



Appeal Decisions

Site visit made on 20 August 2019

by Mr A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 18 November 2019

Appeal A and B Refs: APP/P0119/C/18/3211555 and 3211559

Land adjoining Hazel Cote, 82 Gloucester Road, Rudgeway BS35 3RS

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr John Arnold against two Enforcement Notices (hereinafter Notice 1 and 2) issued by South Gloucestershire District Council.
- The Enforcement Notices were issued on 15 August 2018.
- In Notice 1 the alleged breach of planning control is described in the following terms: *Unauthorised change of use of the land edged red on the plan attached to the Notice from a mixed use of agricultural use and equestrian use (sui generis) to a mixed use of agricultural use, use for incidental residential purposes and the storage and sales of vehicles (sui generis), including as part and parcel of this unauthorised change of use the siting of a metal container, the erection of a fence and gate and the laying of hardstanding.*
- In Notice 2 the alleged breach of planning control is described in the following terms: *Unauthorised change of use of the land edged red on the plan attached to the Notice from a mixed use of agricultural use and equestrian use (sui generis) to ancillary residential use.*
- The requirements of issued Notice 1 are to: (1) *cease the use of the land and buildings edged red on the attached plan for incidental residential purposes and the storage and sales of vehicles,* (2) *cease the use of the land edged red for any use except agricultural use and equestrian use,* (3) *remove all of vehicles from the land edged red,* (4) *remove all domestic paraphernalia from land and buildings edged red including boats,* (5) *remove the metal container numbered 1 from the land edged red,* (6) *reinstate the fence between the points labelled A and B to match the existing post and rail fence on the boundary between the land edged red and Hazel Cote,* (7) *remove the fence and gate between the points labelled C and D,* (8) *remove the hard standing from the area shown hatched green on the plan attached to the Notice,* (9) *re-seed the area hatched green with grass and* (10) *return the land edged red to its condition prior to the breach taking place.*
- The requirements of issued Notice 2 are to: (1) *Cease the use of the land edged red on the plan attached to the Notice for ancillary residential purposes,* (2) *cease the use of the land edged red for any use except agricultural use and equestrian use,* (3) *remove the fences between the points labelled A and B, and B and C, and* (4) *reinstate the fence between the points labelled A and C to match the post and rail fencing removed.*
- The period for compliance with the requirements is 4 months in Notice 1 and 2 months in Notice 2.
- Appeal A and B are proceeding on the grounds set out in section 174(2) (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period in Appeal A and B, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Summary of Decisions: The appeals succeed in part on ground (f) and (g) and the Enforcement Notices are upheld with corrections and variations in the terms set out below in the Formal Decisions.

The appeals on ground (b)

1. The burden of proof in enforcement appeals is on the appellant, Mr Arnold, with the standard of proof being the balance of probabilities. For an appeal to succeed under this ground, Mr Arnold needs to show that the breach of planning control alleged on the face of Notice 1 and 2 have not in fact occurred. The relevant date is that of the issue of the notices.
2. Mr Arnold acquired the appeal property in 1999 and maintains that all the land under his ownership is in residential use. The extent of land under his occupation is shown edged red on Her Majesty's Land Registry title plan.¹ In response to searching questions found in the Planning Contravention Notice issued by the Council, Mr Arnold states that his land is part of the curtilage to Hazel Cote and forms a single unit of occupation². Essentially, the ground of challenge is that no breach of planning control has occurred because the land to which Notice 1 and 2 relate is in residential use.
3. It is reasonable to consider the precise geographical area in determining whether the alleged change in the use of the land constitutes a material change of use. The concept of the planning unit ['PU'] and curtilage are distinct and separate; they should not be confused. In considering whether a material change of use of land ['MCU'] has taken place, it is necessary to identify the appropriate PU.
4. First, whenever it is possible to recognise a single main purpose of the use of the occupier's land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land. Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate PU. It should be borne in mind that the area outlined on a title plan is not necessarily determinative of the PU.
5. Mr Arnold owns all the land outlined red on the title plan and Hazel Cote is a dwelling-house located within a large and spacious plot. It does not necessarily follow that all the land constitutes a residential PU. The submitted evidence includes aerial images taken between 1991 and 2017. The validity of this information has not been challenged. Although only a snapshot in time, this evidence is instructive of the land's layout and configuration. The images captured between 1991 and 2008 show Hazel Cote with land immediate around and about it. This area appears to be in use for residential purposes. For example, in the 2005 photograph play equipment seems to be on display. A small portion of this land situated along the property's boundary with Gloucester Road, and outlined in red on a site plan attached to an existing use Lawful Development Certificate ['LDC'], is used for car sales and storage³.

¹ Title number AV206211.

² Grounds of appeal and appendix 1 and 2.

³ Council ref: PTE/2605/CLE approved 26 August 2014.

6. In contrast, the land located to the rear of both the dwelling and garden forms a separate parcel the boundary of which is enclosed by dense vegetation. This area is separately accessed. In one corner of this land there is a rectangular stable building with hard-standing. The 2017 image shows a track and motorised vehicles parked on this parcel of land.
7. The site plan attached to Notice 1 and 2 show smaller parcels of land and exclude the residential property as well as the area subject to the LDC. The identified areas appear physically separate albeit a section of post-and-rail fence had been removed for access. These areas are mainly used for an agricultural and equestrian purpose. There is evidence of unity in terms of land ownership, but, as a matter of fact and degree, the areas that are subject to enforcement action are separate with distinct and substantially different and unrelated uses.
8. Mr Arnold's own evidence is that, during the period leading up to the issuing of both Notices, the areas covered by Notice 1 and 2 were used for residential purposes in connection with his use of the dwelling-house. The latter supplanted the agricultural and equestrian use of the area covered by Notice 2. The residential and retail of motorised vehicle activity was introduced to the land covered by Notice 1. This resulted in a mixed agriculture, equestrian, residential and storage and sale of motorised vehicle use that has, in fact, been facilitated by the siting of a metal container, the erection of a fence and laying of a hard-surface. While the container has been removed and LDC land is now used for car sales, at the time when the Notices were actually issued, the introduction of a primary residential use and the storage and sale of vehicle activity effected a change in the use of the land subject to Notice 1.
9. I therefore find that both Notices correctly identify the areas where an alleged MCU occurred, but the description of the allegation is incorrect. This is because *use for incidental residential purposes* is too vague and imprecise: it should also be borne in mind domestic garden is not a planning land-use. Additionally, the use of superfluous terminology is unnecessary. It is necessary to get the issued Notices in order if I can. This is, of course, subject to the test of injustice.
10. The allegation in both Notices should be corrected so as to accurately reflect the reality on the ground. I suggest that the allegation is described in the following terms in Notice 1:

Without planning permission, the material change in the use of the land edged red from a mixed agriculture and equestrian use to a mixed-use comprising agricultural, equestrian, residential and the storage and sale of motorised vehicles facilitated by the siting of a metal container, the erection of a fence and gate and the laying of hardstanding.

Notice 2 should read:

Without planning permission, the material change in the use of the land edged red from a mixed-use of agriculture and equestrian to a residential use.

The steps required for each Notice would need to flow from the corrected allegation.

11. The imprecision in description of the allegation is does not necessarily render the Notices a nullity. This is because the matters that appear to the Council as constituting a breach of planning controls are generally stated. The issued Notices have been interpreted on the basis that a residential and the sale of motorised

vehicle use has been introduced to the area covered by Notice 1, and a separate residential use introduced on the parcel of land covered by Notice 2. In addition, it is reasonable to look at the whole of the Notices, including the requirements, and each one clearly alleges a MCU without planning permission. The described allegation as issued is not hopelessly ambiguous nor is it has it caused significant confusion. I am satisfied that the intended corrections will cause no injustice to any party and so the Notices are correctable.

12. On the basis of the available evidence, I find that the matters alleged in corrected Notice 1 and 2 had occurred as a matter of fact. The appeals on ground (b) must therefore fail.

The appeals on ground (c)

13. Mr Arnold needs to adduce sufficient and precise evidence to show that, on the balance of probabilities, the corrected matters alleged do not constitute a breach of planning control. Essentially, his argument is a simple one, namely, that the areas identified on the site plan attached to Notice 1 and 2 falls within the curtilage to Hazel Cote and can be used for incidental residential purposes.
14. Section 55(1) includes in the definition of "development" the making of any material change in the use of other land. It must be emphasised that the activity which constitutes the second limb of the term '*development*' is not merely a change of use, but a '*material*' change. The concept of a MCU is not defined in any statute or statutory instrument. The question as to whether or not a change of use is material is that it is largely a matter of fact and degree. A MCU requires a change in the definable character of the use of the land.
15. The land to which the Notices relate were used for agricultural and equestrian purposes. As I have already stated elsewhere, during the period leading up to the issuing of the Notices these areas were primarily used for residential purposes in connection with the dwelling-house. The undisputed photographic information shows extensive areas were used for these activities. Subdividing barriers around and about the dwelling-house had been physically removed. A large amount of area was hard-surfaced and subsequently used for storage and sale of motorised vehicles. The nature of the use of the land covered by Notice 1 changed to a mixed-use comprising agriculture, equestrian, residential and the storage and sale of motorised vehicles. The area covered by Notice 2 changed from agriculture and equestrian to residential.
16. The introduction of the residential and car storage and sale activity changed the layout and configuration of the land given the extent of the operations. For instance, the open-air storage of motor vehicles and spread of domestic paraphernalia has had a visual impact. The nature and scale of the residential and car storage and sale activities resulted in a change to the physical appearance of the land. In addition, the introduction of these uses was likely to generate significant off-site impacts, given the potential increase in the frequency of comings and goings and the use of a separate gated access from Gloucester Road. The reasons for issuing the Notices refer to land-use planning consequences given the policy constraints affecting the land.
17. Whichever way one scrutinises the presented evidence I consider that, in all intent and purposes, the scale of the residential and car storage and sale operations are markedly and significantly different in land-use terms compared to the agricultural and equestrian use. The former being significantly different in

activity and character to the latter. As a matter of fact and degree, I find that the alleged matters in the corrected Notice 1 and 2 resulted in a dramatic change in the definable character of the land the nature of which effected a MCU, which falls within the meaning of development for planning purposes.

18. Mr Arnold relies on the operation of s 55(2)(d) of the Act. It excludes from the meaning of "development" the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such⁴.
19. What is "curtilage"? The term *curtilage* is relevant to this provision and sections of the Town and Country Planning (General Planning Development) Order 2015 as amended [the 'GPDO'] where the term has been defined in certain Classes.⁵ It defines an area of land in relation to a building and not a use of land. Frequently the residential curtilage will also equate with the residential PU, for example, the house and garden plot on a housing estate. It is also not uncommon for land to be beyond the curtilage even though it is in the same unit of occupation, not physically separate, in use for residential purposes incidental to the dwelling-house use and within the same residential PU.
20. The Oxford English Dictionary describes the term as a small court, yard, garth, or piece of ground attached to a dwelling-house and forming one enclosure with it and the area attached to and containing a dwelling-house and its outbuildings. However, there is legal authority to indicate that it is not always small. Case-law establishes that curtilage can be characterised as an area about a building, intimate association with the land which is undoubtedly within the curtilage is necessary to make the area under consideration part and parcel of that undoubted curtilage land. It can be described as piece of land, whether enclosed or unenclosed, immediately beside or around the building. It must serve the purpose of a building in some necessary, beneficial or useful manner. Factors like physical layout of the land, past and present ownership and use or function are relevant. Whether something falls within a curtilage is a question of fact and degree and thus primarily a matter for the decision-maker. The mere fact that the Notice 1 and 2 land adjoins areas around and about the dwelling-house and is in the same ownership does not necessarily or automatically mean that it is part of the residential curtilage to Hazel Cote.
21. As I have already said elsewhere, Hazel Cote is a detached dwelling-house situated in a spacious plot. It is roughly located to the northeast of Gloucester Road⁶. The property has a gated driveway with forecourt parking. Roughly southwest of the dwelling-house, there is a driveway where a portion of the land is subject to the LDC. Opposite this and to the south of the dwelling is a manicured lawn the extent of which is defined by a post-and-rail fence and vegetation. This area appears private and has a domestic appearance because of its intimate layout, close association and relationship with the dwelling-house. The evidence suggests that, due to the arrangement of outdoor furniture, access to paved areas and display of domestic paraphernalia, the area immediately around and about the building are connected to the house; they possess a sense

⁴ Section 55(2)(d) of the 1990 Act.

⁵ For instance, certain development permitted under Part 3 of Schedule 2. The word is undefined for purposes of Part 1 Class E and F development. I shall apply relevant definition and principles established by relevant legal authorities on the topic.

⁶ Taken from the HM Land Registry title plan.

of domesticity. In comparison to the size of the property, this area is modest and serves a reasonably useful function as curtilage to the building.

22. In contrast, the land to which Notice 1 and 2 relate appear set apart and disconnect from the dwelling-house. The land was mainly overgrown and include a stable building. Visually, these areas appear physically separate from the land closest to the building given their location and positioning. Whilst the land has merged with the residential curtilage, the texture and type of grass combined with the layout of the area is different to those around and about the dwelling-house. These do not appear or seem to have a close association with the dwelling. They do not have an intimate relationship with the land which is undoubtedly within the curtilage. Additionally, the evidence about the historic agricultural and equestrian use shows that these areas were distinctly disconnect and separate from the dwelling-house. As a matter of fact and degree, and on the circumstances of this particular case, I find that these areas cannot reasonably be regarded as residential curtilage to Hazel Cote. The change in the use of the land is therefore not exempt by the operation of law.
23. As for the ancillary or incidental link to the residential use, apart from Mr Arnold living at Hazel Cote, the agricultural and equestrian use of the land to which the two Notices relate to was, and is, physically and functionally distinct. The nature and scale of the residential and car storage and sale operation amounts to a primary use of the land given their distinctive characteristics and qualities. The current use, as stated in the corrected Notices, cannot reasonably be described as ancillary or incidental to the residential use of Hazel Cote due to the physical and functional distinctiveness. Even if an alternative view prevails and the areas subject of the Notices fall within the curtilage to Hazel Cote, the evidence presented does not show that the unauthorised uses are ancillary or incidental to the use of Hazel Cote as a single dwelling-house.
24. For planning purposes, development also includes the carrying out of building operations. The indisputable evidence is that building operations falling within the meaning of s 55(1) and (1A) of the Act had been carried out. These operations resulted in the siting of a metal container, the creation of a fence and gate and the laying of hardstanding. There is no dispute that the metal container and hard-surface were initially constructed to facilitate the residential use and car sale activity; indeed, without the hard-standing the land covered by Notice 1 couldn't be easily accessed. Given the scale of the operations, I consider that this aspect of the development alleged are part-and-parcel of the change in the use of the land.
25. Schedule 2, Part 2, Class A to the GPDO grants deemed planning permission for the erection of a gate and fence subject to limitations. The gate and fence located between C and D is a timber means of enclosure and is above 1 metre in overall height. There is a wide soft verge between the fence and Gloucester Road; the structure is about 5 m back from the road, but it does not have to physically touch the edge of the highway for it to be adjacent to it. The fence and gate is clearly visible from public vantages due to its siting and positioning. It is adjacent to the footpath because of its location. It is close enough to have the perceived function of forming a boundary between the public footpath and site. The fence and gate is situated adjacent to a public highway and so breaches paragraph A.1(a) of Class A to Part 2 because of its height.

26. Drawing all the above threads together, on the balance of probabilities, I find that the matters alleged in the corrected Notice 1 and 2 amount to development for which express planning permission is required. The latter has not been obtained and the matters alleged in each Notice constitute a breach of planning control. The appeals on ground (c) must fail.

The appeals on ground (f)

27. It is necessary to consider whether the requirements exceed what is necessary to remedy the breach⁷. The purpose of the requirements is to remedy the breach by restoring the land to its condition before the breach occurred, and s173(5) gives power to require the alteration or removal of buildings or works, or the carrying out of building or other operations, for the purposes of remedying the breach. A Notice directed at MCU may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, so that the land is restored to its condition before the breach took place.
28. The issued Notices require the cessation of the unauthorised uses and removal of vehicles, domestic items and paraphernalia from the land. The metal container has been removed, but the fence and gate as well as the hard-standing facilitated the unauthorised uses. The Notices can legitimately require the removal of these elements of development because they are integral to the unauthorised uses. The requirements, as stated on the issued Notices, do not exceed what is necessary to remedy the breach of planning controls constituted by the matters alleged in the corrected Notices. Reducing the overall height of the fence would not remedy the breach. Nothing short of full compliance would achieve the Notices' purpose.
29. Having said that, the requirement to cease the use of the land except for agriculture and equestrian is unnecessary: reversion rights apply. As I have said elsewhere, the requirements need to flow from the corrected allegation for consistency. I therefore intend to vary the steps required for clarity's sake. The intended variations are minor and no more onerous than first issued. No injustice is caused to any party⁸. Since I am varying the requirements, the appeals on ground (f) succeed to this limited extent.

The appeals on ground (g)

30. Given the nature of the work required by Notice 1 and 2, the compliance period fall short of what should reasonably be allowed. Additionally, specifying two separate periods causes confusion given the type and nature of the works required by each Notice. A period of six months for compliance with the corrected Notices would be reasonable. The appeals on ground (g) succeed to this extent.

Appeals A and B – Conclusions

31. For the reasons given above, and having regard to all other matters, I conclude the appeals on ground (b) and (c) fail. Although the steps required by the corrected Notice 1 and 2 are not excessive, the requirements will be varied and a reasonable period for compliance would be six months. As I am varying Notice 1 and 2, prior to upholding it, the appeals on ground (f) and (g) succeed to that extent.

⁷ Section 174(2)(f) of the Act.

⁸ Section 176(1) of the Act applied.

Formal Decision – Appeal A

32. It is directed that the Enforcement Notice be corrected and varied by:

- (1) The deletion of all text in section 3, the matters which appear to constitute the breach of planning control, and the substitution therefor by the following text:

Without planning permission, the material change in the use of the land edged red from a mixed agriculture and equestrian use to a mixed-use comprising agriculture, equestrian, residential and the storage and sale of motorised vehicles facilitated by the siting of a metal container, the erection of a fence and gate and the laying of hardstanding.

- (2) The deletion of all text and numbers in section 5, what you are required to do, and the substitution therefor by the following text and number:

- (1) *Cease the use of the land and buildings edged red on the plan attached to the Notice for residential purposes and the storage and sales of vehicles.*
- (2) *Remove all of vehicles from the land edged red.*
- (3) *Remove all domestic paraphernalia from land and buildings edged red.*
- (4) *Remove the metal container numbered 1 from the land edged red.*
- (5) *Reinstate the fence between the points labelled A and B to match the existing post and rail fence on the boundary between the land edged red and Hazel Cote.*
- (6) *Remove the fence and gate between the points labelled C and D.*
- (7) *Remove the hard standing from the area shown hatched green on the plan.*
- (8) *Re-seed the area hatched green with grass, and*
- (9) *Return the land edged red to its condition prior to the breach taking place.*

- (3) The deletion of '4 months' and substitution therefor by '6 months' in section 6: time for compliance.

33. Subject to the corrections and variations above, Appeal A is dismissed and the Enforcement Notice is upheld.

Formal Decision – Appeal B

34. It is directed that the Enforcement Notice be corrected and varied by:

- (1) The deletion of all text in section 3, the matters which appear to constitute the breach of planning control, and the substitution therefor by the following text:

Without planning permission, the material change in the use of the land edged red from a mixed-use of agriculture and equestrian to a residential use.

- (2) The deletion of all text and numbers in section 5, what you are required to do, and the substitution therefor by the following text and number:

- (1) Cease the use of the land edged red on the plan attached to the Notice for residential purposes.*
- (2) Remove all fences between the points labelled A and B, and B and C, and*
- (3) Reinststate the fence between the points labelled A and C to match the post and rail fencing removed.*

- (3) The deletion of '*2 months*' and substitution therefor by '*6 months*' in section 6: time for compliance.

35. Subject to the corrections and variations above, Appeal B is dismissed and the Enforcement Notice is upheld.

A U Ghafoor

Inspector