

Appeal Decisions

Hearing held on 15 March 2021

Site visit made on 23 March 2021

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 May 2021

Appeal A: APP/C1760/C/20/3256880

Land and premises at Lakelands, Newtown Road, Awbridge, Romsey, Hampshire SO51 0GJ

- 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 A Valiauga against a notice issued by Test Valley Borough Council.
 - The notice was issued on 24 June 2020.
 - The breach of planning control as alleged in the notice is:
Without planning permission,
 - (i) The erection of two timber buildings marked as B(a) and B(b) on the attached plan,
 - (ii) The laying of concrete foundation slab marked as C on the attached plan,
 - (iii) The laying of hardstanding marked as area E on the attached plan and
 - (iv) The formation of timber sleeper planters marked as F on the attached plan.
 - The requirements of the notice are:
 - (i) Demolish the two new timber buildings in the north west corner of the site – B(a) and B(b) on the attached plan;
 - (ii) Take up the concrete foundation slab between the two timber buildings – C on the attached plan;
 - (iii) Remove the gravel/hardstanding area – E on the attached plan;
 - (iv) Remove the timber sleeper planters – F on the attached plan; and
 - (v) Remove from the land all materials and waste resulting from compliance with the requirements set out at 5(i) to (iv) above.
 - The period for compliance with the requirements is six(6) months after this Notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (b) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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Appeal B: APP/C1760/W/20/3256256

Land and premises at Lakelands, Newtown Road, Awbridge, Romsey, Hampshire SO51 0GJ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr A Valiauga against the decision of Test Valley Borough Council.
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- The application Ref 20/00813/FULLS, dated 14 April 2020, was refused by notice dated 15 June 2020.
 - The development proposed is described as '*Conversion of existing buildings to holiday accommodation, construction of an area of decking between proposed holiday accommodation units and erection of 2 buildings to house composting toilets.*'
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Formal Decisions

Appeal A

1. The Enforcement Notice is corrected with the deletion of 'Newton Road' under the heading 'The land to which the Notice Relates', and its substitution with the wording 'Newtown Road.'
2. The appeal under ground (b) is dismissed.
3. Subject to the said correction the enforcement notice is quashed as planning permission is granted on the application 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 two timber dwellings with the laying out of a concrete slab situated between, the laying out of hardstanding, and the formation of timber sleeper planters.

Appeal B

4. The appeal is dismissed.

Background

5. The site, until recently, accommodated a single, timber-framed building which a local resident indicated had been in situ for some fifty years. It is understood that the building was used by the previous landowner(s) for storage purposes, but not in relation to any use contained on the land.
6. Photographs provided by both main parties show that, in recent times, the building had fallen into significant disrepair. An enforcement officer from the Council visited the site in March 2019 and witnessed the building's poor physical condition and that the central section of the building had collapsed.
7. In August 2017 I understand that the Council had been approached regarding a potential proposal for a dwelling at the site. Subsequently, in March 2019, the Council received complaints regarding alleged works being carried out at the site. Although investigative site visits were made works continued, and by January 2020 substantial rebuilding works to the new buildings had apparently been undertaken.
8. In April 2020 a planning application (ref 20/00813/FULLS) was submitted proposing the conversion of the existing buildings into two units of holiday accommodation, construction of area of decking between the units, erection of two buildings to house composting toilets. Planning permission was later refused and the Council then saw it expedient to issue an enforcement notice on 24 June 2020

9. At my site visit I noted the former shipping container (marked 'A' on the plan attached to the EN), now painted grey and with windows and doors installed which it appears was being used for general storage purposes. This building is not targeted by the enforcement notice, and neither is the wooden decking on which it is situated. However, the surrounding area of single (Area 'E'), and the wooden planters ('F') are included in the notice's allegation.

Appeal A

The appeal on Ground (b)

10. An appeal on ground (b) involves the appellant claiming that the breaches alleged in the enforcement notice have not occurred as a matter of fact. As such, in this particular instance, the appellant claims that the alleged unauthorised erection of the two timber clad buildings has not taken place.
11. Section 55(1A) explains that 'Development' involves building operations which also includes structural alterations or additions to buildings. Section 55(2) then says that operations which should not be taken as involving development of land include works which either affect only the interior of the building or do not materially affect the external appearance of the building.
12. The appellant says that the timber buildings are not new buildings but, instead, are the remains of the previous one; the only difference being that the middle section has been removed. It is also claimed that the footprint – save for the removal of the central section – and the buildings' ridge heights are identical to that of the original structure. Accordingly, it is being claimed that the works carried out constitute no more than standard repair and maintenance.
13. The Council takes a different view, stating in paragraph 6.10 of its Statement relating to the s78 appeal (Appeal B):

"...the buildings currently on site are not lawful buildings in the countryside given they represent both a form unrelated to that which existed on site previously, and only exist as a consequence of the substantial collapse/demolition and rebuilding prior to the submission of the planning application."
14. In terms of case law, as was outlined at the Hearing, the judgement in *Grahame Oates v SSCLG and Canterbury City Council* [2018] EWCA Civ 2229 is relevant here. The question posed was whether it was wrong in law for an Inspector deciding an appeal under s174(2) to uphold an enforcement notice that required the complete demolition of three "new buildings" whose construction had incorporated parts of the buildings previously on the site. The appellant's contention was that the surviving parts of the original, lawfully erected buildings on the site could not properly be enforced against, and that the enforcement notice, if upheld, should have therefore been varied.
15. The Court of Appeal held that for a structure or piece of a structure to be "part of a building" there must in the first place be a building of which it can be a part. If the buildings now on the site were "new buildings", it follows that the remaining fabric of the original buildings was no longer part of those original buildings, but was now part of the "new buildings" themselves. Accordingly, having found that the buildings were "new buildings", constructed without planning permission, the

Inspector was not compelled to conclude that the remedy for the breach of planning control was anything less than complete demolition.

16. The enforcement of planning control should not be used to deprive landowners of their lawful use rights, as per the "Mansi principle". However, in the current case any immunity that had attached to the original building was lost when it ceased to exist as a single entity and the two new buildings had replaced it. At the point of replacement any previous lawfulness no longer subsisted and the new buildings created had no lawful use of their own.
17. The appellant commissioned a report from a specialist consultants, but this involved a structural survey being undertaken "*limited to a visual examination of the loadbearing elements of the buildings to assess their structural adequacy and condition.*" The findings showed, amongst other things, no signs of any subsidence or foundation movement, made some cosmetic recommendations, and concluded that the buildings would be capable of conversion to residential use. This does not, though, help the appellant's assertion that no breach of planning control has occurred.
18. The appellant, in an attempt to support his case, refers to an appeal decision from 1992 relating to a site in Upminster (*T/APP/C/91/B5480/609090 & 60902*) which involved the repair and maintenance of an agricultural building. The then Inspector was faced with a similar situation as is the case with the current appeal; works which can be considered to go beyond what might be considered to constitute repair and maintenance. In the Upminster appeal the changes referred to involved the building being painted white and it being re-roofed with a new red roof tile type. In the circumstances, on weighing up the relative alterations that have taken place, I am not of the view that a convincing parallel can be drawn to add support to this appeal, and I therefore afford this case little weight.
19. In light of the *Oates* judgement, which I consider has considerable bearing on the current appeal, along with the evidential facts, I conclude that the allegation in the enforcement notice has occurred as a matter of fact. Two new timber clad buildings have been erected which, given the circumstances, do constitute a breach of planning control for which planning permission is required.
20. The appeal on ground (b) therefore fails.

The appeal on Ground (a) and the deemed planning application (DPA)

Main Issue

21. The main issue is whether or not the development constitutes appropriate and essential development within the countryside.

Reasons

22. Policy COM2 of the Test Valley Borough Revised Local Plan (LP) says that development outside the the boundaries of settlements in the hierarchy, of which this site is, can be defined as countryside, and will only be permitted if it is appropriate in the countryside, and satisfies other listed policies contained within the plan and it is essential for the proposal to be located in the countryside.
23. Planning permission is only being sought here for the retention of the various operational development enforced against. Considering the site's history and

that, save for the structural alterations, the appearance of the buildings does not significantly differ from that when they constituted a single structure, and there are no use rights at issue I agree with the Council that only policy COM2 itself is directly applicable. Certainly, as I have found that a breach of planning control has occurred Policy LE16 'Re-use of Buildings in the Countryside' is not relevant to the DPA.

24. The explanatory text for policy COM2, in paragraph 5.49, says that development away from the defined settlements is unlikely to meet all the elements of sustainable development, particularly the access to a range of facilities, and any proposals would need to demonstrate that the overall social and economic benefits outweigh the disadvantages of a location which is relatively remote from facilities. However, development proposals need to be put into context, and the scale and impact of new development, and also its nature, are also considerations.
25. Here, the DPA relates merely to the retention of the two small timber buildings, the concrete slab which lies between these, the area of shingle and the three small wooden planters. As with the modified shipping container all these features lie towards the northern boundary of the site. I find that the developments enforced against, given the previous storage use of the single building, are somewhat innocuous in their setting and granting planning permission for these elements would not afford the two resultant buildings any use rights. The hardstanding, slab and planters are somewhat incidental in the context. Accordingly, any intended use would need to be the subject of a planning application to the Council or, alternatively, a s192 application, whereby a lawful development certificate might be sought.

Conclusion on DPA

26. Having had regard to all the factors and considerations involved I conclude that the development enforced against is appropriate in its setting but cannot be considered essential. However, granting planning permission for the retention of the various elements at issue would not create harm to the surrounding area, nor would it materially conflict with the aims and requirements of LP policy COM2. The appeal on ground (a) is therefore allowed and planning permission is hereby granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B

Preliminary Matter

27. Following the Council issuing its decision the appellant put forward revised plans showing that the structures intended to house composting toilets shown outside the two buildings would no longer be required as a proposed internal redesign would allow for toilets to be provided within the internal accommodation. All foul water would drain into a cesspit which would be emptied and collected by vehicle, as necessary. The Council has taken a pragmatic stance on whether I should accept these plans and, given that the intention would lead to less development and reduce any external clutter, I have decided to assess the appeal on this basis.

Main Issues

28. The Council refused planning permission, citing eight individual reasons for refusal. However, given further details received, the Council now accepts that suitably worded conditions would remove the objection previously raised against the effect on nearby protected trees and also the objection that relates to the provision of an appropriately surfaced area to allow for vehicles to turn within the site. Natural England is also satisfied that the proposal would not have a significant effect on the habitat of local bats and offers no objection to the development. In this connection I note that, subsequent to the appellant submitting a Preliminary Ecological Appraisal, he also presented the Council with a Bat Awareness survey which indicated that a lighting strategy would be employed in the event that the appeal was successful and the development implemented.
29. Accordingly, I am satisfied that the primary issues can be consolidated as follows:
- 1) Whether the appeal site is an appropriate location for the proposed holiday lets accommodation;
 - 2) The effect of the development on the character and appearance of the surrounding area; and
 - 3) The development's effect on the River Solent and its protected species, and whether it would achieve nitrate neutrality.

Reasons

Location

30. The explanatory text to LP policy LE18 'Tourism' says that small scale buildings can play an important part in the tourism industry through, for instance, the provision of self-catering accommodation. The policy itself says that proposals for tourist related development will be permitted in instances where it is to be located in the countryside providing that it utilises an existing building and meets the requirements of policy LE16 which is concerned with the re-use of buildings in the countryside. Although in the circumstances of this particular case the application of policy LE16 is not strictly applicable, from the evidence adduced and my site inspection I am satisfied that the two buildings are structurally sound and are physically suitable for the proposed use.
31. Paragraph 83 of the National Planning Policy Framework (the Framework) says that planning decisions should enable sustainable rural tourism which respects the character of the countryside. This, in turn, can benefit the local economy, albeit scaled to the extent of the development involved. To this end the advice is to encourage the use of previously developed land, and also sites that are well related to existing settlements where suitable opportunities exist.
32. On balance, as there is no relevant policy requirement to demonstrate any need for holiday lets and, as there are other developments near the site it cannot be considered as isolated in the true sense of the word, I am satisfied that the proposal, particularly due to its nature and scale, would not materially conflict with the aims and requirements of LP policy COM2.

Character and appearance

33. LP policies E1, E2, LE18 and, for its part, LE16, all indicate that development should integrate into its surroundings and not adversely impact on the immediate landscape. Proviso (c) of policy LE16 also requires that the proposed use would be restricted primarily to the building itself. This would be to guard against open storage and the presence of associated paraphernalia. Given the limited accommodation and the small scale of the development I am satisfied that unnecessary open storage and the possible presence of any additional temporary accommodation could be controlled by the imposition of appropriately worded planning conditions. Further, realistically, there would not be an excessive number of vehicular movements associated with the use.
34. Accordingly, there is no compelling reason before me to suggest that the proposed development, with appropriate limitations, would give rise to significant harm to the surrounding area. Indeed, save for the 'location' argument I see little reason why the intended use should not operate successfully in its contextual setting. The proposal would represent a more efficient use of this partly previously developed piece of land and could also improve its appearance. Certainly, the buildings themselves now in situ are visually more appealing than was the case before the development enforced against was carried out. In this connection I note that planning permission (ref 19/01464/FULLS) was granted in 2019 for works to extend one of the two ponds at the site whilst the other was to be filled in.
35. On this main issue I find no material conflict with the aims and requirements of LP policy E1, which seeks a high quality development in terms of design and local distinctiveness, nor policy E2 which serves to conserve and enhance the landscape.

Nutrient neutrality

36. In particular, LP policy E7 'Water Management' requires that new development should not result in the deterioration of water quality. The Council considers that, in the absence of convincing evidence to suggest otherwise, the proposal would result in adverse effects on the nearby River Solent and its protected species; a European designated site. Natural England (NE), for its part, makes reference to the report from Earthcare Solutions, commissioned by the appellant, and notes that, although the appellant carried out a nutrient calculation, consequent upon the change of use, NE's recognised methodology was not followed and it considers that the appellant has not provided a complete picture of the likely impacts. NE does, though, acknowledge that foul water will be collected on site and removed for disposal to land which enjoys a nitrogen permit, and this might potentially offset the amount of nutrients that would arise from the proposed use.
37. The Council, in its assessment of the proposal, took a precautionary approach on this issue. The matter was discussed at the Hearing and thereafter I provided wording to a possible condition that might be imposed should it achieve the desired result to mitigate on a grant of planning permission. The wording reflected that used by a different Council within Hampshire, and I sought comments from both main parties. In this respect the Council takes the view that, unlike certain other local authorities, Test Valley Borough Council does not yet have a strategic solution to the issue and the appellant has not demonstrated adequate mitigation measures to counteract the proposal's effects. With this in

mind I have decided that the suggested condition's wording cannot be transposed in this instance.

38. I also note that in paragraph 6.28 of the appellant's Statement he comments that a planning obligation will be submitted to this end, but, irrespective of its effectiveness of purpose in the circumstances, no such document was presented to me.
39. In the circumstances I must agree with the Council that the appellant has not provided sufficient information to demonstrate that the development would achieve nutrient neutrality, as is required for new developments.
40. NE, in its e-mail of 12 February 2021, although acknowledging an intention to limit the occupancy of each building to a maximum of 155 days per year, says that the Council must be satisfied that such a level of occupancy is acceptable. Taking note of the wording of the Council's suggested condition in this regard – for which no restriction on periods of occupancy was put forward – it seems to me that the actual occupancy periods are not the concern, more the continuing impact on nitrate neutrality. Weighing up the relevant factors on this particular issue I must conclude that, without compelling evidence to the contrary, there is a lack of certainty as to the proposal's impacts. The development is therefore contrary to the objectives of LP policies E7 and E8.

Other considerations

41. I have noted and weighed up all representations received from interested parties whereby objections to the development are raised. Given my findings, these grounds have not affected my conclusions.

Conclusion

42. I have not found harm on the first two main issues but this is outweighed by my findings on nutrient neutrality which means, unless it can be achieved and is properly demonstrated, the proposed residential use would have harmful consequences.
43. For the above reasons, and having had regard to all other matters raised, the appeal does not succeed.

Summary of Decisions

44. In terms of Appeal A, for the reasons given above the enforcement notice is corrected and, subject to this correction, the notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, as described in the Formal Decision.
45. Appeal B is dismissed.

Timothy C King

INSPECTOR

APPEARANCES

For the Appellant

Andrius Valiauga	Appellant
Jeremy Higgins	Planning Consultant, Southern Planning Practice
Mike Royal	Structural Engineer

For the Local Planning Authority

Ms Sarah Barter	Senior Planning Officer, Test Valley Borough Council
Mrs Dreana Broomfield	Planning Enforcement Officer, Test Valley Borough Council
Mr Bill Chick	Building Control Surveyor, Test Valley Borough Council

Other Interested Parties

Ursula Gooding
Mike McLachlan
Susan Sillence
Madeline Clavey
Darren Hodson
Andrew Jaes
Councillor Tony Burley

Documents

1. Council's notification letters of appeal and the Hearing event.