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## 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**

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**Appeal Ref: APP/P1560/C/18/3212587**

**Land at 139 Colne Way, Point Clear Bay, St. Osyth, Clacton-on-Sea, Essex CO16 8LW**

- 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 Alan Tatham against an enforcement notice issued by Tendring District Council.
  - The enforcement notice, numbered 10/00667/BRCHC3, was issued on 30 August 2018.
  - The breach of planning control alleged in the notice is failure to comply with condition 3 of planning permission 00/00616/FUL granted on 14 June 2000.
  - The development to which the permission relates is replacement holiday dwelling.
  - The condition in question is No 03 which states that: The holiday dwelling shall not be used for human habitation between October 31 in any one year and March 1 in the succeeding year but, during that period may be used for storage of household effects.
  - The notice alleges that the condition has not been complied with by the use as human habitation of this holiday dwelling between the period of 31 October in any one year and 1 March in any succeeding year otherwise than in compliance with the said planning permission 00/00616/FUL.
  - The requirements of the notice are to: Comply with Condition 3 to planning permission 00/00616/FUL dated 14 June 2000 by ceasing the use as human habitation of this holiday dwelling between the period of 31 October in any one year and 1 March in any succeeding year otherwise than in compliance with the said planning permission 00/00616/FUL.
  - The period for compliance with the requirements is 1 November 2019.
  - 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. General evidence relating to flooding considerations and proximity to services and facilities, 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 were heard throughout the remainder of the Inquiry. The appellant attended on 19 July 2019.
2. The postcode is incorrect on the notice and should be CO16 8LW rather than CO16 8LU. It is clear from the remainder of the address and plan attached to the notice which property the notice relates to. No injustice will be caused if I correct the postcode accordingly.

3. The period for compliance stated in the notice gives a date rather than a period of time. However, it is possible to establish the time period between the notice taking effect on 5 October 2018 and the time for compliance on 1 November 2018. No prejudice would be caused to the main parties if I were to specify an equivalent period for compliance. The Council confirmed any corrected period for compliance could be rounded up to the nearest month.
4. It has also been necessary to correct the period for compliance in relation to other notices. 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 for compliance with the notices amongst this set of appeals should the notice be upheld.

### **Decision**

5. It is directed that the enforcement notice be corrected by the deletion of the postcode 'CO16 8LU' and its substitution with 'CO16 8LW'. Subject to this correction the appeal is allowed and the enforcement notice is quashed.

### **Reasons**

#### **Ground (d)**

6. For Ground (d) is pleaded on the basis that at the date when the notice was issued, no enforcement action could be taken in respect of the breach alleged in the notice; in other words, it was too late for the local planning authority to take action. 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.
7. 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 for 10 consecutive years without compliance with the condition.

#### *The Legal points*

8. A Breach of Condition Notice (BoCN) was issued in 2012 that relates to the same breach. The point was made on behalf of the appellant that it was therefore too late for the Council to take further enforcement action because S171B (4)(b) explains that the preceding sub-sections (those sub-sections that set out the time limits beyond which no action may be taken), do not prevent the taking of further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach. This is often referred to as the 'second bite provision' as it allows the local planning authority to take further action outside of the time limits set out in S171B(1), (2) and (3) provided it does so within this 4-year period. It does not however impose a 4-year time limit within which the Council can take further action when that further action is taken within the time limits set out in those preceding sub-sections.

9. The Council properly conceded that it was not relying on the second bite provisions, accepting that it was too late to do so. I agree that the current enforcement notice was issued too late for the Council to rely on S171B(4)(b). In this case, the relevant date against which the ten-year period should be assessed is on or before 30 August 2008.
10. Nevertheless, the BoCN dated 28 June 2012 remains in force and is not before me. Indeed, there is no right of appeal against a BoCN. 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, otherwise the appellant would benefit from their own wrong doing.
11. In support of this submission the Council relies on the judgement of *Welwyn Hatfield v SSCLG v Beesley* [2011] UKSC 15 ('the Welwyn Hatfield judgement'). In this case Mr Beesley was claiming he had gained immunity for the use of a building as a dwellinghouse. One of the issues involved consideration of the scope and application of the principle that, unless the contrary intention appears, statutes are to be construed to the effect that no one should be allowed to profit from his own wrong. The Court noted that Mr Beesley intended to deceive the Council from the outset by his statements in the planning application. This was positive deception in matters integral to the planning process and directly intended to undermine that process. The Court found that the principle applied despite acknowledging that Mr Beesley's conduct was "not identifiably criminal" and thus not only relevant where there has been the commission of a crime.
12. In this case, there has been no positive deception on the part of the appellant. This is a point accepted by the Council. However, the Council submits that there has nevertheless been the commission of a crime as a result of non-compliance with the BOCN, which is still on-going, and so the principle that no one should benefit from their own wrong doing is clearly applicable.
13. However, I consider the circumstances differ in this case. The Council has not been deceived due to the actions of the appellant(s) in this case so that it 'missed' an opportunity to take any action in the same way that had occurred in *Welwyn Hatfield*, due to the actions of Mr Beesley. Indeed, it did serve a BoCN. The Council could, at any time since serving the BoCN, have sought to prosecute non-compliance with it through the Magistrates Court; it still could. The Council has simply chosen not to do so to date. That is different to the circumstances in *Welwyn Hatfield* where the Council could not have taken action within the required time limits in the first place because the breach was purposely hidden to prevent them from doing so.
14. Furthermore, the *Welwyn Hatfield* judgement also relates to an appeal against the refusal of a certificate of lawfulness rather than an appeal against an enforcement notice – Mr Beesley was therefore trying to establish that the use as a dwellinghouse was lawful. I recognise that under section 191(3) of the Act, it is clear that the failure to comply with any condition or limitation subject to which planning permission has been granted will only be lawful if the time for taking enforcement action has expired (S191(3)(a)) and it does not constitute a contravention of any of the requirements of any enforcement

notice or breach of condition notice then in force (S191(3)(b)). However, no certificate of lawfulness is being sought alongside this ground (d) appeal. Rather the question before me, is solely whether at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.

15. On that basis, it seems to me that a breach that cannot be lawful due to the existence of a BoCN, can nevertheless give rise to a successful appeal on ground (d) and the quashing of the notice at issue.

#### *The evidence*

16. I turn now to consider the evidence specific to this case. All evidence in relation to this ground of appeal was given under oath.
17. 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.
18. The current owner of the property, Mr Harris, gave evidence under oath that he has occupied the property all year round since about 11 April 2008 until it was rented to the appellant a couple of years ago to Mr Tatham. He clearly explained why the property was initially in his brother's name and the circumstances why he moved to the property. A copy of the tenancy agreement is provided. The Council Tax records show that no discounts were applied for non-occupation since April 2008. Prior to that it was registered as a holiday home for Council Tax purposes.
19. The written and verbal evidence, given under oath, demonstrates that the property has been occupied, on the balance of probability, for a period of 10 years or more prior to the issue of the notice.
20. Accordingly, the evidence submitted does demonstrate that the property has been occupied in breach of the relevant condition for a continuous period of 10 years or more. The appeal on ground (d) therefore succeeds and the Notice will be quashed.
21. Whilst my decision results in the quashing of the enforcement notice because I have found it was too late for the Council to take action in this case, it has no effect on the BoCN which is not before me. I recognise that success on ground (d) and the resultant quashing of the notice may not therefore be of much comfort to the appellant in the knowledge that any on-going breach would still not appear to be lawful as the BoCN would still exist. However, it would be a matter for the Council to decide whether to bring any prosecution proceedings against the BoCN.
22. Furthermore, as the Enforcement Notice will be quashed, there is no alleged breach against which the deemed planning application and ground (a) can be assessed in this appeal. Accordingly, I am unable to proceed to determine whether planning permission should be granted in this case.

## Conclusion

23. To conclude, the appeal on ground (d) therefore succeeds and the notice will be quashed.

*C Sherratt*

Inspector

## APPEARANCES

### FOR THE APPELLANT:

Mr A Tatham

He called

Mrs Mandy Kelly

Mr Harris

General Planning Issues

Landlord / owner

### 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

Copy of Title Deed of property.

Document B

Copy of 2012 Breach of Condition Notice.

Document C

Copy of planning permission

Document 1

Appeal Notification - Copy of Site Notice.

Document 2

Opening Statement by Mrs M Kelly regarding  
flooding.

Document 3

EA Supplementary Maps 1 and 2.

Document 4

Extract from NPPG 'Flood risk and coastal  
change'.

Document 5

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

Document 6

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

Historic Planning Permissions.

Document 11

Legal Submissions on Breach of Condition Notice  
for Tendring DC.

Document 12

Legal Submissions from Mandy Kelly.

Document 13

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

Document 14

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

Document 15

Closing Submissions from Mr Everett.

Document 16

Closing Submissions from Mr Ground QC for the

Document 17

Council.  
Closing Submissions from Mandy Kelly.