



Appeal Decisions

Site visit made on 3 August 2020

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 12 August 2020

Appeal Refs: APP/W1525/C/20/3246276 & 3246277

Land north and west of Rainbows End, Blind Lane, Sandon, Chelmsford, Essex CM2 7FA

- 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 appeals are made by Mrs Vicki Kohler (Appeal A) and Mr Richard Kohler (Appeal B) against an enforcement notice issued by Chelmsford City Council.
- The enforcement notice was issued on 8 November 2019.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land for storage.
- The requirements of the notice are:
 - i. Cease the use of the Land for storage.
 - ii. Remove from the Land all items stored, including all building materials (bricks, breezeblocks, timber, fencing, insulation, metal caging), all waste building materials (building rubble), all items of plant machinery, the boat, the trailer and all other items stored including the gas canisters, heras fencing, the temporary scaffold structure (shown outlined in blue at the approximate location on the plan attached to the notice) and other machinery not used in connection with the lawful use of the Land for agriculture.
 - iii. Restore the land affected by the works carried out at steps (i) and (ii) by seeding with grass.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(d)&(g) of the Town and Country Planning Act 1990 as amended.

Summary of Decisions: The appeals succeed in part and the enforcement notice is upheld with corrections and variations in the terms set out below in the Formal Decision.

Procedural Matters

1. There is a typographical error in the requirements at paragraph 5.ii. of the enforcement notice. It should refer to "all items of plant *and* machinery". No injustice arises from a minor correction to insert the word "and".
2. Arguments raised by the appellants under ground (d) suggest that at least part of the development could constitute permitted development. Whilst no appeal has been brought on ground (c) on the basis that there is no breach of planning control, the arguments are most appropriately addressed in that context. I have a duty to consider hidden grounds of appeal in the interests of natural justice. The Council has responded to the points made in relation to permitted development and so no prejudice would be caused if I deal with those arguments as though made on ground (c).
3. Both grounds (c) and (d) are known as legal grounds of appeal where the

appellants have the burden of proof and the test of the evidence is the balance of probabilities.

Background

4. By way of background, the land and dwelling at Rainbows End was formerly part of a much larger landholding. In December 2014 the land was severed when it was acquired by the appellants to create a separate plot. The appeal site does not include the whole plot within the appellants ownership. It has been drawn to exclude what the Council considers to be the residential curtilage of the bungalow at Rainbows End i.e. the bungalow itself along with what is described as an annexe building together with the closest areas of garden and garden buildings.
5. The appeal site includes the grassed paddock to the north of Rainbows End, the area where nursery buildings once stood and land to the west of former access to the nursery.

The appeal on ground (c)

6. The appeal on this ground is that those matters alleged (if they occurred) do not constitute a breach of planning control. A breach of planning control comprises the carrying out of development without the required planning permission.
7. Photographs taken by Council officers prior to the issue of the notice in 2018 show large quantities of building materials deposited across the appeal site along with plant and equipment.

Whether development has taken place

8. The 'temporary scaffold structure' identified in the notice is erected from scaffold poles and metal sheeting. It has been used to shelter materials. The appellants suggest that land to the west of the dwelling at Rainbows End and where the scaffold structure is located has been used as garden since the 1980's and is within its residential curtilage. The appellants submit that the structure 'should meet the planning requirements of a building constructed on residential land'.
9. Whether any part of the appeal site falls within the residential curtilage is relevant to establishing whether development has taken place. Section 55(2) of the 1990 Act identifies uses of land which shall not be taken for the purposes of the Act to involve development of the land. They include under s55(2)(d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such. Therefore, the appellants can only rely upon s55(2) if the land does form part of the residential curtilage and the storage use can reasonably be regarded as incidental to the use and enjoyment of the dwelling as such.
10. When a Planning Contravention Notice ('PCN') was issued by the Council, the appellants' replies of 5 July 2019 stated that the appeal site was used to graze horses from around 2009-2014. Prior to that from the 1960's to 2009 the land was developed and used as a nursery with an assortment of poly tunnels and greenhouses and with a shop.
11. A plan is produced which dates from 1989 and is stamped by the planning

department as approved for a proposed area of garden 12m in width but it does not appear to extend as far west as the appeal site. Aerial photographs from 2000 and 2009 show the dwelling as separated from the land to the west by the access to the nursery buildings and dense trees/other vegetation. By 2011, the nursery buildings were demolished and the land opened up but the image provided is of poor quality. The 2012 image is sharper and the garden appears to have been extended to include a grassed area cleared of trees to the east of the former access to the nursery. To the west of the access there is grass and trees/other foliage and the concrete slab is clearly visible. In 2014 the position is similar but the land to the west of the former access has a large amount of tree cover. The use is unclear.

12. A planning application submitted by the appellants for another annexe on the land where the scaffold structure is located was refused permission in July 2016. The decision notice describes the proposed siting of the annexe as both physically and visually separated from the main house which would encroach into an area of largely undeveloped countryside and intensify the residential use on the site. This appears to indicate that the Council did not regard the land as forming part of the garden at the time, but it is not wholly clear.
13. The position now is that the area around the hardstand is laid out and planted as a domestic garden. Vegetables are being grown in an area to the north which is separated from the paddock by planting. At what point the land became incorporated as garden at Rainbows End is difficult to tell. It did not appear to be in residential use in 2009 around the time the nursery closed. Pursuant to s171B(3) of the 1990 Act, a material change of use of land does not become lawful until the expiry of 10 years continuous use.
14. Planning permission has not been granted for a change of use and there is no Lawful Development Certificate issued under s191 of the 1990 Act to confirm the existing lawful use of land within the appeal site as residential garden. Even if there were, it does not mean the land forms part of the residential curtilage.
15. Therefore, I cannot be satisfied on the balance of probabilities that the land to the west of the former access is within the residential curtilage of the dwelling at Rainbows End for there to be any possibility of the storage use within this area not amounting to 'development'.

Whether there is permitted development

16. The appellants say that when they purchased the property it was with planning permission to build an annexe for a family member and to undertake significant refurbishment works. The Council confirms that planning permission was granted in September 2014 for alterations and additions to an existing stable building and its change of use to an annexe. Those works were completed some years ago and the annexe, which is a detached bungalow, is occupied.
17. Article 3 and Class A to Part 4 of Schedule 2 to The Town and Country Planning (General Permitted Development) (England) Order 2015 permits the provision on land of buildings, moveable structures, works, plant and machinery required temporarily in connection with and for the duration of operations being or to be carried out on, that land or land adjoining that land. This is subject to the condition that any building, structure, works, plant or machinery is removed and the land reinstated to its previous condition

18. Whilst the scope of Class A extends to the provision of temporary buildings and structures etc. on adjoining land it does not include the storage of building materials and suchlike.
19. The Council says that there are no existing planning permissions for development at the property except for those recently undertaken to the annexe building. The Council further submits that very little authorised works have been undertaken in the past 2 years to renovate the dwelling and there are no active works.
20. The appellants acknowledge that the intention was to complete the intended works within 3 years from the time of acquisition of the property i.e. by 2017. Nevertheless, the appellants claim to have undertaken a substantial amount of work since the Council's last visit. A list is produced which includes new drainage laid, concrete crushed and laid along with foundations, drainage and commencement of roofworks on the annexe extensions. In consequence, they say a large amount of building materials have been used and the machinery utilised in the process.
21. It is plain from the Council's photographs that the nature and scale of storage exceeded the scope of what is permitted by Class A in both nature and extent. Whilst there was plant and machinery commonly utilised in building operations, the photographs illustrate how there was also a wide array of materials and other items deposited across the site which included a boat and trailer. The appellants provided a list identifying the intended use of many items but the extent of storage went beyond what could reasonably be regarded as required temporarily in connection with ongoing operations. Moreover, there was clearly not a short lull in operations but an extended period when no building activity was taking place. The appellants refer to their intention to complete the works when resources allow but Class A does not permit indefinite storage of plant, machinery etc pending their possible use at some indeterminate point in future.
22. As a matter of fact and degree, the scale of the storage use gave rise to a change in the character of the land. It became a primary use of the land in its own right which amounted to a material change of use of land requiring planning permission which had not been obtained. That use did not benefit from the provisions for permitted development.
23. In the case of ground (c), an appellant can rely upon matters occurring since the date of issue of the enforcement notice to show that at the time the appeal is determined, the development which has occurred does not amount to a breach of planning control.
24. When I conducted my site visit there was no sign of active works to the dwelling itself and the appellants do not say otherwise. They refer to 'future works on the house' with external landscaping works proposed in the short term. However, I saw that two small extensions to the annexe building are under construction. Planning permission had been granted in July 2019 for a single storey side extension to the west elevation of the annexe building and a porch to its east elevation. A driveway appeared to have been newly laid or resurfaced with crushed hardcore and kerbstone edging leading in front of the annexe and sweeping around into the appeal site where the former nursery access would have been. Fencing had been erected to segregate the lawn outside the appeal site from the pasture within it.

25. Active works appeared to be ongoing within the area of pasture by the operation of a digger although it was unclear for what purpose. I note from the Council's photographs that there had previously been a large pile of hardcore in this area along with a multitude of other materials. Part of the pasture had been cleared although there clearly remained a storage use including piles of timber, discarded fence panels and doors, rolls wire, a skip filled with waste materials, concrete slabs, bricks and crates full of items.
26. Whereas before there had been no ongoing works, that situation has now changed. That does not alter the position with regard to permitted development under Class A in terms of the pasture. A storage use was taking place and that remains the case which mainly involves the deposit of materials.
27. However, the parties agree that the scaffold structure is moveable and temporary in nature. It is not permanently affixed to the ground and is not particularly large. Indeed, it is described in the notice as a "temporary scaffold structure". In the PCN reply the appellants confirmed that the structure was erected on 1 June 2015 after the storage use commenced. It is located away from the pasture where the main storage use is taking place but is positioned on land adjoining that where the building works are in progress. It contained materials that could feasibly be connected with the building project. Therefore, as a matter of fact and degree I consider that the temporary scaffold structure can now benefit from the provisions of Class A to Part 4 of Schedule 2 of the GPDO as permitted development for the duration of the works being carried out after which it must be removed. Should the structure not be removed in accordance with the conditions of Class A, then it could of course be subject to further enforcement action in future.
28. The temporary scaffold structure is not mentioned in the allegation, but I shall delete reference to it from the requirements. To this limited extent the appeals on ground (c) succeed. In these circumstances, the temporary scaffold structure does not fail to be considered on the remaining grounds of appeal.

The appeals on ground (d)

29. The ground of appeal is that at the time the notice was issued it was too late to take enforcement action. Where there is a material change of use of land as alleged in this instance then there is a 10 year limitation period as provided by s171B(3). Therefore, to succeed on ground (d) the appellants must show that the use commenced by November 2009 and continued thereafter without material interruption.
30. In the PCN reply the appellants say the storage use began in August 2014. This would have been before they acquired the land in December of that year. In another reply the use is stated to have commenced on or before 12 December 2014. Bearing in mind that the building materials and associated equipment are said to be for use for works to the property at Rainbows End, it seems most likely the storage use started after their purchase in December 2014.
31. On the balance of probabilities, the appellants have failed to demonstrate that the storage use commenced at least 10 years prior to the issue of the notice and continued uninterrupted thereafter so as to be immune from enforcement action.
32. The appeals on ground (d) fail.

Whether the steps required by the enforcement notice are excessive

33. No appeal was brought on ground (f) to argue that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control. However, the appellants have raised points pertinent to this ground which it is appropriate to address given that it is my duty to ensure that the notice is in order.
34. The appellants highlight that the concrete slab on which the temporary scaffold structure has been erected was pre-existing. Notwithstanding my finding on ground (c), the notice requires removal only of the structure itself and not the concrete base on which it is positioned. The Council confirms that it deliberately did not require demolition of the foundation slab because it accepts this was in situ prior to both the material change of use and the erection of the scaffold structure. Thus, the appellants do not need to remove the foundation slab for the scaffold structure. No variation is required to the notice in this regard.
35. During my site visit the second appellant pointed out the remains of concrete foundations for a former nursery building in the area now in use for storage. The enforcement notice requires the land to be restored by seeding with grass seed. A notice cannot require improvements or restoration beyond its previous condition. It would be excessive to require the removal of pre-existing foundations in order for those areas to be seeded to grass.
36. What the notice should say is for the land to be restored to its previous condition before the breach took place. I shall vary the notice accordingly.

The appeals on ground (g)

37. The ground of appeal is that the time given to comply with the requirements of the notice falls short of what should reasonably be allowed. Instead of the 3 month compliance period afforded by the notice, the appellants seek a period of 18 months. They say this extra time is needed to allow them opportunity to make progress on their house renovations for which the materials are to be used. They reiterate their intention to complete the works after which any excess materials along with the required plant and machinery will be removed. Those works have taken longer than anticipated which the appellants attribute partly to the costs they have incurred in a legal dispute which has impacted upon their available financial resources to progress the works.
38. The appellants would not necessarily be forced to dispose of all the items. The Council had previously anticipated that those materials intended for use in the renovation of the property would be moved to within the curtilage of the dwelling. Of course, that would be subject to the use not amounting to development.
39. The effect of the notice was to stop the clock and so several months have elapsed since the appeals were lodged. In that time progress has been made to clear the site. Nonetheless, it is desirable that the breach of planning control is remedied without unnecessary delay in order to address the harm arising from it, as identified in the reasons for issuing the notice. It seems to me that a period of 6 months is fair and proportionate in all the circumstances.
40. I shall extend the time limit accordingly. To this extent the ground (g) appeal succeeds.

Formal Decisions

Appeals A and B

41. It is directed that the enforcement notice be corrected by:

- inserting the word “and” between the words “plant machinery” in paragraph 5.ii.

And varied by:

- deleting the words “the temporary scaffold structure (shown outlined in blue at the approximate location shown the plan attached to the notice)” in paragraph 5.ii.
- deleting the words “by seeding with grass seed” in paragraph 5.iii and substituting the words “to its condition before the breach took place”.
- substituting 6 months as the period for compliance.

42. Subject to those corrections and variations, the appeal is dismissed and the enforcement notice upheld.

KR Seward

INSPECTOR