
Appeal Decisions

No event held

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 November 2020

Appeal Refs: APP/W1145/C/19/3241008 and 3241009

The building known as Chilla House Cabin aka The Barn ("*the Building*") on "*the land*" at Chilla, Beaworthy, Devon EX21 5XE

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Samuel Page and Ms Amy Page against an enforcement notice issued by Torridge District Council.
 - The enforcement notice was issued on 10 October 2019.
 - The breach of planning control as alleged in the notice is, without planning permission, the material change of use of the land involving the erection of a building for residential use entailing human habitation.
 - The requirements of the notice are:
 - (i) Cease the residential use and human habitation of the Building
 - (ii) Remove the Building from the Land
 - (iii) All material resulting from the compliance with (ii) shall be removed from the Land indefinitely.
 - The period for compliance with the requirements is 6 months.
 - The appeals are proceeding on the grounds set out in section 174(2) (d) and (f) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: the enforcement notice is quashed.

Application for costs

1. An application for costs was made Mr Samuel Page and Ms Amy Page against Torridge District Council. This application is to be the subject of a separate Decision.

Procedural Matters

2. These appeals were initially scheduled to be heard at a Public Inquiry. In a letter dated 29 November 2019, the Council expressed the view that an Inquiry was unnecessary in this instance. Subsequently, in an email dated 6 October 2020, the appellant indicated that as result of reading the Council's Statement of Case it was agreed that an Inquiry was no longer necessary. However, in that same email, it was requested that the appointed Inspector makes a preliminary finding as to whether the Enforcement Notice subject to these appeals (the notice) is in fact a nullity, for the reasons that the appellants set out in their own Statement of Case and their Final Comments. In the alternative, the appellants consider that the notice is invalid and incapable of correction without causing injustice to them. This Decision is in response to that request.

3. I sought the views of the Council on the points made by the appellants in a letter dated 21 October 2020. The Council responded in a letter dated 26 October 2020, and I have taken those comments into account.
4. The point raised by the appellants were largely based on the relevant legislation and case law. I therefore consider that a site visit was not necessary in this case. I do, however, consider that these appeals have reached the stage where a formal determination is necessary.

Reasons

5. In essence, the key point being made by the appellants is that, in order to comply with the statutory requirements the notice must clearly and with certainty specify what the breach of planning control is and also what must be done to remedy it. In considering this key point, it is first necessary to set out the meaning of development as defined in section 55(1) of the 1990 Act, which is defined there as meaning:

....the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

6. It is immediately apparent from this definition that there are two limbs to the meaning of development. The first limb may be summarised as comprising the carrying out of building, engineering, mining or other operations or, in shorthand, as 'operational development'. The second limb comprises the material change of use of in the use of any buildings or other land or, in shorthand, as 'a material change in use'. It is significant that these two limbs are separated within Section 55(1) by the word 'or'. The construction of section 55(1) is therefore such that the two limbs must be considered to constitute separate entities.
7. This distinction between operational development and the use of land is buttressed by Section 336(1) of the 1990 Act. It is stated in terms in this section that "use", in relation to land, does not include the use of land for the carrying out of any building or other operations on it.
8. The Courts have confirmed that, in principle, there is no reason why allegations of operational development and of a material change of use should not be combined in one notice, provided they relate to connected matters and the time period within which each element of the development is alleged to have taken place is made clear. But that is not the case here.
9. The notice as drafted alleges, without planning permission, the material change of use of the land *involving the erection of a building* for residential use entailing human habitation (my emphasis). It therefore conflates the two limbs of Section 55(1) by alleging that the erection of the building for residential use (the first limb) constitutes a material change of use of the land (the second limb).
10. That is not permissible: the erection of a building is operational development under the first limb of Section 55(1) and not a material change of use under the second limb. The allegation in the notice is therefore directly at odds with Section 55(1) of the 1990 Act and the interpretation of that Act set out in Section 336(1).

11. The distinction between operational development and a material change of use is important, not least because of the provisions is set out in Section 171B of the 1990 Act. This section of the Act specifies different time limits for taking enforcement action: namely four years for operational development (Section 171B(1)) and ten years for a material change of use of any buildings or other land (Section 171B(3))¹. Conflating the two limbs of Section 55(1), as the notice does, means that the clear distinction between the different time periods for the immunity from enforcement action is blurred.
12. It may be surmised from the Council's Statement of Case that the notice purports to allege a material change of the use of the land to a residential use. In fact, it does no such thing. The notice in effect only alleges operational development comprising *the erection of a building* for residential use entailing human habitation (again, my emphasis). The notice states at paragraph 4 that the breach of planning control alleged has occurred within the last ten years. Because the notice in effect allege operational development, this should be four years by reason of Section 171B(1). The corollary is that the time period specified in paragraph 4 of the notice is incorrect and does not relate to the breach of planning control that, in fact, is alleged.
13. Turning now to the steps required to comply with the notice, the underlying principle is that these should flow from the breach of planning control alleged. In this case, Step (i) of the notice requires the residential use and human habitation of the building to cease. The difficulty here is that, because the notice does not actually allege a material change of use (albeit it purports to), Step (i) is requiring a use to cease that does not form part of the breach of planning control alleged in the notice. That also is not permissible.
14. It follows from the above that the notice cannot stand as drafted. The question then arises as to whether the notice is a nullity or whether the defects are capable of being corrected under the powers set out in s176(1)(a) of the 1990 Act. In respect of the latter, the sole test is whether the notice can be corrected and/or varied without causing injustice.
15. The modern approach to the question of nullity is to be found in the judgment of the High Court in *Oates v SoCLG and Canterbury*², which drew extensively upon the preceding case law on the subject. A number of principles emerge from this judgment, including that the test in relation to nullity is best understood not as one of 'hopeless ambiguity' but rather as a failure to tell the recipient with 'reasonable certainty' what the breach of planning control is and what must be done to remedy it. The judgment in *Oates* also indicates that a degree of uncertainty does not necessarily render it non-compliant with statute and that the notice should be read as a whole. Overall, the judgment in *Oates* indicates that the question of nullity should not be approached in a way which is unduly technical or formalistic.
16. Looking at the notice in the round, I am satisfied that it contains all the essential components set out at Section 173 of the 1990 Act. By reading the alleged breach of planning control and the steps required to comply with the notice in conjunction, together with the reasons for issuing the notice, it is reasonably certain that the notice is purporting to attack a material change of

¹ Except for the change of use of any building to use as a single dwellinghouse, where the time limit is four years (Section 171B(2)).

² *Oates v SoCLG and Canterbury* [2017] EWHC 2716

use of the land and/or of a building on the land. I acknowledge that the notice contains some significant errors across the piece. However, when read as a whole and adopting the principle advocated in *Oates* that the question should not be approached in a way which is unduly technical or formalistic, I do not go so far as to say that the notice is a nullity. But it is invalid as it stands.

17. The problems arise when attempting to correct and/or vary the notice. Although purporting to attack a material change of use of the land and/or of a building on the land, the notice does not actually do that. Therefore, correcting the notice to allege a material change of use would introduce something new into the notice.
18. Three points flow from that. Firstly, it is not open to me to second-guess the precise nature of the material change of use that the Council did intend to attack in the notice. To do so would run the risk of causing injustice to the Council should the allegation as corrected by me not allege the breach of planning control that was the intended target.
19. In no small part, this is important because any planning application deemed to have been made under section 177(5) of the 1990 Act can only relate to the matters alleged in the notice. But there is also a risk that, in correcting the notice, I 'under-enforce' in relation to the Council's intended target.
20. Secondly, should I correct the allegation to allege a material change of use of the land, I would need to vary the requirements of the notice to match. This would involve inserting a requirement that did not form any part of the notice as originally drafted. This in turn would have implications for the appellants' appeal on ground (f).
21. In other circumstances, I might have sought clarification from the Council on this first point and offered the appellants an opportunity to respond on both points. In these respects, it is possible that correcting and varying the notice would not have caused injustice and I might have pursued that option in the wider public interest of determining these appeals expeditiously. However, the final point precludes that.
22. The appellants have made it clear that the absence of any allegation relating to a material change of use prevented them from making an appeal on ground (a): namely that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. I have no reason to doubt the veracity of that statement. Unlike the other grounds of appeal against an enforcement notice, an appeal on ground (a) requires the payment of a fee within a specified time period. That time period has expired, such that the appellants are not now able to make an appeal on ground (a). It follows that the appellants would be caused injustice should I attempt to correct the notice to allege a material change of use, insofar as they would be denied any opportunity to seek planning permission for the breach of planning control then alleged in the notice.
23. In its letter dated 26 October 2020, the Council accepts that the notice could have been expressed with greater precision but considers that the notice is tolerably clear, insofar as the breach alleged is intended to be,

"without planning permission, the use of a building designed and erected as a dwelling for use as a dwellinghouse"

24. The Council asserts in its letter that this is the breach of planning control identified by the Inspector in dismissing an appeal against the refusal of the Council to grant a certificate of lawful use or development for the use of Chilla House Cabin as a single dwellinghouse (APP/W1145/X/18/3204080). That is not the case. In her decision, the Inspector concluded, on the balance of probabilities, that the evidence was not sufficiently precise or unambiguous to demonstrate that Chilla House Cabin was first constructed and used as an agricultural building rather than having been constructed for use as a dwellinghouse. That is not alleging a breach of planning control: it is simply a conclusion based upon the facts before the Inspector. It is then a matter for the local planning authority to determine whether that constitutes a breach of planning control and, if so, whether it is expedient to initiate enforcement action against it.
25. Two points flow from the revised allegation suggested by the Council. The first point is that the meaning of development as defined in section 55(1) of the 1990 Act includes the making of any *material* change in the use of any buildings or other land (emphasis added). The simple use of a building, as cited in the revised allegation, does not constitute development for the purposes of Section 55(1) of 1990 Act: there has to be a material change of use. Clearly, in the absence of any alleged development under the 1990 Act, there cannot be a breach of planning control.
26. It is nevertheless reasonably clear that the Council is again intending to allege a material change of use in the revised allegation. In other circumstances, I might have been able to correct the notice in that regard without causing injustice. But the second point prevents that. This relates to the matter being alleged which, in the revised allegation, is the use of a building designed and erected as a dwelling for use as a dwellinghouse. On the face of it, there is nothing surprising about a building designed and erected as a dwelling being used as a dwellinghouse. Indeed, that may reasonably be expected to be the case: if not intended for use as a dwellinghouse, why design it as such?
27. The Courts have held that, for there to be a material change of use, there needs to be some significant difference in the character of the activities from what has gone on previously. The construction of the revised allegation suggests that the Council considers the previous use of the building described as being designed and erected as a dwelling to have been in some way significantly different in character from the use of that building as a dwellinghouse: in other words, that the building was previously not being used for its designed purpose as a dwelling. But that is by no means clear.
28. My difficulty with the revised allegation is therefore that, on the face of it, there would appear to be little or no difference in character between the use of a building designed and erected as a dwelling and use of that building as a dwellinghouse, such that a material change in the use of the building has taken place. The Council has not specified what the 'from' use is, nor is it required so to do. Again, it may be surmised from the Council's Statement of Case that the 'from' use is considered by the Council to have been agricultural. However, in the absence of that information within the wording of the revised allegation itself, it is far from clear that the revised allegation actually does allege a breach of planning control.

29. I recognise that the judgment in *Oates* confirms that a degree of uncertainty does not necessarily render a notice non-compliant with statute. Nevertheless, in my view the revised allegation goes beyond a degree of uncertainty. Adopting the language in *Oates*, it fails to tell the recipient with 'reasonable certainty' what the breach of planning control is.
30. I am again mindful that *Oates* advocates that the notice should be read as a whole and I recognise that the requirements of the notice could assist the recipient of the notice to understand what the alleged what the breach of planning control is and what must be done to remedy it. But the Council has not provided a revised requirement(s) to go with the revised allegation, and there is therefore nothing further to assist the recipient in understanding what the alleged breach of planning control actually is.
31. There are also other problems associated with the revised allegation now proposed by the Council. The notice as originally drafted states at paragraph 4 that the breach of planning control alleged has occurred within the last ten years. The revised allegation that the Council now proposes is specifically for use as a dwellinghouse. In accordance with Section 171B(2)) of the 1990 Act, the time limit for taking enforcement action in relation to the change of use of any building to use as a single dwelling is four years, and not the ten years specified in the notice as originally drafted.
32. In principle, the powers set out in s176(1)(a) of the 1990 Act would enable me to correct the notice to state the shorter time period. However, I cannot discount the possibility that the appellants might then wish to re-cast their appeal on ground (d) to reflect the shorter time period and/or to re-cast their appeal on ground (f). Furthermore, I cannot discount the possibility that the appellants may also wish to respond to the revised allegation with an appeal on ground (b): namely that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters have not occurred. Similarly, an appeal on ground (c): namely, that those matters do not constitute a breach of planning control, and/or an appeal on ground (g): namely that that the period for compliance specified in the notice falls short of what should reasonably be allowed.
33. All of the above grounds of appeal could be made, or revised as the case may be, at any stage whilst the appeal is still 'live'. The same is not true, however, should the appellants then wish to make an appeal on ground (a) which, as set out above, is subject to a time limitation that has now expired. It follows that the appellants would be denied any opportunity to seek planning permission for the breach of planning control as now proposed by the Council to be revised. That would cause injustice to the appellants.

Conclusion

34. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control or the steps required for compliance, either as originally drafted or as now proposed by the Council to be revised. It is not open to me to correct the errors in accordance with my powers under section 176(1)(a) of the 1990 Act as amended, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances, the appeals on the grounds set out in section 174(2) (d) and (f) of the 1990 Act as amended do not fall to be considered.

Formal Decision

35. The enforcement notice is quashed.

Paul Freer
INSPECTOR