



Appeal Decision

Inquiry commenced on 18 June 2019

Site visit made on 1 August 2019

by C Sherratt DipURP MRTPI

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

Decision date: 18 December 2019

Appeal Ref: APP/P1560/C/17/3189365

Land at 82 Norman Way, Point Clear Bay, Clacton-on-Sea, CO16 8LX

- 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 Mrs Patricia Godfrey against an enforcement notice issued by Tendring District Council.
 - The enforcement notice, numbered 10/00617/BRCHC3, was issued on 9 October 2017.
 - The breach of planning control alleged in the notice is failure to comply with condition no 2 of a planning permission Ref TEN/119/59 as amended on appeal on 3 July 1990 as set out in paragraph 22.9 of the Inspectors decision letter.
 - The development to which the permission relates is for construction of new chalets.
 - The condition in question states that:
The chalet may be occupied for residential purposes only during the following periods
 - (i) At any time from 1 March to 31 October
 - (ii) At weekends from noon on Friday until noon on Monday between 1 November in any year and the end of February in the following year
 - (iii) During any period of 10 consecutive days which shall include both Christmas Day and New Years Day.
 - The notice alleges that the condition has not been complied with by the breach of the new condition to planning permission TEN/119/59 dated 7 May 1959 as amended at appeal on 3 July 1990 as set out in the Inspectors decision letter paragraph 22.9 by the occupation of this chalet between the period of 1 November and 28 February (20 February in a leap year) each year otherwise than in compliance with the amended condition of the said planning permission.
 - The requirements of the notice are to comply with the condition of Planning Permission TEN/119/59 dated 7 May 1959 as set out in the Inspectors appeal decision letter dated 3 July 1990 in paragraph 22.9 by ceasing the occupation of the chalet on the land between 1 November and 28 February (29 February in leap year) each year unless such occupation is during a period allowed by the said Condition during that period.
 - The period for compliance with the requirements is three months.
 - 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.
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Procedural Matters

1. A number of appeals relating to several properties at Point Clear Bay were heard together at the above Inquiry over a period of 14 days. General evidence relating to flooding considerations, common to many appeals containing ground (a), including this one, was heard during Week 1 and presented on behalf of a number of appellants by Mrs Kelly. There was an opportunity for any matters specific to individual appeals to be heard throughout the remainder of the Inquiry.
2. Whilst no corrections are required to this Notice, it has been necessary to correct the period for compliance in relation to a number of the notices relating to other appeal properties. The Council's witness accepted that there should be a consistent compliance period across this group of appeals. Accordingly, I intend to vary the compliance period to 14 months to correspond with the longest period specified amongst this set of appeal notices should the Notice be upheld

Decision

3. It is directed that the enforcement notice be varied by the deletion of 3 months and the substitution of 14 months as the period for compliance. Subject to this variation, the appeal is allowed and the enforcement notice is quashed.

Reasons

4. The time limits for taking enforcement action are set out in Section 171B of the Act. In these appeals S171B(3) applies which states that in the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
5. For the appeal on ground (d) to succeed the onus is upon the appellant to demonstrate, on the balance of probability, that the condition referred to in the enforcement notice has been breached for a continuous period of ten years or more prior to the date of the issue of the Enforcement Notice; in other words that the property has been occupied during the winter period (other than only on weekends from noon Friday to Monday and for 10 consecutive days including Christmas and New Year) for 10 consecutive years without compliance with the condition.
6. In the case of a continuing requirement condition, such as the case here, discontinuance of the offending activity will bring an end to that particular breach. The clock starts again with any subsequent breach. The period of compliant activity needs to be significant and not de minimis, as a matter of fact and degree. The cessation of that breach means that the clock would start again for any fresh breach of the condition. The question to be asked during any period of compliant occupation is whether enforcement action could have been taken against a breach of the condition.
7. A Breach of Condition Notice (BoCN) was issued in 2012 that relates to the breach of condition 2 of planning permission TEN/119/59. The 2012 BoCN remains in force. The Council therefore submits that the continued occupation of the property after the date specified for compliance with the BoCN, was and continues to be a criminal offence. Accordingly, the Council say the appellant cannot benefit from a claim that an on-going breach, after this compliance

- date, would contribute to the ten-year 'immunity' period, as the appellant would benefit from their own wrong doing.
8. Some documents have been submitted confirming that bank statements and P60s showed the appellant as living at the address from 2003. Although this documentary evidence does not of itself show that the condition was breached during the Winter periods, I am satisfied on the basis of the appellant's oral evidence, given under oath, that is also consistent with a letter from a neighbour, that on the balance of probability, the appellant did continue to occupy the property all year round for a continuous period in excess of 10 years prior to the issue of the notice. Furthermore, there is no dispute between the parties that the Council Tax records, provided by the Council, support the appellant's case that she has occupied the property for in excess of 10 years.
 9. This ground of appeal therefore turns on the effect of the 2012 BoCN that was served on the appellant in 2012. It specifies a breach of condition 2 of the 1959 planning permission. However, this condition was varied in the later 1990 appeal decision to allow occupation from noon on Friday to noon on Monday and 10 consecutive days during the winter period. The 1990 planning permission is a new and separate permission. Although the Enforcement Notice makes reference to the 1959 planning permission it is clear that its intention is to enforce the more recent condition imposed on the 1990 permission. This is the condition that is repeated in the notice. The BoCN is therefore directed at a different breach to the enforcement notice. Had I accepted the Council's proposition, it could not have applied in this particular case.
 10. For the reasons given above I conclude that the appeal should succeed on grounds (d). Accordingly, the enforcement notice will be quashed. In these circumstances the appeal under ground (a) as set out in section 174(2) to the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Claire Sherratt

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Everett

He called

Mrs Mandy Kelly

Mrs Patricia Godfrey

General Planning Issues

Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mr Richard Ground QC

He called

Ms Hanna Coogan

Mr Guy Cooper

Mr Keith Hutchinson

Mr Chris Stathers

Instructed by the Council's solicitor

Technical Director in Flood Risk Management
with Jeremy Benn Associates Limited

For the Environment Agency

Of Hutchinsons Planning and Development
Consultants

Enforcement Officer for Tendring District Council

Documents received at the Inquiry

Document A

Document 1

Document 2

Copy of 2012 Breach of Condition Notice

Appeal Notification - Copy of Site Notice.

Opening Statement by Mrs M Kelly regarding
flooding.

Document 3

Document 4

EA Supplementary Maps 1 and 2

Extract from NPPG 'Flood risk and coastal
change'.

Document 5

Document 6

Judgement: Wisenfeld v Secretary of State for
the Environment and another [1992] 1 PLR 32

Judgement: Michael William Howells v SoSCLG &
Gloucestershire County Council [2009] EWHC
2757 (Admin).

Document 7

Decision Notice 16/00809/FUL – variation of
seasonal occupancy period at Seawick Holiday
Village.

Document 8

Extract from Strategic Housing Land Availability
Assessment (May 2019)

Document 9

EA comments and Committee Report relating to
planning application for replacement dwelling at
138 Colne Way.

Document 10

Document 11

Historic Planning Permissions.

Legal Submissions on Breach of Condition Notice
for Tendring DC.

Document 12

Document 13

Legal Submissions from Mandy Kelly.

Welwyn Hatfield BC v SSCLG & another
[2011]UKSC 15.

Document 14

Bonsall v SSCLG & another [2015]EWCA Civ
1246.

Document 15

Document 16

Closing Submissions from Mr Everett.

Closing Submissions from Mr Ground QC for the
Council.

Document 17

Closing Submissions from Mandy Kelly.

