

Appeal Decisions

Inquiry held on 4, 5, 6 and 19 April 2017

Site visit made on 5 April 2017

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 02 June 2017

Appeal A: Appeal Ref: APP/J2210/C/16/3158988

Land at Hoath Farm, Bekesbourne Lane, Canterbury, CT3 4AB

- 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 Graham Oates (Graham Oates Associates) against an enforcement notice issued by Canterbury City Council.
- The enforcement notice, Ref ENF/15/00159/LP, was issued on 22 August 2016.
- The breach of planning control as alleged in the notice is without planning permission, the erection of three new buildings in the open countryside for residential use.
- The requirements of the notice are:
 - i. Demolish three buildings marked A, B and C on the plan attached to the notice.
 - ii. Remove all resultant material from the land.
 - iii. Make good the land underneath the three former buildings.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with variations.

Appeal B Appeal Ref: APP/J2210/W/16/3153039

Hoath Farm, Bekesbourne Lane, Canterbury, CT3 4AB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr Graham Oates (Graham Oates Associates) against the decision of Canterbury City Council.
- The application, Ref CA/16/00137/FUL, dated 11 January 2016, was refused by notice dated 22 April 2016.
- The development proposed is 'external alterations and extensions to 5 existing buildings including retro-fitting insulation and new external cladding/roof materials in connection with the formation of 8 no. residential dwelling (comprising 7 x 3 bedroom and 1 x 4 bedroom units); alterations to existing vehicular access including creation of vehicular turning head and formation of 12 car parking spaces; erection of boundary fences to create residential curtilage for each dwelling and associated landscaping including new tree planting'.

Summary of Decision: The appeal is dismissed.

Procedural Matters

1. All oral evidence to the Inquiry was given after the witnesses had either taken the oath or made an affirmation.
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2. The Appellant made an appeal on ground (g) and asked for nine months in which to comply with the notice. The Council agreed with this request and I have no reason to find otherwise. I will vary the notice accordingly.
3. In the heading for Appel B I have set out the description of the development as stated on the application, however, there was some dispute between the Parties about the description of the development. I will consider this matter below.

Relevant planning history

4. The appeal site in the s.78 appeal, as shown by the red line¹, is some 0.93 hectares and is part of a much larger area of land at Hoath Farm, some of which remains under the control of the Appellant. A substantial part of this larger area has been developed over the years from agricultural land and buildings to eight residential dwellings². I will refer to these developments and their planning permissions as appropriate below.
5. So far as the buildings and land that are the subjects of these appeals are concerned the following are relevant:

CA/12/01791³ – permission granted for proposed alterations to exterior façade of existing commercial building. (Unit 7)

CA/13/02053⁴ – prior notification to convert existing offices into residential. Prior approval not required. (Units 1-6)

CA/13/02353⁵ - Prior notification to convert existing offices into residential. Prior approval not required. (Unit 7)

CA/14/00816⁶ – Prior notification to convert agricultural building to residential accommodation. Prior approval not required. (Unit 8)

Appeal A: The appeal on ground (b)

6. An appeal on ground (b) is on the basis that the breach of planning control alleged in the notice has not occurred as a matter of fact.
7. There were three chicken sheds at Hoath Farm, buildings A, B and C now comprising units 1-6, for which planning permission was granted for a change of use from agricultural to Class B1 and B8 use⁷. There is no dispute that this change of use was implemented and also that prior approval was not needed for a change of use from offices to residential⁸.
8. The development permitted by Class J was for 'development consisting of a change of use of a building and any land within its curtilage to a use falling within Class C3 (dwellinghouses) ... from a use falling within Class B1(a) (offices)', that is, for a change of use only with no permission for any operational

¹ Drawing No 179/01

² The references of the various grants of planning permission are at paragraph 1.3 of the statement of common ground – Document 10

³ Appendix 13 to Mr Harper's proof

⁴ Appendix 14 to Mr Harper's proof

⁵ Appendix 15 to Mr Harper's proof

⁶ Appendix 16 to Mr Harper's proof

⁷ Appendix 11 to Mr Harper's proof including Unit 7 (paragraphs 3.4 – 3.8 of Mr Harper's proof)

⁸ CA/13/02053 pursuant to Class J of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 as amended

development. The submitted drawings showed the curtilage area of the three buildings⁹ and existing and proposed floor plans¹⁰.

9. The original chicken sheds had shallow pitched roofs and timber clad exteriors and Class J only permits the change of use and there is no permission, deemed or otherwise, for any operational development.

The works (Buildings A, B and C; Units 1-6)

10. In or around May 2015 the Council was made aware of works taking place to the three buildings. No document or list of the works undertaken has been provided but Mr Harper produced a schedule of works¹¹ in the ground (f) appeal which he suggested comprised the lesser steps necessary to remedy the breach. From this schedule it is apparent that the works undertaken included the erection of an exo-skeleton shell around each of the three buildings; drystone walling to the corners of each building; blockwork between the steel posts; the installation of 24000 natural roof slates¹²; the installation of Tyvek roofing battens; 200mm Cellotex Insulation between the rafters; the provision of Gluelam rafters; welding to the steel sections; the addition of scarfed sections of the timber rafters; and bolts to the steel posts.
11. Photographs also show that the floors of the buildings were removed and re-laid with concrete¹³. In addition, as I saw on my visit, interior works have included the erection of a block wall to separate the two halves of each building; the creation of rooms by studwork and plasterboards; and plaster boarding around what were the original exterior walls and the remaining parts of the original wooden frame to create walls and ceilings.
12. In order to re-instate the buildings as they were before it would be necessary to refit the timber ridge; refit the timber scarfed rafters; re-felt and batten; fit corrugated roof panels; remove ply panels; and refit shiplap boarding¹⁴. In addition the schedule listed works not being as before which included the barn doors being removed; new windows and glazed doors being inserted; the asbestos roofing being replaced with zinc replacements; the ventilation units on the roof being removed; and the internal concrete dividing wall being built to divide each building into two units.
13. The Council's list of the works that have been done include the erection of new steel frames partially clad; the removal of existing structures' walling; removal of existing structures' frames; retention of some existing structures' fenestration; the erection of new internal layout, timber frames/partitions; and the erection of a new roof on each structure¹⁵.
14. There was and still is considerable dispute between the Parties about who said what to whom about the works and their respective interpretations of what those works entailed. These interpretations included whether the original buildings had been demolished or not; whether the original buildings had been retained or not; and whether the re-cladding of the walls and the replacement

⁹ Drawing No 97/01 Document 8

¹⁰ Drawings Nos 97/03 and 97/05 Appendix 14 to Mr Harper's proof

¹¹ Document 9

¹² It is not clear whether this number of slates is for one roof or all three

¹³ Appendix 5 photographs 3 and 5 to the Council's proof

¹⁴ Document 9

¹⁵ Document C paragraph 46

of the roofs amounted to a conversion of the original buildings or the erection of new buildings¹⁶.

The reports submitted by the Appellant

15. The Appellant submitted a structural appraisal by Mr Stocker, a chartered structural engineer, dated 22 November 2016¹⁷. Mr Stocker made a visual inspection of the structures of the buildings as 'it is required to know that the existing buildings are structurally strong enough to take any loading that comes with the external works to provide for residential use so that the buildings could be considered to have permitted development rights'¹⁸.
16. Although the Appellant asserts that Mr Stocker was 'there throughout'¹⁹ there was no evidence of this and by the date of his appraisal the works referred to above had largely been completed. However, the overall conclusion of the report is 'that the structures of the buildings are adequate for their proposed conversion taking into account any external works that will be required to provide for residential use'²⁰. The report makes it clear that the exo-skeletal works do not impose loading on the existing structure and that 'the structural integrity of the existing frame is not compromised by the oversailing of the new external skeletal frame'. He goes on to say 'The original portal frames remain in existence supporting additional rafters. The exo-skeleton structure spans over them and supports all external loading. The existing timber frames have full remaining structural integrity where the connection between rafters ties and columns remain unaltered and purlins and eaves beams ensure their longitudinal stability'²¹.
17. Given these findings it is somewhat surprising that he then says 'An external skeletal frame will be erected around the perimeter of the existing office buildings to allow for proposed aesthetic detailing plus external alterations ... the proposals are therefore not to affect the existing structures but to erect external frameworks that are independent of the original structures'²² and 'the building structures are suitable for conversion without demolition/rebuilding or strengthening of the structural elements of the roof or walls'²³. As the exo-skeletons had been erected by this time and they were supporting new roofs and new blockwork walls it is not at all clear to me what Mr Stocker was referring to.
18. Mr Stocker provided additional comments²⁴ in which he stated 'the timber portal frames are supporting purlins which in turn support rafters carrying the ceiling' and 'the exo-skeleton supports the external variable loads of snow and wind and this has reduced the total loading on the existing framework structure but not completely removed it'. He considered 'the original frames to be still employed as part of the structure of the building and that they remain adequate for the buildings' present use for their normal life provided the framework is maintained'.

¹⁶ Documents 18 and 19 (among others)

¹⁷ Appendix RH10 to Mr Harper's proof

¹⁸ Paragraph 3.3 of RH10

¹⁹ Mr Randle's oral response to Mr Atkinson's closing submissions

²⁰ Paragraph 2.1 of RH10

²¹ Paragraph 4.1 of RH10

²² Paragraph 4.41 of RH 10

²³ Paragraph 5.2 of RH10

²⁴ Document 4

19. It is unfortunate that pre-arranged commitments prevented Mr Stocker from attending the Inquiry and thus the Inquiry had to rely on his report and further comments without any additional clarification and explanation.
20. A letter from Mr Edwards²⁵, a consultant civil engineer, confirmed that the original fabric of Units 1-6 including the blockwork walls, timber studs and structural posts were all still in place and that some original windows had been used, some were boarded over and new windows had been inserted. It was Mr Edwards' opinion that none of the original buildings had been demolished or even substantially altered and that clear evidence was visually available of the maintenance of the original structure of all of the buildings. Mr Edwards did not attend the Inquiry and he could not be asked for any further clarification.
21. There is also a report from Mr Webborn, a building surveyor, of Cornerstone Surveys, dated 20 December 2016²⁶. Mr Webborn did not attend the Inquiry and I note that his address, Ancona Barn, was the name of one of Units 1-6 and that a Mr Webborn at Marans Barn (another of the units) was served with a copy of the enforcement notice. It is his view that the original roof structure has been incorporated into the existing structure²⁷ and in his conclusions he says that 'it is evident that significant sections of the original buildings remain in position within all the structures. The original structures have been incorporated and designed into the current external envelope ... The original buildings have not been demolished, or so substantially altered, as to make the original construction unrecognisable or non-existent'²⁸.
22. A drawing showing the existing and proposed structural arrangements was submitted by Mr Harper with his statement²⁹ which shows, among other things, both the internal and external structures. The internal structure includes a super structure frame comprising beams, rafters and six pairs of posts located through the main part of the building which are stated to remain. I noted on my visit that some of these posts were located in awkward positions within rooms creating some unusable space. It is therefore a matter of interest that these upright posts do not appear in the plans of the proposed floor plans and elevations for Buildings A, B and C³⁰ in the s.78 appeal; the rooms shown are all uncluttered by posts.
23. The Council presented no evidence from any engineer or surveyor but relied on evidence from Mr Hawkins as to what he had observed on the appeal site.

Demolition

24. The Appellant took the view that the Council relied on Buildings A, B and C having been demolished and presented a case that they had not been, relying on the case of *Shimizu*³¹. The notice does not allege demolition and there is authority that whilst 'a development following a demolition is a rebuild ... the test is one of substance not form based upon a supposed but ultimately artificial clear bright line drawn at the point of demolition [and] it is a matter of

²⁵ Dated 2 December 2016 Appendix RH10

²⁶ Attached to Mr Harper's supplemental statement

²⁷ Paragraph 3 of Mr Webborn's report

²⁸ Paragraph 4 of Mr Webborn's report

²⁹ Drawing No 179/16 Appendix RH11

³⁰ Drawings Nos. 179/09, 179/10 and 179/11

³¹ Document 16

legitimate planning judgement as to where the line is drawn'³². Mr Justice Green in *Hibbitt* goes on to say that 'there will be numerous instances where the starting point might be so skeletal and minimalist that the works needed to alter the use to a dwelling would be of such magnitude that in practical reality what is being undertaken is a rebuild'.

25. I appreciate that *Hibbitt* was concerned with Class Q of the GPDO and, among other things, whether an agricultural building had been 'converted' or rebuilt which is not the case here but *Hibbitt* is relevant in its consideration of whether a building has been re-built or, as preferred by Mr Justice Green, fresh built. On the basis of *Hibbitt* it seems to me that, depending on the works undertaken, an original building need not be demolished for it to become a new building.
26. The Appellant submitted that, given the Council's misdirection of itself that there had been demolition, the breach of planning control was incorrectly described because what had occurred was not the erection of three new buildings but the erection of an external structure around the original building. I will consider this submission below.

Reasoning

27. From the evidence, both written and oral, including the photographs and reports and from what I saw on my visit there can be no dispute that as a matter of fact a substantial amount of operational development has taken place in respect of Buildings A, B and C. Put simply this operational development includes: the erection of a metal framed exo-skeleton around the original building which provides a structure for the slate roof and blockwork walls; this exo-skeleton has been erected some 0.3m from the original building and has its own foundations; the walls of the original building have largely been removed save for the short blockwork elements and replaced with plasterboard which now forms the interior walls; there are new concrete floors; the original internal wooden structure remains, although it has been extensively repaired and parts re-placed.
28. Whilst elements of the original buildings remain, and in particular I note that the proposal in the s.78 appeal does not include retention of parts of the currently existing internal wooden structure, taking all the above matters into account together with the judgement in *Hibbitt* there is no question in my mind that Buildings A, B and C are new buildings as a matter of fact as alleged on the notice.
29. In the circumstances I consider that the description of the breach as stated on the notice is correct and there is no need for it to be corrected.
30. The appeal on ground (b) fails.

Appeal A: The appeal on ground (c)

31. In an appeal on ground (c) the Appellant is saying that there has not been a breach of planning control.
32. The prior notification to convert the existing offices in Units 1, 2 and 3 (as they were then described) into residential use related to a change of use only and

³² *Hibbitt and Another v SSCLG and Rushcliffe BC* [2016] EWHC 2853 (Admin) paragraph 27 at Appendix 15 to the Council's proof

related to the buildings present at that time. This is clear from the notice dated 27 November 2013³³ which, among other things, cites the submitted drawings³⁴. No permission or deemed permission was granted for operational development.

33. The allegation is 'the erection of three new buildings in the open countryside for residential use' and is in respect of operational development. I have found that the operational development that has taken place amounted to the erection of three new buildings and these three new buildings cannot benefit from any consent for a change of use because that consent applies to buildings which had existed before the operational development took place but which no longer exist. The prior approval is therefore not capable of implementation.
34. In this respect it is also pertinent to note that the use of the buildings for residential purposes took place after the operational development had taken place, that is, in the new buildings and there was no actual change of use of the buildings that had been the subject of the prior approval.
35. The erection of three new buildings for residential use requires planning permission and none has been granted. The matters alleged in the notice constitute a breach of planning control; three new buildings have been erected; and the ground (c) appeal fails.

Appeals A and B: The appeal on ground (a), the deemed planning application and the s.78 appeal

Main issues

36. From the reasons for issuing the notice and for refusing the application I consider that the main issues in these appeals are, firstly, whether the proposed development would be a sustainable form of development and secondly, the effect of the development on the character and appearance of the countryside.

The description of the development

37. The development was described on the application as 'External alterations and extensions to 5 existing buildings including retro-fitting insulation and new external cladding/roof materials in connection with the formation of 8 no. residential dwelling (comprising 7x3 bedroom and 1x4 bedroom units); alterations to existing vehicular access including creation of vehicular turning head and formation of 12 car parking spaces; erection of boundary fences to create residential curtilage for each dwelling and associated landscaping including new tree planting'.
38. The validation letter³⁵ described the development as 'Formation of 8 residential dwellings (comprising 7x3 bedroom and 1x4 bedroom units) from the conversion of 5 existing buildings including retro-fitting insulation and new external cladding/roof materials along with formation of 12 parking spaces and associated landscaping'. The Appellant was invited to contest that description but he did not do so.

³³ CA/13/02053 - Appendix 14 to Mr Harper's proof

³⁴ Drawings Nos 97/01, 97/02 and 97/05 - Document 8 and Appendix RH14

³⁵ Mr Harper's appendices HPC020b dated 27 January 2016

39. The third description is set out on the decision letter as 'Formation of 8 residential dwellings (comprising 7x3 bedroom and 1x4 bedroom units) along with formation of 12 parking spaces and associated landscaping'.
40. These differences in the description were the subject of written and oral evidence and submissions and the differences are relevant to the s.78 appeal. However, the ground (a) appeal is based on the Appellant saying that planning permission ought to be granted for the matters stated in the notice, that is, the erection of three new buildings in the open countryside for residential use.
41. In his closing submissions the Appellant introduced a matter that had not been raised before, that is, whether the new buildings were complete or not and what the scope of the ground (a) appeal was³⁶. The ground (a) appeal in this case is seeking planning permission for what has been built. There has been no dispute that the new buildings have been used for residential use, indeed some of them were occupied at the time of my visit. What has been built is therefore capable of residential use and it is the buildings as they currently exist together with the proposals for external finishes, including walls, fenestration and doors, that I will be considering below. In this latter respect the gable end overhangs have been built larger than shown on the original drawings³⁷ and in order to rectify this the Appellant has submitted, and I have accepted, amended drawings that show what is applied for and what has been built³⁸.
42. I therefore consider that the description can be broken down into the following: the erection of three new buildings, together with external finishes, in the open countryside for residential use; external alterations and extensions to two existing buildings including retro-fitting insulation and new external cladding/roof materials; the formation of eight no. residential dwelling (comprising 7x3 bedroom and 1x4 bedroom units); alterations to existing vehicular access including creation of vehicular turning head; formation of 12 car parking spaces; erection of boundary fences to create residential curtilage for each dwelling; and associated landscaping including new tree planting'.
43. There appeared to be no dispute between the Parties that, pursuant to s.79 of the 1990 Act and the Planning Practice Guidance³⁹, that I had powers to vary the description of the development. I will therefore determine the appeals and deemed application on the basis of the amended description above in paragraph 42 as appropriate.

The lawful use of the buildings and the fallback position

44. The principle of the residential use of the original Buildings A, B and C and Units 7 and 8 was established by consent pursuant to permitted development rights and the respective conditions and limitations imposed by the then GPDO. Matters such as development plan policy and the planning merits were not matters for consideration at those times. The residential use of these buildings and works to them are therefore being considered for the first time in these appeals in terms of policy and planning merits.

³⁶ Document D paragraph 18

³⁷ The Council's Appendix 10

³⁸ Annex B to Mr Harper's supplemental statement – drawings Nos 179/03 rev A; 179/09 rev A; 179/10 rev A; and 179/11 rev A

³⁹ Paragraph :046 Reference ID: 14-046-20140306

45. I accept that the Appellant's case is that that erection of the exo-skeleton was purely an enhancement to the buildings' external appearance which would in turn enhance the setting and improve the efficiency of the fabric and it is on this basis that he seeks permission. However, I have found above that Buildings A, B and C as they now exist are new buildings and therefore the Appellant is seeking permission for the erection of the three new buildings and their use for residential purposes. In the ground (c) appeal I also found that 'these three new buildings cannot benefit from any consent for a change of use because that consent applies to buildings which had existed before the operational development took place but which no longer exist'⁴⁰. On this basis the three new buildings have no lawful use and there is therefore no fallback position for Buildings A, B and C as they currently exist.
46. The permitted change of use of Unit 7 consented under permitted development rights has lapsed, as has the permission for alterations, and thus the lawful use of Unit 7 is Class B1. However, both of these lapsed consents are material considerations and it was Mr Hawkins' evidence that similar consents would be likely to be granted should they be applied for again. I have reason to believe that the Appellant would be likely to make further similar applications and thus this is the fallback position in respect of Unit 7.
47. Unit 8 has a lawful residential use by virtue of permitted development rights. A significant amount of work has been done to Unit 8 and whether those works fall within the works permitted by the GPDO are matters outside the considerations of this appeal. The fallback in respect of Unit 8 is restricted to its residential use.
48. I will consider the ground (a) appeal, the s.78 appeal and the deemed planning application on the basis of the above findings.

The development plan and five year housing land supply

49. The development plan includes saved policies in the Canterbury District Local Plan First Review July 2006. The draft Canterbury District Local Plan has been the subject of examination and the Inspector issued a letter dated 15 December 2016 commenting on the Main Modifications⁴¹.
50. The Council maintain that there is a five year housing land supply as submitted to the Examining Inspector whereas the Appellant says there is not and relies on figures presented to the Examining Inspector⁴². It is not for me, in these appeals, to determine whether there is a five year housing land supply or not but I note that the figures provided by the Appellant are in a report dated August 2016 and in his letter dated December 2016 the Examining Inspector does not raise any issues about the Council's ability to demonstrate a five years' supply.
51. The matter is of relevance in respect of the saved Local Plan policies that are cited in the reasons for issuing the notice and the reasons for refusal because, as advised by the National Planning Policy Framework (the Framework), policies for the supply of housing should not be considered up-to-date if the Council cannot demonstrate a five year supply of deliverable housing sites⁴³;

⁴⁰ Paragraph 33 above

⁴¹ Mr Harper's Appendices RH26 and 27

⁴² Mr Harper's Appendix RH28

⁴³ Paragraph 49 of the Framework

and if such policies are out-of-date permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits⁴⁴. The cited policies are Policy H1 which concerns the restriction of residential development to sites allocated for housing or mixed use or on previously developed land within the urban area and Policy R1 which restricts the conversion of agricultural or rural buildings in the open countryside to residential use.

52. The consensus of the Parties appeared to be that whether the housing land supply was just over or just under the five year period, there was an acknowledged need for housing in the area and a windfall site such as this would contribute to that need.

Development plan and emerging plan policy

53. Applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.
54. Saved Policy H1 permits residential development on sites allocated for housing or mixed use or on other non-identified sites on previously developed land within the urban areas. The appeal site is none of these. The Council's case is that the development in these appeals is at odds with this Policy because it is in the countryside whereas the Policy favours more urban and sustainable locations⁴⁵. The Appellant questions whether Policy H1 applies to rural areas and therefore to the appeal site⁴⁶. The relevance of this Policy as a housing supply policy for the purposes of paragraph 49 of the Framework is dependent on whether there is a five year supply of housing land⁴⁷ and given the position set-out above I give this Policy limited weight.
55. Saved Policy R1 provides for the conversion of existing agricultural or other rural buildings in the open countryside to a residential use subject to a number of specified criteria. This Policy only applies to Units 7 and 8. Given the lawful use of Unit 7 it is an 'other rural building' and the proposal fails to satisfy criterion d) in that the proposal includes a substantial additional outbuilding. Whether it also satisfies criterion c), that is, that the proposed extension and alterations can be achieved without a detrimental impact on its character and appearance and the second part of criterion d), that is, the conversion can be achieved without a significant change in the setting of the building, are matters for the second main issue.
56. Unit 8 has a lawful residential use but no permission for any operational development therefore criteria c) and d) in Policy R1 as set out above are applicable. As the proposal for Unit 8 also includes a substantial additional outbuilding it fails to satisfy criterion d). I note that Policy HD5 in the emerging Local Plan is in similar terms to Policy R1.
57. I have not been referred to any policies in the Local Plan relating to new residential buildings in the countryside but emerging Policy HD4 largely follows the Framework⁴⁸ in that it sets out criteria for new dwellings in the countryside which include them only being granted where there is an essential need for a

⁴⁴ Paragraph 14 of the Framework

⁴⁵ Document C paragraph 81

⁴⁶ Document D paragraphs 68 and 69

⁴⁷ *Suffolk Coastal DC v Hopkins Homes Ltd and SSCLG and Richborough Estates Partnership LLP and SSCLG v Cheshire East BC* [2017] UKSC 37

⁴⁸ Paragraph 55 of the Framework

rural worker or where the development would be of exceptional quality or innovative design. None of these apply here and the three new buildings fail to comply with the Framework or emerging development plan policy.

Sustainable development

58. The Framework advises that there is a presumption of sustainable development which runs through the decision making process and that there are three dimensions to sustainable development: economic, social and environmental.
59. The appeal site is located at the rear of Hoath Farm and adjacent to open agricultural farmland. It is not within any defined hamlet or settlement. The only vehicular entrance to Hoath Farm is from Bekesbourne Lane which is a narrow winding country road with high hedgerows, no footpaths or lighting and a 60 mph speed limit. I consider it would be most unlikely that anyone would choose to walk along the Lane from Hoath Farm to the bus stops on the main Canterbury Road and I also consider that cycling along the Lane would not be a pleasant experience.
60. There is a private footpath, over which I understand the residents of Hoath Farm have a right of way, which joins with the public footpath network to the east of the appeal site. It is possible to walk along these footpaths to the main Canterbury Road and the almost immediately adjacent bus stops. However, from my visit when I completed that walk, I consider that again it is unlikely that the footpath links would be used to any great extent given the distance, the lack of lighting, the openness that would be detrimental in inclement weather and the compacted earth surface of the path closest to the main road which could be muddy in wet weather.
61. I appreciate that there are proposals for extensive development on sites relatively close to the appeal site which may have a beneficial effect on such things as the provision of public transport and the provision of nearby services and facilities but so far as these appeals are concerned I consider that it is likely that the vast majority of trips to and from the proposed eight residential units for all purposes including shopping, leisure, taking children to school and going to work would be by the private car which is contrary to both the social and environmental roles of sustainable development.
62. I also appreciate that there are already a number of residential units at Hoath Farm, some of which were approved in the same policy context. However, whilst consistency in decision making is a material consideration I have to consider these appeals for eight residential units on their own merits.
63. There would be some economic benefit for, among other things, builders and the suppliers of materials and fittings; some environmental benefits including the proposed low-energy consumption of the finished units; and social benefits in the re-use of previously developed land and the provision of housing. But I consider that these benefits are outweighed by the harm resulting from the location and its inaccessibility other than by the private car.

Character and appearance

64. The complex that was Hoath Farm comprises the Manor House and a number of buildings which have been converted to, or built as replacements for, residential dwellings. Some of these residential buildings have been extended and some have large garages/outbuildings with links to the dwelling. All of the

respective changes of use, conversion and operational development in respect of these buildings have been approved.

Buildings A, B and C

65. The three new buildings lie to the east of the main part of the complex and given their distance away from the main complex they are separate from it. Furthermore, they bear little or no resemblance in shape, style, external materials, design or size to other buildings on the appeal site or the complex in general.
66. I accept that the former chicken sheds were not attractive buildings but their rural, agricultural and relatively neutral appearance has been changed to a completely residential one including brickwork corners, slate roofs and extensive fenestration (as proposed but not all inserted at the time of my visit). In addition the surrounding domestic planting and hardstanding for vehicles (as proposed) would emphasise the character and appearance of the domestic use to the detriment of this countryside location.
67. I also accept that the extent of the enlargement of each building may not be great overall but the cumulative effect of the three extensive sloping slate roofs, which were glistening in the sun on the day I visited, were very prominent in the landscape when viewed from the nearby public footpaths and were out of keeping with the character of the area. In this respect I note that the external materials so far used and proposed on these buildings is different from the clay roof tiles and cladding used on the residential units that have been completed and as proposed for Units 7 and 8. These different materials further emphasise the distinction between these buildings and the other parts of Hoath Farm to the detriment of its cohesive appearance.

Unit 7

68. Unit 7 is located some distance from the main group of buildings that comprise the complex at Hoath Farm; it is a substantial building of brickwork construction and it has a utilitarian appearance. Because of its relative isolation and its different appearance from the other buildings it appears as a separate unit and this separation is enhanced by the extent of its curtilage and the proposed hardstanding and domestic planting. From the drawings it seems to me that the proposed curtilage appears to be somewhat larger in the s.78 appeal than that in the prior approval and from what I saw on my visit; in addition the external features, particularly the fenestration, that were granted approval⁴⁹ are different from those in the proposal⁵⁰ with which I am concerned largely arising from the proposed addition of the link.
69. The proposed link between the residential unit and the very large three bay garage would have a footprint nearing the size of the footprint of the residential building and these elements would be disproportionate to the size of the residential unit. The resulting significant amount of built development would be on the very edge of Hoath Farm and close to the surrounding orchards. Such development extending into the countryside and separate from the cluster of other buildings would not reflect the rural character of the area.

⁴⁹ Drawing No 118/06 Document 7

⁵⁰ Drawing No 179/13

Unit 8

70. The works that have been done to Unit 8 are said by Mr Hawkins to be within those permitted by the prior approval therefore they are not structural. But the development that is proposed is far in excess of the works that had been done that I saw on my visit. No structural report in respect of Unit 8 has been provided but from what I saw it appears to me that most probably the Unit would need a new roof, including a new roof structure, given the current wavy and sagging ridge line and corrugated covering and the walls appeared to me to require rather more than re-cladding. The proposals for Unit 8 include reclaimed clay tiles on the roof and reclaimed brickwork and timber boarding on the wall and without further details the question of whether the proposals for Unit 8 would amount to a new building rather than the formation of a residential unit cannot be answered. The proposed external materials would be in keeping with other buildings within Hoath Farm.
71. There would also be a link from the Unit to a large garage which would be almost as high as the residential building and which would be nearly half of the size of the footprint of the residential Unit. Whilst this development would be closer to the complex of other buildings, it would increase the amount of built development at Hoath Farm to an unacceptable amount. In this respect I note that the prior approval for a change to residential use only relates to the building itself and a curtilage of the same footprint whereas that proposal is far more extensive both in the amount of residential built development and curtilage.
72. With regard to the garages proposed for Units 7 and 8 a similarly large garage was considered by an Inspector in an appeal in respect of the Former Stables at Hoath Farm⁵¹. That Inspector had concerns about the garage in that case but, on balance given its particular location he granted approval for it; on balance, I have found otherwise in respect of the proposed garages for Units 7 and 8

The development as a whole

73. The original farmstead at Hoath Farm apparently comprised the farm house and associated buildings; and the chicken sheds were built in the 1970s. In place of a farm there is now a housing complex of some eight dwellings with large ancillary buildings with a further eight dwellings and two large ancillary buildings proposed. The additional proposed eight dwellings would completely change the character of the area from a moderate sized rural housing development into a 16 unit housing estate.
74. I appreciate that the Appellant has undertaken the development at Hoath Farm to a high standard but the buildings are domestic in character and appearance and no longer have any resemblance to an agricultural farmstead. The landscaping that has been done thus far is attractive but it is undeniably domestic and the proposals would increase the domestic extent and appearance of the site even more, with additional hardstanding, access ways and buildings. Hoath Farm would no longer form part of the rural and agricultural landscape but would be a domestic housing estate encroaching into the countryside.

⁵¹ APP/J2210/E/09/2114941 etc Appendix 17 to Mr Collings' [Mr Hawkins'] proof

75. I am aware that by virtue of the various prior approvals a change of use of to residential use of buildings and land could have taken place but the impact on the character and appearance of the countryside would not have been so great given the restrictions on additional buildings, the works that could be undertaken within the approvals which would leave the appearance of the buildings relatively unchanged from their form as agricultural buildings and the size of curtilage permitted.

Other matters

76. I am aware that the Council has in the past commented on the beneficial effect of development at Hoath Farm so far as the listed buildings are concerned. However, in my opinion, as the buildings and units in these appeals are located some distance from the listed buildings the proposals have no effect on them or their settings.

77. By virtue of s.79 of the 1990 Act I have powers to issue a split decision and there is also a power under s.177(3) to grant permission in respect of the whole or part of the matters stated in the notice as constituting the breach. I have considered whether the individual units and/or proposals could be looked at separately so as to allow a grant of planning permission. I consider that it would be possible to separate various elements of the proposal but for the reasons I have given above in respect of the buildings and the units I do not consider it appropriate to do so.

78. I have also taken into account whether any of the suggested conditions⁵² would render the proposal or the new buildings acceptable; but for the reasons given I do not consider that the imposition of conditions would overcome the harm I have identified.

Conclusions

79. The benefits of the proposal include the provision of housing in an area where windfall housing such as this is needed to boost the supply housing; there would be, albeit minor, economic and social benefits in the form of such things as an increased demand for labour and building materials and an increase in housing. But I have found that the proposal would not be sustainable and it would have an adverse effect on the character and appearance of the countryside. These later matters outweigh any benefits and given my finding that the proposal would not comply with the various development plan policies, emerging plan policies and the Framework to which I have been referred I conclude that the ground (a) appeal fails, the deemed planning application is refused and the s.78 appeal is dismissed.

Appeal A: The appeal on ground (f)

80. An appeal on ground (f) is on the basis that the requirements of the notice exceed what is necessary to remedy the breach. In having to consider the ground (f) appeal I have found against the Appellant on his other grounds of appeal and have thus found that the allegation that three new buildings have been erected is an accurate description of what has happened, rather than the description of 'external alterations to three existing buildings' as submitted by the Appellant.

⁵² Document 10

81. In determining this ground of appeal I have to consider whether there are any obvious alternatives to the stated requirements that would remedy the breach⁵³. The obvious alternative in this appeal is the schedule of works⁵⁴ that the Appellant has prepared as an alternative to the requirement to demolish the three buildings. The schedule is marked as a 'draft' and is in three parts, A/'Removal of the exo-skeleton shell'; B/'Work to be carried out to re-instate commercial buildings as before'; and C/'Works we would like the Inspector to accept, not being as before'. Mr Harper, who prepared the schedule, is not an architect or an engineer but he has a great deal of experience of all types of buildings and matters pertaining to them. Nevertheless part A of the schedule is merely an outline list of works and it lacks the precision and specificity required in the drafting of requirements; in addition it is incomplete with regard to the totality of the works undertaken because it concerns only the exo-skeleton and there is no mention of other works, such as the relaying of the floors and the foundations that have been provided for the exo-skeleton.
82. With regard to the other parts of the schedule, I have no powers to order re-instatement as set out in part B or to permit the matters set out in part C.
83. Given the terms of the schedule of works I have considered whether it would be appropriate to vary the requirements to provide for a scheme of the works to be submitted which would overcome the lack of detail as submitted by the Appellant⁵⁵. A variation of a requirement to restore the land to its former state to a requirement that the land be restored to a scheme to be agreed with the local planning authority was upheld in *Murfitt*⁵⁶. But in a later case⁵⁷ the notice required the submission of a scheme of levelling and planting to be submitted to the local planning authority for approval; the Inspector found that the notice did not comply with s.173(3) in that it did not specify the steps which the authority required to be taken and he substituted precise requirements. It was held that having found that the notice did not comply with s.173, the Inspector had erred in varying its terms and he had no power to do so because the notice was a nullity.
84. It therefore seems to me that to vary the notice as submitted by the Appellant could render it a nullity.
85. The Appellant submits that there are pre-existing lawful use rights and the requirements to return the site of Buildings A, B and C to an empty space go beyond the breach of planning control which arises from the erection of the exo-skeleton and do not comply with the *Mansi* principle which established that the requirements must not purport to prevent an appellant from doing something he or she is entitled to do without planning permission, relying on lawful use rights or rights of reverter, GPDO or UCO rights, or any of the exceptions from the definitions of development⁵⁸. However, in this appeal I have found that as the three buildings are new buildings as alleged in the notice, they have no pre-existing lawful use rights.

⁵³ *Arnold v SSCLG* [2015] EWHC 1197 (Admin) (among others)

⁵⁴ Document 9

⁵⁵ Document D paragraph 14

⁵⁶ *Murfitt v SSE* [1980] 40 P&CR 254

⁵⁷ *Payne v NAW & Caerphilly CBC* [2007] JPL 117

⁵⁸ *Mansi v Elstree RDC* (1985) 16 P&CR 153

86. The purpose of the requirements is to remedy the breach by restoring the land to its condition before the breach took place⁵⁹. The alternative solution offered by the Appellant in the schedule of works does not describe the works to the necessary level of precision and I do not consider it appropriate to vary the requirements to provide for a scheme to be submitted. There are therefore no obvious solutions which would remedy the breach and overcome the harm identified. I consider that the requirement to remove the three buildings, together with the requirement to remove the resulting materials, does not appear to me excessive in that it accords with the statutory purpose so far as the allegation is concerned.
87. However, the third requirement is to 'Make good the land underneath the three former buildings'. It has been established that 'The recipient of an enforcement notice is entitled to say that he must find out from within the four corners of the document what he is required to do or abstain from doing'.⁶⁰ The Appellant did not make any submissions in respect of the third requirement but in my opinion, it is vague and subjective and offends the rule in *Miller-Mead*. I have powers to correct or vary the terms of a notice if I am satisfied that no injustice will be caused to either party. As the requirements would be reduced there can be no injustice to the Appellant or to the Council as the breach would be remedied by requirements 1 and 2. I will delete the third requirement accordingly.
88. The Appellant's appeal on ground (f), however, fails.

Appeal A: The appeal on ground (g)

89. The Appellant's ground (g) appeal has been settled in that the Council has agreed to an additional three months for the period for compliance amounting to nine months in total. I will vary the notice accordingly.
90. The appeal on ground (g) succeeds.

Appeal A: Conclusions

91. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the deemed application.

Appeal B: Conclusions

92. For the reasons given above I conclude that the appeal should be dismissed.

Decisions

Appeal A: Appeal Ref: APP/J2210/C/16/3158988

93. It is directed that the enforcement notice is varied by:
- (a) In part 5 the deletion of requirement iii in its entirety; and
 - (b) In part 6 the deletion of six months and the substitution of nine months as the period for compliance.

⁵⁹ S.173(4) of the 1990 Act

⁶⁰ *Miller-Mead v MHLG* [1963] 1 A11 ER 459

94. Subject to these variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B Appeal Ref: APP/J2210/W/16/3153039

95. The appeal is dismissed.

Gloria McFarlane Inspector

APPEARANCES

FOR THE APPELLANT

Mr S Randle Counsel
He called
Mr R Harper Planning Consultant
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FOR THE LOCAL PLANNING AUTHORITY

Mr G Atkinson Counsel
He called
Mr C Hawkins Planning Consultant
BA(Hons) Dip TP DMA

INTERESTED PERSONS

Mr A Bird Local resident
Ms S Voight Local resident

DOCUMENTS SUBMITTED AT THE INQUIRY

Document 1 - Statement of Mr Bird
Document 2 - Authority to take enforcement action report
Document 3 - Delegated report CA/16/00137/FUL
Document 4 - Comments by Mr Stocker, submitted by the Appellant
Document 5 - Enforcement Notes
Document 6 - Delegated report CA/12/01791/FUL
Document 7 - Drawings Nos 118/04 and 118/06
Document 8 - Drawings Nos 97/01 and 97/02
Document 9 - Schedule of works, lesser steps for ground (f), submitted by the Appellant
Document 10 - Statement of common ground and suggested conditions
Document 11 - *Mansi v Elstree RDC* (1985) 16 P&CR 153
Document 12 - *Spackman v Wiltshire CC* [1977] 1 All ER 257
Document 13 - *Pioneer Aggregates (UK) Ltd v SSE* [1985] 1AC 132
Document 14 - *Brentwood BC V SSE and Gray* (1996) 72 P&CR 61
Document 15 - *Coln Park LLP v SSCLG and Cotswold DC*
[2011] EWHC 2282 (Admin)
Document 16 - *Shimizu (UK) Limited v Westminster CC* [1997] 1WLR 168
Document 17 - *Barnwell Manor Wind Energy Ltd v East Northamptonshire DC, English Heritage, National Trust and SSCLG*
[2014] EWCA Civ 137
Document 18 - Mr Oates' statutory declaration
Document 19 - Mr Hawkins' response to the statutory declaration
Document 20 - *Arnold v SSCLG and Guildford BC* [2017] EWCA Civ 231
Document 21 - Bundle of email correspondence, submitted by the Appellant

DOCUMENTS SUBMITTED BY THE ADVOCATES AT THE INQUIRY

Document A - Opening comments on behalf of the Appellant
Document B - Opening submissions on behalf of the Council
Document C - Closing submissions on behalf of the Council
Document D - Closing submissions on behalf of the Appellant