
Appeal Decision

Site visit made on 13 October 2020

by Stephen Brown MA(Cantab) DipArch RIBA

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

Decision date: 24 November 2020

Appeal Ref: APP/D3505/C/19/3238612

9-10 Rose Farm Cottages, Shotley, Ipswich IP9 1PH

- 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 by Charles McLaren against an enforcement notice issued by Babergh District Council.
 - The enforcement notice, ref. 8/00248/BWK, was issued on 2 September 2019.
 - The breaches of planning control alleged in the notice are:
 - (a) Without planning permission, the construction of two mooring jetties on the riverbed of the River Stour, within the area shown edged red on the plan attached to the notice.
 - (b) Without planning permission, change the use of the land within the riverbed of the River Stour for the permanent retention of a vessel, shown edged blue on the plan attached to the notice.
 - The requirements of the notice are to:
 - (a) Cease the use of the jetties for the mooring of vessels;
 - (b) Demolish the jetties and remove all resultant materials from the site and associated land;
 - (c) Remove all vessels moored, stored or otherwise kept at the jetties or adjacent to the land associated with the property at 9-10 Rose Farm Cottages, Shotley, Ipswich IP9 1PH.
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c), (d) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is allowed on ground (g), and I direct that the enforcement notice be varied by:
DELETION of 2 months; and,
SUBSTITUTION of 9 months as the period for compliance.
Subject to this variation the enforcement notice is upheld.

Preliminary matters

2. The appellant initially indicated an appeal was being made on ground (f) but has subsequently confirmed that this ground was not being pleaded.

Background matters

3. The appeal site lies on the northern bank of the River Stour, in a small group of dwellings outside the village of Shotley. The development enforced against comprises two timber jetties – a shorter one to the west and a longer one to the east – and a concrete lighter moored alongside the western jetty.

The appeal on ground (c)

4. This ground is that there has not been a breach of planning control, which may be the case if for instance planning permission has already been granted for the matters stated in the enforcement notice. In an appeal on this ground – known as a ‘legal’ ground – the burden of proof is on the appellant to show that on the balance of probabilities this is the case. This ground is pleaded in relation to the retention of the concrete lighter, and not to the construction of the two jetties.
5. The appellant argues that in 1997 he was granted planning permission for: *‘Retention of lighter and to infill area between lighter and garden; the construction of a sloping revetment and backfilling and levelling to replace and protect garden, the construction of a wave break and the provision of a mooring’*.¹
6. He then argues that the lighter has been at the site since at least January 1997, it is the self-same vessel that is currently there, and is not materially different in any way.
7. However, looking at the Council officer’s report on the 1997 planning application it is apparent that this would be a comprehensive scheme that would include the effective integration of the lighter – then moored along the edge of the garden – into the garden itself. This would have been done by infilling the space between the vessel and the land with concrete rubble and covering with topsoil up to the coamings of the lighter’s hold, and achieve the objective of protecting the appellant’s land from further erosion. The Council noted that as a result of the lighter being hidden within the banking this could be done without harming the character of the area, or amenities of other residents.
8. Condition 03 on the 1997 permission requires a landscaping scheme to be agreed prior to commencement of development, that should include a completion date for the landscaping works. The site is within an Area of Outstanding Natural Beauty, a Site of Special Scientific Interest (SSSI), an area designated under the Ramsar Wetlands Convention, and a Special Protection Area (SPA). Given this degree of sensitivity I consider the landscaping would be of critical importance for protection of the character of the area, and in this context Condition 03 should be regarded as a condition precedent that ‘goes to the heart’ of the permission.
9. There is no evidence to suggest there was an approved landscaping scheme or agreed completion date, or indeed that any significant landscaping was ever carried out. Even had it been, there is virtually nothing to show that it had existed. Furthermore, no other elements of the approved scheme have been carried out – notably construction of the revetment and the wave-break. In the light of these considerations it is unlikely that the approved development was implemented, and in my opinion that permission has lapsed.
10. The lighter now lies alongside the western of the two timber jetties subject of the notice, which projects at right angles to the edge of the garden and it is by no means integrated into its surroundings. Although the appellant says there is nothing in the 1997 planning permission that restricts the lighter to a fixed

¹ Planning permission ref. B/97/0077, dated 10 July 1997.

location on the shore, the permission as a whole entailed the incorporation of the vessel into a fixed and landscaped construction designed to protect the shoreline. As a matter of fact and degree the mooring of the lighter cannot reasonably be regarded as an independent element, and its presence cannot be seen as part of the development approved in the 1997 permission.

11. It is also the case that an enforcement notice was issued on 21 May 1996 against various matters, including the use of the site for the permanent mooring or stationing of a concrete built lighter. The plan attached to the notice shows the lighter in position alongside the edge of the garden. An appeal against the notice was withdrawn, and it therefore remains in force.
12. The appellant argues that the position of the lighter shown on the plan attached to the 1996 notice differs from the position indicated in the approved scheme, and from its current position. However, the notice acts against use of the site for the permanent mooring or stationing of a concrete built lighter. This applies to any location within the site defined on the plan attached to the notice, and not to a specific location as the appellant suggests. At present the major part of the vessel is clearly within that area, even though a part may be outside. As a matter of fact and degree I consider the current positioning of the lighter is in breach of the terms of the 1996 notice.
13. Overall, I consider that the 1996 enforcement notice remains in force and the 1997 planning permission has lapsed. On the balance of probabilities there is no planning permission for retention of the concrete lighter, and it follows there has been a breach of planning control. The appeal on ground (c) therefore fails.

The appeal on ground (d)

14. This ground is that at the time the notice was issued it was too late to take enforcement action against the matters stated in the notice. In this case, the construction of the two jetties, which is operational development, must have been substantially complete at least four years before 2 September 2019 to gain immunity from enforcement action. The alleged material change of use must have been continuous for a period of at least 10 years before that date.
15. Ground (d) is again a 'legal' ground and the burden of proof is upon the appellant to show that on the balance of probabilities these time limits have been met.
16. The appellant claims the lighter has been in its present position since at least 2008 and has therefore achieved immunity from enforcement action. However, as I have found above, the 1996 enforcement notice remains in force on the site, and in this circumstance under the provisions of s.180(1)(a) of the Act the retention of the lighter cannot become lawful unless express planning permission is granted. There is no such permission and on the balance of probabilities the appeal on ground (d) in relation to the lighter must fail.
17. With regard to the two jetties, the appellant accepts that the longer eastern jetty has not been substantially complete for the requisite 4-year period and does not appeal against that part of the notice.
18. Regarding the western jetty, the appellant has submitted an aerial photograph dated April 2015 showing the lighter and another vessel moored alongside the jetty. Two other photographs dated 1 September 2014 show the stern of a barge moored next to a jetty.

19. The Council argue that as a result of his previous planning applications and enforcement dealings the appellant would have been aware that planning permission was required and could have maintained a record of evidence as to when the jetty was substantially completed. Furthermore, he had not taken the opportunity of explaining the circumstances of his case when completing a Planning Contravention Notice in August 2018 – questions relating to whether planning permission had been sought for the jetties and who constructed them were answered as ‘to be advised’.
20. A ground (d) appeal is analogous to an application for a Lawful Development Certificate, where government advice is that if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make an appellant’s version of events less than probable, there is no good reason to refuse the application, provided the appellant’s evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability².
21. In a case such as this I would expect to see reasonably detailed evidence of construction of the jetty, including such things as a contractor’s quotation, invoices for supply of materials and labour, and receipts for amounts paid, possibly as well as photographs of works in progress, and sworn affidavits. No such material has been put in.
22. Furthermore, I note that the aerial photograph of the lighter in 2008 is accompanied by credible evidence of the date on which the image was taken, whereas no such evidence has been produced of the date of the purported 2015 aerial photograph of the western jetty, or of the 2014 photographs.
23. I find the appellant’s evidence on the date of construction of the jetty to be remarkably sparse and imprecise. Overall, I consider inadequate evidence has been adduced to show that on the balance of probabilities the western jetty was substantially completed 4 or more years before the enforcement notice was issued on 2 September 2019. The appeal on ground (d) therefore fails.

The appeal on ground (g)

24. This ground is that the compliance period is too short. The appellant argues that the mooring of the lighter and positioning of the jetties has been carefully carried out so as to minimise disturbance to the habitat and saltmarshes – just as the approved 1997 scheme had been. Furthermore he contends that the Council are ill-informed concerning the long-term intentions of the development to secure the protection of the marshes. As a result the removal of the lighter will necessitate engagement with the relevant environmental parties including the Environment Agency, Natural England and the Suffolk Wildlife Trust to ensure natural habitat is not destroyed. In addition, it will be necessary to find another mooring for the lighter, which he says has been there for over 20 years, and a 12 month compliance period is requested.
25. The appellant has provided no information about the way in which the lighter and jetties might secure any protection of this sensitive area in either the long or short-term. Furthermore, a recent estate agent’s advertisement for sale of 9-10 Rose Farm Cottages states that a buyer has the choice of buying the lighter, or its removal by the vendor. There is no indication that removal might

² Planning Practice Guidance – ‘Lawful Development Certificates’ Paragraph 006 Reference ID: 17c-006-20140306.

- be a year-long process. In any case I would expect the appellant to expedite removal if completion of a sale were dependent upon it.
26. The Council have consulted Natural England (NE) about removal of the jetties. In a letter of 20 June 2020 NE state that they could be removed without significant impact on the SPA or the SSSI. However, this would be conditional upon carrying out a survey of breeding birds, and the works being done from July to the end of August. They also recommend that all infrastructure associated with the jetty be removed and taken off site to allow the mudflats to recover from any damage. No comment is made about removal of the lighter.
27. In the light of the NE consultation, given the relatively small 2-month window suggested to avoid harm to breeding birds, and the timing of my decision I consider the compliance period should be extended to 9 months. This would also enable the appellant to conduct any further consultations he wishes and carry out any necessary surveys.
28. The appeal on ground (g) therefore succeeds, and I shall vary the notice accordingly.

Conclusions

29. For the reasons given above I conclude that the appeal should succeed to the limited extent on ground (g), and that a reasonable period for compliance would be 9 months. I am varying the enforcement notice accordingly, prior to upholding it.

Stephen Brown

INSPECTOR