



Appeal Decision

Site visit made on 10 July 2020

by D H Brier BA MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 July 2020

Appeal Ref: APP/Y2003/C/19/3237797-98

South Ferriby Marina, Red Lane, South Ferriby DN18 6JH

- 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 Teresa and Patrick Ferguson against an enforcement notice issued by North Lincolnshire Council.
- The enforcement notice was issued on 29 August 2019.
- The breach of planning control as alleged in the notice is the making of a material change of use of land to use for the siting and residential occupation of a cabin.
- The requirements of the notice are:
 - i) Cease the use of the cabin for residential occupation.
 - ii) Remove the cabin from the site.
- The period for compliance with the requirements is 9 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and a variation.

The Appeal Site and Background

1. The appeal site is a marina, boatyard and chandlery on the east side of the River Ancholme. The structure in question is a single storey portable building clad in timber attached to the east side of a chandlery and office building on the northern edge of the marina. Planning permission was granted for a 2 storey extension to the chandlery with residential accommodation above on 5 November 2015 (ref PA/2015/378).

The Enforcement Notice

2. The notice alleges a material change of use, but whereas it is directed at a single use, namely residential, judging by the planning unit identified on the enforcement notice plan, this use appears to be part of a mixed use including the marina and chandlery as a whole, about which the allegation is silent. That said, while the mixed nature of the uses to which the site is put ought to have been acknowledged in the allegation, there is a more fundamental matter in this instance, in that the appellants contend that the cabin referred to in the allegation is a building – a point disputed by the Council. As this has particular implications for the appeal on ground (d), I shall address it at the outset before proceeding to consider the individual grounds of appeal.
3. The definition of a “building” set out in Section 336(1) of the 1990 Act includes “any structure or erection”. I am also mindful that the Court of Appeal judgement in *Skerrits of Nottingham v Secretary of State for the Environment*

Transport and the Regions (No.2) [2000] 2 P.L.R. endorsed an earlier judgement in *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co. Ltd [1949] 1 K.B. 385* which identified 3 primary factors as being relevant to the question of what was a "building", namely size, permanence, and physical attachment.

4. As regards size, the appellants' indication that the external dimensions of the structure are approximately 10m by 3m have not been challenged. While this is relatively modest compared with, say, a typical bungalow, the structure appeared to me to be a distinct, significant, and readily discernible physical entity nonetheless.
5. Turning to permanence, the structure appears to be a typical prefabricated portable cabin of a type often used as a temporary expedient, but this does not necessarily mean that it is impermanent. Indeed, the timber cladding and features such as the decorative uPVC door, which help give the cabin a more domestic appearance, strongly suggests to me that its presence on the land is something other than fleeting or ephemeral. Moreover, having read that the 2015 planning permission has lapsed, the possibility that the cabin is regarded as an alternative means of providing living accommodation on the site for the foreseeable future cannot be discounted. And, the appellants' assertion that the dwelling has been in situ since 2015 (a point I return to below) hardly suggests that it is a temporary feature.
6. As to physical attachment, in my experience, a cabin such as this would probably have been assembled away from the site and transported to it in that form. However, there is nothing to suggest that the structure has been moved since it was placed on the land, and to do so would probably require the use of heavy lifting equipment of some sort. And, while the means by which the structure is fixed to the concrete pad foundations, as the appellants indicate, was not readily apparent from my external inspection of the cabin, it seems to me that its very weight would be sufficient to secure it in place.
7. The provision of drainage and services, none of which has been called into question by the Council, is another element of attachment, albeit such provision could probably be disconnected fairly quickly. But, another weighty factor in this case is the linkage to the kitchen in the adjoining building referred to by the appellants. Not only does this point to another degree of attachment, but I also see it as another facet of permanence.
8. The foregoing considerations lead me to conclude that applying the factors identified in *Skerrits* and *Cardiff Rating Authority* to the circumstances of this case, as a matter of fact and degree, it is reasonable to regard the development in question as a building as opposed to a use, and that this should be reflected in the manner in which the allegation is framed. I have the power to correct the notice, and as doing so in the manner indicated would effectively be re-labelling the notice, as opposed to extending its scope, I am satisfied that this is an instance where the notice can be corrected without giving rise to injustice. The same view applies to a further consequential correction to the time period set out in the reasons for issuing the notice.

Appeal on Ground (c)

9. Ground (c) is a legal ground of appeal, and is distinct from any planning merits. The same applies to ground (d). The Courts have held that in such an instance,

the onus on proving it lies with the appellant. In order for the appeal on this ground to succeed it has to be shown that the matters alleged in the notice do not constitute a breach of planning control.

10. I am unable to identify anything in the appellants' submissions that specifically supports the appeal on this ground; the representations that have been made are more applicable to the appeal on ground (d) which I deal with below.
11. Notwithstanding my concerns about the basis of the allegation, I am satisfied that the stationing of the cabin in question constituted an act of development and that it fell outside any of the categories of permitted development. In the apparent absence of any relevant planning permission, I find the matters alleged in the notice do constitute a breach of planning control. Accordingly, therefore, the appeal on ground (c) fails.

Appeal on Ground (d)

12. In order for the appeal on ground (d) to succeed, it has to be demonstrated that at the time the enforcement notice was issued it was too late to take enforcement action. In the light of my conclusion in paragraph 8, the appropriate period insofar as immunity is concerned is 4 years, which gives a relevant date of 29 August 2015. The test for the evidence is the balance of probability.
13. The appellants' case is based solely on the premise that the cabin is lawful in that at the time the notice was issued the development had been completed and the cabin had been in situ and used as a dwelling for over 4 years. Even though the Council's case opposing the appeal on this ground is based on the '10 year rule', as the notice purports to indicate, I am concerned that no evidence to support the appellants' assertion has been adduced. In particular, there is a complete absence of any documentation, such as details appertaining to the acquisition and installation of the cabin, or anything else that would help shed light on the matter.
14. Without any evidence to support the "for over 4 years" claim, I am concerned that the appellants' case is seriously lacking in robustness, clarity and precision. In other words, I am not satisfied that the statement alone is sufficient to demonstrate on the balance of probability that when the enforcement notice was issued it was too late for enforcement action to be taken. The onus of proof that lies with the appellants has not been discharged.
15. The appeal on ground (d) therefore fails.

Appeal on Ground (a), the Deemed Application

16. I consider there are 2 main issues. Firstly, whether the character and appearance of the area would be adversely affected and secondly, whether the implications for flood risk have been addressed adequately.
17. On the first issue, reflecting the guidance in the National Planning Policy Framework (The Framework), Policies DS1 and CS5 of the Council's Local Plan (LP) and Core Strategy (CS) respectively seek to promote high quality design.
18. Perhaps due to its nature, the form and appearance of the disputed cabin is essentially functional. But in the context in which it is seen, which includes sizeable workshop and storage buildings, the open storage (on land) of a

variety of boats, together with the somewhat unprepossessing looking and larger chandlery building to which it is attached, it does not look unduly incongruous, out of keeping or inappropriate. I would not go so far as to say that the structure enhances the character and appearance of its surrounds, but it does tend to reflect them, and its presence has not had an adverse impact in this respect. I therefore see no conflict with Policies DS1 or CS5.

19. Turning to the second issue, the site lies within Flood Zone 2/3(a), where, according to The Framework, a site specific flood risk assessment should be provided, an approach reiterated in CS Policy CS19. And, LP Policy DS 16 indicates that development will not be permitted within floodplains where it would, amongst other things, increase the number of people or buildings at risk.
20. There is nothing to indicate that a flood risk assessment has been carried out in connection with the development in question. I appreciate that the scheme for which planning permission was granted in 2015 included living accommodation. However, having read that flood risk had been mitigated in that instance because the living accommodation was to be at first floor level, I am not inclined to attach much weight to this matter. All this leads me to conclude that the implications for flood risk have not been addressed adequately and I therefore find the development in question contrary to both the policies referred to above, and the Framework. My concern in this respect outweighs my conclusion on the first issue. Nor do I consider this concern could be overcome by conditions.

Appeal on Ground (f)

21. In order for the appeal to succeed on this ground it has to be shown that the requirements of the notice are excessive. The appellants' case under this heading, however, is partly directed at the planning merits of the development and partly at the question of immunity, both of which I have addressed in the sections above. I am unable to identify anything in the submissions that specifically addresses the appeal on this ground.
22. As I see it, notwithstanding my criticism of the manner in which the notice has been framed, the requirements set out in the notice represent a reasonable response to the breach of planning control alleged therein. I do not find them excessive.
23. The appeal on ground (f) therefore fails.

Appeal on Ground (g)

24. The proximity of the cabin to the appellants' business, the implications for the day-to-day running of the marina business, and the health consequences of the Council's action referred to are not matters I set aside lightly. Taking all these factors into account, I am not satisfied that in this instance the 9 month compliance period is sufficient to give the appellants not only a reasonable opportunity to find somewhere else to live, but also to make any necessary consequential arrangements to ensure that the well-being of their business is not impaired unduly. On the other hand, I consider a compliance period of longer than a year would be tantamount to the grant of a temporary planning permission, which I am not satisfied would be appropriate here.

25. I shall therefore vary the notice by extending the period of compliance to one year. The ground (g) appeal succeeds to this extent.

Other Matters

26. I have taken into account all the other matters raised, but none are sufficient to outweigh the considerations that have led me to my conclusions.

Formal Decision

27. I direct that the enforcement notice be:

A. Corrected:

(i) in section 3 by the deletion of "the making of a material change of use of land to use for the siting and residential occupation of a cabin" and its substitution by "the stationing and residential occupation of a cabin".

(ii) in section 4 by the deletion of the words "during the last 10 years" and their substitution by "during the last 4 years".

B. Varied in section 6 by the deletion of "9 months" as the period for compliance and its substitution by "One year".

28. Subject to these corrections and variations I dismiss the appeal and uphold the notice as corrected and varied. I refuse to grant planning permission on the application deemed to have been made under section 177 (4) of the 1990 Act.

D H Brier

Inspector