



Appeal Decision

Hearing Held on 18 May 2021

Site visit made on 18 May 2021

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

an Inspector appointed by the Secretary of State

Decision date: 25th May 2021

Appeal Ref: APP/V2635/C/20/3260254

159 Fitton Road, Wiggshall St Germans, King's Lynn, Norfolk, PE34 3AY

- 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 Mario D'Aloia against an enforcement notice issued by King's Lynn and West Norfolk Borough Council.
 - The enforcement notice, numbered 20/00001/UNAUTU, was issued on 18 August 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the Land and buildings from agricultural use to a mixed use for the dismantling and selling of car parts and use for residential purposes, including the siting of a caravan for residential purposes.
 - The requirements of the notice are:
 - (a) Permanently cease the use of the Land and buildings for residential purposes;
 - (b) Permanently cease the use of the Land and buildings for the dismantling and selling of car parts;
 - (c) Permanently remove from the Land and buildings the residential caravan and all other structures and residential paraphernalia integral to or part and parcel of the unauthorised material change of use;
 - (d) Restore the land and buildings to their condition before the unauthorised material change of use took place.
 - The period for compliance with the requirements is six calendar months from the date the notice takes effect.
 - The appeal is 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.
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Decision

1. It is directed that the enforcement notice be:

(i) corrected:

(a) in section 2 by deleting "157 Fitton Road Wiggshall St Germans Norfolk" and substituting "159 Fitton Road, Wiggshall St Germans, King's Lynn, Norfolk, PE34 3AY";

(b) in section 3 by deleting the original allegation and substituting:

"Without planning permission, the material change of use of the Land and buildings to use for residential purposes, including the siting of a caravan for residential purposes"; and

(ii) varied in section 5 by deleting the original requirements (b), (c) and (d) and substituting:

“(b) Permanently remove from the Land and buildings the residential caravan and all other structures and residential paraphernalia integral to or part and parcel of the unauthorised material change of use including, for the avoidance of doubt, vehicles and vehicle parts

(c) Restore the land and buildings to their condition before the unauthorised material change of use took place by permanently: removing the 3 no. windows from the southern elevation of the rear eastern wing of the building; removing the 2 no. windows from the eastern gable elevation of the eastern wing of the building; removing the timber cladding from the eastern wing of the building; removing the stud wall erected between the eastern and western wings of the building; removing the timber close-boarded fencing enclosing the site; removing all materials and debris resulting from compliance with these requirements.”

Subject to these corrections and variations the appeal is dismissed, and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Procedural and preliminary matters

2. The enforcement notice stated the site address as “Land at 157 Fitton Road, Wiggenhall St Germans, Norfolk.” Although the land is clearly identified on the notice plan, the address is stated differently in various documents. It was agreed during the hearing that it would be best to use the address which appears in the Land Registry records. That address is in the heading of this decision and the parties agreed that the notice could be corrected to reflect this, and that no injustice would result.
3. The appeal form gave the appellant’s name as Mr Mario Daloia, but he confirmed during the hearing that the correct spelling is as per the heading to this decision.
4. The hearing proceeded on a ‘virtual’ basis, because of restrictions related to the Covid-19 pandemic. Interested parties who took part in the hearing would have preferred to attend the site visit but were unable to. They nevertheless confirmed their agreement to the visit proceeding without them, and for discussion to continue site for the limited purpose of considering the works necessary to restore the land to its condition prior to the breach. The site visit was attended by the appellant and by Mr Wilkinson and Mr Clarey for the Council. I closed the hearing at the end of that visit.

Grounds (b) and (c)

5. As is often the case, the arguments resulted in some overlap between these grounds, and so it is convenient to consider them together.
6. To succeed on grounds (b) and (c) respectively, the appellant must prove on the balance of probability that: the matters alleged in the notice have not occurred; and, if they occurred, they do not constitute a breach of planning control.
7. During the hearing, the appellant acknowledged that he was living in the caravan within the building when the notice was served and has continued to

live there since. He explained that he stationed the caravan in the building because it would be warmer. I saw that the building is used to store associated residential items, and there are now some sofas next to the caravan, along with a fridge and a washing machine. However, there are no other facilities in the building to support residential use and, in this regard, the appellant has been entirely dependent on the caravan. Though it is used in association with the residential caravan and, in that sense for residential purposes, the building has not been converted to a dwelling.

8. For the Council, Mr Bates explained that when he inspected the site before the notice was issued, he saw the appellant was living there, but there were also vehicle parts and cars being worked on. I note an email from the appellant to Mr Bates dated 15 August 2020 in which he said that whilst he was not doing any work himself, his son had been working from the site, "just clearing up old stock cars and parts being sold from here." He also said that, once the stock was gone, he would be looking to "carry on working from here", so that the site would technically have been "in continuous use from August last year, and previously since 1987". Based on that email, and what he had seen, Mr Bates formed the view that the mixed use alleged in the notice was taking place.
9. In an email dated 19 August 2020, being the day after the notice was issued, the appellant said he was not dismantling cars, but was just selling cars and parts that were left over from his old business and he had no intention to carry on with this activity. During the hearing, he explained that he had repaired 3 vehicles: one was his own personal vehicle; one was from his former business; and the other had belonged to his son. These had been sold, but the appellant emphasised that he had never "broken" cars on the site. He also explained that the reference in the 15 August email to carrying on working from the site related to using the site as a carpentry workshop, not for dismantling cars.
10. Mr Morris said that, including in the period up to when the notice was served, he had seen people working on cars into the early evenings and a trailer had been worked on with an angle grinder. He had heard noisy activity from the site once or twice per month. The appellant accepted he had also worked on his trailer but said carrying out repairs to the buildings may also have caused noise, and indeed he had used an angle grinder for this.
11. Clearly the appellant has carried out repairs to vehicles and he admits selling 3 from the site. There have also been vehicle parts kept there, particularly in the Nissen hut. However, the evidence indicates to me that the extent of these activities was insufficient to establish them as a primary element in a mixed use of the land. Indeed, having heard the evidence, Mr Morris' solicitor, Ms Fonseka, accepted that these activities were "at a low level" and "probably ancillary to the residential use." I am satisfied on the balance of probability that they were merely ancillary to the residential use of the land.
12. Given this partial success on ground (b), the notice can be corrected to delete reference to the dismantling and selling of car parts. Concerns that these activities might continue, even if the residential use ceases, can be addressed by varying requirement (c). For the avoidance of doubt, that requirement can include reference to vehicles and vehicle parts among the residential paraphernalia to be removed, given that the vehicle related activities were

merely ancillary to the residential use. The appellant had no objection to such a variation, and it can be made without causing injustice.

13. Much of the appellant's written case focused on the argument that the previous lawful use was as a carpentry workshop and not for agriculture. As I indicated in a pre-hearing note, an enforcement notice alleging material change of use need not recite the previous use.¹ It is nevertheless necessary to consider the previous use when determining, under ground (c), if the change of use is material.
14. However, the appellant accepted during the hearing that, whether the previous lawful use of the site was as a carpentry workshop or for agriculture, its use for residential purposes, including the siting of a residential caravan, changed the definable character of the use. I am satisfied that, as a matter of fact and degree, this amounted to a material change of use without planning permission. Accordingly, following correction, the matter alleged does constitute a breach of planning control, such that ground (c) must fail. It is not necessary for me to determine whether the previous lawful use was for agriculture or as a carpentry workshop.
15. In her concluding submissions, Ms Fonseca asked me to "make a determination on this point for clarity and to assist the Council in their determination of the certificate application." There is currently an application before the Council (Ref 20/01300/LDE) for a certificate of lawfulness of existing use or development (LDC) in relation to use as a carpentry workshop and store. It is not for me to formally determine that matter in this appeal. I have no power to issue a certificate in this appeal, and it would not be proper for me to usurp the Council's powers in that regard.
16. The Council will nevertheless be able to consider what I said in my pre-hearing note, and during the hearing, regarding the implications of the 1987 temporary planning permission Ref 2/87/0543/CUF for "change of use of disused farm building to workshop for construction of sectional timber panels." Condition 1 of that permission required the use to be discontinued by 31 May 1992. I questioned whether², even if that use continued for 10 years beyond 31 May 1992, this would have resulted in the carpentry workshop use becoming lawful, or whether only that particular breach of condition 1 would have become immune from enforcement action. In that event, if the use recommenced, I posed the question whether it would constitute a new breach of condition 1.
17. By reference to further case law³, Ms Fonseca reinforced the point in her written response to my pre-hearing note. The Council will need to form a view on this when determining the LDC application but, in the circumstances and given that the notice need not recite the previous use, I will further correct the allegation to delete reference to a change from agricultural use. If the lawful use is as a carpentry workshop, nothing in the enforcement notice as corrected, or indeed as originally drafted, would prevent that use resuming.

¹ Having regard to *Westminster CC v SSE & Aboro* [1983] JPL 602 and *Ferris v SSE* [1988] JPL 777

² Having regard to *Avon Estates Ltd v the Welsh Ministers & Ceredigion CC* [2011] EWCA Civ 553 (in particular paragraph 28).

³ *Ellis v SSCLG* 2009 EWHC 634 (Admin) (para 56 & 57) & *Panton & Farmer v SSETR* (1998) 78 P&CR 186.

Ground (a)/the deemed application for planning permission

Main Issue

18. Based on the corrected allegation, the main issue is whether the residential use, including the siting of a caravan for residential purposes, is acceptable in this location having regard to:
- policies aimed at protecting the countryside;
 - access to services and facilities;
 - any risk of flooding; and
 - any fall-back position and precedents.

Reasons

19. The appeal site lies some 1.7 km south of the villages of Wiggshall St Germans and 0.8 km north of Wiggshall St Mary Magdalen. Both settlements are classified as Rural Villages in Policy CS02 of the Local Development Framework – Core Strategy (CS), adopted July 2011. That policy allows for limited minor development in such villages, where it meets the needs of the settlement and helps to sustain existing services in accordance with Policy CS06.
20. However, the site lies in the countryside, outside the village development areas for these settlements where, reflecting Policy CS01, CS06 says the strategy will be to protect the countryside for its intrinsic character and beauty. Whilst conversion to residential use of buildings which make a positive contribution to the landscape may be considered in specified circumstances, the deemed application is not for the conversion of a building. As indicated, the buildings have been used in association with residential occupation, but the residential use is dependent on the caravan.
21. Furthermore, consistent with the development priorities in CS01, Policy CS06 seeks to ensure residential development is in close proximity to services and other facilities. The Council's evidence is that the site is remote from service provision and my site inspection confirmed this. Indeed, the appellant advanced no positive case to the contrary.
22. Policy DM2 of the Site Allocations & Development Management Policies Plan (SADMP), adopted September 2016 also restricts development outside development boundaries to types identified as suitable in rural areas by other local plan policies, none of which applies. The development conflicts with Policies CS01, CS06 and DM2.
23. Turning to flood risk, on the Council's undisputed evidence regarding its Strategic Flood Risk Assessment the appeal site is at high risk of flooding, being within flood zone 3a and 2. Indeed it says a site specific Flood Risk Assessment, submitted with a recently rejected 'prior notice application' concerning a change of use of the site from light industrial to dwelling house use, recognised that the site could flood up to 1.4m, with water incursion into the buildings.
24. Consistent with the National Planning Policy Framework (the Framework), Policy CS01 indicates that avoiding areas at risk of flooding is a development

priority and this is carried forward into CS08. The Framework refers in turn to national planning guidance. At Table 2, the Planning Practice Guide (PPG) indicates that caravans, mobile homes, and park homes intended for permanent residential use are “highly vulnerable.” Table 3 provides that highly vulnerable development should not be permitted in zone 3a. Furthermore, it should not be permitted in zone 2, unless the Framework’s exception test is met. That exception test cannot be met here because, regardless of any mitigation measures that might be feasible, no wider sustainability benefits to the community have been identified to outweigh the flood risk. The development therefore conflicts with Policy CS08 and further with CS01, and with the Framework and PPG.

25. The appellant’s written case referred to a claimed fall-back position; namely that a workshop use was the baseline for considering any harm resulting from the alleged breach. This was primarily to justify use for the dismantling and selling of car parts. However, the appellant said during the hearing that he had no intention of using the site for that purpose; he was not seeking planning permission for that. Had I not corrected the allegation, so that this car related use remained part of the deemed application, the appellant said he would have invited me to dismiss that part.
26. Even if the lawful use of the site remains as a carpentry workshop, and I have expressed doubts about that, the residential use would not be preferable to that fall-back position. This is because of the serious implications of the identified flood risk in relation to caravan-based residential use.
27. The appellant’s statement also indicated the carpentry workshop use would fall within Class E of the Town and Country Planning (Use Classes) Order 1987 (UCO), as amended, such that a wide spectrum of uses could be instituted without that involving development. However, again, notwithstanding doubts about the lawfulness of a carpentry workshop use, the residential use would not be preferable because of the flood risk implications.
28. Once again, on the basis that the lawful use is as a carpentry workshop, the appellant’s written statement indicated I should take account of possible permitted development rights. He said that residential use is a possibility because of further relaxation of the planning regime. I note that Class MA in Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015, as amended, will permit a change of use from Class E of the UCO to Class C3 dwellinghouse use. However, leaving aside the fact that this does not come into force until August 2021, it is also subject to a condition in MA.2 that prior approval is required as to, among other things, flooding risks. Accordingly, even if my doubts about the lawfulness of the carpentry workshop use are misplaced, the ability to change that use to Class C3 is very doubtful, given the level of flood risk, and the fact that this was one of the reasons for the refusal of a recent prior notice application referred to above.
29. The appellant’s written appeal statement also suggested that the workshop use might even have fallen within Class B2 of the UCO (general industrial use), given the conditions on the 1987 permission regarding the use of power tools, operating hours and general noise concerns. However, if there is a lawful carpentry workshop use, this is based on immunity from enforcement action for the actual use, rather than on the 1987 permission. In my pre-hearing note I

drew attention to *Waltham Forrest LBC v SSETR & Tully* [2002] EWCA Civ 330, which indicates that, in determining whether a change to the current use involved a material change, regard must be had to the actual previous use, rather than the range of notional uses which could have taken place without the need to obtain express planning permission.

30. A neighbour who has lived nearby since 2001 indicated in his letter that, before the appellant's arrival, the appeal site was visited by a single person once or twice per month; occasional minor joinery work was undertaken; and there was neither noise nor disturbance. That is not indicative of a Class B2 use and, when assessing the merits of a residential use, I give no significant weight to the possibility that a Class B2 use might be lawful.
31. Although this point was not raised by the appellant in any event, Ms Fonseca also addressed the issue of permitted development rights under Class Q in Part 3 of Schedule 2 of the GPDO, which concerns the change of use of agricultural buildings to dwellinghouses. She indicated that this right would not apply as the building was not used solely for an agricultural use as part of an established agricultural unit on 20 March 2013.⁴ I have seen no evidence that it was, and indeed the appellant's case is that the building was in use as a carpentry workshop at that point.
32. Finally, the appellant refers to the fact that planning permission was granted for an agricultural dwelling in the mid 1970's. Leaving aside the fact that this was in a different local and national policy context, it must have been based on an agricultural need and justification, and that does not exist in this case. Such permission does not therefore set a precedent for this residential development.

The planning balance and conclusion on ground (a)/the deemed application for planning permission

33. With regard to the main issues discussed above, I conclude that the development is not acceptable in this location and it conflicts with the development plan as a whole and with government policy. Accordingly, planning permission should not be granted unless material considerations indicate otherwise. I have dealt above with the considerations advanced by the appellant but, during the hearing I also asked him about his personal circumstances.
34. Article 8 of the European Convention on Human Rights (ECHR) states that everyone has a right to respect for his private and family life, his home and correspondence. Article 1 of the First Protocol of the ECHR concerns enjoyment and deprivation of possessions. These are qualified rights, whereby interference may be justified in the public interest, but the concept of proportionality is crucial.
35. The appellant said that he has nowhere else to go. He lives alone at the appeal site and the Housing Authority has indicated that it would not assist, notwithstanding the health issues to which he referred at the hearing. Whilst he could keep his caravan, the appellant would have to move it somewhere. However, the notice gives him 6 months to explore alternatives.
36. Dismissing the appeals would interfere with the appellant's rights under Articles 8 and 1 referred to. However, having regard to the 6 month period for

⁴ See Class Q, paragraph Q.1(a)(i).

compliance and the legitimate and well-established planning policy aims to safeguard development from the risk of flooding and protect the character of rural areas, a refusal of permission would be proportionate and necessary. It would not unacceptably violate the appellant's rights under Article 8 and Article 1 of the first protocol. The protection of the public interest cannot be achieved by means which interfere less with his rights. No material considerations indicate that planning permission should be granted despite the conflict with the development plan and, for the avoidance of doubt, the flood risk issue alone is sufficient to justify dismissing the appeal.

Ground (f)

37. This ground is that the requirements of the notice exceed what is necessary to remedy the breach of planning control or, as the case may be, any injury to amenity. Having regard to its requirements, the purpose of the notice is clearly to remedy the breach of planning control and, under s173(4) of the 1990 Act such a notice may require the unlawful use to cease and the restoration of the land to its condition before the breach took place. The notice alleged only a material change of use, rather than operational development, but such a notice can require the removal of works where they were carried out to facilitate the change of use. Ms Fonseka cited relevant case law during the hearing.⁵
38. I am correcting the allegation under ground (b) to remove reference to the dismantling and selling of car parts. It therefore follows that requirement (b) in section 5 of the notice is unnecessary and I shall vary the notice by deleting it. However, at the same time, as discussed above I will vary requirement (c) to make clear that the need to remove residential paraphernalia includes a requirement to remove vehicles and vehicle parts, given that vehicle related activities were ancillary to the residential use in this case.
39. The appellant contended that requirement (d) did not state with sufficient precision what needed to be done to restore the land to its previous condition. During the hearing, he explained that he had cleared lots of rubbish from the site, restored some hard core surfaces, erected a perimeter fence, and carried out repairs to the building. Those repairs included replacing rotten windows and relacing corrugated tin with timber cladding. The Council drew attention to the construction of a stud wall to divide the building and the application of timber cladding on parts of the eastern section of the building which runs at 90 degrees to Fitton Road, and which now houses the caravan. Neighbours expressed particular concern about the provision of upvc windows, particularly those facing the road, and the erection of the fence, which they saw as out of character.
40. Enforcement notices very commonly include a requirement in the same terms as requirement (d) in this case, and I am content that it does not invalidate the notice, as the appellant is in a good position to know what condition the land was in before the change of use. Nevertheless, it would be helpful to him to know for sure what will be required to satisfy the Council that the notice has been complied with.
41. I have the benefit of some photographs from before the change of use took place and was able to compare these with photographs taken afterwards, and with what I saw during my site visit. Although 3 white upvc windows have been

⁵ *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598 and *Somak Travel v SSE & Brent LBC* [1987] JPL 630.

installed in the western elevation of the building facing Fitton Road, they merely replaced windows in the same positions. The appellant says the previous windows were rotten and the available photographs do not suggest otherwise. Whether or not the replacement windows are of a suitable design for a building of this nature, there is nothing to indicate that these works facilitated the material change of use. During the site visit the Council expressed the view that they were merely works of repair. The same is true of the brown coloured replacement window on the opposite, east facing elevation of that same section of the building. The notice should not require removal of any of these windows.

42. By contrast, there were previously no windows in the south or east facing elevations of the rear section of the building, which now contains the caravan. There are now 3 dark coloured windows in the south elevation and 2 metal framed windows in the east facing gable elevation, where previously there was just corrugated tin sheeting and blockwork. These provide light to the caravan within the building and I am satisfied that they were installed to facilitate the unauthorised material change of use. Their removal can be properly required.
43. In and of itself, the application of timber cladding to parts of the eastern section of the building did not facilitate the change of use, but it accompanied the installation of windows which did. Furthermore, some of it will have to be removed from the gable end to enable removal of the caravan, and the appellant said during the site visit that it was all easily removed. I am satisfied that the cladding should be removed as part of the process of restoring the land to its previous condition.
44. The installation of the stud wall between the front (west) and rear (east) sections of the building did facilitate the change to residential use by providing an enclosure for the caravan. I am satisfied that the notice should require its removal to restore the land to its prior condition.
45. Turning finally to the close-boarded timber fencing which encloses the site. The Council indicated during the site visit that, being less than 2m in height, its erection was permitted development. I note also that the section of fencing facing Fitton Road is set well back from the carriageway edge, behind an overgrown ditch, rather than being adjacent to the highway. However, the fact that its erection was permitted development does not mean the notice cannot require its removal if it facilitated the breach of planning control.
46. The appellant indicated that the fencing was provided simply to secure the site. However, this coincided with the change to residential use and it created a level of privacy consistent with and conducive to residential use. Especially since the nature of any alternative use has not yet been clearly established and certified, I am unable to conclude that the fencing was provided for another lawful use. As a matter of fact, it did facilitate the unauthorised change to residential use and the notice should require its removal as part of the restoration of the land to its previous condition.
47. To the extent that requirement (b) is removed and the scope of requirement (d) is narrowed, the appeal succeeds in part on ground (f), and I will make the necessary variations.

Overall conclusion

48. For the reasons given above I conclude that the appeal should not succeed, save in part on grounds (b) and (f). Subject to corrections and variations, I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

J A Murray

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Mario D'Aloia	Appellant
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FOR THE LOCAL PLANNING AUTHORITY:

Keith Wilkinson BA (Hons) MRTPI	Senior Planner
Michael Bates	Planning Enforcement Officer
Matthew Clarey	Planning Enforcement Team Leader

INTERESTED PERSONS:

Tim Morris	Neighbouring resident
Nikki Fonseka	Solicitor to Mr Morris
Jonathan Bell	Neighbouring resident
Peter Earl	Neighbouring resident

DOCUMENTS SUBMITTED DURING THE HEARING

- 1 Extract from Local land Charges Search – register of planning charges