The Planning Inspectorate

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: 18th December 2019

Appeal Ref: APP/P1560/C/18/3193563
Land at 13 Colne Way, Point Clear Bay, St Osyth, Clacton on Sea CO16 8LL

- 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 Billy Clark against an enforcement notice issued by Tendring District Council.
- The enforcement notice, numbered 10/00594/BRCHC3, was issued on 8 December 2017.
- The breach of planning control alleged in the notice is failure to comply with a condition of planning permission Ref TEN/119/59 granted on 3 July 1990.
- The development to which the permission relates is construction of new chalets. The condition in question is set out in paragraph 22.9 of the Inspectors decision letter which states that: The chalet may be occupied for residential purposes only during the following periods (i) At any time from 1 March to 31st October; (ii) At weekends from noon on Friday until noon on Monday between 1st 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 Year's Day.
- The requirements of the notice are: Comply with the Condition of Planning Permission TEN/119/59 dated 7 May 1959 as set out in the Inspector's appeal letter dated 3 July 1990 in paragraph 22.9 by ceasing the occupation of the chalet on the land between 1st November and 28th February (29th February in a 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 1st November 2018.
- 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.

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.

2. 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 15 January 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.

3. 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.

4. It is clear from reading the notice as a whole that it is the condition imposed on the later 1990 permission, granted on appeal, that varied the earlier condition, that the Notice is directed at. For clarity I intend to vary the requirement to delete and reference to the 1959 permission. No injustice would be caused if I were to do so.

Decision

5. It is directed that the enforcement notice be corrected by:

   the deletion of the words "of Planning Permission TEN/119/59 dated 7 May 1959" in section 5. What you are required to do; and

   by the deletion of the words "1 November 2018" and the substitution of the words "14 months" as the period for compliance.

6. Subject to this corrections 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.

Reasons

Ground (d)

7. 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.

8. 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.

The Legal points

9. A Breach of Condition Notice (BoCN) was issued in 2012 that relates to the same breach. The point was made on behalf of some appellants 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.

10. 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 8 December 2007.

11. Nevertheless, the BoCN remains in force and is not before me. The Council therefore submits that the continued occupation of the property after the period of 56 days 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.

12. 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.

13. 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.

14. However, I consider the circumstances differ in this case. The Council has not been deceived due to the actions of the appellant in this case so that it 'missed' an opportunity to take any action in the same way that had occurred in Welwyn Hatfied, 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.

15. 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)). But no certificate of lawfulness is being sought alongside this ground (d) appeal. Rather the question solely before me, is 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.

16. 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

17. I turn now to consider the evidence specific to this case. All evidence in relation to this ground of appeal was given under oath.

18. 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.

19. The appellant has owned the property since 2016, although he explained that he lived in the area and was aware that people had lived in the property previously. During this time he has rented the property out, including to a friend that became homeless and to some tenants through the Council.

20. The Council tax records provided by the Council confirm that Mr Clark was the owner (not resident) from 26 October 2016. The records show that the property was not occupied between 30 September 2006 and 31 March 2008, 21 October 2008 and 20 April 2009, 1 February 2011 and 31 March 2011, 31 January 2014 and 14 September 2014 and 1 May 2016 and 4 November 2016. The appellant suggested that gaps in occupancy are likely to have been for maintenance between tenants as it is necessary to replace carpets and paint the premises. However, on the basis of the records provided, there have been at least three consecutive winters 2006/7, 2007/8 and 2008/9 where the appeal property has not been occupied at all over the full winter period. I have no information in relation to the period prior to this. These were periods prior to the appellant's ownership and in the absence of any documentary evidence to suggest otherwise I am not persuaded, on the balance of probability, that there was any breach of the condition during these winters. The first winter where it appears that there may have been a breach is therefore 2009/10, less than 10 years prior to the issue of the notice.

21. Accordingly, the evidence submitted does not demonstrate, on the balance of probability, 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 fails

Ground (a) and the deemed planning application

22. The deemed planning application is for the 'erection' of the chalets without compliance with the restrictive condition in dispute in so far as it relates to this property. A material change of use is not alleged; correctly so in my view.

23. The appeal site is within an area designated as Flood Zone 3a on the Environment Agency's Flood Map for Planning. Flood Zones ignore the presence of defences and do not take account of possible impacts of climate change and consequent changes in the future probability of flooding. Flood Zone 3a is land classified as being at high probability of flooding.

24. The Environment Agency (EA) witness provided compelling evidence that most of the highest floods occur in the December to February months. For the 10-year period looked at for the Clacton gauge, most of the over 3.1 m maximum floods were in those 3 months. The work done by the EA in Lincolnshire was over a longer period and so is statistically preferable for analysis of flooding. Again, the recorded tide levels and each of the components most likely to cause tidal inundation was greatest for the months of November to March. The EA witness explained that the most recent surges of note in Norfolk, Suffolk and Essex have all been between October to March. No contradictory technical evidence was presented to the Inquiry.

25. In the 1990 appeal relating to some properties at Point clear Bay, the Inspector records at paragraph 14.3 that when the condition was imposed in 1959, flooding from the sea was a major consideration. However, he found no reason, in 1990, to reject the assurances given by Anglian Water that the new sea defences will be good against all events up to 1 in 1000-year frequency. The reason for the imposition of restrictive conditions in 1990 did not therefore relate to concerns about flooding at that time. It is not therefore correct to suggest that the Inspector was somehow of the view that no flooding would occur at weekends or over Christmas and New Year or that flooding would not affect certain individuals. Notwithstanding that there continues to be sea defences in place, the Council take a different view to the 1990 Inspector having regard to current national and local policy and the current advice from the EA.

26. When applying the Sequential Test, a pragmatic approach to the availability of alternatives should be applied. It was not suggested by anyone that it would not be possible to identify more suitable sites for residential development in preferable locations outside of Flood Zone 3 at lower risk of flooding. However, the appeal property will remain whatever the outcome of this appeal irrespective of whether alternative locations for housing are available. It is not the property itself that is unauthorised, but its occupation during the winter in breach of the relevant condition. The question is simply one of whether the condition remains reasonable and necessary given the location of the appeal property in Flood Zone 3a. The Council adopted a pragmatic approach when granting planning permission for a replacement dwelling at 138 Colne Way acknowledging there were more sustainable and preferable sites where housing should be located but, nevertheless acknowledging the benefits that would be achieved by replacing an existing property with one that would, according to the FRA that accompanied it, be made safe in terms of flooding.

27. Whilst it can clearly be argued that the residential development in this location does not have wider sustainability benefits being located in a relatively unsustainable area below the bottom of the settlement hierarchy in the local plan and not classified in the lowest category of settlement called a smaller rural settlement in Policy SPL1 of the emerging plan, again the property exists and will remain. The first part of the exceptions test is therefore of limited assistance in determining if the condition remains reasonable and necessary.

28. I turn now to consider whether it can be shown that the development will be safe for the lifetime of the development. No FRA has been submitted to support the appeal or demonstrate that the necessary requirements could be satisfied. The proposal is clearly therefore in conflict with both national policy and Policy QL3.

29. Even if such a FRA had been commissioned by the appellant, the Council's expert witness gave evidence to show that it would not be possible to achieve the requirements that a FRA should satisfy if planning permission is to be forthcoming.

30. In relation to demonstrating that a development would be appropriately flood resistant and resilient, the correct way of modelling the flooding is to take the lifetime of the development and take into account climate change. This is set out as being the correct approach in NPPG (paragraph 030).

31. The most recent EA coastal modelling completed in 2018 indicates that the defences at Point Clear Bay could experience wave overtopping now in a 10% chance flood. Impacts in that scenario would be limited. However, each subsequent increase in severity of a storm event shows greater impacts stretching further into the area from the south west defences until the 1% chance in any year tide where more widespread flooding would be seen with more defences overtopping. This modelling shows that the defences are close to overtopping from still water levels in the 0.5% (1 in 200) chance in any year. Still water levels means the actual height of the North Sea, not the additional height of the waves. By the 0.2% (1 in 500) chance flood the still water levels are higher than defence levels in places and in 0.1% (1 in 1000) it is higher than most the defences. In the event of a tidal surge, I heard that the impacts depend on a lot of factors such as the wind speed and direction, the height of the preceding tide and the timing of the surge with the astronomical tide. This is based on the assumption that the defences do not breach at a lower level. Once overtopped, the floodwaters would flood the area very quickly with deep, cold and fast flowing water because the area is so low lying and narrow.

32. A breach is a sudden, unexpected structural failure of the flood defences. The Strategic Flood Risk Assessment 2009, carried out by the Council as part of the evidence base for the LP, indicates that a breach in the defences during a 0.5% chance flood in any year would lead water of 2-3 metres across the site and exceeding 4m in places.

33. This could not be warned against and the onset would be fast. The flood hazard has been calculated according to the standard method and the result is that the Hazard is classified as "extreme (dangerous for all)" from a breach . Dangerous for all includes not only the property occupiers but the emergency services.

34. Taking account of climate change, Appendix E, Plan E5 of Guy Coopers evidence on behalf of the EA, shows that for the 0.5% (1:200) year flood event or 0.5% annual probability which is the design flood (NPPG para 055), that towards the end of the lifetime of the development (2115) the design flood will mean that there would be flood water that is 3-4m deep for most of the area at Point Clear Bay.

35. It was put to the inquiry that the lifetime of the development should include the 50 or so years since the chalets were constructed. Even if that were the case, no FRA has been submitted to demonstrate the appeal property could be made flood resistant and resilient over the remaining period, such that a time restricted permission may have been considered. Furthermore, there is no suggestion within the Framework or PPG that assessments can be back dated in this way.

36. It has not been demonstrated that the appeal property could be made flood resistant[1] or resilient[2] for those levels of flood waters, notwithstanding that the appeal property is solid brick built with central heating and I heard that it would be possible to install a skylight and step ladder. Indeed, I heard that 0.6m of water can cause structural damage and the government do not advise that resistance measures should be used for floods above those levels (NPPG paragraph 059).

37. Any safe refuge would need to be above the levels of flood water shown in an extreme event by a sufficient margin. In a recent planning permission granted at 138 Colne Way for a replacement dwelling such a safe refuge was demonstrated, through a FRA to be 5.77m AOD. This was based on the modelling that accorded with national policy at that time.

38. Finally, in considering whether safe access and egress routes are included to the property, the government requires that "access routes should allow occupants to safely access and exit their dwellings in design flood conditions". No access routes that would allow occupants to safely access and exit dwellings in design flood conditions of 3-4 metres have been demonstrated. The shape of the peninsula and the depths of water make it very unlikely that it could be safe to access for emergency vehicles in an extreme flood now or the design flood in the future. There would not be a safe egress for residents during a flood resulting from a breach of the defences or an extreme flood today or design flood in the future. During the floods in 1953 the Causeway was damaged and blocked by boats.

39. I heard that the appellant and others in Point Clear Bay have signed up to receive flood warning alerts from the EA. The Parish Council also have an emergency plan although it was accepted that this was generic in nature.

40. I heard first hand experiences of evacuations in 2013 and 2017 to Dumont Hall following such warnings. Residents were able to evacuate in advance of any predicted flooding. This is a different proposition entirely to the circumstances described by the EA if an unexpected breach were to occur and no warnings were given. I note that if access across the causeway was not possible or

[1] Flood-resistant construction can prevent entry of water or minimise the amount that may enter a building where there is a short duration flooding outside with water depths of 0.6m or less.
[2] Flood-resilient buildings are designed and constructed to reduce the impact of flood water entering the building so that no permanent damage is caused, structural integrity is maintained and drying and cleaning is easier.

restricted for vehicles, as occurred in 1953, then aid to or recovery from Dumont Hall itself may be problematic for the emergency services.

41. Whilst the flood warning service is clearly very good, it only reduces the risk during a flood, it does not eliminate it. I heard from the EA representative, that flood events are inherently difficult to predict. Whilst signing up to flood warnings and emergency plans are important, they don't overcome the risk that would be caused by flood waters of 3-4 m in depth. This is especially the case because there is no safe refuge from the 1:1000 year flood event.

42. Notwithstanding that the absence of a FRA is a clear breach of national and local policy in itself, the Council's proposition that even if a FRA had been commissioned, it would not have been possible to show that any of these requirements could be met, is compelling.

43. A 'hold the line' policy exists in relation to the sea defences. On this basis, it was argued that the flooding scenarios referred to by the EA would be unlikely to occur. The EA witness explained that funding to maintain and improve the flood defences could not be guaranteed since it was necessary to bid for the funding against other schemes. The 'hold the line policy' does not therefore offer assurances that the occupation of the property during the winter months would be safe. It is a consideration I afford limited weight.

44. There are a substantial number of the properties that can now be occupied lawfully throughout the winter without complying with conditions restricting occupation. Some occupiers (such as the case here) can occupy the property every weekend (Friday to Monday)and 10 consecutive days including Christmas and New Year) whilst others are not permitted to reside in the property at all over the winter months. That inconsistency of approach is considered to be an unfair and untenable position for those residents required to leave for all or part of the winter. I recognise that it leaves those occupiers, who may then remain in occupation throughout the winter, in the exact same position that the appellant is seeking through this appeal.

45. Where certificates of lawfulness have been issued, the point at issue was simply one of whether and for how long the condition had been continuously breached. Flooding and other planning considerations have no bearing on those decisions. I have already explained that flooding was not considered to be an issue of great concern for the 1990 Inspector based on the evidence before him at that time. Hence, for entirely different reasons, the condition was relaxed or temporarily waivered for some individuals on a personal basis. The evidence before me on flooding now differs greatly.

46. The Council has granted planning permission to extend the periods when caravans can be occupied on nearby caravan parks. Again, this is seen by many as an inconsistent approach. The Council view the caravan parks, where the owner has the opportunity to ensure evacuation occurs in accordance with an agreed evacuation plan as a different situation to individual occupiers of individual homes. I appreciate there may be more certainty that evacuation of the entire site will be enforced, although that does not address a situation where a breach occurs unexpectedly and without any prior warning.

47. In addition, a replacement property has been permitted at 138 Colne Way with no restrictions on occupancy. The fact that the permission is for a replacement is key to this grant of planning permission as the applicant was able to

demonstrate in that case that, unlike the existing property, the replacement property would be flood resistant and resilient not least because the Flood Risk Assessment demonstrated that the upper floor would be at a height sufficient to provide a safe refuge in the event of a flood. The report to Committee clearly expresses this as a beneficial outcome.

48. I can clearly understand how unfair it may appear to require some occupiers to leave during the winter months when many others can lawfully remain for longer periods or all year round. However, the potential risk from a flood event is a consideration of substantial weight. Paragraph 40 of the PPG says: "Proposals that are likely to increase the number of people living or working in areas of flood risk require careful consideration." Thus, the Government's policy is not to increase the burden for emergency and other services by increasing the number of people living in areas of flood risk. In my view the inconsistency between one property to another is a matter that can be afforded little weight in the determination of this appeal. The reality is that the evidence demonstrates that allowing occupation during the winter increases risk as there is an increased probability of flooding occurring during the winter months.

49. To conclude on this issue, the condition remains reasonable and necessary having regard to the location of the appeal property in Flood Zone 3a and the risk of flooding during the winter months.

Location of property

50. The appeal site is situated outside of a defined settlement area. Whilst there is a small supermarket and other basic facilities generally intended to serve the occupants of the caravan parks and holiday homes during the holiday season, together with a small shop open all year round, t lacks many other services and facilities including schools and healthcare facilities. There is a regular bus service but I nevertheless share the view of the Council that overall it is an unsustainable location and occupiers would be largely reliant on the private car. In relation to plotland development, paragraph 4.168 of the LP says that any spread of permanent housing in such locations would be in direct conflict with the structure and local plan policies for the general distribution of housing and protection of the countryside as well as the Government's approach to sustainable development.

51. New residential development in this location would clearly be contrary to the development plan. However, the development exists and can be occupied for residential purposes for 8 months of the year, unrestricted, bringing with it associated vehicle trips. Furthermore, compliance with the existing condition throughout the remaining months could still potentially generate vehicle trips into and out of the area each weekend in any event.

52. So, whilst there is clear conflict with the development plan, having regard to the existing position, I do not consider that un-restricted occupation would necessarily result in any significant increase in vehicle trips during the winter months. Accordingly, I do not find that the location of the property in relation to services and facilities is a reason why the property is not suitable for permanent, all year round, habitation.

Other Matters

53. The Framework at paragraph 11(d) confirms that the presumption in favour of sustainable development means that where the policies which are most important for determining the application are out-of-date, that planning permission should be granted. The Council accepts that it cannot demonstrate a five-year housing land supply. Accordingly, such policies would be regarded as out-of-date as clarified in footnote 7 and the tilted balance apply. However, exceptions apply, the first of which is where the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed. Areas at risk of flooding or coastal change are one such area of particular importance. The policies in the Framework relevant to the risk of flooding do provide a clear reason for refusing development in this case, for the reasons set out above. As such, notwithstanding the lack of a 5-year housing land supply, the 'tilted balance' need not be applied.

54. I note that the appellant states that the planning application was not included in the title deeds as a restrictive covenant and the property was purchased on this basis. Whilst this may be the case, it does not justify the relaxation of the condition to allow habitation all year round.

55. In this case the property is occupied by tenants for whom the Council are paying the rent and continue to do so through the winter months. The property is providing a home and thus contributing to the available housing stock. This is a consideration clearly in favour of the proposal and one I give great weight.

56. I have no information about what, if any, alternative arrangements could be made during the winter period, if the notice is upheld and complied with. However, the existing tenant does not have security of tenure beyond that offered by any tenancy agreement, irrespective of the outcome of this appeal. No substantive documentary evidence has been submitted to demonstrate the lack of similarly priced rental housing elsewhere in the area, although I do not doubt, having heard from a number of people at the inquiry that property values and rents in Point Clear Bay are generally more affordable when compared to most settlements in the area. The occupier is however in no worse a position than if the appellant as landlord found it necessary to give notice for some reason. The weight I can afford the personal circumstances of the tenant is therefore reduced.

57. I am mindful that the existing condition is drafted in such a way that the property can continue to be used for habitation during the winter months albeit only between Friday from midday and Monday to midday and 10 consecutive days including Christmas and New Year. It is of course, just as likely that a flood could occur during those times of occupation as the days when occupation is restricted. Indeed the 1953 flood occurred on a Saturday. In my view, whilst this is by no means an ideal situation, the existing condition still reduces the overall probability of risk to life. A disclaimer of some description would not overcome my concerns about risks from flooding.

58. Other concerns relate to increased crime and vandalism and opportunities for squatters if properties are left unoccupied over the Winter. Again, no substantive evidence is before me to support this assertion but in any event, some level of surveillance will remain as a result of those properties that can

remain occupied all year round and the condition does not prevent the checking or maintenance of properties, only their occupation. Furthermore, I only give very limited weight to concerns about the validity of house insurance if properties are empty for long periods. This situation is not uncommon, for example where a second home is owned but not permanently occupied.

The overall balance

59. To conclude on ground (a) the removal of the planning condition to allow all year round unrestricted occupation of the property would be contrary to the development plan and national policies concerning flooding. No other considerations are of sufficient weight to indicate that planning permission should nevertheless be granted for the development without compliance with the relevant condition in so far as it relates to this property.

60. In the event that planning permission was refused for the removal of the condition altogether, I was asked to consider extending the period of occupation to 11.5 months, consistent with caravan sites in the area. However, given the compelling evidence relating to the increased risk of flooding during the months of November – February, I do not consider the period should be extended.

61. I have considered the rights of the tenant under Article 8 of the Human Rights Act 1998. Article 8 affords the right to respect for private and family life. This is a qualified right, and interference may be justified where in the public interest. The concept of proportionality is crucial. Dismissing the appeal would interfere with the tenant's rights under Article 8, since the consequence would be that they are unable to occupy their home unrestricted throughout the winter months. It will be necessary to make alternative arrangements at the very least during these periods to avoid becoming temporarily homeless. However, the interference would be in accordance with the law and in pursuance of a well-established and legitimate aim: in the interests of public safety. Given the compelling evidence relating to the increased risk of flooding during the months of November – March, I find that the dismissal of the appeal would be proportionate and necessary. The protection of the public interest cannot be achieved by means that are less interfering of the appellant's rights.

62. The appeal on ground (a) fails.

Overall Conclusions

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

Claire Sherratt

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr B Clark

He called	
Mrs Mandy Kelly	General Planning Issues
Mr B Clark	The appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mr Richard Ground QC	Instructed by the Council's solicitor
He called	
Ms Hanna Coogan	Technical Director in Flood Risk Management with Jeremy Benn Associates Limited
Mr Guy Cooper	For the Environment Agency
Mr Keith Hutchinson	Of Hutchinsons Planning and Development Consultants
Mr Chris Stathers	Enforcement Officer for Tendring District Council

Documents received at the Inquiry

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 Council.

Document 17	Closing Submissions from Mandy Kelly.

APPEARANCES

FOR THE APPELLANT:

He/She called

FOR THE LOCAL PLANNING AUTHORITY:

He/She called

INTERESTED PERSONS:

DOCUMENTS
1
2

64.