



Appeal Decision

Site visit made on 4 February 2021

by Diane Lewis BA(Hons) MCD MA LL.M MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 February 2021

Appeal Ref: APP/W0530/C/20/3260618

Land known as Water Meadow Land to the rear of 41A Green End, Fen Ditton, Cambridge, Cambridgeshire CB5 8SX

- 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 Duncan Burbidge against an enforcement notice issued by South Cambridgeshire District Council.
 - The enforcement notice was issued on 14 September 2020.
 - The breach of planning control as alleged in the notice is Without planning permission:
 - i. The material change of use from agricultural land (Grade 4) to residential curtilage.
 - ii. Unauthorised engineering operations to facilitate a sports pitch including the excavating of ground and laying of a rectangular area of hardcore (100 tonnes), and partial construction of an earth bund surrounding the hardcore area, approximately 1.8 metres in height and approximately 3 metres in width.
 - The requirements of the notice are:
 - i. Remove all bunding
 - ii. Remove all hardcore from the land
 - iii. Return removed soil and subsoil
 - iv. Infill excavated land using returned soil and sub-soil
 - v. Return the land to its previous agricultural use and original condition.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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DECISION

1. It is directed that the enforcement notice be corrected:

- by deletion of the words in paragraph 3(i) and the substitution of the words "The material change in the use of the Land from agricultural land (grade 4) to a mixed use as agricultural land and residential garden land."
- by deletion of the words "to facilitate a sports pitch" and the substitution of the words "to facilitate the use as residential garden land" in paragraph 3(ii).
- The addition of the words "and restore the Land to its condition before the breach took place" at the end of step (iv) in paragraph 5.
- by deletion of the words in step (v) and the substitution of the words "Cease the mixed use by ceasing the use of any part of the Land as a residential garden." in paragraph 5.

2. It is directed that the enforcement notice be varied in paragraph 6 by the substitution of 4 months as the time for compliance.
3. Subject to the corrections and variations, the appeal is dismissed and the enforcement notice is upheld.

REASONS

Grounds of appeal

4. The appeal was originally made on grounds (b), (d), (f) and (g). Subsequently on 6 October 2020 the appellant confirmed in writing that the grounds of appeal should be (c), (d), (f) and (g) and I will proceed on that basis.

Enforcement notice

The Land

5. The Land identified by the plan attached to the notice lies between the River Cam and the houses fronting onto Green End. The Land is partly bounded by a ditch. The Council says it covers an area of 1 hectare. The appellant confirmed when making his appeal that he is the owner of all the Land. This is consistent with the details on the service of the notice.
6. The bund and the area of excavation and hardcore described in the allegation appear to have been towards the north eastern part of the Land. By the time of my site visit the earth bunds had been removed in so far as a raised means of enclosure or earth banks were no longer visible. The appellant confirmed that at the beginning of January 2021 he carried out works to remove the bund in response to advice from a flood risk assessment and the Environment Agency¹.
7. On the north and east side of the ditch is a long narrow piece of land that extends from the house at 41A down to the river and which is not included within the Land. I found on my site visit that this area has a different, much more domesticated character and appearance to the Land. Features of note include a gravel path, garden planting and lawn and two outbuildings, probably boathouses, adjacent to the river. Access across the ditch to the meadowland is provided by footbridge.

The alleged breaches of planning control

8. The enforcement notice alleges two breaches of planning control. Following my site inspection I invited comments from the appellant and the Council on details of the wording of the allegations.
9. The alleged material change of use is from agricultural land (Grade 4) to residential curtilage. However, the term 'curtilage' does not describe a use of land but rather is a physical concept originally derived from property conveyancing procedures. In the planning context the term now is most usually applied in respect of permitted development rights for householders or in respect of a curtilage to a listed building. Nevertheless, the notice is clear and the appellant has understood that the allegation means a change to a residential use as part of the garden.

¹Written confirmation in an email dated 25 January 2021 from the appellant and in his Final Comments

10. When I made my site inspection the southern part of the Land appeared to be covered by rough grass and meadowland, whereas the northern half of the grassland appeared to have been more actively maintained and included the site of the excavation works. There were no physical features separating the land parcels. The Council confirmed that the Land was in a mixed use of agricultural and residential use when the notice was issued in September 2020.
11. The appellant submitted that the Land has not been actively used for agricultural purposes for as long as anyone in the village can remember. However, when considered within the context of the 1990 Act and the meaning of development, section 336(1) of the 1990 Act confirms 'agriculture' includes the use of land as grazing land and meadow land. That being so, the reference to agricultural land in the allegation does not need correcting.
12. The engineering operations are stated "to facilitate a sports pitch", a term which suggests a more formal, organised recreational use than use as part of a domestic garden. The Council has confirmed that the engineering works to construct the pitch were not substantially completed when the notice was issued. The appellant has explained that he considered the term sports pitch to be inaccurate. The intention was to create a flat and well-drained area for family activities, including tennis or cricket as well as picnics. In view of these comments, I will correct the wording to state "to facilitate the use as residential garden land".

Appeal on ground (c)

13. In this ground of appeal the onus is on the appellant to show that there has not been a breach of planning control.
14. Section 55 of the 1990 Act sets out the meaning of development. There are two limbs – the making of any material change in the use of any buildings or other land, and the carrying out of building, engineering, mining or other operations in, on, over or under land. As noted above, the notice alleges two acts of development.
15. The appellant does not seek to argue that no development has taken place. He does not dispute that there has been a material change in the use of the Land and his own evidence confirms that engineering operations have occurred through the formation of a bund and the laying of hardcore.
16. The appellant's case aims to establish that the developments are permitted. However, the short points made are descriptive, mainly in relation to the engineering operations and refer very briefly to visual impact and access. No specific explanation is provided, supported by appropriate reference to the 1990 Act or the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). The evidence on the legal grounds of appeal is primarily directed towards the ground (d) appeal.
17. In respect of the alleged material change of use the only potentially relevant section in Schedule 2 of the GPDO is Part 3 regarding Changes of use but none of the Classes permit a change to a mixed agricultural residential use.
18. In respect of the alleged operational development the only possible relevant section in Schedule 2 of the GPDO is Part 6 that relates to Agriculture and Forestry. However, the Land is not part of an agricultural unit and there is no evidence or indication that any excavation, engineering operations or laying of

a hard surface were reasonably necessary for the purposes of agriculture. The operational development was not permitted under the GPDO.

19. For the sake of completeness, none of the provisions within the Town and Country Planning (Use Classes) Order 1987 apply to the alleged material change of use.
20. In conclusion, the material change of use and the engineering works are acts of development requiring planning permission. Permission has not been granted by a development order or through an application to the local planning authority. The developments are unauthorised and are breaches of planning control. The appeal on ground (c) does not succeed.

Appeal on ground (d)

21. The evidence demonstrates that the engineering operations were not substantially completed by 14 September 2016. Therefore the works were undertaken outside the four year time limit and are not immune from enforcement action. Accordingly, this ground of appeal centres on the material change of use.
22. The main issue is whether the material change of use occurred before 14 September 2010 and continued substantially uninterrupted for a period of 10 years. The onus of proof is on the appellant. The standard of proof is the balance of probability. Case law and national planning practice guidance have confirmed that if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the appellant's version of events less than probable, and provided the appellant's evidence alone is sufficiently precise and unambiguous on the balance of probability, there is no good reason to reject the case on ground (d).
23. There is no statutory definition of 'material change of use'; however, it is linked to the significance of a change in the character of the use of the land and the resulting impact on the use of land and buildings.
24. The appellant provides no evidence based on his own personal knowledge of the Land and by all accounts he acquired the residential property at 41A Green End at the end of 2018. To support his case that the land has been used in the same way for more than ten years the appellant has submitted letters from people with knowledge of the land including the previous owner of 41A Green End, an employee who maintained the land, immediate neighbours and a Vice-Chairman of Fen Ditton Parish Council.
25. The former owner stated that he acquired Number 41A in September 2004. He reached agreement with Cambridge Past, Present and Future² to let the adjacent field, which he did continuously from 2007 to 2018. He stated throughout this period he and his family used the field as an extension to the garden for leisure purposes, including football, tennis, general garden games and picnics. However, there is no detailed information on the frequency of the use and the area used for leisure activities, whether any domestic paraphernalia was sited on the land and no plan is provided to identify the field that was rented. The evidence lacks the necessary precision and does not show that a material change in the character of the land took place after 2007.

² Cambridge Past, Present and Future formerly known as Cambridge Preservation Society

26. The employee refers to 'the inner field' being mown and maintained as garden and used for general leisure purposes by the family continually throughout the year. It was not used for agricultural or grazing purposes. Some information is provided of the mowing regime and of use of the entire field three times a year for larger events, such as those associated with The Bumps. Again this evidence is not precise as to area and the timing, level and frequency of use but suggests that only part of the Land was used for family leisure. There is inconsistency with the former owner's evidence over use for larger events. A mowing and maintenance regime is not evidence of actual use.
27. The letter from near neighbours provides no additional detail. The Parish Councillor's knowledge is based on two visits (dates unknown) before the appellant acquired the property. The first visit was over ten years ago when the land let from Cambridge Past, Present and Future and referred to as 'the plot' was said to be managed differently from the adjacent Brown's Field. Even so the plot was described as meadow and mainly grasses. The second visit was more recently when the plot looked much the same as before.
28. In addition to the letters, photographic evidence is provided based on Google satellite images which the appellant considers showed the land always mown as lawn.
29. The first image is described as dating from the end of 2007. However, although the image is dated 31 December 2007, this date is doubtful because all trees were in full leaf and all the vegetation was very green. The gravel path and long narrow garden north of the ditch is easily distinguished, except nearer the river where the tree canopies are dominant. The Land appears to have comprised of grassland and was defined by the course of the river and lines of trees. It was very similar in appearance to the nearby meadows and fields. The exceptions are (i) a small area of worn grassland close to the northern boundary, where the footbridge now is, and (ii) a small area in the north eastern corner next to the river where it appeared some paths were worn.
30. The second image dated 15 September 2012 is less clear. Two small areas, in a similar position as the first image, appear to be slightly different in grass cover to the remainder of the Land.
31. The third image dated 25 May 2017 indicates two paths towards the river and, as before, slightly less grass cover on the two small areas when compared with the rest of the Land. However, when compared to the surrounding grass and meadowland such variation in appearance was not unusual. By contrast, north of the ditch the long garden with its gravel path and lawns at the back of number 41A has a markedly different character and appearance.
32. In my view the images do not show or confirm areas of mown lawn on the Land. Furthermore, photographic images are snapshots at a point in time. The three images provide very little assistance in demonstrating continuity of use for family leisure activities over a ten year period of time and rather they suggest the Land was of a similar character to adjoining meadows.
33. The common theme from the representations on the appeal from Fen Ditton Parish Council and neighbouring residents is that the Land is water meadow in the functional flood plain of the River Cam. After the appellant bought the land a very significant change occurred in the summer of 2020. Hardcore was laid, brought in by lorries and an earth bund was formed. The works followed the

withdrawal of a planning application to build a sports field and surround it with an earth bund. In one of the representations the Land is described as two fields known locally as Grassy Corner, which were bought by the appellant from a private owner and the Conservation Society. This comment is consistent with the observation distinguishing 'the plot' from the adjacent Brown's Field (see paragraph 27 above). Significantly the term repeatedly used to describe the previous character and use of the land is water meadow.

34. When assessing whether a use is immune from enforcement action a test derived from case law is to ask whether the local planning authority could have taken enforcement action against a change of use at any time over a ten year period. The picture that is built up from all the evidence is of occasional family use by the previous owner and that there would have been very substantial periods of time when the land was not so used. There is little to support a definable change in character that would have justified the issuing of an enforcement notice. The marked and noticeable change occurred after the appellant bought the land in late 2018.
35. In conclusion, on the balance of probability a material change to a mixed use did not take place before 14 September 2010 and continue substantially uninterrupted for a period of 10 years. The mixed use has not become immune from enforcement action through the passage of time. The appeal on ground (d) does not succeed.

Appeal on ground (f)

36. The issue is whether the requirements are excessive, taking into account the purpose of the notice. Steps (i) to (iv) relate to the engineering operations and step (v) to the material change of use and the engineering works.
37. The reasons for issuing the notice relate to the Land's location in the Green Belt and the countryside and to the policy objective to minimise flood risk. When read in conjunction with the requirements it is clear that the purpose of the notice is to remedy the breaches of planning control by discontinuing the use and by restoring the land to its condition before the works took place. By reason of the statutory provisions³ it is only open to the appellant to argue that lesser steps could achieve this purpose, not that the purpose should be limited to remedying the injury to amenity.
38. The grounds of appeal identify two requirements as being excessive, remove all bunding and remove all hardcore. In respect of the bunding, the appellant at first considered a bund of 1 metre in height should be allowed to remain but matters have moved on since then. The appellant in making his final comments accepted that no bund of any form could be retained having carried out a flood risk assessment. All the evidence shows that removal of the bund is not an excessive requirement.
39. The appellant initially argued that retention of the hardcore would pose no risk to the environment. Having now carried out some restoration work the appellant is seeking to retain some 40 tonnes of hardcore, described as clean limestone, in order to make a level surface. However, the deposit of hardcore was not undertaken in association with a lawful use. There is insufficient evidence to demonstrate the approach now proposed provides an obvious or

³ Sections 173(3), 173(4) and s174(2)(f) of the 1990 Act

acceptable alternative, or to enable a requirement to be specified precisely. Deletion of the requirement would conflict with the purpose of the notice and is not supported by sufficient reasoned justification. Removal of the hardcore is not an excessive remedy to the identified breach of planning control. It would be up to the local planning authority to decide whether or not to relax step (ii) using its power under s173A(1) of the 1990 Act.

40. The appeal on ground (f) does not succeed.

41. On a separate matter, step (v) requires the land to be returned to its previous agricultural use. Even though not raised by the appellant, I am concerned that this action would go beyond remedying the breach. The Council has agreed rewording this element of the step to reflect the corrected wording of the description of the breach of planning control. Such a correction, to cease the mixed use of the land and more particularly the garden use element, would not impose a more onerous requirement on the recipient of the notice. I am satisfied that this correction is able to be made without causing injustice to either the appellant or the local planning authority. The second element of the step, returning the land to its original condition, is more appropriately placed at the end of the step (iv) and in making this correction I will adopt the form of words found in section 173(4) of the 1990 Act.

Appeal on ground (g)

42. The issue is whether a period of compliance of three months is reasonable.

43. The time for compliance has to take account of what the recipient of the notice will have to do in practice to carry out the remedial steps and consequently how much time is reasonable to permit for that purpose. A relevant factor in this case is weather conditions and the condition of the ground in the winter months. The land is less likely to be waterlogged and more likely to be harder outside of the winter months, so reducing the likelihood of damage to the surrounding meadowland when gaining access to restore the land to its previous condition. On the other hand, the breaches of planning control should be tackled expeditiously to address the serious harm to the local environment.

44. My conclusion is that extra leeway should be allowed and the compliance period will be increased to four months. The appeal on ground (g) succeeds to this extent.

Conclusion

45. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and variations.

Diane Lewis

Inspector