The Planning Inspectorate

Appeal Decisions

Hearing Held and Site Visit made on 8 December 2020

by M Madge DipTP, MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6 January 2021

Appeal A: APP/N1025/C/19/3238932
Appeal B: APP/N1025/C/19/3238933
Brailsford Meadow, Risley Lane, Breaston DE72 3TT

- The appeals are 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 Mr and Mrs Barry and Angela Bickley (Appeal A) and Mrs Angela Bickley (Appeal B) against an enforcement notice issued by Erewash Borough Council.
- The enforcement notice was issued on 30 August 2019.
- The breach of planning control as alleged in the notice is without planning permission, the erection of a dwellinghouse, in the approximate position cross hatched in black on the attached plan ("the Dwellinghouse").
- The requirements of the notice are (i) Demolish the Dwellinghouse and remove all materials arising from the demolition from the land.
- The period for compliance with the requirements is 3 months.
- Appeals A and B are proceeding on the grounds set out in section 174(2)(a), (b), (c) and (f) of the Town and Country Planning Act 1990 as amended. Since the appeals have been brought on ground (a), applications for planning permission are deemed to have been made under s177(5) of the Act.

Summary of Decision: The appeals are allowed on ground (a), the enforcement notice is quashed, and planning permission is granted in the terms set out below in the formal decisions.

Preliminary matters

1. It is the appellants contention that the matters alleged in the notice, namely the erection of a dwellinghouse, has not occurred as a matter of fact. Appeals have been made on both grounds (b): that those matters alleged have not occurred and (c): that those matters (if they have occurred) do not constitute a breach of planning control. The appellants evidence in relation to ground (c) does not however seek to demonstrate why 'the erection of a dwellinghouse' would not constitute a breach of planning control. Rather, it reaffirms the ground (b) case. While the ground (c) appeals were not formally withdrawn, it was agreed by the appellant and the Council that the evidence provided in respect of ground (c) should be applied to the ground (b) appeals.

Background

2. The appellants have farmed the land surrounding the development as a small holding for in excess of 25 years and currently maintain a small collection of cattle, sheep and poultry. The appellants secured planning permission for the erection of an agricultural building at the site in August 1993. That building was erected and used to house livestock and for agricultural storage. The appellants

made 2 prior notification applications, under Class Q of the GPDO[1], to convert that agricultural building into a dwelling before securing approval on a third prior notification proposal at appeal[2] on the 23 May 2016 (the 2016 Appeal).

3. The previous Inspector described the agricultural building as 'a timber framed building with external walls of blockwork and timber and a corrugated metal and fibreglass roof'. The building operations set out in the 2016 Appeal included re-roofing the building with new corrugated panels with roof lights inserted, the provision of new doors and windows and the construction of new internal insulation measures. Internal partitions were to be installed to create rooms, the western lean-to structure was to be demolished to provide a domestic curtilage, and the eastern lean-to was to be retained as a garage. These building operations were accepted as being 'limited in nature' and 'not extend[ing] beyond what is reasonably necessary to enable the building to be converted to a dwelling'.

4. A fourth prior notification application was submitted to the Council (application reference: ERE/0916/8011), which sought to extend the scope of the building operations previously allowed by the 2016 Appeal. The proposed works were identified as 'one lean-to to be demolished to provide amenity space. New windows to be installed and existing openings to be utilised where possible. The exterior will be insulated and clad in treated timber and the building will receive a replacement roof covering'. In granting approval for these works, the Council considered it was not necessary to reassess the proposal against the criteria in Class Q(a). Furthermore, the Council considered that, while the scheme proposed a greater number of openings on 3 of the building's elevations, it would still be reduced in size and generally retain its existing form and scale. The Council also confirmed that the complete re-cladding of the building in timber would not be out of character in the context of the rural nature of this area. Prior approval for this scheme was issued on 24 November 2016 (the 2016 Approval).

Appeals A and B - Ground (b)

5. This ground is that the breach of planning control alleged in the notice has not occurred. In order to succeed on this ground, the appellants would need to show that the erection of a dwellinghouse has not occurred. The appellant has the burden of proof and the test of the evidence is the balance of probabilities.

6. It is the appellants case that they have implemented the 2016 Approval and the dwellinghouse, which they are now occupying, was created by the conversion of the former agricultural building to a dwelling. They acknowledge that the building operations carried out went beyond what was specified in the 2016 Approval. However, as no conditions were imposed on the 2016 Approval to restrict the extent of works, they considered that they had discretion to deviate from the approved details.

7. The Council claim that it was not necessary to impose conditions relating to the extent of works approved by the 2016 Approval as it is Class Q that grants the planning permission, subject to the restrictions specified in the GPDO, and compliance with the requirements specified in Class W. In the Council's opinion the building operations undertaken by the appellants exceed what had been

[1] Town and Country Planning (General Permitted Development) Order 2015 as amended
[2] Appeal reference: APP/N1025/W/3139007 allowed 23 May 2016

approved, and go beyond the scope of building operations permitted by Class Q.1(b) and therefore a new dwelling has been erected.

8. Class Q.1(i) of the GPDO confirms that development is not permitted by Class Q(b) if it would consist of building operations other than –

   (i) The installation or replacement of –

   (aa) windows, doors, roofs, or exterior walls, or

   (bb) water, drainage, electricity, gas or other services,

   To the extent reasonably necessary for the building to function as a dwellinghouse; and

   (ii) Partial demolition to the extent reasonably necessary to carry out building operations allowed by paragraph Q.1(i)(i).

9. Class W confirms what elements the prior notification application must contain, and this includes "a written description of the proposed development", which in relation to development proposed under Class Q(b), includes a description of any "building or other operations". Furthermore, Class W(12)(b) confirms that, where prior approval is required, the development must be carried out in accordance with the details approved by the local planning authority.

10. The building operations described within the 2016 Approval have been set out above. The Council's approval confirms that prior approval is required and granted "in accordance with details approved by the local planning authority to meet the requirements of W.(12)(a) of the above Order unless otherwise agreed in writing". The Council's approval also states that the applicant "should satisfy yourself that the development complies with the conditions, limitations or restrictions applicable to development permitted by the Town and Country Planning (General Permitted Development) Order". The 2016 Approval is therefore clear that it only approves the works specified in the prior notification application, unless otherwise agreed in writing.

11. In addition to the building operations described in the 2016 Approval, the timber support frame was removed, a new steel supporting framework was erected, and the eastern lean-to was demolished and rebuilt on a smaller footprint. There is no dispute that these additional building operations occurred and that they took place without the local planning authority's prior written agreement.

12. The appellant advises that the eastern lean-to construction consisted of a sheeted roof and timber clad walls supported on a recycled telegraph pole framework with an earth floor. The 2016 Approval provided for the roof and wall coverings to be replaced. Once these coverings were removed, only the telegraph pole framework remained.

13. The 2016 Approval also made provision for the replacement of the roof and wall coverings and for new openings to be created in the blockwork walls that formed the central section of the building. These approved building operations would have left the concrete floor, sections of the 4 blockwork walls (approximately 1.8 m high) and the timber support structure for the central section in situ.

14. Having commenced the approved building operations, the approved operations left a relatively skeletal structure. The appellants were then advised that the timber support structure for the central section was not adequate to take the loading of the insulated roof panels, roof lights and timber wall cladding. The appellants were also advised that the telegraph poles could not be used in the conversion due to the carcinogenic properties of the bitumen that they were treated with. The appellants were further advised that the solution was to provide a steel framework for the eastern lean-to and the main building section. This steel framework was installed after the timber framework and telegraph poles were removed. It is the appellants' argument that these works were reasonably necessary to allow the building to be converted and that these works fell within the scope of Class Q.(b) having regard to Class Q.1.(i).

15. While Class Q.1(i)(i) makes provision for the installation or replacement of windows, doors, roofs and exterior walls, it does not make provision for structural frameworks to be replaced. Furthermore, while Class Q.1(i)(ii) makes provision for partial demolition, this only relates to partial demolition that is reasonably necessary to facilitate the building operations identified in Class Q.1(i)(i), which does not include structural frameworks.

16. It was confirmed in Hibbitt[3] that there was no need for complete demolition of an agricultural building to have occurred before the resulting dwelling would be considered a 'fresh build' or new build. Mr Justice Green confirmed "it is a matter of legitimate planning judgement as to where the line is drawn" between conversion and new build, "there will be numerous instances where the … works needed to alter the use to a dwelling would be of such magnitude that in practical reality what is being undertaken is a fresh build [and] the nub of the point being made [is] that the works went a very long way beyond what might sensibly or reasonably be described as a conversion. The development was in all practical terms starting a fresh, with only a modest amount of help from the original agricultural building".

17. There is no dispute that the former agricultural building was reduced to the concrete floor and areas of blockwork wall shown highlighted in Appendix E of the appellant's Hearing Statement. While the agricultural building was not demolished in its entirety, the eastern lean-to was removed and re-built, and a new structural steel frame was erected to which the previously approved insulated roof sheets and wall cladding, along with the roof lights, were then attached.

18. The building operations that formed the 2016 Approval were extensive. There is no dispute that the completed dwellinghouse stands in the same position and is similar in appearance, scale and design to that which would have been constructed had the conversion been completed in accordance with the 2016 Approval.

19. In this instance however, I find the additional building operations undertaken go a very long way beyond what could sensibly or reasonably be described as a conversion, with only a modest amount of help being provided by the original agricultural building. The building operations undertaken therefore exceeded what was reasonably necessary to facilitate the change of use from an agricultural building to a dwelling and have resulted in building operations that are equivalent to the erection of dwellinghouse.

[3] Hibbitt v SSCLG & Rushcliffe BC [2016] EWHC 2853 (Admin)

20. For these reasons, I find the matter alleged in the notice has occurred as a matter of fact and the appeal on ground (b) fails.

Appeals A and B - Ground (c)

21. This ground is that the matters alleged in the notice have occurred, but they do not constitute a breach of planning control. The appellant has the burden of proof and the test is the balance of probabilities.

22. The appellant claims that the 2016 Approval encompasses the works that have been undertaken to facilitate the creation of the dwellinghouse. Whereas the Council claim that Class Q does not provide approval for the erection of a dwellinghouse.

23. As I have found that the matter alleged in the notice has occurred, the Class Q permitted development right cannot be relied upon as it only supports the conversion to a dwelling and not the erection of a dwelling. A full planning application to retain the dwellinghouse was unsuccessful and I have not been made aware of any other extant planning permission relating to the development. The matter alleged in the notice does therefore constitute a breach of planning control.

24. The appeal on ground (c) fails.

Appeal A - Ground (a) and the deemed planning application

25. It has been established that the matter alleged in the notice has occurred. The development for which planning permission is being sought therefore, is the erection of a dwellinghouse.

26. The **main issues** are:

- Whether the proposal is inappropriate development in the Green Belt having regard to the revised Framework and any relevant development plan policies.
- The effect on the openness of the Green Belt.
- The effect on the character and appearance of the street-scene.
- Would the harm, by reason of inappropriateness, and any other harm, be clearly outweighed by other considerations so as to amount to the very special circumstances required to justify the proposal.

Whether inappropriate development

27. Policy 3 of the Erewash Core Strategy (March 2014) and saved policy GB1 of the Erewash Borough Local Plan (March 2014) reflect the approach taken in the National Planning Policy Framework (the Framework), which identifies that the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open. The Framework states that inappropriate development is harmful to the Green Belt and should not be approved except in very special circumstances. The construction of new buildings should be regarded as inappropriate in the Green Belt, subject to the exceptions set out in paragraph 145 of the Framework.

28. The erection of a dwellinghouse is not specified as an exception in paragraph 145 of The Framework. The development is therefore inappropriate development in the Green Belt.

Openness of the Green Belt

29. The appellant claims that the development has increased the openness of the Green Belt as the dwellinghouse has reduced the built mass of the former agricultural building. Whereas the Council claim that the site should be considered to have been vacant before the dwelling was erected, as such there has been a significant reduction in openness.

30. While the building operations undertaken amount to the erection of a dwellinghouse, the former agricultural building was not demolished in its entirety. As such the starting point for assessing the effects of the development on openness is not a vacant site, it is the built structure that remained at the time the 'fresh build' commenced.

31. The remaining structure was modest in scale and it has been enveloped by the rebuilt eastern lean-to, timber insulated wall panelling and new insulated roof sheeting. The floor area and finished height of the dwellinghouse is larger than the modest structure that remained before the 'fresh build' commenced. The completed dwellinghouse has therefore reduced the openness of the Green Belt, both spatially and visually. In accordance with paragraph 144 of the Framework, I afford this harm substantial weight.

Character and appearance

32. Risley Lane is a busy road, which connects the settlements of Breaston and Risley. It has a footway along its entire length, which I saw to be well used at the time of my visit. While located in the countryside, there is built development located intermittently along the Lane's entire length. Development along Risley Lane is, in the main, set back from the highway. The prevailing boundary treatment adjacent to the highway is native species hedgerow.

33. The Council has again assessed the effects of the development on the street scene in respect of a vacant site versus the developed site. The Council claim that the design and proximity of the dwellinghouse to Risley Lane has resulted in visual intrusion, which detracts from the rural nature of the adjacent street scene.

34. The design of the completed dwellinghouse is not dissimilar to that which would have resulted had the 2016 Approval scheme been completed. The dwellinghouse therefore retains the appearance of a converted agricultural building, which the Council previously found acceptable.

35. Limited views of the dwellinghouse are available when travelling along Risley Lane and these not greater than the views that would have been available of the former agricultural building. While the built form of the agricultural building had been significantly reduced before the dwelling was completed, the time period within which no, or little, built development would have been visible from Risley Lane would have been short in comparison to length of time that the agricultural building occupied the land.

36. The development as built occupies a smaller footprint than the agricultural building but is the same height and configuration of what the development would have been, had the 2016 Approval been complied with. Therefore, the development has no greater impact on the longer distance views of the street scene, than the original agricultural building.

37. The south east corner of the agricultural building had formed part of the highway boundary treatment for in excess of 25 years prior to the demolition of the eastern lean-to. The remainder of the highway boundary is defined by a native species hedgerow, in excess of 2m in height. The demolition of the eastern lean-to left a gap in the highway boundary, which the appellants filled with an unauthorised 2 m high close boarded fence.

38. The fresh build of the eastern lean-to is narrower and therefore inset from the highway boundary. The relocation of the eastern elevation is in keeping with the prevailing character and appearance of development long Risley Lane. Therefore, the visual impact of the development on the street scene has been reduced. The resultant gap in the hedgerow however contributes little to the street scene. The appellants have offered to plant native hedgerow species to fill the gap, which would make a positive contribution to the street scene. This hedgerow planting, and its future maintenance could be secured by condition.

39. For the reasons given, and subject to a condition to secure the hedgerow planting, the development complies with Policy 10 of the Erewash Core Strategy (March 2014).

Other considerations to justify the development

40. The appellants' evidence refers to the as built dwellinghouse differing only slightly from the 2016 Approval. One of those differences being that the completed dwellinghouse is nominally smaller. The appellants confirm their intention was to implement and complete the 2016 Approval and they only strayed from this intention due to the complexity of the Class Q regime. The Council however consider this to be immaterial as the development is a new dwelling and not a conversion.

41. Ignorance of planning legislation and intention would not normally be any defence in respect of a breach of planning control. In this instance however, the appellants have been the custodians of the land for a considerable period of time. Their perseverance in respect of securing prior notification approval through the 2016 Appeal, then making a fourth application, to secure approval for the wall cladding, and continuing to work with the 'out of true' footprint of the building demonstrates a commitment to following the correct procedure in respect of converting the agricultural building to a dwellinghouse.

42. Furthermore, the lack of reference to structural works within Class Q or structural issues being raised throughout the appellants' numerous forays with the planning system, would not necessarily lead a lay person to realise the impact of removing the timber support framework and telegraph poles. The requirements of Class Q.1(b) would, taken at face value, suggest that the partial demolition and erection of replacement walls and roofs represent reasonably necessary building operations for the building to function as a dwelling. It is Hibbitt, in conjunction with amended Planning Policy Guidance, that has qualified and given clarity to the extent of building operations

permitted by Class Q, both of which occurred after the 2016 Appeal was allowed.

43. The Council claim that, as the appellants were professionally represented, they must have known that the works went outside the scope of what is permitted by Class Q(b). It is not however uncommon for professional representation to step aside once planning approval is secured, leaving clients to implement the development without further input. The appellants did receive further input, but this was in respect of Building Regulations rather than planning legislation. Having made it clear to their contractor that the development had to be a conversion, I find it unlikely that lay people would have considered that the professional advice they were being given would compromise their planning position to such an extent that they would lose the benefit of the 2016 Approval.

44. Both the previous Inspector and the Council were content that the agricultural building was sufficiently robust for its use to be changed from agriculture to a dwelling. The appellants have shown that they worked with the building, in so far as they have been able, to create a dwelling that is not dissimilar to what it would have been had the timber framework and telegraph poles been retained and strengthened and treated. The fact that the blockwork walls were retained and incorporated demonstrates the appellants ongoing commitment to what they thought was still a conversion. I give significant weight to the extraordinary circumstances that arise from the appellants' historical connection to the site, their perseverance in securing prior approval to convert the agricultural building to a dwelling and their explanation of events and reasoning that led to the operational development stepping beyond what is permitted by Class Q.(b) and therefore resulted in a fresh build in planning terms.

45. In addition, the dwelling has been designed and constructed to meet the appellants' long-term health and disability needs. While I have no substantive evidence to demonstrate that the appellants have nowhere else to live, the demolition of the dwellinghouse would result in the appellants losing their home. Mr Bickley's on-going medical conditions mean that he can no longer drive and needs to have accessible welfare facilities. Living on site in the completed dwellinghouse allows Mr Bickley to continue to operate the small holding, which positively contributes to his mental and physical health and rehabilitation. Conversely, moving away would mean an end to his operation of the small holding. This coupled with the loss of his home, into which he has poured his life savings, would undoubtedly have a negative effect on his mental and physical health and rehabilitation. These personal circumstances are unlikely to be repeated with any regularity and would not set a precedent for similar cases. I give the appellants' personal circumstances considerable weight.

46. The appellant also claims that the removal of the building from the highway boundary, coupled with the provision of native species hedgerow planting would represent a visual improvement to the street scene. While I have concluded that the development does not cause harm to the character and appearance of the street scene, this lack of harm is not a factor in the proposal's favour and I therefore give it neutral weight in my decision.

Green Belt Balance

47. I have found that the proposal would be harmful to the Green Belt by reason of inappropriateness and loss of openness. The Framework requires me to give this harm substantial weight. However, I have found that the development is not harmful to the character and appearance of the street scene and I am satisfied that provision of additional native species hedgerow planting to fill the gap in the highway boundary, make a positive contribution to the street scene.

48. In this case I find that the extraordinary circumstances which culminated in the deviation from the 2016 Approval, coupled with the considerable personal benefits that arise from Mr Bickley being able to maintain the management of his small holding to clearly outweigh the harm to the Green Belt. Consequently, the very special circumstances necessary to justify the development exist.

Conditions

49. The Council has suggested 3 conditions should the appeals be allowed. Two of the suggested conditions seek to limit the extent of the domestic curtilage around the dwelling and to remove permitted development rights for domestic extensions, outbuildings and minor operations. Had the dwelling occurred as a result of the 2016 Approval, these restrictions would have been in place and I concur that they are necessary to retain the form of the development and to preserve openness. The third condition requires the replacement of the unauthorised close boarded fencing with 2m high chestnut paling fencing. It was also agreed that the chestnut paling fence should be supplemented by native species hedgerow planting, in the interests of visual amenity.

50. Two of the conditions require action to be taken, as the development has already occurred, it therefore is necessary to impose a sanction for non-compliance for them to be enforceable. Having regard to the condition tests, I have adapted the agreed conditions accordingly.

Conclusion on ground (a)

51. The appeal on ground (a) succeeds and planning permission is deemed to be granted for the matters alleged.

Overall conclusion

52. For the reasons given above, I conclude that the appeals on grounds (b) and (c) shall not succeed, however the appeals on ground(a) shall succeed. I shall grant planning permission for the development as described in the notice. The appeals on ground (f) do not therefore fall to be considered.

Formal decisions

53. The appeals on ground (a) are allowed, the enforcement notice is quashed and planning permission is granted on the application(s) deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the erection of a dwellinghouse at Brailsford Meadow as shown on the plan attached to the decision notice and subject to the following conditions:

    (a) Within 2 months of the date of this decision, the section of close boarded fence adjacent to Risley Lane shown in figure 10 of the appellants' 'Grounds of Appeal' dated 10 October 2019, shall be replaced with

chestnut paling fence (2 metres in height) as shown in figure 11 of the appellants' 'Grounds of Appeal' dated 10 October 2019.

(b) Within 2 months of the date of this decision, a scheme of native species hedgerow planting, to fill the gap currently occupied by the close boarded fencing referred to in condition (a), shall be submitted to and approved in writing by the local planning authority. The scheme shall include details of the type, height and number of plants and future maintenance proposals. The approved details shall be carried out in the first available planting season and maintained thereafter in accordance with the approved maintenance scheme.

Condition (b) is imposed to ensure that the native species hedgerow planting scheme is submitted, approved and implemented so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and it is not possible to use a negatively worded condition to secure the approval and implementation of the hedgerow planting scheme before the development takes place. The condition will ensure that the development can be enforced against if the requirements are not met.

(c) Within 2 months of the date of this decision, a plan shall be submitted to the local planning authority for approval, showing the curtilage of the dwelling for all purposes pursuant to Parts 1 and 2 of Schedule 2, Article 3 of the Town and Country Planning (General Permitted Development) Order 2015 (as amended)(or any Order revoking and re-enacting that Order).

Condition (c) is imposed to ensure that the curtilage plan is submitted and approved so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and it is not possible to use a negatively worded condition to secure the approval of the curtilage plan before the development takes place. The condition will ensure that the development can be enforced against if the requirements are not met.

(d) Notwithstanding the provisions of Parts 1 and 2 of Schedule 2, Article 3 of the Town and Country Planning (General Permitted Development) Order 2015 (as amended)(or any Order revoking and re-enacting that Order) the dwellinghouse shall not be extended or altered externally nor shall any incidental building, structure or enclosure be erected.

M Madge

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Richard Piggott BA(Hons) MSc MRTPI	Planning and Design Practice Ltd
Angela Bickley	Appellant
Barry Bickley	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Richard Snow BA(Hons) DipTP MRTPI	Development Manager

INTERESTED PERSONS:

Graham Elliott BSc(Hons) CEng	Breaston Parish Council
Barbara Nielsen	3 The Crescent
Roger Cockle	Former Parish Councillor