010 pp says "The permission hereby granted shall be for a limited period expiring on 30 April 2011 on or before which date the mobile home shall be removed and the land restored to its former condition in

¹ Town and Country Planning Act 1990

accordance with a scheme of work submitted to and approved by the Local Planning Authority”.

4. The Council issued two decision notices for the 2010 pp; these are identical except in so far as the description of the development. One decision refers to “Retention of agricultural workers dwelling (Retrospective)(Resubmission) and the other says “Retention of agricultural workers mobile home (Retrospective) (Resubmission). The appellant was unable to confirm which of the decisions he had received² but his understanding of both permissions is that the subject development was essentially the same. In either case the permission authorised residential occupation of a structure already on site for a period of one year. The conditions on both decisions are identical. The Council was unable to explain why 2 decisions were issued but on the balance of probabilities I consider this was an administrative error. As such, bearing in mind that the appellant was not misled as to what the permission referred to, it is not determinative in this appeal.

Planning history

5. J & J Nurseries commenced its operations at the appeal site in about 2002 and secured planning permission for horticultural buildings; these were subsequently constructed. In June 2005 the appellant was granted planning permission for a temporary agricultural worker’s dwelling (the 2005 pp) which expired in May 2008. Notwithstanding the terms of the consent, in about August 2005 the appellant brought 2 twin unit mobile homes onto the land and joined these together in an L shaped configuration.
6. On expiry of the temporary planning permission the Council issued an Enforcement Notice but this was subsequently withdrawn at appeal³ (the 2009 appeal). The Inspector found that the development on the land was not that permitted by the 2005 pp. He allowed a linked Section 78 appeal which effectively extended the 2005 pp for a further one year. However the development subject of the 2005 pp (and the 2009 Section 78 appeal decision) has never been implemented.
7. The Council subsequently granted permission, for the use of the structure actually on the land, for residential occupation subject to a limited period until 30 April 2011. It is this structure and condition 1 of the 2010 pp which is the subject of the Enforcement Notice and hence the appeal before me.
8. The appellant considers that the structure is operational development and is a building. However the Council say that the structure is a ‘mobile home’ and is a use of land. In the interests of neutrality I use the term ‘structure’ in this decision to describe the development subject of the Notice.

Appeal on Ground (c)

9. Section 171A (1)(a) of the Act says that the carrying out of development without the required planning permission constitutes a breach of planning control. In turn Section 171A (1)(b) says failing to comply with any condition or limitation subject to which planning permission has been granted, constitutes a breach of planning control.

² Although he recalled it was probably the one that used the word “dwelling”

³ Appeal references APP/L1765/C/08/2084675 and APP/L1765/A/08/2084489 dated 4 March 2009

10. In this appeal it is agreed that the subject of the Notice is the structure on the land. But as I have noted above, there is a dispute as to whether the structure constitutes a 'building' or a 'use of the land' and I shall consider this issue later in this decision. In the context of the ground (c) appeal it is not determinative of that dispute because Section 55 of the Act says development means the carrying out of building operations or the making of any material change in the use of any buildings or other land. Thus planning permission is required in either scenario.
11. Section 57(1) says in turn that planning permission is required for any development of land other than in respect of specified exceptions, none of which are claimed here. Prior to 2010 no planning permission was granted for the structure because what was implemented was materially different from what had been approved. Planning permission was granted for the structure in April 2010 (the 2010 permission) but that expired on 30 April 2011 at the end of the 12 month period subject of Condition 1. Thus there is no extant planning permission for a structure occupied as residential accommodation.
12. Consequently, in the absence of any extant planning permission, the structure on the appeal site is a breach of planning control and therefore the appeal on ground (c) fails.

Appeal on Ground (d)

13. The appellant says that 2 twin unit mobile homes were brought onto the site in August 2005 and in the next few months the 2 units were spliced together to form one unit of residential accommodation. It was then occupied by his family from October 2005. These dates are not disputed by the Council. He also says that the works undertaken in 2005 resulted in the creation of a 'building' on the site. Consequently it is argued that by October 2009 the structure or building had been on site for a period for excess of 4 years or more and no enforcement action could be taken against it.
14. On the other hand the Council say that the structure is a 'mobile home' and thus should not be regarded as operational development. In these circumstances the development did not become immune from enforcement action until 10 years after the use of the structure commenced (October 2015). In support of this view the Council rely on the descriptions used by the appellant in his planning applications (in 2008 and 2010) where the development is described as a residential mobile home and also by the description of the structure in the 2009 appeal decision. In paragraph 3 of that decision, the structure was described as a "mobile home which constituted unlawful development".
15. Whilst I can understand the Council's view, its reliance on terminology used by the appellant and in the 2009 Section 78 appeal decision is misplaced. It is clear that over the years, the terms 'mobile home', 'caravan' and 'agricultural workers dwelling' have been used loosely and interchangeably both by the appellant and the Council. Indeed the two decisions issued by the Council in 2010 illustrate this. But in any event it is not the terms used by the parties but the nature and characteristics of what has actually occurred on site that is determinative in this enforcement appeal. In these circumstances it is surprising, at best, that the Council's planning witness had not visited the site to see the structure for himself.

16. Case law indicates (*Skerritts*⁴ and *Market Café*⁵) it is necessary to consider whether or not the structure is a building. This is in the context of three tests: size, permanence and physical attachment. In terms of size, it is agreed by the parties that the dimensions of the structure are in excess of those used in the Caravans Sites Act 1960 (as amended) (CS Act) to define a 'caravan'. As I saw, the structure comprises 2 x twin unit 'mobile homes' which have been arranged in an L shaped configuration and joined together. The CS Act says that twin units can be caravans but does not envisage 2 or more twin units being occupied as one structure and constituting a caravan. The dimensions of the structure significantly exceed those in the 1960 CS Act (as amended).
17. As regards permanence the unchallenged evidence is that the structure has been on the appeal site since 2005 (a period of about 11 years before the Notice was issued). The works undertaken in 2005 included the construction of a connecting roof to link the twin units together and various works subsequently undertaken included moving and constructing internal divisions. In addition there is an external timber platform which provides access to the 'front' door. Whilst the structure could be readily separated from the timber platform, in my judgment the other works of alteration have been so extensive as to render dismantling impractical because the structure would be significantly damaged. Consequently the separation of the units in order to re-create 2 mobile homes is unrealistic and such works would effectively amount to at least partial demolition. In any event the length of time and the clear intention of the appellant to continue his occupation as part of the nursery enterprise have significant material weight.
18. As regards physical attachment, the structure is supported by hydraulic jacks which in turn are simply placed on concrete blocks. There are no foundations, brick plinth or other means of physical attachment other than links to services for drainage, heat and power. If I had found that the structure could have been readily dismantled, this factor would count against any finding that the structure is a building. But as I have noted above, dismantling the structure would result in significant damage even if it were physically possible. Thus on balance I find that the weight and size of the structure as a whole effectively attaches the structure to the land.
19. Looking at all these factors together, I find that although the structure was originally (2) mobile homes, the building works that have been undertaken since have resulted in the creation of a building. Consequently what is now on site is a building, as matter of fact and degree, and is operational development, not a use of land.
20. But whether or not the building became lawful by the end of 2009 is complicated by the oral evidence given to the Hearing. Mr and Mrs Kopinski both said that part of the structure was used as a Nursery office and store and also for space to accommodate tender vulnerable seedlings and cuttings⁶. Thus it appears that at some unspecified time the building may have been in mixed use but evidence on this is contradictory and vague. As I saw, the structure is

⁴ *Skerritts of Nottingham Ltd v SETR (No 2)* [2000] 2 P.L.R

⁵ *R on the application of Westminster City Council v SETR and Market Café Plc* [2001] EWHC Admin 270

⁶ The plan showing the layout of the structure submitted by the appellant to support the 2010 application appear to confirm the use of part of the structure in association with the Nursery

at present, fully in residential use. But had it been in a mixed use from late 2005 (or had that use occurred at any time before April 2010) the immunity period would have been 10 years.

21. But whether or not the structure was in mixed use or solely in residential use before April 2010, the permission then granted for the structure re-started the clock. After this permission was granted on 28 April 2010 there was an authorised lawful use of the existing structure as a residential unit.
22. There is no dispute that the structure was in residential use as at 1 May 2011 and because this was no longer authorised due to the terms of Condition 1 of the 2010 pp this was in breach of that planning condition. Similarly there is no dispute that residential use has continued thereafter and on the balance of probabilities was the sole use of the structure⁷ on the 12 May 2016, the date the Notice was issued. Consequently at the date the Notice was issued there has been a period in excess of 4 years during which condition 1 of the 2010 permission has been breached.
23. The Court of Appeal has held (*First Secretary of State and Arun District Council and Karen Felicity Brown* [2006] EWCA Civ 1172) "that as long as the breach of planning control involves a "change of use", it matters not which type of breach it is: whether development without planning permission or failure to comply with a condition". Consequently in this case, because it is a breach of condition concerning a change of use of the structure (building) to use as a single dwellinghouse, the residential use of the structure became immune from enforcement action after 4 years.
24. In this appeal it is not contested that the unauthorised use of the building to a single dwelling house occurred on 1 May 2011 after the expiry of the time limited 201 pp. It thus became lawful on 1 May 2015, just over a year before the issue of the Notice. Consequently the use of the building as a single dwellinghouse was immune from enforcement action at the date the Notice was issued and the appeal on ground (d) succeeds.

Conclusion

25. From the evidence at the Hearing and with the agreement of the parties, I conclude that the allegation in the Notice of 12 May 2016 is incorrect and I shall therefore correct the Notice. As regards the appeal on ground (d) I am satisfied as a matter of fact and law that the structure is a building and the appeal on this ground should succeed in respect of those matters which, following the correction of the enforcement notice are stated in it as constituting the breach of planning control. In view of success on legal grounds, the appeals under grounds (a) and (g) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Formal Decision

26. It is directed that the enforcement notice be corrected:

⁷ The area previously used as part of the Nursery appears to have been primarily used for domestic storage in the more recent past.

- a) by the deletion in Section 1 of the words "Section 171A(1)(a)" and the substitution of the words "Section 171A(1)(b)"; and
- b) by the deletion in full of the allegation in Section 3 and the substitution of the words "Without planning permission failure to comply with Condition 1 of Planning Permission reference 10/00101/FUL in that the dwelling was not removed by 30 April 2011".

27. Subject to these corrections the appeal is allowed and the enforcement notice is quashed.

Sukie Tamplin

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Jerzy Kopinski	Appellant in person
Mrs Jeannette Kopinski	Appellant's wife and partner
Mr Chris Ward BA (Hons) LLM MRTPI	Director, Bryan Jezeph Consultancy
Paul Harris	Giles Wheeler-Bennett

FOR THE LOCAL PLANNING AUTHORITY:

David Townsend	Team Leader-Enforcement Winchester City Council
Julia Allen	Bruton Knowles

DOCUMENTS received at the Hearing

- 1 Appellants comments on Council statement and 2 appendices
(previously submitted but not cross copied)
- 2 Plan JK1 (previously submitted but not cross copied)
- 3 Costs applications submitted by the appellant.