



Appeal Decision

Site visit made on 6 July 2020

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 July 2020

Appeal Ref: APP/X1165/C/19/3238058

Land at 'Woodend', Lincombe Drive, Torquay TQ1 2LP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (The Act) by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Adrian Knott against an enforcement notice issued by Torbay Council.
 - The enforcement notice was issued on 29 August 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the change of use of the main villa and its gardens and swimming pool area, all shown hatched black on the plan ('the Villa'), from Class C3 (residential) to commercial holiday accommodation.
 - The requirement of the notice is cease the use of the premises for commercial holiday accommodation.
 - The period for compliance with the requirements is within 21 days after this notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is corrected and varied by:
 - Deletion at section 2 (Land to which the notice relates) of the words "edged red" and their substitution with the words "hatched black";
 - Deletion at section 5 (What you are required to do) of the words "the premises" and their substitution with "Woodend as hatched black";
 - The addition at section 5 (What you are required to do) after "accommodation" of the words "other than where it is within the scope of Use Class C3 or ancillary to that lawful use"; and
 - Deletion at section 6 (Time for compliance) of "21 days" and its substitution with "56 days".
2. Subject to the corrections and variations the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Application for costs

3. An application for costs was made by Mr Adrian Knott against Torbay Council. This application is the subject of a separate Decision.

Preliminary Matters

The planning unit, the plan and description of the allegation

4. 'Woodend' is a large villa within an area including other similar large residential buildings. In addition to the villa at the property there are 3 dwellings that are all within the appellant's freehold ownership which is outlined in red on the notice plan.
5. These buildings are within spacious grounds with some elements being clearly shared such as the access and parking areas. The part of the grounds which includes the swimming-pool and covered hot-tub space directly adjoining Woodend, is fenced off with a gated access to the patio immediately on the seaward side of that building although there are also gates through from the separate dwellings to the north. However, the swimming pool and hot-tub area as well as the extensive grounds down-hill towards the sea more closely relate, in my opinion, to the main building on the site which is Woodend.
6. The land within the appellant's ownership contains different properties which are each occupied separately. When considering whether a material change of use has occurred it is first of all necessary to consider what the relevant planning unit is. It has been held that this is usually the unit of occupation unless a smaller area can be identified which is physically separate and distinct and/or occupied for different and unrelated purposes. It is not disputed that the separate dwellings and Woodend are separately occupied and are separate planning units. In terms of the land around them, some parts are shared but the evidence submitted such as the advertisements for holiday use of Woodend indicate that the swimming-pool and hot-tub area as well as being physically closely related to that building are also functionally used integrally with it by people staying there. I am told that the occupiers of the other dwellings are also allowed to use the pool and hot-tub area and that is set out within the tenancy agreements. However occasional use by those neighbours does not alter my view that as a matter of fact and degree, the planning unit of Woodend includes those areas.
7. The red outline on the plan that has been submitted therefore covers more than the planning unit that is of concern to the Council but that does not make it faulty. The plan also shows black hatching relating to what I consider is a reasonable interpretation of the planning unit covered by the alleged breach of planning control. The basement flat is also in that area but as the appellant acknowledges, it is difficult to separate that out. After all, the plan represents 3 dimensions in 2 dimensions and is meant only as an aid to identify the property and the breach. The plan achieves that in my view and does not require deletion or amendment.
8. The appellant has raised concerns about some inconsistencies between the wording in different sections of the notice. Section 2 of the notice makes it clear that the notice relates to Woodend only but it would be even clearer and more consistent with other sections of the notice, particularly section 3, if this also referred to the black hatched area on the plan, rather than the broader area outlined in red. Section 5 of the notice refers to "use of the premises", this could also be clearer and more consistent if that also referred to Woodend and the black hatched area. The appellant has clearly understood the terms of the notice and it is generally clear on its face. Making these changes would not

cause injustice to the appellant or the Council. I can therefore correct the notice in those respects using my powers under S176(a) of the Act.

The Appeal on ground (b)

9. To succeed on ground (b), it is incumbent on the appellant to demonstrate that the alleged breach has not occurred, as a matter of fact.
10. There is no dispute that Woodend has been rented out as short-term holiday accommodation and that this has occurred since July 2017. There is also no dispute that when that happens, it is a commercial activity. The appellant states that the property is still his main home, that he is not there all of the time and that the property is let for short periods totally less than 140 days per year.
11. The use of the premises for commercial holiday accommodation has occurred prior to the issuing of the notice as a matter of fact. Whether that use is a material change of use of the premises for which planning permission is required is a matter of the appeal on ground (c).
12. I have also considered under this ground whether the wording of the alleged breach accurately reflects what the Council is describing. The submitted documents suggest the possibility of correcting the description to a mixed use including that within Use Class C3¹. It seems on the balance of probabilities that the use of the property at times may be occupied by the appellant as an individual or with his family. However, at other times the building is occupied by other people on a short-term holiday basis. Even if there are times when the appellant and his family do live at the property whilst others are there on holiday, that appears to be intimately associated with the overall commercial use particularly if management is necessary. The degree of commercial use may vary but that does not change the fact that the alleged use for commercial holiday accommodation had occurred prior to the issuing of the notice and that was outside of the scope of Use Class C3.
13. I therefore consider that development has taken place as alleged, the appeal on ground (b) therefore fails.

The Appeal on ground (c)

14. On ground (c), the onus of proof is on the appellant to demonstrate that the development does not constitute a breach of planning control.
15. Class C3 defines "dwellinghouses" as use as a dwellinghouse (whether or not as a sole or main residence) by (a) a single person or by people to be regarded as forming a single household; (b) not more than six residents living together as a single household where care is provided for residents; or (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within class C4).
16. It was held in Moore² that it was not correct to say either that using a dwelling for commercial holiday lettings would never amount to a material change of use or that it would always amount to a material change of use. It is a matter of fact and degree and would depend on the "particular characteristics of the

¹ Dwellinghouses - Class C3 to the schedule to The Town and Country Planning (Use Classes) Order 1987 (as amended)

² Moore v SSCLG & Suffolk Coastal DC [2012] EWCA Civ 2101

use as holiday accommodation.”

17. There is no dispute that Woodend is capable of being a dwelling, albeit that it is very large. It has 7 lettable bedrooms and the appellant states that it is available as a single property for short term self-contained holiday letting to “families and pre-formed friendship groups only”. A building of this size can physically cater for a lot of people. Where those people live as a single household, that would be a very low-key use. Whilst it is impossible to guarantee how reasonable and considerate members of a single household would be, living in such a large dwelling within very spacious grounds they are more likely to live in a low intensity manner which is likely to have limited obvious impacts upon neighbouring properties or the area in general.
18. In this case, the property has at times been advertised inconsistently via well-known internet-platforms. Sometimes it is shown as being available for sleeping up to 17 people within the 7 bedrooms. The appellant’s screenshot of the same internet platform indicates up to 8 guests but within 7 available bedrooms and 14 beds. The appellant acknowledges that the marketing effort was altered before the notice was issued. Many of the bedrooms have been laid out as confirmed by that evidence with more than one bed. This is an indication of a potentially more intensive use than occupation by a family or single household. The same screenshot provided by the appellant indicates that guests will “have the villa to yourself” and that it is a self check-in arrangement rather than the appellant or a family member supervising visits as suggested elsewhere within their evidence.
19. Even a single household may at times cause noise and disturbance or may have parties with guests which may also lead to impacts that make a temporary but noticeable change in character. However, the propensity for such changes in character are far greater if the property is regularly used by people from different households arriving in numerous vehicles, who are coming together to stay for a short period. People staying at the property from families or pre-formed friendship groups enjoying a holiday are unlikely to live in the same way that a single household would with a normal daily or weekly routine. Recreational activity by people living in the property whilst enjoying their holiday, particularly in good weather, may lead to exuberant activities within the garden including use of the swimming pool and hot-tub which is close to the boundary with Holmwood House. The reasonableness of individuals and their ability to judge what is appropriate behaviour is, in my experience, diminished when feeling in holiday spirits. Those different groups may have in a number of vehicles as indicated by some of the evidence which when arriving and leaving would also be an indication of the scale of use.
20. There have been a series of complaints from a number of people who live nearby which indicates that the intensity of occupation at times has been noticeable and a cause of disturbance. That evidence is compelling in terms of its detailing of the impacts of the occupation of the property between 2017 and 2019 along with some verification from the Council. I would not expect the frequency and extent of impacts to occur if the property was in low key use by a single household or that the effects would be so noticeable given the spacious nature of the area with the solid boundary walls and also substantial landscaping which in places will help to reduce such impacts. The physical attributes of the site and adjoining properties, which I will describe more fully in the appeal on ground (a), are such that the level of noise at times must have

been in extreme contrast to the previous lower level use by a single household or group of people living as a household.

21. The appellant acknowledges that there have been instances of noisy activities as a result of such bookings. Some measures have been put in place to attempt to control this. Those and the self-imposed limitation of 140 days for potentially letting out in order to stay below local taxation limitations does not alter my view on these matters. Even if the appellant lives at the property as his main residence with his family, based upon the submitted evidence of substantial use beyond the scope of what would normally be considered use by a single household, as a matter of fact and degree has resulted in a distinct change in character of the property. That therefore has resulted in a material change of use as alleged.
22. The appeal on ground (c) therefore fails.

The Appeal on ground (a) and the deemed planning application

23. Under this ground of appeal, I am considering the development as alleged on the notice. The main issue is the effect of that development on living conditions at neighbouring residential properties by reason of noise and disturbance.
24. The building is large and is within spacious grounds and generally, there is a good degree of separation between it and the surrounding dwellings outside of the site although it is more intimately positioned relative to those dwellings within the appeal site. I visited both of properties that adjoin the side boundaries of the appeal site. The area is part of the pleasant seaside setting which was quiet at the time of my site visit and although that is a snap-shot in time, it is similar to the description set out by the Council and which the appellant has not disputed or presented evidence to the contrary.
25. The adjoining property at Holmwood is also set within spacious grounds and is separated from the site by a wall and robust planting on the boundary. The area within the site that contained the swimming-pool and hot-tub is a substantial distance from the patio area within Holmwood. I would expect more reasonable levels of noise than have been experienced by these neighbours to be mitigated to some extent by the physical nature of the boundary including the fence, wall, trees and other landscaping. However, the submitted evidence indicates that the level of use through loud voices other noise from people as well as music being played has at various times of the day and night caused substantial disturbance.
26. The vehicular and pedestrian access from Lincombe Drive is close to the back wall of the dwelling at Bankside. Whilst this is set behind a robust stone wall, there are upper floor windows in the dwelling at Bankside as well as a terrace at first floor level, only a short distance back from that wall. Whilst the wall will provide some protection against noise, the more intensive traffic movements in and out of the appeal site driveway as well as slamming doors and groups of people talking may be a cause of some disturbance for those in Bankside in my view. As suggested by the appellant, there is substantial parking capacity at the site for around 6 vehicles. When the property is in use regularly for short term holiday lets at an intensive level this could result in significant degrees of noise from those vehicles manoeuvring in and out of the site. There will also be from vehicle doors opening and closing along with the general hubbub from arriving and departing guests.

27. Although not addressed by the main parties, it is also necessary to consider the living conditions of those people occupying the other dwellings within the appeal site who may also be affected by such intensive use of Woodend. The effects I describe above will also impact upon those occupiers given that the dwellings are even more intimately associated with the appeal site.
28. The occupation of the site by multiple families with a number of vehicles with those occupiers being in party mode when staying at the property is in sharp contrast to the general quiet nature of the area. Use at the level that has occurred in this case is in my view has unduly impacted upon the amenity of neighbouring residential properties, contrary to Policy DE3 of the adopted Torbay Local Plan 2012-2030. In relation to the main issue the development has had a harmful effect on living conditions at neighbouring residential properties by reason of noise and disturbance.

Planning conditions

29. The appellant has suggested some basic subject areas for planning conditions which are put forward to help to control or prevent harmful impacts. I have not been provided with detailed suggested wording and the Council has not provided detailed comments on these subject areas and has simply stated that they do not consider that planning conditions could overcome the harm.
30. I am not presented with evidence to indicate what number of occupants, minimum number of night stays or the number of bookings during the year that could possibly make a difference to the harm that I consider is caused from the current level of use. The presented evidence does not demonstrate that measures open to the Council to take action under other regimes would be sufficient to prevent harm to living conditions of neighbouring properties. It is also not explained how closed-circuit television, a noise management plan or registers of those staying would assist the Council in enforcing reasonable controls over the property although these measure may help the appellant in controlling occupants within his own managerial regime. A limitation of the Use to a single household is amongst my consideration below under ground (f).

Conclusion on ground (a)

31. For the reasons given above and having regard to other matters raised, planning conditions of the type suggested would not effectively prevent the harm I have identified in relation to the main issue. The appeal on ground (a) and the application for deemed planning permission fail.

The Appeal on ground (f)

32. The appeal on this ground is that the steps required exceed what is necessary to achieve the purpose of the notice. The notice requires the use of the premises for commercial holiday accommodation to cease.
33. It has been held that the recipient of an enforcement notice is entitled to say that he must find out from within the four corners of the document what he is required to do or abstain from doing. The notice must largely therefore be read on its face and taken literally. However, the requirements of a notice must not purport to prevent the recipient of a notice from doing something which they are entitled to do without planning permission such as those which relate to lawful use rights. A notice cannot be interpreted so as to make an offence out of a lawful activity.

34. The use of the building for commercial holiday accommodation does not necessarily always fall outside of the scope of Use Class C3 if occupied by a single household. Such occupation may involve a substantial number of visitors living within the limitation of the use class. Also, occupation by people not within a single household but who were staying on a commercial holiday basis may not always involve a material change of use of the building from its lawful use as a dwellinghouse. As such each set of circumstances should be considered as a matter of fact and degree and will inevitably involve a judgement given the circumstances when they occur.
35. The current requirement would therefore at face value appear to interfere with ancillary use rights and this could be a concern should the matter need to be considered subsequently if it was alleged that a further breach had occurred. Whilst it is not possible to put precise limits by varying the requirement given the need to assess each occurrence on its merits, it would assist if it were clarified that commercial use can be within the scope of Use Class C3 or can be ancillary to that lawful use.
36. To this limited extent therefore the appeal on ground (f) succeeds.

The Appeal on ground (g)

37. The appeal on this ground is that any period specified in the notice falls short of what should reasonably be allowed.
38. The notice was issued last August but the appellant is entitled to assume that he may be successful in his appeal and it is reasonable to take into account that complying within the 21 days following this decision could have significant consequences for the appellant and those people who may have already booked to stay at the property. It is reasonable for existing booked guests to have a longer notice period to re-arrange their holiday plans. The appellant suggests 8 weeks.
39. A balance needs to be struck between protecting the neighbouring residents from the potential harm from the unauthorised use whilst not having an unreasonable financial and practical impacts upon guests and the appellant. The enforcement regime is not a punitive process. Other non-planning controls alone will not in my view be adequate to safeguard neighbouring living conditions but 21 days in my view is too short a period for the cessation of the unauthorised use. I consider that 8 weeks (56 days) will strike a more reasonable and proportionate balance.
40. On that basis, the appeal on ground (g) therefore succeeds.

Conclusion

41. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and variations and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

A Harwood

INSPECTOR