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: 23 March 2020

Appeal Ref: APP/P1560/C/17/3188947
Land at 50 Colne Way, Point Clear Bay, 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 Mrs Kim Earle against an enforcement notice issued by Tendring District Council.
- The enforcement notice, numbered 10/00626/BRCHC3, was issued on 9 October 2017.
- The breach of planning control alleged in the notice is breaches of condition 2 of planning permission TEN/119/59 dated 7 May 1959 with amended layout on 5 November 1959 and condition 2 of planning permission TEN/119G/59 dated 23 March 1961.
- The development to which the permission relates is construction of new chalets.
- The condition in question is No 2 which states that: The chalets shall be used for habitation only during the period 1 March to 31 October in each year and during the winter months may be used for storage of household effects.
- The notice alleges that the condition has not been complied with by the habitation (occupation) of this chalet between the period of 1 November and 28 February (29 February in leap years) each year otherwise than in compliance with condition 2 of the said planning permission TEN/119/59 and condition 2 of the said planning permission TEN/119G/59.
- The requirements of the notice are to:
  1. Comply with Condition 2 of Planning Permission TEN/119/59 dated 7 May 1959 with layout amended on 5 November 1959 by ceasing the habitation (occupation) of the chalet on the land between 1 November and 28 February (29 February in leap years) each year.
  2. Comply with Condition 2 of Planning Permission TEN/119G/59 dated 23 March 1961 by ceasing the habitation (occupation) of the chalet on the land between 1 November and 28 February (29 February in leap years) each year.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a) and (d) of the Town and Country Planning Act 1990 as amended.

This decision is issued in accordance with section 56 (2) of the Planning and Compulsory Purchase Act 2004 as amended and supersedes that issued on 18th December 2019.

Procedural Matters

1. A number of appeals relating to several properties at Point Clear Bay were heard together at the above Inquiry. General evidence relating to flooding considerations and proximity to services and facilities, common to many appeals containing ground (a), including this one, was heard during Week 1 and presented on behalf of a number of appellants by Mrs Kelly. There was an

opportunity for any matters specific to individual appeals were heard throughout the remainder of the Inquiry. The appellant gave evidence on 11 July 2019.

2. Whilst no corrections are required to this Notice, it has been necessary to correct the period for compliance in relation to a number of the notices relating to other appeal properties. The Council's witness accepted that there should be a consistent compliance period across this group of appeals. Accordingly, I intend to vary the compliance period to 14 months to correspond with the longest period specified amongst this set of appeal notices should the Notice be upheld.

Decision

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

Reasons

Ground (d)

Main Issues

4. The time limits for taking enforcement action are set out in Section 171B of the Act. In these appeals S171B(3) applies which states that in the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

5. For the appeal on ground (d) to succeed the onus is upon the appellant to demonstrate, on the balance of probability, that the condition referred to in the enforcement notice has been breached for a continuous period of ten years or more prior to the date of the issue of the Enforcement Notice.

The Legal points

6. A Breach of Condition Notice (BoCN) was issued in 2012 that relates to the same breach. The point was made on behalf of the appellant(s) 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 subsections 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) but still rely on the date of the earlier action. 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.

7. 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 therefore on or before 9 October 2007.

8. Nevertheless, the 2012 BoCN remains in force. The Council therefore submits that the continued occupation of the property after 1 November 2013, the date specified for compliance with the BoCN, was and continues to be a criminal offence. Accordingly, the Council say the appellant cannot benefit from a claim that an on-going breach, after this compliance date, would contribute to the ten-year 'immunity' period, as the appellant would benefit from their own wrong doing.

9. 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.

10. 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.

11. 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 Breach of Condition Notice, 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.

12. Furthermore, the Welwyn Hatfield judgement also relates to an appeal against the refusal of a certificate of lawfulness rather than an appeal against an enforcement notice – Mr Beesley was therefore trying to establish that the use as a dwellinghouse was lawful. I recognise that under section 191(3) of the Act, it is clear that the failure to comply with any condition or limitation subject to which planning permission has been granted will only be lawful if the time for taking enforcement action has expired (S191(3)(a)) and it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force (S191(3)(b)). However, no certificate of lawfulness is being sought alongside this ground (d) appeal. Rather the question before me, is solely whether at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.

13. 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

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

15. 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.

16. In support of this ground of appeal the appellant provides a Council Tax bill dated 7 July 2006 to demonstrate when she started living in property all year round. Title deeds dated 2002 show when the property was purchased by the appellant's late husband. In the grounds of appeal form he confirms that he has lived at the property all year round since then (i.e. "for over 15 years"). This is all collaborated by the oral evidence, given under oath, by Mrs Earle and the Council Tax records provided by the Council which show that the property was identified as occupied without any exemptions claimed from 27 September 2002 to the current day.

17. Accordingly, the evidence submitted does 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 prior to the issue of the notice. The appeal on ground (d) therefore succeeds and the Notice will be quashed.

18. Whilst my decision results in the quashing of the notice because I have found it was too late for the Council to take action in this case, it has no effect on the Breach of Condition Notice that is not before me. I recognise that success on ground (d) and the resultant quashing of the notice, may not therefore be of much comfort to the appellant in the knowledge that any on-going breach would still appear not to be lawful as the BoCN would still exist. However, it would be a matter for the Council to decide whether to bring any prosecution proceedings against the Breach of Condition Notice.

19. Furthermore, as the Notice will be quashed, there is no alleged breach against which the deemed planning application and ground (a) can be assessed. Accordingly, I am unable to proceed to determine whether planning permission should be granted in this case.

Conclusion

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

C Sherratt

Inspector

APPEARANCES

FOR THE APPELLANT:

Mrs K Earle	
She called	
Mrs Mandy Kelly	General Planning Issues
Herself, Mrs K Earle	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 A	Statement of Mrs K Earle.
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 & Glocestershire 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.