The Planning Inspectorate

Appeal Decision

Inquiry opened on 8 February 2021

Site visit made on 26 March 2021

by Paul Dignan MSc PhD

an Inspector appointed by the Secretary of State

Decision date: 19 April 2021

Appeal Ref: APP/G5180/C/20/3246812
Land at Home Farm, Kemnal Road, Chislehurst, BR7 6LY

- 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 Pauline Selby against an enforcement notice issued by the Council of the London Borough of Bromley.
- The enforcement notice was issued on 13 January 2020.
- The breach of planning control alleged in the notice is failure to comply with condition Nos. A.2(2), A.2(5) and A.2(7) of Schedule 2 Part 6 Class A of a planning permission granted by Article 3.1 of The Town and Country Planning (General
- Permitted Development) (England) Order 2015 (the GDPO).
- The development to which the permission relates is the erection of an agricultural building.
- The notice alleges that condition A.2(2) has not been complied with in that the building has not been erected in accordance with details approved on 9 June 2015 on an application for prior approval, that A.2(5) has not been complied with in that the building has not been used for the purposes of agriculture, and that condition A.2(7) has not been complied with in that the Council was not notified of the date of completion.
- The requirements of the notice are: Remove from the Land the building as described in paragraph 3, including all debris resulting from its dismantlement; and landscape the Land to its former condition with the entire area grassed over and all hardstanding removed.
- The period for compliance with the requirements is 4 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.

Decision

1. It is directed that the enforcement notice be corrected by, in the heading, the deletion of the words “Operational Development” and their replacement by “Failure to comply with conditions”; in paragraph 1, the deletion of the words “paragraph (a) of Section 171A(1)” and their replacement by “paragraph (b) of Section 171A(1)”; and in paragraph 4 the deletion of the word “four” and its replacement by “ten”.

2. Subject to these corrections I allow the appeal, and direct that the enforcement notice be quashed. In accordance with section 177(1)(b) of the 1990 Act as amended, I hereby discharge conditions A.2(2) and A.2(7) attached to the planning permission granted by Article 3.1 of The Town and Country Planning (General Permitted Development) (England) Order 2015 for the erection of an

agricultural building for which prior approval was granted by the Council of the London Borough of Bromley on 9 June 2015 (Ref. DC/15/01995/AGRIC).

Application for costs

3. At the Inquiry an application for costs was made by Pauline Selby against the Council of the London Borough of Bromley. This application is the subject of a separate Decision.

The notice

4. Home Farm is an agricultural unit of just over 7 ha, hence it benefits from GDPO permitted development rights set out in Class A of Part 6 of Schedule 2. Class A permits, among other things, works for the erection of a building that is reasonably necessary for the purposes of agriculture within that unit. Class A development is subject to limitations (A.1) and conditions (A.2). So far as the erection of a building is concerned, Condition A.2(2)(i) requires that an application for a determination as to whether prior approval as to siting, design and external appearance will be required be made before beginning the development. In this case an application for such a determination was made for the erection of a barn, accompanied by the requisite details, and prior approval was granted on 9 June 2015. Construction of the barn began subsequently, and it was substantially completed between late December 2015 and early January 2016, certainly, as agreed, before 13 January 2016.

5. It is not disputed that the barn was not constructed strictly in accordance with the details approved, as required by condition A.2(2)(v)(aa), nor that condition A.2(7), which requires that the developer must notify the local planning authority within 7 days of the fact that the development is substantially completed, was met. The contingent operation of condition A.2.(5), which requires the removal of the building in defined circumstances, is disputed. Failure to comply with these conditions is stated in the notice as the matters which appear to constitute the breach of planning control.

6. Section 173 of the 1990 Act requires that an enforcement notice shall state the matters which appear to the local planning authority and the paragraph of section 171A(1) within which the breach falls. However, paragraph 1 of the notice identifies the breach in this case as falling within paragraph (a) of section 171A(1) of the 1990 Act, which concerns the carrying out of operational development or the making of a material change of use, rather than paragraph (b), which concerns failing to comply with a condition or limitation subject to which planning permission has been granted. Hence the recitation of section 171A(1)(a) as the paragraph within which the breach falls is inconsistent with the description of the alleged breach. Similarly, within the reasons for issuing the notice, the Council makes reference to the breach having occurred within the last four years, referring to the period within which enforcement action can be taken before the development enforced against becomes immune. The relevant immunity period for the conditions specified is 10 years.

7. The Council says that it has erroneously quoted the incorrect sub-paragraph of section 171A(1) and that the reasons given for issuing the notice should have referred to 10 years rather than 4 years. It confirmed that its intention was to enforce against a failure to comply with the GDPO conditions and requested that the notice be corrected.

8. Section 176(1)(a) enables the Inspector to correct any defect, error or misdescription in the notice provided there is no injustice to the parties, and I am satisfied that the failure to specify the correct sub-paragraph of section 171A(1) and the incorrect 4 year reference does not render the notice a nullity. Further the extent of the changes required is not of such magnitude as to indicate that the notice as issued was incomprehensible, and invalid for that reason. It is clear from the way the appellant case was put, notwithstanding the arguments made below, that the appellant understood what was alleged to have been done in breach of planning control, and what was required to be done to comply with the notice. The corrections are not extensive and do no more than put the notice in order.

9. The appellant argued nonetheless that the changes required to put the notice in order cause injustice to the appellant. Behind that argument is the proposition that the building was built without planning permission, either because it was not reasonably required for the purposes of agriculture or because it was not constructed in accordance with the details granted prior approval, such that the entire development was unauthorised, and would therefore become immune from enforcement after 4 years. It is submitted that a correction or amendment that made it unambiguous that the allegation was not concerned with the building having been erected without planning permission would leave the appellant unable to argue ground (d), that is immunity from enforcement action after 4 years. For clarity, it is common ground that the notice was issued more than 4 years after substantial completion of the building.

10. I see no merit in the argument that the Council, despite what it says and how the allegation is framed, consider that the building was not permitted development. It is for the Council to identify the breach of planning control when it issues the notice, and the grounds of appeal necessarily relate to that alleged breach. Regarding the failure to erect the building in accordance with the prior approval details, the requirement to do so is expressed as a condition rather than a limitation, so it is open to the Council to enforce against failure to comply with the condition. Had the appellant wished to establish that the building as erected did not benefit from the GDPO permission but was lawful due to immunity from enforcement then it was open to her to apply for a Certificate of Lawfulness of Existing Use or Development. But in any case, since the notice does not allege the unauthorised erection of the building I consider that my correction of the notice does not prejudice the appellant by preventing an appeal on ground (d), which could only succeed on the basis that the building was erected without planning permission.

11. The notice is also criticised for failing to specify the date on which the Council considered that the use for the purposes of agriculture had permanently ceased. However there is no requirement for such detail to be included in a notice, and its omission does not make the notice a nullity or invalid. Looking at the notice in the round, and subject to the necessary amendments set out above, 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 clear that the notice was purporting to attack a failure to comply with conditions.

Ground (b)

12. An appeal on ground (b) is that the matters alleged did not occur. This argument is made in respect of the alleged failure to comply with condition A.2(5). The structure of this condition is that it is engaged initially by the permanent cessation of the use of the building for the purposes of agriculture within the unit within 10 years of the substantial completion of the building. This triggers a 3 year period within which planning permission may be sought for development for purposes other than agriculture, failing which the building must be demolished and the site restored, unless otherwise agreed in writing by the Council.

13. As the appellant has noted, it is ultimately the failure to demolish the building in the circumstances proscribed that constitutes the breach of the condition, and that is not specified in the reasons for issuing the notice. Nonetheless, the notice read as a whole provides sufficient clarity on the matter, and the requirement at section 5 of the notice would constitute compliance with the condition, hence making clear that the purpose of the notice is to remedy the relevant breach of planning control.

Chronology

14. A chronology of the use of the land is important in understanding the use of the building. The appellant and her husband bought Home Farm in 1994. At that time it had been used for sale and distribution of turf, for cattle rearing and as a livery stables. They also bought plant and machinery from the previous owner, including 2 tractors, a dumper and a mini-digger. These items, or their replacements, subsequently came to be kept in the appeal building. At that time the holding was considerably larger. Mrs Selby ran the property as a livery stables and sheep farm, the latter being focused on breeding Romney rams. Hay cropping is described as the initial agricultural use, though hay making appears to have been intermittent and primarily for use on the holding, much of it going to the livery stables use. Although the farm accounts show some specific accounting for the sheep and livery uses, in the main they appear to have been part of the same enterprise with apportionment, so far as I could see, being at the discretion of the accountant. Hay cropping does not appear as a separate activity, unsurprisingly when it was not leaving the farm. It seems some hay crops were mainly used for the livery, the valued being reflected in higher rents with hay being included in the charge.

15. The farm at that time had storage barns for hay/straw and for machinery. An arrangement was made with a neighbouring landowner to sell part of the holding to him, apparently contingent on planning approval for a dwelling on part of the land. The sale was eventually agreed, the requisite approval having been indicated, at least, in late 2013. In anticipation of the sale Mrs Selby had sold off the Romney flock in October 2013. The land sold was in part that used for lambing, including a small lambing barn. The sale, which eventually went through in April 2015, also involved the main barns, though there was an agreement to allow the continued use of the machinery barn for a year to enable the Selby's to make alternative arrangements.

16. Seemingly the same day as the Selby's received confirmation of the planning approval that would enable the sale of the land to go ahead, the farm, including their house and the livery stables, were hit by a serious flood event. All of the horses left the land in the following months. There has been no livestock,

agricultural or equestrian, on the land since then. So far as the land was concerned, the damage appears to have made it unusable and a significant programme of flood defence works was initiated to avoid re-occurrence. This was not complete until March 2015.

17. The prior approval application for the barn was accompanied by an Agricultural Need Assessment (CLM2015). This indicated that the sheep breeding enterprise would be resumed (although inaccurately stating that it had been suspended due to the flood incident) and that a new barn was needed for hay and fodder storage, machinery storage and occasional livestock handling and shelter. It also indicated that the land would be used for hay production when not stocked by livestock. Prior approval was granted and building commenced, with completion around the end of the year, after which the farm machinery was moved from the barn that had been sold. At this point there had been no productive farming of the land for 2 years, understandably. However, while the land was evidently kept in good condition, productive farming did not actually occur until, at the earliest autumn 2018 with preparation for hay making in 2019.

18. In the meantime, Mrs Selby suffered ill health. Being unable to commit to re-introducing sheep, she and her husband decided to try to sell the farm. A buyer was found, but in the event the sale did not go through, the process ultimately finishing in April 2018.

19. Having had a positive health prognosis in October 2017, Mrs Selby decided to look at the resumption of her sheep breeding enterprise, and a prior approval application, accompanied by an Agricultural Need Assessment (CLM2018a) was made if February 2018 for an agricultural building, again under GDPO Schedule 2, Part 6, Class A, for sheep handling, housing and storage of hay, straw, feed and associated sundries. This application was refused, design, siting and external appearance being considered unacceptable, but lack of clarity, and indeed evidence, about whether there was an agricultural trade or business was also raised within the officer's report, as was the use of the appeal barn. In any event, the refusal led Mrs Selby to reconsider resuming the sheep breeding enterprise. Notwithstanding that their son had returned to live on the farm and was taking an active interest, the Selby's decided to try to sell the house and retire.

20. In December 2018 they applied to convert the appeal barn to a dwelling, and wrote to DEFRA to inform them that the farm was closing down. The application to convert the barn was accompanied by an Agricultural Statement (CLM2018b) which advised that "the agricultural business or trade is ceasing", "The applicant has therefore formally ceased farming.", and "The future agricultural use of the agricultural building has been considered and it is clearly surplus to the applicants' requirements." In oral evidence Mr Morris, who co-prepared the report, suggested that the report had erroneously misrepresented the appellant's intentions since his co-author had only discussed the cessation of the sheep enterprise with Mrs Selby. He stated that he is now aware that hay making continued. However, while all three agricultural reports referred to hay making, there had, at this point, been no production of any kind since the cessation of the livery in early 2014, and the 2018 report suggested that hay production could be undertaken by a third party.

Appraisal

21. For the purposes of the GDPO, "agricultural land" means land which, before development permitted by Part 6 is carried out, is land in use for agriculture and which is so used for the purposes of a trade or business. To comply with condition A.2(5) the agricultural land comprised in the unit must be used in this manner, and the barn must necessarily be part of that use.

22. When the erection of the barn commenced, the flooding repair and remediation works had just been completed and the land would then have been fit to return to production. Sheep farming was the principal agricultural enterprise used for justifying the need for the barn, with hay cropping in some years when sheep were not on the land. When the erection of the barn commenced, however, the resumption of sheep rearing seemed unlikely due to Mrs Selby's health, meaning that she was unable to physically manage the sheep. Nonetheless, given the history of farming at the holding, the need to re-house the existing farm machinery and equipment, and the land restoration effort, I can see no good reason why the barn would not have met the Class A requirements, both in terms of need and the qualifying status of the agricultural unit.

23. After the equipment was moved to the new barn and the flood defence works were complete, however, there appears to have been no resumption of productive agricultural activity on the unit, as opposed to mere land maintenance, until at least late 2018. There will, in the life of many farming enterprises, be points at which crucial decisions need be made, such as, in this case, whether to retire or continue farming. Other examples could include decisions about restructuring to respond to economic or market changes. Where there has been a history of qualifying use, short periods of low or maintenance level activity would not equate to permanent cessation of the use of the land for an agricultural trade or business, notwithstanding that no trade or business was being conducted. But the duration of periods of productive inactivity and what happens subsequently will be relevant to any decision on whether the use of a building for agricultural purposes on the unit has ceased.

24. The decision to put the farm on the market in the Spring of 2016 was on a "lock, stock and barrel" basis, so it would be reasonable to accept that during the sale process inactivity, production wise, on the land would not necessarily mean that the use of the land for agriculture had ceased. Following the unsuccessful sale there was a decision by Mrs Selby, whose health had significantly improved, to resume sheep farming, hence the application for prior approval of a livestock barn. With the refusal of that application, the Selby's decided, as they put it, to explore other options, in particular retirement, which led to the application to convert the barn, the expressed use of the land then being to lease it to a third party. While that might have seen the land continue in agricultural use, justification for the barn conversion was that the barn would no longer be needed for the purposes of agriculture on the holding.

25. From all of the evidence up to this point, chronologically, an obvious conclusion to draw is that when the barn conversion application was made in December 2018 the use of the land for agriculture, in GDPO terms, had ceased. As the Agricultural Statement supporting the conversion application put it: "The future agricultural use of the agricultural building has been considered and it is clearly surplus to the applicants' requirements. Commonly such buildings fall in to *ad hoc* and unauthorized uses which the applicant is seeking to avoid by requesting

the Council consent to the prosed conversion." Whatever was in the applicants' minds, taking that statement at face value, and that the holding number was surrendered and the applicants described as non-farming landowners, could only lead to an inescapable conclusion that the use of the building for the purposes of agriculture within the agricultural unit had permanently ceased.

26. The Council, following a site visit in January 2019, formed the view that the barn had never actually been used for the purposes of agriculture within the unit. The barn was considered to be used at that time for the storage of maintenance equipment and the storage of building materials, and there was no sign of agricultural activity on the land, which was unfenced. The Council now accepts that there was not storage of building materials, and that the equipment present in the barn was all capable of being used for agriculture. While I don't disagree, I note that some of the items present, the mini-digger and dumper, would not normally be considered necessary on a 7ha holding which was engaged in relatively low-input enterprises. Indeed these items were not part of the 2015 justification for the building.

27. Unsurprisingly the Council sought further information with a view to enforcement. Answers to a Planning Contravention Notice in March 2019 indicated that cropping of hay would continue as the agricultural use of the land, but that is no more than was proposed in the Agricultural Statement supporting the conversion application, which was still before the Council[1], which indicated that the land would be leased for that purpose.

28. Later that year a crop of hay was in fact taken, and a further crop was made in 2020. Both crops were stored in the barn. The first crop was stored wet and subsequently rotted. The second was sold in one lot, but is kept in the barn for the purchaser to take as required. Mr Bord for the Council accepted at the Inquiry that the hay making in 2019 and 2020 meant that the land then was being used for agriculture in GDPO terms, and accordingly that the agricultural use of the barn had not permanently ceased.

29. I disagree on the hay-making point. Hay cropping can be agriculture for GDPO purposes, but it is often a matter of scale, and the operation needs to be looked at as a whole. In the case of Home Farm, the most significant inputs are undertaken by an outside contractor, mowing, turning and baling, and the cost of this has made the hay cropping unprofitable, to an extent that puts in question the point of it. The extent of land available for hay cropping at the holding would not justify the investment in specialised hay making machinery, without which it is difficult to see how the enterprise could be sustainable. While it is not essential that an agricultural enterprise be profitable, or of a particular scale, to come within the GDPO requirement of agriculture as a trade or business, there should at least be some return to the inputs, mainly in-hand labour in this case. But on the basis of the hay cropping undertaken to date there appears to be little or none. If it was the intention to continue to farm the land solely for hay, I would conclude that the use of the land for agriculture as a trade or business had ceased.

30. However, there has been substantial planning for establishing a new vine-based enterprise on the farm as a trade or business. This remains in the planning stage for now, but it can be considered in the context of the history of Home Farm before and since the flooding incident, which undoubtedly created a hiatus

[1] Ref. 18/05570/FULL1, subsequently withdrawn October 2019

of sorts, the down-sizing of the holding, which led to the need for the barn, the health related issues and retirement thoughts, now potentially resolved with Joe Selby having moved back and developing an interest in continuing farming, and the efforts at least to show that agriculture was to continue on the holding, notwithstanding my view above about the hay making, and that the land and barn have not been used for other purposes. Having regard also to the personal testimony given in the course of the appeal, I am satisfied that there is sufficient to indicate, as a matter of fact and degree, on the balance of probabilities, that the use of the land, and hence the barn, for the purposes of agriculture within the unit as a trade or business, has not permanently ceased.

31. I will briefly address the Council's view that the agricultural use permanently ceased when the barn was substantially completed and that the A.2(5)(b) 3-year period had passed when the notice was issued, and hence the breach, the failure to comply with the condition by demolishing the barn, had in fact occurred. First, there is the argument that the use cannot have ceased when it had not begun. However, conditions should be construed in a common sense way, so that the condition should have a sensible meaning if possible, and consistent with that a condition should not be construed narrowly or strictly. Having regard to those principles, and reading the condition in the context of the permission as a whole, I consider it at least arguable that, for the purposes of the condition, the use for which the building has been granted permission can be said to have ceased if it has not in fact started.

32. The second point is the appellants argument that if the use may be said to have ceased, it must nonetheless cease permanently before the condition is engaged. For the purposes of the condition, I consider that there is not an infinite window within which the term 'permanently' is to be construed. In my view it must be interpreted in the context of the purpose of the condition, which is to avoid a proliferation of unnecessary buildings in the countryside, and so it would be reasonable to come to a view that a use for agricultural purposes had ceased permanently if there had been no actual productive agricultural use on a relevant unit of a nature that would amount to a trade or business within a reasonable timeframe after substantial completion of an agricultural building. It should not be necessary for the Council to see the full 10 year period elapse to avoid an allegation of prematurity. In other words the term 'permanently' should not be interpreted so as to make it possible to frustrate the purpose of the GDPO condition by prevarication.

33. Nonetheless, my conclusion on this matter is that GDPO condition A.2(5) has not yet been engaged because the use of the building for the purposes of agriculture within the unit has not ceased permanently. The appeal on this ground succeeds accordingly.

Grounds (c) and (a)

34. Ground (c) is that the matters alleged in the notice, if they have occurred, are not a breach of planning control, while an appeal on ground (a) is that planning permission should be granted for the matters alleged in the notice as comprising a breach of planning control, and this appeal is accompanied by a deemed planning application. Where a notice is aimed at a failure to comply with conditions attached to a planning permission, the deemed planning application is for the original development without complying with the relevant condition, in this case the requirement to carry out the development in

accordance with the prior approval details approved. The only prior approval matter at issue is that of the appearance of the building, which as built differs in some respects from the approved plans.

35. Leaving aside condition A.2(5), it was not actually argued at the Inquiry that conditions A.2(2) and A.2(7) had been complied with. Nonetheless, in view of the way the Council put its case in respect of the failure to comply with condition A.2(2), which was confined to deviations from the approved external appearance details, and that the condition enables such deviation with the written consent of the Council, I consider it most appropriate to deal with this ground on the basis of whether the external appearance of the building differs materially from the approved details, the siting and design being in accordance with the approved details.

36. The differences between the approved and as-built structure include the installation of doors and windows along both the eastern and western elevations, the installation of additional skylights along the eastern and western roof slopes, and external materials comprising blockwork with timber cladding above, as opposed to timber cladding only.

37. Mr Bord's proof of evidence describes these differences as material, but then goes on to state that they are minor in themselves, the main point being that they are different, and it was not part of the Council's case that there were any planning reasons to alter the barn to comply with the approved details. In any case, the building retains a utilitarian appearance and is agricultural in character. I saw nothing in any of the changes that might be objectionable in terms of their effect on the character or appearance of the Chislehurst Conservation Area, or indeed of the character and appearance of the countryside. I consider the differences to be minor in nature, akin to non-material amendments (see section 96A of the 1990 Act) which would not require a fresh planning application, hence I am reluctance to deal with the matter under ground (a), success on which would result in a new planning permission for matters that, in the circumstances, amount only to a technical breach. The better way in my view, in the interests of clarity, is to simply discharge the condition using the section 177(1)(b) power.

38. Similarly, on a practical level, condition A.2(7) no longer serves a useful planning purpose, the relevant information having been aired by now, hence it would not form part of the deemed planning application, save to also formally discharge it.

39. Accordingly, taking a pragmatic approach I shall uphold the appeal on ground (c), and for clarity discharge the 2 conditions.

Overall conclusion

40. The appeal succeeds on ground (b) in respect of failure to comply with condition A.2(5), and on ground (c) in relation to conditions A.2(2) and A.2(7). The enforcement notice shall there be quashed and the appeals on grounds (a), (d), (f) and (g) do not fall to be considered.

Paul Dignan

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Jonathon Clay	Of Counsel
He called	
Alan Selby	Appellant's husband
Pauline Selby	Appellant
Joe Selby	Appellant's son
Jonathon Morris	Agriculture Consultant
Jonathon Edis	Heritage Consultant
John Escott	Planning Consultant

FOR THE LOCAL PLANNING AUTHORITY:

Giles Atkinson	Of Counsel
He called	
Paul Mellor	Principal Planning Officer
David Bord	Principal Planning Officer

DOCUMENTS SUBMITTED AT THE INQUIRY

1 Opening submissions - Appellant
2 Closing submissions - Council
3 Closing submissions - Appellant
4 Costs application - Appellant