
Appeal Decision

Site visit made on 8 March 2021

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 23 March 2021

Appeal Ref: APP/F1610/C/20/3258581

Land at The Waterfront Tea Room, Victoria Street, Bourton on the Water, Gloucestershire GL54 2BX

- 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 Stephen Allely against an enforcement notice issued by Cotswold District Council.
- The enforcement notice was issued on 20 July 2020.
- The breach of planning control as alleged in the notice is: Without planning permission the erection of a grey kiosk on the Land.
- The requirements of the notice are: Permanently remove the grey kiosk from the Land.
- The period for compliance with the requirements is 1 month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal is brought on ground (a), an application for planning permission is deemed to have been made under s177(5) of the Town and Country Planning Act 1990.

Summary Decision: The appeal is allowed following correction of the enforcement notice in the terms set out below in the Formal Decision.

Application for costs

1. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Preliminary Matters

2. An appeal was originally also brought under ground (e) as the appellant sought to make a case that copies of the enforcement notice were not served as required by s172 of the Town and Country Planning Act 1990 as amended (1990 Act). However, this ground of appeal was withdrawn at the final comments stage, since the appellant accepted the Council's explanation of its service as having been in accordance with the 1990 Act. I have no reason to disagree with that approach on the evidence before me.
3. Both the appellant and the Council submitted new evidence within their final comments. Since this late evidence was of relevance, I accepted this and gave both parties an opportunity to comment. Comments made are taken into account in my decision.

The appeal on ground (b)

4. The appeal on ground (b) is that the matters in the enforcement notice have not occurred as a matter of fact. The onus is on the appellant to demonstrate this on the balance of probability.

5. At my site visit, I observed that there was a grey shepherd's hut on the land whereas the enforcement notice refers to a grey 'kiosk'. I find as a matter of fact and degree that the object more closely resembled a shepherd's hut than a kiosk in view of its traditional wheeled design.
6. Further, the notice refers to 'erection' of the kiosk, which connotes some act of construction or assembly. The appellant's evidence is though that the shepherd's hut was not constructed on site, but was fully assembled off site and was brought onto site in its final form. The Council does not appear to dispute this and, bearing in mind its size and simplicity of design, I find as a matter of fact and degree that the shepherd's hut was not 'erected' on the land. The ground (b) appeal succeeds in these respects.
7. However, I am permitted by s176 of the 1990 Act to correct any error or misdescription in the enforcement notice provided that I am satisfied that this will not cause injustice to the appellant or the Council. As such, I can correct the notice to refer to the 'siting' of a grey 'shepherd's hut' on the land. I do not consider that this would cause any injustice to either party, given the overlap with related arguments under the ground (c) appeal.

The appeal on ground (c)

8. The appeal on ground (c) is that the matters in the enforcement notice do not constitute a breach of planning control. Again, the onus is on the appellant to demonstrate this on the balance of probability.
9. The thrust of the appellant's argument is that the placing of the grey shepherd's hut on the land does not represent development requiring planning permission. Specifically, the appellant submits that it does not represent operational development under s55(1) of the 1990 Act¹.
10. Turning then to the shepherd's hut, it is a rectangular shaped object with a curved roof which has four large wheels. It was, at the time of my site visit, sitting within the front garden of the Waterfront Tea Room which is a Grade II listed building. The appeal site is adjacent to another listed building, and within both the Bourton-on-the-Water Conservation Area and the Cotswolds Area of Outstanding Natural Beauty.
11. Operational development is defined in s55(1) of the 1990 Act as the carrying out of building, engineering, mining, or other operations in, on, over or under land. Connected to whether or not a building operation has occurred, section 336(1) of the 1990 Act states that a "building" includes "any structure or erection". The courts have held that regard must be had to size, permanence and degree of physical attachment in determining whether an item is a building. No single factor is decisive in the assessment², which is a matter of fact and degree in each case.
12. As to size, although the shepherd's hut is held under its own weight without permanent rope ties or anchoring, and is not discreet within the modest-sized front garden, it is small enough to have been brought onto site ready-made. Mrs Justice Lang in the *Woolley Chickens* case³ emphasised that the term

¹ There is no suggestion from either party that a material change of use has occurred and I have no reason to conclude otherwise.

² *Skerritts of Nottingham Ltd v SSETR & Harrow LBC (No.2)* [2000] EWCA Civ 5569

³ *R (oao) Save Woolley Valley Action Group Ltd v Bath and North East Somerset Council* [2012] EWHC 2161 (Admin)

- 'building' is widely defined in s336 of the 1990 Act and indeed, the courts have interpreted this to include many items which would not ordinarily be considered 'buildings'. However, there is no doubt that the shepherd's hut is significantly smaller in size than the poultry units in *Woolley Chickens*, the marquee in *Skerritts* and indeed than the polytunnels in *Hall Hunter*⁴.
13. With respect to permanence, Mrs Justice Lang in *Woolley Chickens* cited the *Skerritts* judgment in which it was held that permanence should be construed in terms of significance in the planning context i.e. that an item is in situ for long enough to be of significance. The Council submits that the shepherd's hut has been on site since around July 2018, and that it is visually prominent obscuring the front of a listed building within the conservation area. It would appear that the intention is for the shepherd's hut to remain on site for a period of years, rather than months or weeks.
 14. Whilst I acknowledge that the ability to move the shepherd's hut within the site does not remove its significance in visual terms⁵, it was held in *Skerritts* that permanence is a matter of degree between the temporary and the everlasting. Whilst the shepherd's hut has a greater degree of permanence than some obviously temporary items, it is less permanent than an item that can only be removed by a process of taking down or pulling it to pieces, for example a bricks and mortar house.
 15. Turning then to the degree of physical attachment, the shepherd's hut is not physically attached to the ground, having only an electrical hook up connection which could be very quickly and easily disconnected. Although the Council refers to the shepherd's hut's wheels as being 'ornamental', it appears to accept that the hut has been moved to some degree within the garden. I find it highly improbable that it would have been so moved if the wheels were ornamental. As such, although held in place by its own weight, its degree of attachment is such that it could be quickly detached and moved from the site in one piece.
 16. I note third party concerns as to consistency related to a kiosk locally which was required to be removed by the Council. However, I do not have full details of that kiosk to enable a proper comparative assessment. Comments regarding planning legislation precluding structures on wheels are not substantiated.
 17. Drawing all of these matters together, I find on the evidence before me and as a matter of fact and degree that the shepherd's hut is not of such size, permanence, and degree of physical attachment to be considered a 'building'. No building or other operations have occurred as a result of its presence on the site. Consequently, it does not represent operational development under s55 of the 1990 Act. It follows that planning permission was not therefore required in respect of the shepherd's hut.

Conclusion

18. From the evidence before me, I conclude that the alleged breach of planning control set out in the enforcement notice is incorrect. The appeal succeeds on ground (b) to that extent.

⁴ *R (oao Hall Hunter Partnership) v FSS & Waverley BC* [2006] EWHC 3482 (Admin)

⁵ per Mrs Justice Lang in *Woolley Chickens*

19. On the balance of probabilities, the appeal on ground (c) should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control.
20. The enforcement notice will be corrected and quashed. In these circumstances, the appeals on grounds (a) and (g) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Formal Decision

21. It is directed that the enforcement notice is corrected by:
- the deletion of the word 'erection' from paragraph 3 of the notice and substitution of the word 'siting';
 - the deletion of the word 'kiosk' from paragraph 3 of the notice and substitution of the word 'shepherd's hut'; and
 - the deletion of the word 'kiosk' from paragraph 5 of the notice and substitution of the word 'shepherd's hut'.
22. Subject to these corrections, the appeal is allowed and the enforcement notice is quashed.

V Bond

INSPECTOR