
Appeal Decisions

Site visit made on 7 July 2020

by Nick Fagan BSc (Hons) DipTP MRTPI

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

Decision date: 10 August 2020

Appeal A Ref: APP/U1105/C/19/3234097

Land at and adjacent to The Workshop, Longmeadow Road, Lympstone, Devon EX8 5LF

- 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 John Lomax against an enforcement notice issued by East Devon District Council.
 - The enforcement notice was issued on 10 July 2019.
 - The breach of planning control as alleged in the notice is works to install a self-contained Klargestar sewage treatment plant discharging into Wooton Brook, in the approximate position shown edged blue on the attached plan.
 - The requirements of the notice are:
 - (I) Permanently remove from the land the sewage treatment plant and permanently remove any associated plumbing and electrical cabling from the land;
 - (II) Permanently cease the use of the sewage treatment plant;
 - (III) Permanently connect the dwelling, known as The Workshop, to the mains sewage system as indicated as part of planning application 18/1474/FUL; and
 - (IV) Permanently remove from the land any debris and materials resulting from compliance with the above actions and return the land to its former state clear of such items.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal B Ref: APP/U1105/X/19/3238290

Land at and adjacent to The Workshop, Longmeadow Road, Lympstone, Devon EX8 5LF

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr John Lomax against the decision of East Devon District Council.
 - The application Ref 19/1557/CPL, dated 15 July 2019, was refused by notice dated 11 September 2019.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is the provision of a porous hard surface to be used for any purpose incidental to the enjoyment of the dwelling known as The Workshop.
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Decisions

Appeal A

1. It is directed that the enforcement notice be varied by the deletion of requirement (II) (*'Permanently cease the use of the sewage treatment plant'*) and requirement (III) (*'Permanently connect the dwelling, known as The Workshop, to the mains sewage system as indicated as part of planning application 18/1474/FUL'*) and to consequently re-number the remaining requirements as (I) to (II). It is also directed that the compliance period of three months be deleted and substituted to a period of six months. Subject to these variations, the enforcement notice is upheld.

Appeal B

2. Appeal B is dismissed.

Application for costs

3. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Reasons

Appeal A – Ground (a): the deemed application for planning permission

4. Ground (a) is that planning permission should be granted. The main issue is the likely long-term effect of the sewage treatment plant (STP) and whether its installation complies with development plan policy.
5. The site as defined by the map attached to the notice is the land to the south and partly to the east and west of the appellant's dwelling (The Workshop). This is the same site as that submitted with the LDC application, the subject of Appeal B.
6. The Council makes no objection to the installation of the STP outside what it considers to be the dwelling's residential curtilage because it creates no visual harm and the land would still remain in agricultural use.
7. Its objection is to the impacts of the STP's discharge to the Wooton Brook, the local watercourse that abuts the site's south eastern and south western boundaries, and to local flood risk since the site lies within Flood Zone 3.
8. The appellant has provided correspondence from the Environment Agency (EA) to a local Councillor, which suggests the EA had no concerns regarding the STP polluting Wooton Brook.¹
9. I was able to inspect the location of the Klargester STP on my visit, which is correctly shown edged in blue on the plan attached to the notice. The appellant showed me a channel that discharges the run-off from the STP to the Wooton Brook. I acknowledge that when this STP functions properly that any run-off would be pollution free and essentially equivalent to potable water, as the EA officers found during their visit in 2019.
10. I also acknowledge that the appellant has made a planning application to the Council to retain the STP, albeit this has not been validated as a householder

¹ Email from Doug Parker/Nicola Rumsey of the EA to Cllr Dimond dated 12 February 2019 contained in the appellant's appeal statement

application because of the ongoing dispute concerning whether or not the site is or isn't part of the curtilage of the house – which I address in Appeal B below.

11. However, irrespective of the curtilage dispute issue, the history of the residential development of The Workshop and the Council's relevant planning policies are apposite to the consideration of ground (a).
12. A mains sewer runs through the village somewhere to the north of the dwelling and the application for change of use from workshop to single dwelling that was granted on 31 October 2018 (LPA Ref 18/1474/FUL) specified that foul sewage would be disposed of via a mains sewer, which is customary where such a sewer exists.
13. The most relevant policy here is East Devon Local Plan 2013 to 2031 (LP) Policy EN19 (Adequacy of Foul Sewers and Adequacy of Sewage Treatment Systems), which states:

"New development will not be permitted unless a suitable foul sewage treatment system of adequate capacity and design is available or will be provided in time to serve the development. Development where private sewage treatment systems are proposed will not be permitted unless ground conditions are satisfactory, and the plot is of sufficient size to provide an adequate subsoil drainage system or an alternative treatment system."
14. The explanatory text to this policy, which is particularly relevant here, states at paragraph 22.28 of the LP:

"In rural areas where connection to the main sewer is not possible new development may be served by private sewage plants. Private systems may also be used for new development in areas affected by drainage restrictions preventing connection to the main sewer. However, the installation of a private sewage treatment system will only be possible on plots of adequate size and if detailed assessment of the site and local environment shows adverse effects will not arise. As a general principle new development should be served by new or existing public foul sewerage systems and sewage treatment plants, rather than a proliferation of small private sewage treatment systems."
15. Policy EN19 does not prohibit the installation of this STP but I observed at my visit that the ground of the site has a high clay consistency, which may exacerbate any run-off from it, albeit that run-off would not be polluting providing the STP was maintained properly. The site is not in an open rural area but in a village. But above all the installation of such a small private STP in a built-up area served by a mains sewer has not been justified. No case is made that the nearby mains sewer or local sewage system cannot take the foul sewage load generated by The Workshop.
16. The way for the appellant to justify this is through the mechanism of a formal application for planning permission. This would involve the formal consultation of the EA by the Council and would also involve the submission of a formal Flood Risk Assessment so that the EA can determine any implications for flood risk on this and adjoining sites next to Wooton Brook, which lie within Flood Zone 3.

17. I know the appellant has tried to submit such an application and he can now confidently do so following these linked decisions. But until such an application has been formally determined, following formal consultation with the EA, I conclude that insufficient information has been put forward to justify why the Klargester STP should be allowed to remain when there is a nearby mains sewer that is apparently capable of taking the foul sewage generated by this dwelling.

18. For these reasons the appeal on ground (a) fails.

Ground (f)

19. Ground (f) is that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. In this case the reasons for issuing the notice are concerned both with remedying the breach by restoring the land to its condition before the breach took place as set out in S173(4)(a) and to prevent any possible adverse impacts to third parties down-stream from the land by reason of increased flood risk or polluting run-off from the STP, as set out in S173(4)(b).

20. Requirement (III) of the notice – *"Permanently connect the dwelling, known as The Workshop, to the mains sewage system as indicated as part of planning application 18/1474/FUL"* – goes beyond the customary requirement simply to restore the land to its previous condition. Clearly it will be necessary for the appellant, if he is to continue living in the dwelling, to establish a suitable alternative means of disposing of the dwelling's sewage that meets the Council's requirements. But this is a matter between him and the Council. The requirement in the notice to connect to the main sewer is therefore unnecessary. I will therefore delete it.

21. Requirement (II) of the notice – *"Permanently cease the use of the sewage treatment plant"* – is also unnecessary because it would simply be impossible to use the treatment plant if it had already been removed as per the first requirement. For reasons of clarity I will therefore delete it.

22. The appellant's case here is that, because the Council has failed to properly assess whether the land on which the STP lies is or is not curtilage, its decision to enforce its removal is essentially premature.

23. I have explained above that the implications for possible pollution and flood risk need to be assessed as part of a full planning application with the input of the EA as a statutory consultee. In the absence of such a formal process and indeed in the absence of planning permission I cannot see what lesser steps the Council could reasonably take to resolve the breach of planning control. If the outcome of a formal application results in retrospective planning permission for the STP then that permission would override the requirements of the notice, as set out under S180 (1) of the Town and Country Planning Act 1990.

24. Consequently, the ground (f) appeal succeeds but only to the extent set out above.

Ground (g)

25. Ground (g) is that the period for compliance falls short of what should reasonably be allowed.
26. The compliance period set out in the notice is three months. In itself that would be sufficient and reasonable time to comply with the EN's requirements. However, given the expressed desire to submit a retrospective planning application for the STP and have it determined by the Council, a period of six months would be more reasonable, especially because this matter has previously been the subject of correspondence between the main parties.
27. The appellant suggests a period of 18 months would be reasonable because any refusal of planning permission would then be appealed, which would take up to 12 months. Although I acknowledge that this may be the case, I consider it unlikely that the Council would seek to take action in the courts (or otherwise) for breach of the notice when an appeal on the matter in question was still outstanding.
28. Consequently, I conclude that the compliance period of the notice be changed from three months to six months, and ground (g) succeeds to that extent.

Appeal A Conclusion

29. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control and the potential injury to amenity and the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeal on grounds (f) and (g) succeed to that extent.

Appeal B

30. The porous hard surface referred to in the Certificate of Lawful Use or Development (CLU) application is a brick paviour patio abutting the rear (south) elevation of the dwelling.
31. Schedule 2, Part 1, Class F of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) grants planning permission for the provision within the curtilage of a dwellinghouse of a hard surface for any purpose incidental to the enjoyment of the dwellinghouse as such.
32. So, it is necessary to determine whether the site, which includes the location of the patio, is within the curtilage of the dwelling, because if it isn't Article 3 (5) of the GPDO specifically excludes unlawful development from constituting permitted development. The burden to make out the case that the development is lawful rests with the appellant.
33. The appellant quotes a range of caselaw in relation to the issue of curtilage. The *Burford* case² provides a useful reference for reaffirming the criteria laid

² *Adrian Burford v SSCLG and Test Valley BC* [2017] EWHC 1493 (Admin)

down in the *Sutcliffe* case³ as being (i) the physical 'layout' of the listed building and structure; (ii) their ownership past and present; and (iii) their use or function past and present. The *Burford* judgement notes, at para 46, "*Whether something falls within a curtilage is a question of fact and degree and thus primarily a matter for the decision-maker*" and "*It was for the Inspector to decide what weight should be given to each of the relevant factors.*"

34. The Council refers to a more recent High Court case: *Challenge Fencing*.⁴ Paragraph 18 of the judgement reaffirms that the extent of the curtilage of a building is a question of fact and degree and a matter for the decision maker. It also reaffirms the three criteria that Lord Justice Stephenson determined must be taken into account in the *Sutcliffe* case above.
35. Permission was only granted for the conversion of the workshop to the dwelling here on 31 October 2018, the month Mr Lomax acquired the property. The red line of the proposed site plan of that permission follows the south, west and half the east walls of the new dwelling and excludes the whole of the CLU red line site (which is also the red line site in the plan attached to the enforcement notice). It is well established that the red line on the site plan for new dwellings comprises the residential curtilage. The site boundary of the application is clear and was clearly arrived at deliberately in order to secure planning permission – because this land lies outside the village settlement boundary. There is no dispute between the main parties – other than on this issue of curtilage – that the authorised use of the land is for agriculture.
36. The dwelling's curtilage lies to the north and north west of the house as set out on this approved site plan. The CLU site is not therefore part of the dwelling's curtilage. This conclusion is in full accord with the *Burford* and *Sutcliffe* cases. It was confirmed by the Inspector in paragraph 8 of his decision in the recent appeal against Condition 3 of the October 2018 permission for the dwelling.⁵
37. For this reason, the patio or porous hard surface is not within the curtilage of the dwelling and consequently is development which does not benefit from planning permission granted by the GPDO. It is therefore in breach of planning control and thus unlawful.

Appeal B Conclusion

38. I dismiss Appeal B for the above reasons.

Nick Fagan

INSPECTOR

³ *Sutcliffe v Calderdale BC* [1982] 46 P&CR 399

⁴ *Challenge Fencing Ltd v SSHCLG & Elmbridge BC* [2019] EWHC 553 (Admin)

⁵ APP/U1105/W/18/3216628 8 May 2019