The Planning Inspectorate

Appeal Decisions

Site visit made on 2 December 2019

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 7 February 2020

Appeal A - Ref: APP/J1535/C/19/3217566
Land at and adjacent to Griffin Wood House, Copped Hall Estate, Epping CM16 5HT

- 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 Avtar Singh Hare against an enforcement notice issued by Epping Forest District Council (the LPA).
- The enforcement notice, numbered GMS/EB/CM/874, was issued on 30 October 2018.
- The breach of planning control as alleged in the notice is: the unauthorised erection of 3 buildings on the land in the approximate positions shown hatched black and numbered 1, 2 and 3 on the attached plan.
- The requirements of the notice are as follows:
  - (i) Demolish the buildings shown in the approximate positions hatched black on the plan and numbered 1, 2 and 3.
  - (ii) Following compliance with 5(i) above, remove all resultant debris from the land.
- The period for compliance with the requirements is 3 months.
- The appeal was initially made on grounds (a), (d), (f) and (g) as set out in section 174(2) of the Town and Country Planning Act 1990 as amended. It is now proceeding on grounds (a), (f) and (g).

Appeal B - Ref: APP/J1535/C/19/3217545
Land at and adjacent to Griffin Wood House, Copped Hall Estate, Epping CM16 5HT

- 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 Jasdip Singh Hare (Anami Limited, formerly Anami PLC) against an enforcement notice issued by Epping Forest District Council (the LPA).
- The enforcement notice, numbered GMS/EB/CM/874, was issued on 30 October 2018.
- The breach of planning control as alleged in the notice is: the unauthorised erection of 3 buildings on the land in the approximate positions shown hatched black and numbered 1, 2 and 3 on the attached plan.
- The requirements of the notice are as follows:
  - (i) Demolish the buildings shown in the approximate positions hatched black on the plan and numbered 1, 2 and 3.
  - (ii) Following compliance with 5(i) above, remove all resultant debris from the land.
- The period for compliance with the requirements is 3 months.
- The appeal was initially made on grounds (a), (b), (c), (d), (e), (f) and (g), as set out in section 174(2) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed. The appeal is now proceeding on grounds (e), (f) and (g).

Costs Application: An application for costs has been made on behalf of the appellants, Mr Jasdip Singh Hare (Amani Limited) and Mr Avtar Singh Hare. This is the subject of a separate decision.

Decisions

1. Both appeals succeed to a limited degree on ground (g) only. Otherwise both appeals are dismissed and the enforcement notice is upheld as varied. See formal decisions below.

Matters of clarification

2. There is one enforcement notice; two appellants and two appeals (A and B). The agents are Savills (SV) for Appeal A (by Mr Avtar Singh Hare) and Rainer Hughes (RH) for Appeal B (by Mr Jasdip Singh Hare – Anami Limited). At the start of the appeals process the manner in which the submissions were made on behalf of the appellants and the LPA caused considerable confusion for both the Inspectorate Case Officer and for me. This necessitated a meeting at the start of my site visit to clarify matters of fact relating to the two appeal references; the two appellants; the agents for each appeal/appellant; the status of all of the initial grounds of appeal; the withdrawn grounds of appeal; the statements already submitted and how they related to the two appeals A and B.

3. On 19 December 2019 (the last date for '*final comments*') it was confirmed by the agent for Appeal B (RH) that the two appellants relied on all of the previous documents submitted to-date for both appeals. The matters set out in the bullet points above are, therefore, now agreed and it is on this basis that I have dealt with the two appeals. The '*final comments'* added late and new information to the appeals including further representations on ground (e); the validity of the notice and an application for costs against the Council. All of this information should have been provided in accordance with the appeals programme.

4. Initially Appeal A was made on grounds (a), (d), (f) and (g). The appeal on ground (d) was withdrawn leaving grounds (a), (f) and (g) to be considered. Appeal B was initially made on grounds (a), (b), (c), (d), (e), (f) and (g). As indicated above the appeal on ground (a) lapsed. Appeals on grounds (b) and (c) were not taken forward and ground (d) was withdrawn. This leaves grounds (e), (f) and (g) to be considered.

5. In Appeal B there had been no detailed submissions in relation to grounds (b) and (c) which were initially pleaded. However, these two grounds could not have succeeded. Firstly, with regard to ground (b), it is evident that the allegations as set out in the notice have occurred as a matter of fact. I saw the buildings which have been enforced against during my site visit.

6. Secondly, with regard to ground (c), a contravention of planning control has occurred since there is no planning permission in place for the 3 buildings as constructed and in their specific locations on the site. Nor, for various reasons, do they constitute permitted development under The Town and Country Planning (General Permitted Development) Order 2015 (GPDO).

7. The details of the appeal on ground (e) for Appeal B were set out on a separate sheet submitted by RH on 28 November 2019. I cannot find anything in detail on the ground (e) appeal before that date. The main point made was the contention that the notice had not been served correctly on Mr Jasdip Singh Hare – Anami Limited, or on others with an interest in the land. I deal with this under Appeal B, ground (e) below. This separate sheet also referred to the fact that Mr Jasdip Hare was not clear as to which buildings the notice referred. At that stage there were no detailed arguments made relating to the validity or authorisation of the notice. Nor was it indicated on behalf of the appellant(s), until '*final comments'* stage that a costs application was being made on the basis that the Council had acted unreasonably with regard to, amongst other things, administrative and procedural matters.

8. However, some references had been made to the service and authorisation of the notice in that it was stated that the appellants and others would be severely prejudiced if the notice had not been properly served or authorised. The matters submitted as an appeal on ground (e), therefore, raised two fundamental points, one of which went beyond such an appeal on this ground. The first clearly related to invalid service of the notice (a normal reason for appeal under this ground) whilst the second point questioned the validity of the notice itself. At that stage no details were submitted regarding the alleged nullity or invalidity of the notice, although the matter had been raised briefly in the earlier submissions.

9. As referred to above, on 19 December 2019 RH submitted '*final comments*' in relation to Appeal B, which included further submissions on ground (e) as well as a costs application. However, these were far from just '*'final comments'.* The matters, amongst other things, contended that the notice was considered to be a nullity. Although references had been made earlier to questions surrounding the authorisation of the notice, the details now submitted raised new issues relating back to earlier LPA submissions made on 26 November 2019. The LPA was allowed to respond to the costs application which had effectively been merged or conflated with the additional ground (e) matters.

10. The appellants were given the normal opportunity to '*reply'* to the Council's '*response'* to their Costs application. However, the '*reply'* added yet further arguments relating to the authorisation and validity question. The PINS case officer wrote on my behalf to the Council to request that their legal department responded to the specific points. These have been received and I have now considered all of the submissions relating to whether or not the notice is valid or a nullity. This is a separate question to whether or not it was correctly served or indeed whether or not the LPA had behaved unreasonably. These two matters are dealt with in detail in the ground (e) appeal below and the costs application respectively.

11. Before considering any of the grounds of appeal, therefore, following the section below on background information (paragraphs 12 to 23), I have considered whether or not the notice is either invalid or a nullity (paragraphs 28 to 67). I have then gone on to consider the respective grounds of appeal starting with ground (e) in Appeal B and whether or not the notice was served correctly (paragraphs 68 to 71).

Background information

12. The buildings referred to in the notice comprise a car port attached to an outbuilding which includes space for storage, office, music room/games room to the south-west of the house (the buildings numbered 1 and 2 in the enforcement notice) and a separate building, to the north-east, which is stated to be used for guest accommodation (the building numbered 3 in the notice).

13. The approximate locations of the buildings are shown on the plan attached to the enforcement notice. However, following my request, two more detailed plans have been submitted on behalf of the appellants. These are as follows: *Site Plan 1*, showing the positions of the house and all other buildings on the site, prior to the construction of the appeal buildings (1, 2 and 3) and *Site Plan 2* showing all of the existing buildings currently on the site including buildings 1, 2 and 3. Land Registry Title Plans have also been submitted.

14. The LPA has also produced 2 plans in addition to that attached to the notice. The first is dated 18/10/2018 but does not show all of the previous buildings. The second is dated 26/11/2019 and this shows the appeal buildings 1,2 and 3; the large barn building to the south of buildings 1 and 2; the two parts to the main house and the outbuilding to the south-east of the house.

15. The appeal buildings are located within the land associated with Griffin Wood House (GWH), which itself is located within the Copped Hall Conservation Area (CHCA) and the Green Belt (GB). It is not a listed building but is referred to as being *'locally listed'* and is considered to be of some architectural and historic interest, due to its Arts and Crafts characteristics. GWH sits within an extensive area of land comprising residential garden areas; woodland and grazing areas. It is approached by a long 160m long, tree-lined driveway from the private road which gives entry to the overall estate from the main road to the south. It lies to the east of the listed Copped Hall and in the eastern-most section of the CHCA.

16. It is indicated that the property (GWH plus all of the land and outbuildings) was purchased as a company investment by the appellants (Mr Jasdip Hare – Anami Limited and Mr Avtar Hare) in 2007. However, the holding was subsequently split and now comprises two adjoining parcels of land. There were two Land Registry Plans initially submitted (EX781798 and EX794763). It is stated that the ownership of the land was split for tax purposes. It would appear that the company, Anami Limited, now owns the woodland area to the north of buildings 1 and 2, as well as the land to the north of the driveway. I refer to this as Land Area Y. The driveway, the house, the immediate surrounding garden land to the house and other buildings close to the house are in separate family ownership. I refer to this below as Land Area X.

17. A copy of Title Plan EX781798 was submitted, along with other documents, on 28 November 2019. This shows a green-lined boundary which incorporates the long driveway leading to the house from the private road. This boundary line is shown as running along the width of the drive and around the house and its lawned garden areas (Land Area X). From this plan it would appear that appeal buildings 1 and 2 lie outside of the green bounded Land Area X, to the north west of the large industrial building and the tennis court, and within the company owned Land Area Y. However, it also appears that building 3 lies within the boundary line of Land Area X. This land is more closely related to GWH, its garden area, the gravelled area to the front and the annexe. I deal in more detail with the question of the curtilage of GWH below.

18. A red line on the plan bounds the land to the north, north-east and north-west of the house and this appears to be the second separate parcel of land owned by the company, Anami Limited (Land Area Y). Reference is made to the initial sales particulars of the property which referred to the house, outbuildings and garaging, as well as to the lawns and wooded areas, the tennis court and a disused swimming pool (Land Areas X and Y). Some photographs of the demolished outbuildings are submitted. A valuation report at the time confirmed that the *'stable buildings, garages and outbuildings are falling down'.*

19. In his statement Mr Jasdip Hare refers, amongst other things, to Google Earth pictures of the land and the fact that these show the land heavily wooded and thus rendering some of the earlier smaller outbuildings not being visible. Other photographs are submitted to indicate that the various outbuildings were in a state of disrepair or dilapidation. It is stated that some of these outbuildings were improved or demolished over an 8 year period between 2006 and 2014 and that until 2014 the land was used for *'residential purposes plus some as offices and for storage'.*

20. It is also indicated that in, or around, 2007 planning permission was granted for the demolition of the stable blocks and the erection of a swimming pool enclosure, plus permission for a plant room, changing area, garages and open store. The plans show these to be located to the south west of the main house. However, it is evident that this particular permission was not implemented since the only building close to the house is the separate residential annexe. The current swimming pool and

associated buildings are located to the south-east of the house on *Site Plan 2,* labelled as outbuilding and shown as building No 7 on the Council's site plan which shows the existing buildings around the house.

21. The planning history of the site is set out in detail in section 2.6 of the Council’s delegated enforcement report, as well as well as in section 3 of the Grounds of Appeal statement prepared by the agent for Appeal A. There is no need to set this out in detail again as there appears to be no dispute between the parties about the site history of GWH and its surrounding land. However, I agree that the most relevant applications are the 2007 approval for the demolition of the old stable block and the barn enclosure to the swimming pool, and the 2017 refusal of planning permission for the retrospective application to retain buildings 1 and 2, part subject of the notice.

22. By letter, dated 2019, evidence on ground (d) had been submitted, following a request from the Planning Inspectorate Case Officer. This initially claimed that there had been buildings in the locations of buildings 1, 2 and 3, as now enforced against; that these were dilapidated and that the new buildings were erected by the end of July 2014. However, very little evidence was submitted and the Council refers to submitted photographs which support its case that a ground (d) appeal could not have succeeded. In any event the appeals on ground (d) were both withdrawn.

23. I have, therefore, not considered any of the evidence in the various submitted documents and statements which purported to support any aspect of the now withdrawn ground (d) appeals. However, I have taken into account all other parts of the submissions and statements where they relate to the merits of the ground (a) appeal in Appeal B and the other grounds pleaded, (e), (f) and (g); to the matters relating to the validity of the notice and to all other material considerations relating to both appeals.

Relevant Policy

24. In considering whether or not planning permission should be granted on the ground (a) appeal for Appeal A, I have had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004, which requires that planning applications should be determined in accordance with the development plan, unless material considerations indicate otherwise. Because the appeal site lies within the CHCA, I have also paid special attention to the requirements of section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended.

25. The current development plan comprises the Epping Forest District Council Adopted Local Plan (1998) and Alterations (2006) (LP). The most relevant policies are CP2 (Protecting the Quality of the Rural and Built Environment); GB2A (Development in the Green Belt); DBE1 (Design of new buildings); HC6 (Character Appearance and setting of Conservation Areas); HC7 (Development within Conservation Areas) and 14 Enforcement Procedures).

26. Although they cannot be given the full weight of the development plan, policies within the Epping Forest District Local Plan Submission Version (2017) (LPSV) are material considerations, following formal endorsement by the Council in December 2017. Relevant material policies are SP7 (The Natural Environment, Landscape Character and Green Infrastructure; DM4 (Green Belt); DM7 (Heritage Assets); DM9 (High Quality Design) and DM7 Monitoring and Enforcement. These policies accord with the above LP policies.

27. The National Planning Policy Framework (NPPF) is a major material consideration. The most relevant sections are 2 (Achieving sustainable development); 12 (Achieving well-designed places); 13 (Protecting Green Belt Land); 15 (Conserving and

enhancing the natural environment) and 16 (Conserving and enhancing the historic environment). I have also had regard to relevant section of Planning Policy Guidance (PPG). The policies in the LP and the LPSV are generally in accordance with the NPPF. Because GWH lies within the CHCA I have paid special attention to the requirements of section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

The enforcement notice: validity and nullity matters

28. In Mr Jasdip Singh Hare's statement (referred to and set out as a 'Witness Statement' and dated 30.11.2018), it was contended that the LPA had a pre-existing policy regarding enforcement action which it exercised without regard to its discretionary powers (paragraph 20). At paragraph 28 reference is made to the service of the notice (see ground (e) below). At paragraph 29 it is stated that the plans were not clear and that it was difficult *'to identify with certainty which buildings the enforcement notice refers to'.*

29. At paragraph 30 it is stated that '*In the event that the notice was not properly served, severe prejudice would be caused to the appellant if the Secretary of State were to allow the current enforcement procedure to proceed, as the Appellant's have been using these buildings in some way for the last 4 years'.* However, this latter point is now in question, as both appeals on ground (d) were withdrawn.

30. Other than querying the service of the notice, at that stage there had been no detailed references as to whether or not the LPA had followed the correct procedures with regard to the authorisation and the issuing (as opposed to the serving) of the notice. Although briefly referred to earlier, the first main recorded requests from RH regarding the lawful authorisation of the notice were contained in an e-mail from one of the agents, dated 22 November 2019.

31. On 9 December 2019 RH e-mailed the LPA once more referring, amongst other things, to the general principles of law relating to formal delegation and commenting on the documents by the LPA, including reference to 'CLD2' (see later). Documentary confirmation was requested from the LPA as to whether or not the notice was: (a) determined by the Services Planning Director of the LPA or, (b) by an officer nominated by him to do so.

32. Further references were made to 'CLD2' (paragraphs 3(a), 4.3 and 3(d)). This raised questions of whether or not the delegation was properly documented; confirmation of the policies the officer was implementing and who the officer had consulted. In particular there was a question relating to whether Mr Thompson, a former LPA enforcement officer had been consulted. The Council had replied on the same date (9 December 2019) indicating that '*the request for information will not be answered'* and that the information was included in the LPA supplementary statement of 26 November 2019 and indicating that the appellants should make their *'final comments'* on the evidence already provided which included what was referred to as a relevant part of its scheme of delegation. It was later confirmed by the LPA that Mr Thompson was an Enforcement Officer only, as opposed to a Planning Officer and that he had no formal authority to deal with any other general planning matters.

The final comments (and costs application) dated 19 December 2019

33. On 19 December 2019 RH submitted *'final comments'*. These related to Appeal B, covering more detailed ground (e) matters; detailed authorisation arguments as well as a costs application. The costs application part of the document had referred to costs incurred by both appellants and relating to both appeals (see costs decision).

34. Under 'Ground (e)' and for the reasons set out in paragraphs 4 to 23 of the '*final comments'*, it was contended that the notice was a nullity. Amongst other things,

references were made to the full powers of delegation for EFDC. These are shown on the Council website as 'Constitution, Part 3, Appendix 3, item 26. (CLD2). It is contended on behalf of the appellants that there is no evidence that the signatory officer was authorised by the Director of Planning Services (DPS); that there is no evidence that any sub-delegation was authorised; no evidence that any sub-delegation was documented and no evidence that any delegation was properly documented.

35. These matters were expanded upon in paragraphs 9 to 20 and the following cases are relied upon by the appellants: *'R v St Edmondsbury Council ex parte Walton (1999) JPL 805* (St Edmundsbury); *R Miller v Prime Minister [2019]UK SC 41.* (Miller); *R v Lancashire County Council ex p Huddleston [1986] 2All ER 941* (Lancashire County Council); *Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd [200] EWCA Civ 1409* (Quark Fishing); *Padfield [1986] AC 997* (Padfield); *Shasha v Westminster City Council [2016] EWHC 3283* (Shasha) and *Pioneer Aggregates (UK) Ltd v SoS for the Environment [1985] AC 132* Pioneer Aggregates).

36. It is stressed that the rule '*Delegatus non potest delegare'* applies in this case and that a person with delegated power cannot sub delegate (except as expressly provided (see '*St Edmundsbury'*). It is contended that that the failure by the LPA to provide evidence that the delegated powers were properly recorded and a written log kept, confirming that the signatory to the notice was actually given delegated power, makes the notice ultra vires and a nullity. It is stated that it cannot have been the case that these matters were too late to argue in the appeal process and if there was no power to make a decision then the notice has no legal effect (see *'Miller'*).

37. It was also stressed that the failure by the LPA, not to answer the questions relating to authorisation, questions their duty to provide transparency at all stages, this being a well-established public law principle (as set out in *'Lancashire County Council'*). In the case of *'Quark Fishing'* it is indicated that it was held that a failure to provide a complete and comprehensive account in judicial proceedings may justify an adverse inference against a public authority. This was expanded upon by reference to the finding that there is a '*very high duty on public authority respondents …to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide'.*

38. It is further submitted on behalf of the appellants that the failure by the Council to answer questions as to authorisation of the enforcement notice was unreasonable and a breach of the LPA's statutory obligations under the '*Openness of Local Government Bodies Regulations 2014'* (OLGBR). It is stressed that transparency is required and a failure to engage is unreasonable. References are made to various authorities and case law (outlined above) relating, amongst other things, to whose name should appear on the notice; to whom the relevant delegated power has been assigned; to the necessity to have a clear audit trail; to the fact that transparency is a well-established public law principle and to the Local Government Transparency Code of 2015.

39. Attention is also drawn to Regulation 7 of the OLGBR which requires a decision-making officer to produce a written record of any decision if it affects the rights of an individual. It is stressed that the notice clearly affects the appellants' rights and thus the regulation applies in this case. It is similarly argued that Regulation 8 applies, which requires a detailed written record to be produced as soon as practicable following the decision.

40. Detailed references are made to the case of *'Pioneer Aggregates' (UK) Ltd V Secretary of State for the Environment [1985]* where it was found that Regulation 7 of

the OLGBR was applicable to a decision taken under delegated powers. It is also indicated that parts of the Local Government Act 2000, the Local Government Act 1972 are also relevant and that the Accountability Act 2014 also make clear that the power to delegate any functions is subject to any express provision contained in any Act passed after 1972.

41. It is contended that the failure of the LPA to provide evidence that the delegated powers were properly recorded and a written record kept, to confirm that the signatory to the notice was actually ever given relevant delegated power, makes the notice ultra vires and a nullity. If this is the case then it is argued that the appeals must succeed.

42. It is also indicated that this is not the first time that the Council has failed to provide relevant material or to provide it on time. For example it is indicated that the Council failed to send documents attached to the appeals questionnaire until several requests were made and that ultimately PINS had to request that copies be provided. A number of other documents relating to the enforcement history of the site are stated to still not having been provided.

43. There are also more detailed references in these *'final comments'* to the service of the notice on Mr Jasdip Singh Hare and Anami Limited. These are dealt with in ground (e) below.

The Council's response dated 6 January 2020

44. This response was in three parts. It dealt firstly with matters relating to the ground (e) points, which were split into the authorisation and the issuing of the notice and, secondly, it referred to the serving of the notice. I have dealt with matters relating to the allegation of incorrect service of the notice in ground (e) below. It also responded to the application for costs made on behalf of the appellants.

45. With regard to the authorisation and issuing of the notice the Council indicates that it had previously supplied a copy of a section of the LPA constitution. In response to the above *'final comments'* the LPA now provided a full copy of that constitution (not the correct one however – see costs application and below). It is indicated that authority to deal with enforcement matters is given at CLD2, part 3, in the constitution. A copy of the delegation functions (DF) for the Governance Directorate (GD) was also provided. This DF document shows the LPA post holders who have delegated authority to sign documents. The signatory to the notice is post reference GCT02. A copy of this DF document is submitted.

46. The LPA indicates that the relevant policy for making this enforcement decision is Policy 14 relating to Enforcement Procedures. A copy of this is also submitted. It is stressed by the LPA that the delegated authority report clearly states that the proposal is to issue an enforcement notice under section 172 of the Act. It is also stressed that the initial ground (e) appeal was made on the basis of incorrect service only and that it was after the first statements were served that RH had requested information regarding the authority to serve the notices.

Reply on behalf of the appellants, dated 13 January 2020 to LPA response of 6 January 2020.

47. It is indicated that the latest version of CDL2 is a different version to the previously submitted document. It is also indicated that the version of CDL2 is dated February 2018 and that this precedes the Council Minutes of 31 July 2018. On that basis it is contended that it cannot be the applicable or correct copy. Attention is also brought to the fact that the Assistant Director of Governance in the DF document 'issue 2018/March' indicated that '*in respect of enforcement matters, this will require*

the signature of GEF01 (or in his absence GEF02 Clare Munday) and one other from the above list of 4'. This list of 4 included Ms Jill Shingler. The notice was signed by Ms Ava Mitchell the assistant Director of Legal Services.

48. Paragraphs 8 to 18 refer in detail to the Agenda and Minutes of the Council meeting of 31 July 2018. Matters relating to the Constitution Working Group regarding arrangements for delegation of planning related matters were dealt with. The minutes indicate, amongst other things that the Director of Governance post had become redundant on 31 July 2018 and that the responsibilities were to be taken over by the 'Monitoring Officer'.

49. It is indicated that the minutes also confirmed that the applicable CLD2 was that as set out in Appendix 2 of the Report to Council which stated that the 'Service Director of Planning' (SDP) is the person to whom the power to authorise or approve enforcement action had been delegated. This version of the CLD2 makes no mention of the Director of Governance or a Level 1 or 2 Officer being granted any delegated powers.

50. It is indicated that although the minutes also contain a provision for the Area Plans sub-committee to be amended, so that Paragraph 7 permits the sub-committee to request officers to undertake enforcement action where members have refused a retrospective planning application, the LPA has not at this stage submitted that this power is, or was, used.

51. It is contended therefore, that not only had the LPA submitted the incorrect version of CDL2, the correct version approved by the Council only granted delegated powers for the taking of enforcement action to the SDP. It is contended, therefore, that the LPA cannot rely on CDL2 as granting any powers to sub-delegate, whether to Ms Shingler or Ms Munday. Even if CDL2 did grant such powers the notice was not signed by both of them but by Ms Ava Michell.

52. Although it is accepted that the officer report of 16 October 2018 confirms that the proposal is to issue an enforcement notice, it is stressed that a proposal or proposition that a notice should be issued is not a determination or decision that such should be issued. Furthermore the report must be read as a whole and it specifically confirms that the author is seeking authorisation from the assistant Director of Governance (Legal), not only for the service of the notice, but also for authority to vary or withdraw it.

53. In this case it is indicated that both the officer report and the notice are dated 30.10.2018 and that there is no separate record of a decision actually having been taken, when it was made or the reasons thereof and any alternative options considered. With regard to the constitution it is contended that no formal delegation ever took place other than to the SDP. Reference is made to the relevant documents dealing with delegated powers in Appendix 3 of part 3 and Appendix 5.

54. Submissions made in the '*final comments'* are repeated as follows:

i) A delegated decision must either implement a policy or decision previously approved or taken by the Council or

ii) Facilitate or be conducive to implementing such a decision

iii) Whilst sub-paragraph 3a provides a power to delegate in writing all or any of the delegated functions to other Officers the council minutes of 31.07.18 removed this power in respect of powers delegated by the Council.

iv) In exercising any delegated powers , the officer must consult other officers and have regard to advice taken.

55. With regard to policies to be taken into account it is accepted that the LPA was under an obligation to do so. However, it is contended that it was also incumbent upon the authority to consider whether it was expedient to serve a notice or whether, for example the appellants should have been asked to submit a retrospective application for building No 3, or to have a meeting to discuss remedial steps. The case of '*Flashman v Camden LBC [1975]* (*Flashman*) is referred to, whereby it was held that the LPA had misused its discretionary powers or failed to take a relevant power into account.

56. In summary it is contended therefore that the enforcement notice is a nullity since a planning officer cannot serve an enforcement notice which has not been duly approved and authorised by the LPA. It is stressed that the notice was signed by Ms Ava Michell, a solicitor and Assistant Director of Legal Services and that there is no evidence that:

a. Ms Ava Mitchell was ever authorised by the Service Director of Planning
b. Ms Jill Shingler was ever authorised by the Director of Planning Services
c. any sub-delegation was authorised
d. any sub-delegation was properly documented
e. that any delegation was properly documented.

The response of the Council's Legal Section dated 16 January 2020

57. In response to item i) in paragraph 26, the LPA states that '*The enforcement notice is not a nullity and was duly approved and authorised by the LPA'.*

58. In response to ii)a, the LPA indicates: *'The enforcement notice was issued by the then Assistant Director of Legal Services, and solicitor to the Council, Alison Mitchell. The Service Director of Planning <u>or his nominee</u> has delegated authority under Part 3 Scheme of Delegation to Officers from Full Council (CLD2)(Council 31 July 2018) to take enforcement action under the Town and Country Planning Act. The Service Director of planning nominated the Assistant Director of Legal Services to issue the enforcement notice, as evidenced by the attached excerpt from the Constitution and Delegated Report.*

59. In response to ii)b, the LPA indicates *'The delegated report was cleared by Jill Shingler who was authorised by the Service Director of Planning. The Service Director of Planning <u>or his nominee</u> has delegated authority under Part 3 Scheme of Delegation to Officers from Full Council (CLD2(Council 31 July 2018) to take enforcement action under the Town and Country Planning Act (as evidenced by the attached excerpt from the Constitution and Delegated Report). The Service Director of Planning nominated specified post-holders within the Council's Planning Services Directorate to exercise certain functions on his behalf. Jill Shingler was a post-holder authorised by the Service Director of Planning to issue the enforcement notice as evidence by the attached EFDC Planning Services Directorate – Delegation of Functions.*

60. In response to ii)c, ii)d and ii)e it is stated that '*The LPA repeats its response in b above'.* In accordance with my request the legal section of the authority responded to the points in paragraph 26. This was submitted by Elaine Bell, Planning Solicitor to the Council.

My assessment on the basis of all of the submitted documents

61. The arguments relating to validity; authorisation and issuing of the notice; whether or not it was served correctly and whether or not the LPA behaved unreasonably in not providing the requested information, have all been intermingled. In the submissions made on behalf of the appellants the three arguments have been conflated or brought together as one in contending that the notice is ultra vires and a

nullity or invalid. The serving of the notice is a separate matter from the validity questions, as is the question of whether or not the LPA acted unreasonably in relation to the appeals process.

62. Clearly the matters are inter-related. However, it cannot be the case that improper service of the notice or the behaviour of the LPA in failing to provide information can go to the heart of whether or not the notice was ultra vires, a nullity or invalid. The notice was either validly authorised or it was not so authorised. It is necessary, therefore, to separate this point from the others, before considering the questions of service of the notice and/or whether or not the Council's actions constituted unreasonable behaviour in the processing of these two appeals. The former is dealt with in the ground (e) appeal below and the latter in the costs application.

63. It is evident that the detailed arguments relating to the validity of the notice were only raised at a very late stage in the appeals process. This was at *'final comments'* stage. Admittedly there were early queries made on behalf of the appellants about how the notice had been authorised and the LPA had not supplied the information requested. I have referred to the various submissions above and there is no need to repeat them here. The main issue regarding authorisation is whether or not the LPA followed its designated constitution for such matters at the time the notice was authorised and issued. Matters of 'transparency' and how the LPA dealt with other administrative matters are not directly relevant to my consideration of the appeals unless the Council's actions resulted in a defective or invalid notice or their behaviour resulted in unnecessary loss and expense.

64. Despite the confusion caused by, amongst other things, the Council's reference to an earlier copy of CLD2, it is clear from the latest LPA legal submission that the relevant and appropriate version of CLD2 (which applied to the authorisation of this notice issued on 30 October 2018) was the one eventually submitted on 16 January 2020 by the Council's Legal section. This was dated September 2018, as opposed to the earlier one, referred to in detail on behalf of the appellants, dated March 2018.

65. In the 16 January 2020 document the LPA indicates that the enforcement notice was issued by the then Assistant Director of Legal Services, and Solicitor to the Council, Alison Mitchell. It is indicated that the Service Director of Planning (SDP), or his nominee (LPA underlining) has delegated authority under Part 3, Scheme of Delegation to Officers, from Full Council (CLD2 - Council 31 July 2018) to take enforcement action. It is further confirmed that the SDP nominated or authorised the Assistant Director of Legal Services to issue the enforcement notice.

66. The LPA further indicated that the delegated report was cleared by Jill Shingler who was authorised by the SDP and that the SDP or his nominee has delegated authority under Part 3, Scheme of Delegation to Officers, from full Council to take enforcement action. The SDP is stated to have authorisation to nominate specified post-holders within the Council's Planning Services Directorate to exercise certain functions on his behalf. Jill Shingler was a post-holder authorised and nominated by the SDP and listed in the EFDC Planning Services Directorate – Delegation of Functions (PSDDF).

67. Having seen the relevant documents, CLD2 (September 2018) and the latest version of the PSDDF, I consider that the LPA has shown that the enforcement notice issued on 30 October 2018 notice was duly authorised in accordance with its constitution at that time and in accordance with section 172 of the Act. Irrespective of the how the parties have dealt with the question of validity I am satisfied, on the basis of all that I have read, that the correct process of delegation was carried out by

the LPA. Furthermore the notice comprises all of the constituent parts to render it a proper notice on its face notice and complies with the relevant parts of section 173 of the Act. I conclude, therefore that it was validly issued; that it is not ultra vires and is not a nullity. I now turn to the specific grounds pleaded for each appeal.

Appeal B on ground (e)

68. In support of this ground of appeal it is contended that because the notice (dated 30.10.2018) has an effective date of 04.12.2018, it should have been served on owners and occupiers of GWH, at the latest, by 05 November 2018. Mr Jasdip Hare states that he did not receive the notice until 8 November 2018. It is also indicated that additional occupants of the house were not served with the notice and that the notice is not clear, as to which buildings it applies to. It was also contended that, '*on the evidence available at that time',* it was not clear that the notice had been validly authorised or issued. I have dealt with the validity/nullity matters above.

69. The Council indicates that it had received an e-mail from the one of the appellants' agents (RH), asking for verification that the notice had been served correctly by a person authorised to do so. There is clear evidence that the notice was served on 30 October 2018 and that it was posted. The LPA has also submitted photographs relating to the service on Mr Jasdip Hare. The notice was also served on a list of others including the 'occupier' of GWH and Mr Avtar Singh Hare. This would have covered any other person living at GWH at that time.

70. With regard to the notice not being served on Anami Limited, the Council refers to the fact that the notice was hand delivered and served on Mr Jasdip Hare who represents Anami Limited. A copy was also sent to Anami PLC (former name of Anami Limited) company address as per the title absolute on Land Registry reference EX781798. This is recorded by the Council. I do not consider, therefore, that it has been demonstrated by the appellants that the notice was not properly served on the company Anami Limited

71. On the basis of all of the submissions, I am satisfied that the notice was properly served. In any case, even if it had not been served correctly, the Secretary of State has the power to disregard lack of service if no prejudice is caused (s.176(5) of the Act). In this case it cannot be argued that any prejudice in the appeal process has been caused to either appellant. Both appellants in these appeals were fully aware of what was being enforced against (buildings 1, 2 and 3) and each has had every opportunity to submit a case under the respective grounds eventually pleaded. The appeal, therefore, fails on ground (e). Mr Jasdip Hare may have been confused initially regarding which buildings the notice referred to but it is clear from the rest of his statement that he could have been in no doubt that the appeal buildings referred to were buildings numbered 1, 2 and 3, as referred to in the notice.

Appeal A on ground (a)

72. The main issues are as follows:

- whether the 3 buildings constitute inappropriate development in the Green Belt for the purposes of the NPPF and development plan policy,
- the effect of the buildings on the openness of the Green Belt,
- their effect on the character and appearance of this part of the CHCA,
- if the 3 buildings do represent inappropriate development, whether the harm, by reason of inappropriateness and any other harm, is clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development within the Green Belt.

Whether the 3 buildings constitutes inappropriate development in the Green Belt (GB)

73. On behalf of the appellant, it is contended that the buildings are not inappropriate development as they are replacement buildings, which are in the same use and are not materially larger than those which have been replaced. It is considered that they do not undermine the openness, character or permanency of the GB, or any of the reasons for including land within it. It is further argued that the appellant has a realistic fall-back position for the erection of the buildings, in that they are considered to be incidental to the enjoyment of the dwellinghouse under Schedule 2, Part 1, Class E of the GPDO. It is also contended that the fall-back position represents the very special circumstances (VSC) to justify retention of the buildings in this part of the GB.

74. In addition it is stressed that the appeal buildings (1,2 and 3) are characteristic of other outbuildings within the CHCA and that they have been discreetly located, so as not to draw undue attention or compete with the locally listed dwellinghouse, GWH. They are considered to be appropriate in terms of scale, massing, proportion and orientation and it is argued that they preserve the significance of the CHCA '*which is principally derived from its openness and landscape'.*

75. With regard to the 5 purposes of the GB, set out in the NPPF, reference is made to the Council's Stage 1 GB (2015) Review (GBR) and, that the most important contribution that this part of the GB plays, is the prevention of encroachment into the countryside. Based on the location and scale of the appeal buildings it is contended that they have not resulted in unrestricted sprawl or the merging of towns. It is also considered that they do not encroach into the countryside by virtue of them being within the curtilage of GWH.

76. The Council does not accept that any of the buildings lie within the curtilage of GWH and, in any case, argue that the buildings do not accord with the exceptions set out in the NPPF or with policy GB2A of the LP, which is broadly in accordance with the NPPF. It is stated that, whilst some dwellings within the GB can have buildings as permitted development, they are not recognised in national or local policy as being appropriate. Neither is it considered that these buildings can be classed as limited extensions to GWH, since they are within an undeveloped part of the overall site.

77. I agree with the arguments put forward on behalf of the appellant that the buildings have not resulted in unrestricted sprawl or the merging of towns and I deal with the question of encroachment and effect on openness below. However, I turn first to the question of whether or not the 3 buildings constitute <u>inappropriate</u> development within this part of the GB (my underlining).

78. Buildings such as these are not listed as exceptions in paragraph 145 of the NPPF. As indicated by the LPA they must, therefore, be considered as being inappropriate development in the first instance. However I now turn to the exceptions. In paragraph 145(d) it is indicated that replacement building may not be inappropriate '*providing that the new building is in the same use and not materially larger than the one it replaces'.* In as much as the 3 buildings are being used for residential purposes, garaging, storage and additional accommodation, they are clearly '*in the same use'* as GWH and the outbuildings which they replaced.

79. *Site Plan 1* indicates a former car port and a separate smaller storage outbuilding in an approximate position on the land as buildings 1 and 2. The buildings lie outside of Land Area X and within Land Area Y. There is also a L-shaped outbuilding and a storage container shown in the approximate position of building 3 within Land Area X. However, it is evident that the appeal buildings are substantially larger than those previously on the site. Buildings 1 and 2 merge into each other forming one long structure. This exacerbates and emphasises its overall bulk and massing in this

particular location, well away from the main house. It is perceived as a large separate structure on this part of the land (Land Area Y).

80. Building 3 is also substantially larger than the narrow L-shaped outbuilding previously shown to be on the land. Again, due to its overall massing, height and bulk, it is perceived as another large separate building, rather than one which might be an ancillary outbuilding to GWH. The attachment of the basic storage container increases this perception of a large separate structure and, in my view, results in a very poor overall design for this building which is referred to as ancillary guest accommodation and lies within Land Area X.

81. The unauthorised development (buildings 1, 2 and 3) as carried out does not fall into any of the categories set out in paragraph 146 of the NPPF. With regard to paragraph 146(d), in my view the 3 new buildings cannot possibly be described as being '*the re-use of buildings'.* Instead, I consider that, as a matter of fact and degree, they constitute substantial new buildings on the land in the approximate positions of the former outbuildings. The overall sizes; their construction methods and materials used reinforce my view in this respect. In conclusion I find that the 3 buildings are not replacement buildings in accordance with paragraph 145(d) and neither do they constitute a re-use of any pre-existing outbuilding.

82. I do not accept the contention that the appellant '*has sought to up-grade the outbuildings visually and functionally'.* From submitted photographs the new buildings are significantly different in overall size, scale, massing and appearance. Rather than an up-grading of the smaller pre-existing outbuildings it is evident to me that the previous dilapidated buildings have been completely demolished and that new larger and more bulky new structures, of completely different designs, have been erected.

83. From my site inspection and from all of the submissions I consider that the work carried out in the construction of buildings 1, 2 and 3, constitutes inappropriate development in this part of the Green Belt. Inappropriate development within the Green Belt is by definition harmful and I now turn to the next issue and the specific effects that buildings 1,2 and 3 have had on the openness of this part of the GB.

The effect of the buildings on the openness of the Green Belt (GB)

84. There is no definition of '*openness'* in the NPPF but, in the GB context, it is generally held to refer to freedom from, or the absence of, development. The courts have held that *'the concept of openness means the state of being free from development, the absence of buildings – as distinct from the absence of visual impact'.* It has also been held, amongst other things, that '*the concept of 'openness of the Green Belt' is not narrowly limited to the volumetric approach'* and that *'the word 'openness' is open textured and that a number of factors are capable of being relevant when it comes to applying the facts of a particular case'.*

85. Prominent amongst these factors is how built up the GB was in the first place, compared to how built up it is as a result of the development carried out. In that context it was held that *'volumetric matters'* may be a material consideration but not necessarily the only one. The courts have accepted that the '*effect of development on openness may involve questions of degree'* and that a conclusion on the degree of impact on openness is essential to the new reliance on the new flexibility for previously developed land in the first place…and to the analysis of harm. In reaching my conclusions on the effect on '*openness',* I have had regard to the court findings.

86. The 3 buildings clearly comprise development and the enforcement notice seeks to remedy the breach of planning control by the removal of the buildings. In my view the two structures (buildings 1 and 2 together and building 3) clearly impact on the

openness of this part of the Green Belt. I acknowledge that the former scattered smaller outbuildings must have also had an effect on openness. However, instead of small scattered outbuildings, there are now two substantial new buildings which have resulted in a significant increase in scale, bulk and massing of built form. Buildings 1 and 2 comprise noticeably different elements and building 3 has the added attachment of the inappropriate storage container. In my view buildings 1 and 2 and building 3 have had a noticeable and harmful effect on the 'openness' of this part of the GWH site within this part of the GB.

87. The positioning of buildings 1 and 2, in Land Area Y, exacerbates their impact on 'openness'. These two buildings are perceived as encroaching into the northern part of the site which, although lawfully used for residential purposes, lies outside of Land Area X which is more closely related to GWH and its curtilage. Building 3, although within Land Area X is also perceived as being more physically related to the wooded and open land to the north and north-east. This is partly due to its location north of a line of the front elevation of the house which renders it contrary to the permitted development conditions of the GPDO. I comment further below on the question of the curtilage of GWH.

88. When viewed from the lawned area in front of GWH; when approached from the north-east and also (in winter) when seen from the road, I consider that the impact on openness of all 3 buildings is considerable. Instead of the former *'openness',* between the scattered and smaller outbuildings, there are now two substantial structures in the form of buildings 1 and 2 and building 3. Together with the extensive gravelled area and the smaller garden shed adjacent to buildings 1 and 2, I consider that, volumetrically, the openness of this part of the Green Belt cannot possibly be said to have been preserved by the unauthorised works as carried out.

89. Having seen these new structures within this part of the overall site and for the reasons set above, I consider that the appeal buildings and the immediate gravelled areas surrounding them are significantly harmful to the openness of this part of the GB. It follows that the matters set out in the notice have resulted in the openness not being preserved. This is contrary to the relevant NPPF test on preservation of openness, as well to policy GB2A of the LP. Both appeals fail, therefore, in relation to this part of the main issues.

Effect on the character and appearance of the CHCA

90. The character of the CHCA derives in the main from its openness and its countryside landscape, as indicated and acknowledged on behalf of the appellants. It is characterised by scattered dwellings set within very large and spacious sites. During my site visit I was able to view many of these from the private lane, including the two large properties closest to GWH. Most of the other dwellings within the CHCA had ranges of additional buildings and outbuildings, a great number of which were painted black. This seems to be a traditional colour for barn and outbuilding structures in this part of the CHCA and the appeal buildings have also been painted black.

91. However, other than for the hall itself, most of the additional buildings to other properties were more tightly grouped and did not give the appearance of being spread out randomly all over the land to which they related. Generally the outbuildings were also perceived as been secondary and generally smaller than the main dwellings. They did not give the impression of being second dwellings within their respective sites and nor did most of them give the impression that they were encroaching into the more open areas of the overall sites or the GB. Thus, I found generally that their effect on openness within the GB landscape was generally low-key, as well as being distinctly secondary in appearance to the houses.

92. The appeal buildings on the other hand, due to their bulk and massing, clearly compete visually with GWH. The north-west adjacent annexe and the almost linked outbuildings to the south-east are relatively close to the main house. Although their designs are not, in my view, complementary with the GWH Arts and Crafts design, at least they are not perceived as being completely separate buildings on the GWH site.

93. However, due to their size and location and the fact that they are positioned within the separate, fenced-off, gravelled area to the north of the lawned gardens, buildings 1 and 2 appear as obtrusive elements within this part of the overall site. The large green barn outbuilding adjacent to the tennis court, although within Land Area X, increases the overall perception that this part of the site is different and noticeably physically separated from GWH itself.

94. I have already concluded that the buildings and gravelled area are detrimental to the openness of the GB. I also consider that visually they detract from the other attractive lawned and landscaped parts of the site surrounding the attractive GWH. Situated between the lawned gardens and the woodland (and dog run area), I consider that buildings 1 and 2 are perceived as a large separate structure set within a site that is physically separate from GWH. Whilst appreciating that it is not a separate dwelling, due to its form, size and position I consider that it is perceived as such. I also find that these two buildings are of very poor design with the car port element having a completely different appearance to the rest of the building.

95. Although not as obtrusive as buildings 1 and 2, building 3 also gives the impression of being a completely separate structure. Again I find that the design is poor and particularly in relation to the storage container which has been attached, (without any consideration for the overall design) to its south-east side to provide additional floorspace. This storage container appears alien and obtrusive within the landscape, as do other small storage containers and portacabin type structures on this part of the GWH site.

96. In my view, the fact that the appeal buildings are painted black, similar to other buildings within the CHCA does not help. In fact, in these particular locations, the dark colour emphasises the inappropriate bulk and massing of the buildings within the site and exacerbates the negative visual impact caused by the poor designs and the bulky nature of the structures. As indicated above I was able to see the buildings from the estate road to the north. Whilst acknowledging that these views would be screened at other times of the year, I do not consider that this factor can carry weight with regard to their retention in such obtrusive locations.

97. I consider that the appeal buildings neither preserve nor enhance the character or appearance of this part of the CHCA. I find them to be contrary to policies CP2, DBE1, HC6 and HC7 of the LP, as well as to policies within sections 12, 15 and 16 of the NPPF. Thus, as well as harming the Green Belt in principle through inappropriateness and non-preservation of openness, the 3 buildings are also harmful due to their negative visual impact on the general rural character and appearance of this part of the CHCA.

98. I now turn to whether or not the harm, by reason of inappropriateness; the harm to openness and the harm to the CHCA, are all clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development of the 3 buildings within this part of the Green Belt.

Whether there are very special circumstances (VSC)

99. It is contended on behalf of the appellant that there is a realistic fall-back position for the erection of outbuildings which would be incidental to the enjoyment of the

dwelling house under Schedule 2, Part 1, Class E of the GPDO. This fall-back condition is considered to represent the VSCs required to outweigh the harm in principle and the other harm identified, so as to justify these particular buildings as development in this part of the GB.

100. The Council does not accept that there is a realistic fall-back position. Nor does it accept that any of the 3 buildings fall within the '*residential curtilage'* of GWH. It is concluded, therefore, that the buildings cannot benefit from permitted development rights under the GPDO. In addition it is stressed and that the appellant has not submitted any further information to indicate that any other VSCs exist which would outweigh the overall harm caused to the Green Belt.

101. Having considered the appellant's case on this point, I do not consider that, in these particular circumstances, the claimed *'realistic fall-back position'* is a sufficient argument to justify the unauthorised development(s) carried out. I consider that the arguments are fundamentally flawed in that it is clearly acknowledged that none of the appeal buildings accords in the first instance with the necessary part or conditions as set out in the GPDO. I deal further with the question of curtilage development below in relation to the appeals on ground (f).

102. At this stage I do not consider that the arguments and the overall situation regarding the unauthorised buildings can amount to the VSCs required to justify the development carried out. The case for VSCs is very weak in my view and carries little, if any, weight to outweigh the harm by inappropriateness and the other harm (to openness of the GB and to the character and appearance of the CHCA) which I have identified above. The fact that there are no other arguments put forward reinforces my view that that the VSCs necessary to justify the retention of buildings 1, 2 and 3 within the Green Belt do not exist.

Overall conclusion on ground (a)

103. I have concluded above that the 3 buildings are harmful to the GB in principle in that they constitute inappropriate development; that they are harmful to the openness of the GB and that they neither preserve nor enhance the character or appearance of this part of the CHCA. I do not consider that any other factors put forward in support of the retention of the 3 buildings can outweigh the harm in principle and the other harm to the Green Belt. It follows that the very special circumstances necessary to justify this particular development within the Green Belt (buildings 1, 2 and 3, the subject of the notice) do not exist.

104. For the above reasons I do not consider that planning permission should be granted for the retention of the 3 buildings. Appeal A therefore fails on ground (a).

Appeals A and B on ground (f)

105. Normally appeals on ground (f) are made on the basis that the steps required to comply with the notice are excessive and that lesser steps would overcome the objections. In this case the objections and the harm caused are set out above. The notice was clearly issued in order to remedy the harm caused to the GB and the CHCA. For the reasons set out above, I have identified the harm and agree with the Council that the 3 buildings are unacceptable and ought not to be granted planning permission. The Council is of the view that the requirements as set out in the notice are necessary and that no lesser steps could overcome the objections.

106. The appellants' case, on the other hand, under this ground is twofold. Firstly it is contended that there is the *'realistic fall-back position'* in that permitted development rights can be relied upon whereby the appellants could erect similar buildings as being '*incidental to the enjoyment of the dwellinghouse' (*GWH) within its

curtilage and, secondly, that amendments or particular alterations to the unauthorised buildings (1, 2 and 3) would make them acceptable in planning terms.

The permitted development arguments

107. On behalf of both appellants, reference is made to Schedule 2, Part 1 Class E of the GPDO, which allows for the erection of a building or enclosure *'incidental to the enjoyment of the dwellinghouse'*, if it is located within the curtilage of the dwellinghouse. This, of course, is subject to various conditions set out in the GPDO. Reference is also made to the fact that there is no Article 4 Direction in place which removes PD rights. Although it is accepted that the existing outbuildings would not strictly accord with the relevant PD rights and conditions, it is still contended that the fall-back position is '*vital in the assessment of the impacts of these appeals'.*

108. The appellants' position is that, owing to the size of the site and the building's curtilage (that is the curtilage of GWH), a significant amount of outbuildings could be erected at the rear of GWH. I do not dispute that this is the case. In support of this position it is argued that such buildings could have a greater impact on the openness of the GB and the setting of GWH, than the unauthorised buildings 1,2 and 3. Although it is accepted that buildings 1 and 2 cannot be PD due to their height (and a verandah), it is contended that their siting, size and footprint do *'comply with the GPDO' and that even larger buildings could be erected'.*

109. With regard to building 3, again it is accepted on behalf of the appellants, that that this too does not strictly comply with the GPDO, due to its particular position in relation to GWH and cannot, therefore, constitute PD. However its '*footprint and general scale'* is considered to comply with PD requirements. It is further argued that this could easily be relocated '*to the rear of the curtilage'* of GWH*;* that the existing siting does not compete with GWH and that it does not cause harm to the GB.

110. It is again stressed that the fall-back position represents VSCs and the case of *'Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314'* is relied upon. Given the above analysis it is indicated that the appellants would be willing to give up PD rights by condition. Otherwise it is stated that the appellants would retain the PD rights and use them in the future if the notice is upheld. Clearly there is nothing to stop the appellants taking such a course of action and/or applying for permission to erect any other buildings either within or outside of the curtilage of GWH and its associated land. But in my view this argument does not carry sufficient weight to convince me that the '*fall-back position'* represents an appropriate VSC.

111. The Council stresses that none of the unauthorised buildings comply with the GPDO conditions and therefore cannot constitute permitted development. It is also argued by the Council that the buildings all lie outside of the curtilage of the GWH. However, the Council expands on these arguments to state that even if the buildings were considered to be within the curtilage of GWH, there is still no legal fall-back position since if the notice were to be upheld, then to legally comply with the requirements, the buildings would have to be demolished and rebuilt to accord with PD rights.

The curtilage of the dwellinghouse (GWH)

112. In the context of what might be the curtilage of a dwelling house, '*residential curtilage'* is not a use of land and a lawful '*residential use'* of land does not necessarily equate to it falling within the '*curtilage of a dwelling house'*. Parliament has not defined the word *'curtilage'* and decision makers have to rely on dictionary definitions and to the case law authorities set out over the years. The courts have held that

whether or not land falls within the '*curtilage of a dwelling house'* is 'a matter of fact and degree' and each case must be considered on the facts of the case.

113. In this case the facts are these: first there are two separate areas of land in the appellants' ownership. These are firstly Land Area X (in family ownership); comprising the driveway, the main house, its various annexes, building 3 and the rear gardens. Secondly there is the Land Area Y (owned by the company Anami Limited); made up of the rest of the land including woodland, the dog-run, the grazing and the gravelled area where buildings 1 and 2 are located. During my visit I noted the two quite separately perceived elements of the land. Although there was no complete physical definition on the ground between the two areas as shown on the Title Deed plans, there was a timber fence (albeit not a complete boundary) from a line opposite buildings 1 and 2 and the large agricultural building/tennis court, to a point close to the south of building 3.

114. Although it is argued that the whole of the appellants' land lies within the curtilage of GWH, in my view this is not how it is perceived, as a matter of fact and degree, on the ground. The fence line referred to above is seen to generally separate the green lawned area and gardens to the rear of GWH from the more recently gravelled area. These two areas have distinctly different visual characteristics; one being green and well-planted, the other being spartan and gravelled.

115. Whilst accepting that the whole of the land (both parts) have only been used for residential purposes, as indicated above it does not automatically follow that all of the land lies '*within the curtilage'* of GWH. Just because the whole of the GWH site has been used for residential purposes in the past, it cannot follow that Land Area Y automatically lies within the curtilage of the dwellinghouse.

116. The courts have held that there are certain criteria, or tests, which should be applied in assessing what constitutes the '*curtilage of a dwellinghouse*'. These have been referred to on behalf of the appellants and are; the '*physical layout of the land and buildings past and present; ownership past and present and the use and function of the land, past and present'.* In this case I accept that the criterion relating to function of the land, past and present is met. It seems that, even before the land was split into the two titles (stated to be for tax purposes) it was used solely for '*residential'* purposes in association with the use of GWH. This is still the case now, in that none of the appellants' land at GWH is used for any purpose other than residential use.

117. The physical layout of the land in the past was also clearly related to its function as residential land. However, it would appear that Land Area Y, although used extensively as extended garden area, dog run and recreational woodland in the past, has changed physically in that there is now the extensive gravelled area, as well the site for buildings 1 and 2. I accept that there were smaller outbuildings on the site previously. However, the submitted aerial photographs also show that where these are now positioned, there was extensive woodland. This is confirmed in the Witness Statement of Mr Jasdip Hare, whereby it was clearly pointed out that the former outbuildings could not be seen due to the '*tree cover'.*

118. I also accept that Land Area Y can also be said to be still '*required for the comfortable enjoyment of the dwelling house'.* However, although it might be used in this way, I do not consider that this part of the overall site forms '*an integral part of the same'* in terms of the '*curtilage of the dwelling house'* as referred to by the courts. Land Area Y, in my view, as a matter of fact and degree, now lies outside of the curtilage of GWH. Thus, if any part of any land is found to lie outside of the '*curtilage of the dwelling house'* then, irrespective of the use of that land being

lawful for residential use, PD rights cannot apply and planning permission is required for any development on that land.

119. Having reached my conclusions regarding buildings 1 and 2, it would seem to me that building 3 does lie within Land Area X, which is shown to be within the green-bounded area of the latest submitted Title Plan. On this basis I consider that this part of the appellants' land does lie within the curtilage of GWH. In the past this would also have been the case. Thus, I consider that building 3 is physically within the curtilage of GWH, the land itself is and always has been within the curtilage and although the *'ownership'* has changed (the splitting of the overall land into two titles), this has not changed the situation regarding whether or not building 3 lies within the curtilage of the dwellinghouse GWH.

120. I consider, therefore, that the unauthorised buildings 1 and 2 do not, as a matter of fact and degree, lie within the curtilage of GWH and cannot be considered as being incidental to the enjoyment of the dwellinghouse. They cannot therefore be PD. Building 3 on the other hand does lie within the curtilage of GWH but again cannot be PD due to the fact that it does not comply with the conditions as set out in the GPDO. I have referred to these points above.

121. For the above reasons I do not accept that the appellants' *'fall-back position'* can be considered as being the equivalent of *'lesser steps'* which would overcome the identified objections (by the LPA and by me) to these unauthorised buildings within the Green Belt. I have also concluded above that there are no VSCs to outweigh the harm identified to justify their retention.

Overall conclusion on the ground (f) appeals

122. An appeal on ground (f) cannot introduce further arguments relating to the merits of the case: that is, whether or not planning permission should be granted for what is alleged in the notice. As indicated above to succeed on this ground it must be shown that the requirements of the notice are excessive and that lesser steps would overcome the objections. I have noted the suggestions regarding alterations to the 3 buildings to render them more in compliance with the GPDO PD conditions.

123. However, it is my view that in these cases PD rights cannot be gained by altering something that was not PD in the first instance. It is not simply a question of removing parts of the buildings as constructed and, in any case, there are no drawn details submitted to show how this might be achieved. I agree with the Council's position that, even if all 3 buildings were within the curtilage of GWH, in order to legally comply with the GPDO the buildings would need to be demolished and rebuilt to completely accord with the GPDO conditions.

124. I have concluded above that buildings 1 and 2 lie outside the curtilage of GWH and although building 3 lies within that curtilage, to comply with the GPDO the building would need to be re-erected in a position which accorded with the conditions. Irrespective of its size and footprint the GPDO requirements cannot be satisfied by partial compliance. If a development does not comply with all of the conditions set out in the GPDO it cannot be lawful as PD and planning permission is required. I note that the LPA did not consider it appropriate to request a retrospective application for building 3 (see other matters below). However, that was a matter for the authority who considered that on the basis of the unauthorised works carried out it was expedient to issue the notice. Nevertheless the appellants could have submitted a retrospective application but did not do so.

125. In conclusion on the ground (f) appeals, I do not consider that the appellants' arguments go anywhere near to indicating that any lesser steps would overcome the

harm in principle to the Green Belt; the harm to its openness and the harm to the CHCA. Nor, in my view, do the fall-back arguments carry sufficient weight to outweigh the harm identified and the objections to the unauthorised buildings. Both appeals must, therefore, fail, on ground (f).

Appeals A and B on ground (g)

126. On behalf of both appellants it is argued that a period of just 3 months does not give sufficient time to financially and contractually arrange for the demolition and removal of materials relating to buildings 1, 2 and 3. The Council has also commented on this ground and I have taken into account their position.

127. Having considered all of the matters relating to this ground of appeal I consider it appropriate to extend the compliance period to 9 months. This should be more than enough time in my view for the appellants to comply with the requirements of the notice whilst also considering how they might wish to take advantage of any valid PD rights relating to their land and/or submitting a retrospective application for building 3. I shall vary the enforcement notice accordingly.

Other matters

128. I have noted the submissions regarding building 3 and the contention that the Council made *'a decision in respect of an outbuilding which neither implemented nor was conducive to or facilitating any earlier decision taken by the LPA'.* It is contended that the Council had a pre-existing policy regarding enforcement action which it exercised without regard to its discretionary powers and that a retrospective application for building 3 should have been requested.

129. However, an LPA may issue an enforcement notice if it appears to them that there has been a clear breach of planning control and that it is expedient to issue a notice. In this case the LPA identified the breaches of planning control in relation to the 3 appeal buildings and clearly considered it expedient to issue the notice in this part of the GB and the CHCA.

130. The courts have held that, as a test for what might be *'expedient',* a balancing of the advantages and disadvantages of a course of action might be considered. However, the main proviso is for a LPA to have regard to the development plan and to any other material considerations and this means that planning considerations should be the basis for issuing an enforcement notice.

131. The reasons for issuing the notice are clear. The LPA was of the view that it was expedient to issue it and that, in the overall circumstances, there were sufficient planning considerations to justify its issue. The appellants may disagree with the Council's judgement in this respect but an LPA must balance all of the relevant factors and decide whether or not it is expedient to take enforcement action. I do not consider that in this case the LPA misused its discretionary powers or failed to take a relevant power into account. They simply decided on the facts that it was expedient to issue a notice and Have also clearly indicated that a retrospective application for building 3 would not have been supported.

132. In reaching my conclusions in these appeals and on all grounds pleaded, I have taken into account all of the written submissions, as well as my observations regarding the appeal buildings, the overall GWH land and the CHCA. The submissions include the full planning history of the GWH land; the initial documents as submitted; the subsequent statements from both of the appellants' agents (however submitted); all of the specific witness statements; the various photographs and plans; all other documents, e-mails and reports; the final comments (including the costs application) and all of the full submissions from the parties regarding the validity of the notice.

133. However, none of these carries sufficient weight to alter my conclusions on the main issues and does any other factor change my decision that both appeals A and B should be dismissed and that the notice should be upheld as varied.

Formal Decisions

134. I direct that the enforcement notice be varied by deleting the number '3' in section 6 of the notice (TIME FOR COMPLIANCE) and by substituting, therefore, the number '9'.

Appeal A

135. The appeal succeeds to a limited degree on ground (g) only. Otherwise the appeal is dismissed and the enforcement notice is upheld as varied. Planning permission is refused on the application deemed to have been made under section 177(5) of the Act.

Appeal B

136. The appeal succeeds to a limited degree on ground (g) only. Otherwise the appeal is dismissed and the enforcement notice is upheld as varied.

Anthony J Wharton

Inspector