
Appeal Decisions

Inquiry Held on 1 & 2 August 2017

Site visit made on 1 August 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 August 2017

Appeal A: APP/F1610/C/16/3156262

Land opposite 10 Cutwell, Tetbury, Gloucestershire GL8 8DZ

- 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 Clive Chivers against an enforcement notice issued by Cotswold District Council.
- The breach of planning control as alleged in the notice is:
Without planning permission, the laying of a hard surface on the Land ("the unauthorised Works")
- The requirements of the notice are:
 - (i) Permanently remove the hard surfacing material from the Land.
 - (ii) Restore the Land to its original level before any development took place using top soil with no additional spoil or waste material.
 - (iii) Allow the Land to regenerate naturally.
- The period for compliance with the requirements is 2 weeks.
- The appeal is proceeding on the grounds set out in section 174(2) (a) and (d) of the Town and Country Planning Act 1990 as amended.

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

Appeal B: APP/F1610/C/16/3163011

Land opposite 10 Cutwell, Tetbury, Gloucestershire GL8 8DZ

- 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 Clive Chivers against an enforcement notice issued by Cotswold District Council.
- The breach of planning control as alleged in the notice is:
Without planning permission, change of use of the Land from amenity land to use for storing building materials and equipment, waste items and vehicles.
- The requirements of the notice are:
 - (i) Remove from the land all building materials and equipment, waste materials and vehicles.
 - (ii) Cease the use of the Land for storage purposes.
 - (iii) Cease the use of the Land for parking vehicles.
 - (iv) Cease the use of the Land other than for forestry, for grazing, or in connection with an agricultural trade or business.
- The period for compliance with the requirements is 2 weeks.
- The appeal is proceeding on the grounds set out in section 174(2) (a) and (d) of the Town and Country Planning Act 1990 as amended.

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

Appeal C: APP/F1610/W/16/3156213

Land opposite 10 Cutwell, Tetbury, Gloucestershire GL8 8DZ

- 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 Clive Chivers against the decision of Cotswold District Council.
- The application Ref 15/04146/FUL, dated 21 September 2015, was refused by notice dated 11 April 2016.
- The development proposed is Erection of 2 bedroom cottage and associated landscape works.

Summary of Decision: The appeal is dismissed.

Applications for costs

1. At the Inquiry applications for costs were made by Mr Clive Chivers against Cotswold District Council and Cotswold District Council against Mr Clive Chivers. These applications are the subject of separate Decisions.

Background and procedural matters

2. The site is located within the Tetbury Conservation Area (TCA) and in the Cotswold Area of Outstanding Natural Beauty (AONB). Cutwell is a narrow street which drops steeply down to a ford on the south-western side of the historic core of Tetbury. It is common ground that this part of the TCA has a semi-rural character and marks a transition between the tightly built up centre and the rural countryside to the south.
3. Nos. 2-10 Cutwell comprise a terrace of cottages lining the east side of Cutwell. Historically all these cottages had a designated garden area on the west side of the road. Nos 2-6 retain their gardens, but the former garden to No.8 now forms the access to a development to the rear known as Barley Croft.
4. The historic garden to No. 10 is the subject site for all the appeals. The Council says that the house together with its garden was purchased by Mr S Genillard and registered on 10 April 2012. In January 2013 Mr & Mrs Genillard made an application for the erection of a dwelling on the garden land. This was refused and subsequently dismissed at appeal¹ (the 2014 appeal).
5. Whilst the 2014 appeal was pending, the land was re-registered and this had the effect of severing the house from the garden land on the title on 18 December 2013. The house and garden were then disposed of separately and the appellant bought the garden only (now the appeal site) on 5 January 2015. None of this evidence is challenged.
6. At the Inquiry I considered Appeals A & B first together with the respective applications for deemed planning permissions for the development subject of the 2 enforcement notices (Notice A and Notice B). I then heard evidence on Appeal C and the planning merits of erecting a dwelling on the land. These decisions follow the same order.
7. Appeal A was originally submitted on Grounds (a), (d) and (f). Subsequent correspondence said that the appeal should proceed on grounds (a) and (c). However at the Inquiry it was confirmed by the appellant that both appeals are

¹ Appeal reference: APP/F1610/A/13/2203790 dated 4 February 2104.

proceeding on grounds (a) and (d) only. My assessment of these appeals is on these amended grounds only.

8. All evidence, at the Inquiry, in respect of Appeals A & B was taken on Oath or Affirmation.

Appeals A & B

The Notices

Notice A

9. The parties agreed that requirement (iii) was superfluous because it would preclude any cultivation of the land and thus go beyond the purpose of the Notice.

Notice B

10. It was also agreed at the Inquiry that the allegation subject of Notice B is inconsistent with the requirements. In particular the former does not allege parking of vehicle whereas the requirements require that parking (amongst other matters) ceases.
11. Notwithstanding this, the evidence by both parties clearly addresses the use of the site for parking and thus a correction of the allegation would not cause injustice.
12. Similarly it was agreed that Requirement (iv) was unnecessary.
13. In respect of the proposed correction to the allegation in Notice B and variations to the requirements for both Notices I am satisfied that because these were raised at the opening of the Inquiry and were not challenged by either party, neither would result in any prejudice.

Appeals A & B: Ground (d)

14. This ground of appeal is that the development subject of the allegation is immune from enforcement action by reason of the passage of time. Section 171B of the Act² says that in the case of any breach of planning control, other than exceptions that do not apply here, no enforcement action can be taken in respect of operational development (in this case the laying of hardstanding) after the end of any period of four years beginning with the date of the breach. Notice A was issued on 08 June 2016 and thus to be immune the latest date on which the breach of planning control could have occurred was 08 June 2012.
15. Similarly in respect of the alleged change of use subject of Notice B, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach³. Thus to be immune the change of use would have to have commenced by 08 June 2008.
16. The Council says in this case the immunity periods in S171B have to be considered in the light of the planning history of the appeal. Thus notwithstanding the evidence submitted in terms of the surface treatment or any previous uses of the site, a new chapter in the planning history of the site commenced when it was severed from the dwelling known as No.10 Cutwell.

² Town and Country Planning Act 1990 as amended

³ S171B (3) of the Act

Accordingly it says from 18 December 2013, the appeal site became a new planning unit in its own right. And from that date, because it was no longer physically or functionally connected with the dwelling at No.10, it is argued that the commencement of any period relied upon under S171B cannot predate the creation of the new planning unit.

17. The appellant did not accept this approach, and said that the concept of a new planning unit is not relevant for reasons I come back to below. Consequently he says because the appeal site has been used for parking and storage, including storage of building materials for considerably in excess of 10 years, the uses subject of Notice B are immune from enforcement action. But the appellant provided scant evidence of the prior existence of any hardstanding which may have been present on the site prior to its acquisition by him. The evidence suggests at best that there was some hard-standing possibly close to the access. However there is little or no evidence of the extent of that hard-standing and thus I can give it little weight.
18. But even if I accepted the appellant's assertion that there had been an area of hard-standing across the site and it had become lawful by reason of the passage of time prior to 2013, the evidence shows that before the hard-core was laid across most of the land, the levels within the site were altered and remodelled. Thus, on the balance of probability, any pre-existing hardstanding was removed when the new hard-core was imported onto the site and spread by the appellant in about 2015-2016. Hence any previous hardstanding on the site does not count towards the immunity period because the hard-core and the re-modelled ground has replaced and superseded any previous surface on most of the land.
19. The appellant argued that the appeal site is (still) land incidental to the enjoyment of No.10. In such circumstances he said parking, storage and the laying of hardstanding all benefit from permitted development rights enshrined in Part 1 of Schedule 2 of The Town and Country Planning (General Permitted Development) Order 2015 (the GPDO). This says that, subject to various limitations, certain uses and development in a residential curtilage do not require a formal grant of planning permission.
20. In order to come to a view as to whether the appeal site is separate and stands on its own, or remains part of the planning unit of No.10, it is necessary for me to make a judgment in the light of the facts in this case as to what should be construed as the relevant planning unit. The Council relied on *Burdle*⁴ which says that "it may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount to a separate use both physically and functionally". Firstly there is no dispute that the appeal site and No.10 were in separate ownership and or occupation at the date the Notices were issued. Secondly, in terms of physical links, the appeal site has always been separated from the dwelling at No.10 by the public highway and this remains the case. However I consider the determinative aspect in this appeal is the third variable, namely the functional link.
21. The house plot of No.10 is in residential use and the appellant describes the appeal land as a 'development site'. However he accepted that the occupier/and or owner of No.10 had no rights of access onto the appeal site or

⁴ *Burdle and Another v Secretary of State for the Environment and Another* [1972] 1 W.L.R. 1207

- rights to use it in any way. The appellant was unable to identify any functional link with the appeal site; neither could he identify any ancillary activity. The evidence shows, fairly and squarely, that the two parcels of land are no longer functionally related.
22. In these circumstances the suggestion that the two sites should be considered as a single planning unit is unconvincing. Consequently on the *Burdle* test or 'rule of thumb', and as a matter of fact, I conclude that the appeal site is a now a separate planning unit. But even if I had accepted the appellant's argument, photographs and evidence submitted to the Inquiry indicate that the site was not used for non-residential purposes prior to its acquisition by the appellant in 2015. However evidence given under oath indicates that the land has been used for non-residential purposes after acquisition by the appellant. This evidence is supported by the submitted photographs.
 23. Accordingly, a new chapter in the planning history of the appeal land commenced on 18 December 2013, and the appeal site cannot rely on any deemed planning permission for parking, storage or the laying of hardstanding conveyed by Schedule 2, Part 1 of the GPDO that may have existed before that date. This is because such deemed planning permission is only available to sites that are within a residential curtilage and also because most if not all the features which were previously on the land have been removed since late 2014.
 24. Consequently the use of the site independent from No.10, commenced after 18 December 2013, and it is common ground that the hardstanding was also laid after that date. Hence in neither case has the development, whether operational or a material change of use, become immune from enforcement action by reason of the passage of time.
 25. I thus conclude that the development subject of the Notices does not benefit from the immunity granted by S171B of the Act. In coming to this view I have taken account of the appellant's argument that the tests of 'abandonment' and the relevant case law should be considered. But nothing in the evidence suggests that there has been an intention to abandon the use of the site and thus that argument carries little if any weight in the appeal before me. Consequently the appeals on ground (d) fail.

Appeals A & B Ground (a) and the deemed applications

26. The appellant's primary arguments under this ground are firstly that the appearance of the land is not materially different from that that could have resulted by utilising permitted development rights when it was the garden to No.10. Secondly he says that the appearance of the hardstanding is similar to the former garden land to No.8 which now provides the access to the Barley Croft houses to the west and rear of Cutwell. Thirdly he asserted that the storage of waste building materials and vehicles had subsisted for many years on the appeal site and that there was historical evidence of hardstanding.
27. In turn the Council says that the creation of a hardstanding fundamentally altered the character of the site from a rural, green space, to a hard, urban quasi-industrial space. In addition the storage use and 'non-residential' parking have introduced a commercial use incompatible with the residential character and semi-rural character of this part of the TCA.

28. The appellant provided an ecological report compiled following a site visit on 17 July 2013. This shows that at that date the site was becoming overgrown by rank vegetation. Photographs show that there was considerable shrubby growth along the frontage, at least one apple tree and grassed areas. The site also accommodated a shed, coal bunker and some isolated areas of waste material including tipped building rubble and wooden sheets. A photograph taken by a neighbour at about the same time⁵ shows a substantial hedge to the rear or west boundary. Earlier photographs taken in April 2010 show that the appearance of the then garden was verdant, if overgrown. The Council took photographs of the site in December 2014 and these show that much of the site was grassed although most of the taller vegetation, other than a small tree, had been cleared. These latter photographs also showed a considerable quantity of what appears to be rubble and assorted building materials.
29. Taking all this evidence together it appears, on the balance of probabilities, that the appeal site was previously largely green and verdant at the time when it was garden attached to No.10. On the balance of probabilities, at the time the site was severed from No.10, the site was, on the evidence before me, a garden which provided a soft green backdrop to Cutwell. Thus the Council's description of the site as a 'rural green space' appears apt. This is the baseline that I consider is appropriate for assessing the effect on the TCA. In these circumstances whether or not there was at that stage an opportunity available under the GPDO to install a significant area of hardstanding is of little relevance to this appeal. In any event, as I have noted above, most if not all of the original features of the land have been removed by the appellant and thus cannot be relied upon.
30. At the time of my visit in August 2017, I saw that most if not all the vegetation had been removed from the site and it had been surfaced with hard-core. This appearance of the land equates to that shown in photographs taken by the Council on 27 April 2016, about 6 weeks before Notice A was issued. In these circumstances and given the lack of evidence to the contrary, there is no reason to doubt that at the date of issue this was the state of the land.
31. I saw that the gardens at Nos. 2-6 do have limited areas of hardstanding and ancillary 'garden buildings'. But the planting and trees which are also in these gardens provide a soft foil to the street and help to create the 'semi-rural character' identified by the Council as an asset to the TCA. I also saw that other gardens visible from Cutwell add to this semi-rural character.
32. In contrast, the appeal site now has a harsh commercial and alien appearance and the change of use, evidenced by the photographs provided by the Council and local residents, exacerbates the serious and harmful effect of the hardstanding on the character and appearance of the TCA. In coming to this conclusion I note the loss of the garden to No.8, but this now has an alternative purpose as an access to residential property and in any event is softened by perimeter planting. I have also taken account of the fence to the south of the access to Barley Croft but that does not alter my conclusions.
33. I therefore find that the development subject of the 2 Notices conflicts with Policies 15 and 18 of the Cotswold Local Plan (CLP) because these seek, amongst other matters, to preserve or enhance the character and appearance

⁵ 22 September 2013.

of the TCA and to avoid adverse environmental or visual harm to the site and its surroundings.

34. For similar reasons I find that both the change of use and the associated hardstanding harm the TCA. In these circumstances there is also conflict with the National Planning Policy Framework (the Framework) which says that great weight should be given to the conservation of designated heritage assets, in this case the TCA. Whilst that harm is less than substantial it is not outweighed by any public benefits arising from the developments. Indeed the appellant has not provided evidence of any such benefits arising from the laying of the hardstanding or the use of the site for storage and parking of vehicles and other chattels including building materials and waste.
35. Accordingly, the Appeal A and Appeal B ground (a) appeals do not succeed.

Overall conclusions on Appeals A & B

36. For the reasons given above I conclude that the appeals should not succeed. I shall uphold the enforcement notices and refuse to grant planning permission for the deemed applications.

Appeal C

Main Issue

37. The main issue in this appeal is the effect of the erection of the proposed dwelling on the character or appearance of the TCA and the designated Cotswold AONB.

Reasons

38. As I have noted above, a previous application for a single dwelling was refused and subsequently dismissed on appeal. The findings in that decision are material considerations which carry considerable weight in this appeal unless there has been significant amendment to adopted policy or guidance or if other material considerations apply.
39. The appellant conceded that adopted policy is unchanged and there has been no significant change to either local or national government guidance. However he says that the submitted changes to the design and form of the proposed dwelling overcome the concerns expressed about the effect on the TCA. In particular he said that the proposed dwelling would be located at the back of the site and would not project towards the street as previously proposed.
40. As a matter of fact the proposed house is both greater in height and has a larger footprint than the scheme that was the subject of the 2014 appeal. This was confirmed in an agreed note between the Council and the appellant and reaffirmed by Mr Seiersen in evidence. It was also agreed that the resulting built coverage of the plot would be considerably greater than in the case of any other garden plot in Cutwell. Indeed it appears that the proposed site layout is not finalised and would require amendment to ensure vehicular turning facilities can be provided within the site. Thus the proposed vegetative cover is likely to be less than that shown on the submitted plans.
41. Whilst I agree that in views from the south the proposed house would not be readily visible, in other views it would appear as a substantial building within

the historic garden plots on the west side of Cutwell and this is accepted by the appellant. These open garden plots are an important feature of this part of the TCA because they mark the transition from the densely developed historic core to the countryside beyond. The openness of the garden plots is a positive asset to the TCA and this would be seriously compromised by a dwelling on the land. Moreover the appellant conceded at the Inquiry that the proposed dwelling was contrary to the aims and spirit of CLP Policy 15 and 18 and would result in harm to the TCA, though he said this would be less than substantial.

42. I have noted the design features which are at issue between the parties, and the arguments regarding whether or not the detailing complies with the aims of the Cotswold Design Guide (subject of CLP Policy 42). However whether or not this is the case is not determinative in this appeal because the height, bulk and footprint of the proposed dwelling would be seriously intrusive in this semi-rural part of the TCA. Thus it is not necessary for the purposes of this appeal to consider the detailing of the proposed building. Notwithstanding this, given the location of the appeal site within the TCA, I find the discrepancies on the submitted plans, the lack of a final layout and the absence of 2 elevations unfortunate at best and at worst unacceptable in a proposal to build in an historic location designated as a conservation area.
43. The appellant sought to rely on informal planning advice provided by the Council in 2012, which, he said, indicated that the erection of a small dwelling on the appeal site could be feasible. But I give little weight to this because such advice has now been tested through the submission of an application in 2013 and the subsequent dismissed 2014 appeal. Therefore whilst I can understand the frustrations of the appellant at the present situation, he should have been aware, when he purchased the land in early 2015, of the dismissed appeal and the reasons for that decision. In those circumstances he therefore took the risk of further failure in submitting the application subject of the appeal before me.
44. For the reasons I have given the proposed dwelling would be contrary to the aims of the adopted development plan⁶ and Policies 15 and 18 in particular. I also find that the proposed dwelling would result in less than substantial harm to the TCA. In such circumstances the Framework says that this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use.
45. The proposal would result in the erection of a single dwelling, though this benefit falls to be considered in the light of the demonstrable 5 year supply of housing land. This supply is not disputed by the appellant. In terms of optimum viable use, the appellant accepted that use of the appeal site as a garden would amount to an optimum viable use. Thus the public benefit amounts to the erection of one house.
46. The site is within the TCA and the Framework says that great weight should be given to the significance of the Conservation Area. Similarly paragraph 115 of the Framework says that great weight should be given to conserving landscape in AONB's. The proposed house would seriously erode the openness of the appeal site and the character of the semi-rural fringe of the historic core and hence would harm the significance of both the TCA and AONB in turn. In these

⁶ The Council accept that the adopted CLP is 'out of date' but in terms of the policies relevant to this appeal I find that they are consistent with the Framework and thus I give them full weight.

circumstances the benefit of a single house is outweighed by these other material considerations.

47. For the reasons I have given the proposed house and associated works would not preserve the character or appearance of the TCA and would harm the landscape of the AONB. Consequently Appeal C does not succeed.

Formal Decisions

Appeal A: APP/F1610/C/16/3156262

48. It is directed that requirements in paragraph 5 of the Enforcement Notice are varied by:
49. The deletion of step (iii) "allow the land to regenerate naturally" in its entirety.
50. Subject to this variation the appeal is dismissed, the enforcement notice is upheld, and planning permission is refused for the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B: APP/F1610/C/16/3163011

51. It is directed that the allegation in paragraph 2 of the Enforcement Notice is corrected by the addition of "and for the parking of vehicles."
52. It is directed that the requirements in paragraph 4 of the Enforcement Notice are varied by the deletion of step (iv) "Cease the use of the land other than for forestry, for grazing, or in connection with an agricultural trade or business" in its entirety.
53. Subject to this correction and variation the appeal is dismissed, the enforcement notice is upheld, and planning permission is refused for the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal C: APP/F1610/W/16/3156213

54. The appeal is dismissed.

Sukie Tamplin

INSPECTOR

APPEARANCES

FOR THE APPELLANT: Mr B Hargreaves, Agent

He called

Mr Clive Chivers	Appellant in person
Mr Michael Seiersen	Architect

FOR THE LOCAL PLANNING AUTHORITY: Mr C Streeten of Counsel

He called

Mrs Yvonne Poole	Enforcement Officer Cotswold District Council
Mr Justin Ayton	Design and Conservation, Cotswold District Council
Ms Claire Baker	Senior Planning Officer, Cotswold District Council
Mr Kevin Farnham	Local Resident

INTERESTED PERSONS:

Mr Ian Bailey	Local Resident
---------------	----------------

DOCUMENTS submitted at the Inquiry

1. Photographs taken by residents 2010-2017
2. Email exchange between former owner of appeal site and Mr Farnham
3. *Burdle and another v SSE and another* [1972] 1 WLR 1207
4. *Essex Water Co v SSE* [1989] EGCS. 20 (QBD)
- 5.....*Ian Carl Hughes v SSETR and South Holland District Council* [2000] EWCA Civ 506
6. *Felicity Irving and Mid-Sussex District Council and Mr J Ball T/A SDP Developers and Building Contractors* [2016] EWHC 1529 (Admin)
7. *Goring-on-Thames Parish Council and South Oxfordshire DC, the Environment Agency and Goring and Streatley Community Energy Ltd* [2016] EWHC 2898 (Admin)
8. Agreed note re windows plot coverage, scale and site levels.
9. Council note of progress on processing application subject of appeal.
10. Council Design Guides, "Traditional Dormer Windows" and "Traditional Casement Windows"
11. Application drawings Appeal C at true scale
12. Closing submissions on behalf of the Council
13. Closing submissions on behalf of the Appellant
14. Costs application by appellant
15. Response to costs application by the appellant and costs application by the Council.