



Appeal Decisions

Site visit made on 12 October 2020

by Hilary Orr MSc, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 October 2020

Appeal A Ref: APP/U1430/C/19/3227642,

Appeal B Ref: APP/U1430/C/19/3227643

Land at Junction Filling Station, Junction Road, Bodiam, Robertsbridge, East Sussex

- Appeal A and Appeal B are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- Appeal A is made by Mr Neil Churchill and Appeal B is made by Ms Nichola Barnes, against an enforcement notice issued by Rother District Council.
- The enforcement notice, numbered MKN298, was issued on 4 April 2019.
- The breach of planning control as alleged in the notice is the erection of a high close boarded fence on the Land.
- The requirements of the notice are:
Remove from the Land:-
 - (i) All fencing shown for identification purposes only marked by blue lines on the attached plan; and
 - (ii) All materials, rubble rubbish, debris, waste, tools and equipment from the land arising from compliance with the above step and return the land to its former condition before the breach took place.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2) (c) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Summary Decision: The appeals are dismissed and the enforcement notice is upheld with a variation in the terms set out below in the Formal Decision.

Appeal C Ref: APP/U1430/C/19/3228201

Appeal D Ref: APP/U1430/C/19/3228202

Land at Junction Filling Station, Junction Road, Bodiam, Robertsbridge, East Sussex

- 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 Neil Churchill against an enforcement notice issued by Rother District Council.
- The enforcement notice, numbered MKN298, was issued on 4 April 2019.
- The breach of planning control as alleged in the notice is the material change of use of the land from commercial and agricultural to a mixed use of commercial, agricultural and for the stationing of caravans for residential purposes.
- The requirements of the notice are:
Cease the use of the Land for:-
 - (i) Residential purposes; and
 - (ii) The stationing of all caravans for residential purposes.
Remove from the land:-

- (iii) All caravans including the two caravans currently in the approximate position shown edged blue on the attached plan and the large twin unit caravan currently in the approximate position showed shown coloured blue on the attached plan which are stationed on the land for the purposes of residential occupation; and
- (iv) All residential, domestic and personal effects in connexion with the unauthorised change of use; and
- (v) All materials, rubble rubbish debris waste tools and equipment from the land arising from steps (i) – (iv) above and return the land to its former condition before the breach took place.

- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2) (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Summary Decision: The appeals are dismissed and the enforcement notice is upheld with a variation in the terms set out below in the Formal Decision.

Decisions

Appeal A and Appeal B

1. It is directed that the enforcement notice is varied by: the deletion of the words *'Remove from the Land:- (i) All fencing shown for identification purposes only marked by blue lines on the attached plan; and (ii) All materials, rubble rubbish, debris, waste, tools and equipment from the land arising from compliance with the above step and return the land to its former condition before the breach took place.'* and the substitution with the words: *'(i) Remove from the Land all fencing marked by blue lines on the attached plan; or (ii) Reduce the height of the fencing marked by blue lines on the attached plan to a height that does not exceed 2 metres; and (iii) Remove all materials, rubble rubbish, debris, waste, tools and equipment from the land arising from compliance with either step (i) or (ii).'*
2. Subject to the variation, the appeals are dismissed and the enforcement notice is upheld.

Appeal C and Appeal D

3. It is directed that the enforcement notice is varied by: the deletion of six months and the substitution of nine months as the time for compliance. Subject to the variation, the enforcement notice is upheld.

Preliminary matters and background

4. Two enforcement notices have been issued by the Council. In summary the first relates to the erection of fencing, and the second alleges a material change of use of the land. Each notice has been appealed by two appellants as set out above. However, as the submissions for each appellant are substantially the same, I shall deal with them together as Appeals A and B; and Appeals C and D respectively.
5. I note that paragraph 7.1 of the appellants statement (Appeals A and B), makes reference to ground (f), although much of the accompanying evidence relates to ground (c). The appeal form and additional evidence provided by the

appellant, however indicates that these appeals are only proceeding under ground (c). Nevertheless, I shall also consider those matters that relate more correctly to an appeal, under ground (f).

6. The appellants appeal form for Appeals C and D, indicate that the appeal is lodged under ground (f) and (g). However, the evidence also relates to an appeal under ground (d). Following submission of the appeals the appellants have since confirmed that they wish to add ground (d) and I shall therefore consider the appeals on this revised basis.
7. The appeal site is located to the east of Junction Road and comprises a group of commercial buildings, a forecourt and vehicle storage area, used in connection with car sales and the motor trade. There is wooden fencing separating the business activities and the adjacent paddock. At the time of my site visit there was one touring caravan connected to a vehicle, with a second sited to the rear of the buildings. This was being used for the storage of a small quantity of straw, although there was no evidence of any livestock on the site. The third was a substantial and more modern double unit which was in residential occupation.

Reasons

Appeal A and Appeal B

Ground (c)

8. The appeals are proceeding on ground (c), that the matter alleged in the notice does not constitute a breach of planning control. This is a legal ground where the burden of proof is on the appellant, to make out the case that there has not been a breach of planning control.
9. s55(1) sets out that development means the carrying out of building, engineering, mining, or other operations in, on, over or under land or the making of any material change of use of any buildings or other land. Operational development comprises activities which result in some physical alteration to land which has some degree of permanence. There is no disagreement that the fence constitutes development and there is nothing to suggest that the development, as alleged, had not been carried out at the time that the notice was issued.
10. Schedule 2, Part 2 Minor operations, Class A, (b) of The Town and Country Planning (General Permitted Development) (England) Order 2015 (the GDPO), sets out that development is not permitted if the height of any other gate, fence, wall or means of enclosure erected or constructed, would exceed 2 metres above ground level. The parties disagree about the original height of the fencing, but acknowledge that the height of the fencing has been reduced and no longer exceeds 2 metres. Nonetheless, following its initial construction the Council considered that it required planning permission, as it exceeded the height limitations set out above. I have no reason to disagree with this view.
11. From the evidence, it is clear that the fencing was reduced in height following initial construction. Consequently, as permitted development rights cannot be gained retrospectively, it would not have constituted permitted development at the time it was first constructed. For these reasons, the appeal on ground (c) fails.

Ground (f)

12. An appeal under this ground is that the requirements of the notice exceed what is necessary to achieve the purpose of the notice. The purposes of an enforcement notice are set out in section 173 of the 1990 Act and are to remedy the breach of planning control (s173(4)(a)), or as the case may be, to remedy injury to amenity (s173(4)(b)).
13. The Council confirms that in their view, the fencing now complies with the GDPO. They go on to assert that the notice has therefore been complied with. However, to my mind, the notice is remedial in nature as it clearly requires the unauthorised fence to be removed and the land restored. Therefore as drafted the works carried out fall short of full compliance.
14. I have had regard to the points raised by David Campion on behalf of local residents. However, to my mind there is nothing in this part of the GDPO that restricts permitted development rights, to land with an otherwise lawful use. The Council has framed the allegations into two distinct and separate notices, and I have no reason to disagree with this approach.
15. There is nothing before me to suggest that following compliance with the notice, a replacement fence of up to two metres in height could not be constructed in its place. Moreover, the parties are clearly satisfied that the reduction in the height of the fencing is acceptable. Accordingly, this represents an obvious fallback position. It is important to note that the enforcement process seeks to be remedial rather than punitive. Therefore, complete removal of the fencing would serve no useful purpose.
16. I consider that the requirements of the notice could be varied to reflect this alternative position, without causing injustice to any of the parties. I shall therefore replace the requirements set out at paragraph 5 of the notice, with the following words:
 - (i) Remove from the Land all fencing marked by blue lines on the attached plan; or
 - (ii) Reduce the height of the fencing marked by blue lines on the attached plan to a height that does not exceed 2 metres; and
 - (iii) Remove all materials, rubble, rubbish, debris, waste, tools and equipment from the land arising from compliance with either step (i) or (ii).
17. For the above reasons I shall vary the requirements of the notice to reflect my findings and to this extent the appeals on ground (f) succeed.

Appeal C and Appeal D

Ground (d)

18. The appeal is proceeding on ground (d) and is a claim that the development enforced against, has become immune and therefore lawful through the passage of time. The relevant time for this appeal, is 10 years before the enforcement notice was issued. This is another legal ground, where the burden of proof lies with the appellant, the relevant test of the evidence being on the balance of probability.

19. It is the appellants case that there has been a caravan on the site since the 1990's and the previous owner lived on the site until ill health forced him to move out. For the appellants claim to succeed, evidence needs to be provided, to demonstrate a continuous and uninterrupted residential use of the caravan for the 10 years, prior to the issue of the notice on 4 April 2019.
20. In summary for this period, the appellants evidence in support of his claim includes a number of Google Earth aerial photographs, together with a handwritten letter from Mr Buckle, who is a local resident. Several matters arise in relation to this evidence. The annotated dates on the photographs range from 2006 to 2018. It is not however clear whether these dates have been verified by Google Earth. Nonetheless, they do appear to show a structure to the rear of the commercial buildings that could be a caravan. However, although these may indicate the presence of a caravan, it is not possible to determine from these what it is being used for. Therefore, they do not provide clear evidence to assist with the claimed residential use of a caravan.
21. A feature of the appellants evidence is that there are no sworn supporting affidavits. Sworn evidence given on oath, carries with it the risk that giving false evidence, could render the individual liable to prosecution. Accordingly, sworn evidence will usually carry greater weight than unsworn evidence. Although sworn evidence from the previous owner may not be possible, I have not been provided with evidence to suggest that attempts have been made to contact any other parties, who may have personal knowledge of the site, or why this has not been possible.
22. I acknowledge that the letter from Mr Buckle states that the previous owner lived on the site for at least 10 years. However, importantly, it falls short of providing corroboration about the nature of that occupation, or any relevant dates to demonstrate that residential occupation was continuous throughout the claimed period.
23. For the above reasons, I consider that limited evidence has been submitted in support of the appellants case, and it is far from being precise and unambiguous. Consequently, I find that the appellants evidence is not sufficient to demonstrate, on the balance of probabilities, that the subject caravan has been in continuous residential use for the necessary period. While the Council has not provided evidence to contradict the evidence provided, the appellants evidence falls short of discharging the burden of proof. The appeal on ground (d) therefore fails.

Ground (f)

24. The notice issued by the Council clearly sought to remedy the breach of planning control. This objective would be achieved through the cessation of the residential use, removal of the caravans and restoration of the land. It is the crux of the appellants case, that the removal of the caravans is excessive. Their first reason is the length of time that a caravan has been on site. This has already been considered above under ground (d).
25. Their second reason is that the caravan could be retained and used by the staff, for eating and relaxation during their breaks. Additionally, due to the future need for electric infrastructure, future customers could use the caravan to wait whilst their vehicles are being charged. To my mind, these reasons

relate more to the planning merits of retaining the caravan. Arguments that relate to the merits of the development, would generally only be considered where ground (a) has been pleaded and the appropriate fee paid. They cannot be introduced under ground (f).

26. It is clear from the evidence that the original caravan was replaced by the larger unit by the appellants, following their purchase of the land to facilitate the residential use of the site, although it seems to now be sited in a different location. It is also acknowledged that in general terms, it may be possible to station a caravan on land for a use that is ancillary to the lawful use of that land, without the need for express planning permission. However, it is apparent from the sales particulars provided by David Campion (Appendix 1), that the land was offered for sale in two plots. The first for the commercial buildings and yard, and the second for the adjacent field of some 2.5 acres. This position is also reflected in the copies of the two Land Registry titles (Appendix 2).
27. From the evidence I have, the caravan was clearly brought onto the land to facilitate the residential use. It is also not clear from the evidence, what the functional relationship between these two parcels of land was, or how they have been historically used. Accordingly, I have no evidence to demonstrate that the caravan, as sited, could be retained for any of the proposed ancillary uses, without the need for planning permission.
28. Overall, I find that the steps required by the notice do no more than is required, to remedy the breach of planning control, and lesser steps would not achieve that purpose. Consequently, the appeal on ground (f) is dismissed.

Ground (g)

29. For an appeal under ground (g) it is necessary to consider whether the compliance period, of six months, is too short.
30. The appellants consider that the period given for compliance with the notice is too short, because of the financial implications involved with securing alternative accommodation. They have not suggested a specific timescale but are suggesting a significant extension.
31. The Council consider that the appellants have been aware of the breach of planning control since early 2019, and therefore six months is reasonable. Although it is acknowledged that the notice may have been issued some time ago, the appellant is entitled to assume success on their appeals, and to a reasonable period for compliance after the notice takes effect.
32. I acknowledge that the appellants have already made a financial commitment when purchasing the land and the replacement caravan. Securing alternative accommodation is likely to require additional resources. However, the development must be considered in the context of the harm caused to the character and appearance of the High Weald Area of Outstanding Natural Beauty and the countryside. The Council have clearly identified the harm in their reasons for issuing the notice. I have no reason to disagree with that view.
33. It is however, recognised that the decision I have made, will result in disturbance and upheaval for the residents of the caravan, as compliance with

the notice will require arrangements for alternative accommodation to be made.

34. I am also mindful of the uncertain situation that currently exists with regard to COVID-19 and any effect it has on the business and any resultant financial implications for the appellants. Accordingly, I consider that an extension of the time of compliance to nine months, would be a more reasonable time for suitable arrangements to be made. This would give time to ensure that the residential use ceases, with any remaining compliance works carried out. The appeal on ground (g) therefore succeeds in this regard.
35. If additional time beyond this is required, the Council have the power to extend the time for compliance with the notice. It is however important to note that this is a purely discretionary power within the Councils' gift to exercise.

Other matters

36. I am very mindful of the appellants personal circumstances and the sequence of events that have led to this appeal. I am also aware of the effect that this decision is likely to have. I have carefully considered the Human Rights issues that may be pertinent to this appeal. However, the protection of the public interest cannot be achieved by means which are less interfering of the appellants rights. Accordingly, the decision is proportionate and necessary in the circumstances.
37. I note the concerns raised by the appellants around their dealings with the Council. However, these matters fall outside the scope of these appeals and do not alter my decision.

Conclusion

Appeal A and Appeal B

38. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with a variation.

Appeal C and Appeal D

35. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with a variation.

Hilary Orr

INSPECTOR