The Planning Inspectorate

Appeal Decisions

Date of Hearing 15 December 2020

Site visit made on 17 December 2020

by Grahame Kean B.A. (Hons), Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 27 August 2021

Appeal A: APP/P1615/X/19/3229226
Ganders Green Barn, Ganders Green, May Hill, Longhope Gloucestershire GL17 0NJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr James Wynter against the decision of Forest of Dean District Council.
- The application Ref P0780/17/LD1, dated 12 May 2017 was refused by notice dated 27 July 2017.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is a building.

Summary of Decision: The appeal is dismissed.

Appeal B: APP/P1615/W/19/3228415
Ganders Green Barn, Ganders Green, May Hill, Longhope Gloucestershire GL17 0NJ

- 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 James Wynter against the decision of Forest of Dean District Council.
- The application Ref P0979/18/FUL, dated 22 June 2018, was refused by notice dated 12 November 2018.
- The development proposed is: Change of use of agricultural barn to residential dwelling with associated parking and ancillary works.

Summary of Decision: The appeal is dismissed.

Appeal A

Preliminary matters and main issues

1. The planning merits of the development for which a certificate is sought are not relevant to the appeal. The decision is made on the facts, relevant law and judicial authority.

2. Advice in Planning Practice Guidance (PPG) is that if the Council has no evidence itself, or from others, to contradict or make the applicant's version of events less than probable, there is no good reason to refuse the application. However the applicant's evidence must be sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

3. By s191(2) of the 1990 Act operational development is lawful at any time if no enforcement action may then be taken in respect of it, because it did not involve development, or it did not require planning permission, or the time for enforcement action has expired or for any other reason.

4. The overriding issue, considering but ultimately irrespective of the reasons of the Council, is whether the refusal of the application was well-founded. The burden of proof is on the appellant on the balance of probability.

Summary of parties' cases

5. The appellant points to the use of the building at the time of the LDC application, stated as "Agricultural/Store", and claims there is clear and unambiguous evidence demonstrating on the balance of probability that the building as it exists today has existed for over four years and has become lawful through the passage of time. The enforcement notice is said to be no longer enforceable. It is also asserted that through the grant of planning permission for the rebuilding and retention of the building, the notice has ceased to have effect by virtue of s180 of the 1990 Act.

6. The appellant submits a statutory declaration by the owner of the site as identified in drawing LDC.2060_01 edged red and additional land in the ownership, edged blue. The declaration is that Mr Wynter has owned the property "Land adjoining Ganders Green Cottage" including the building which is the subject of this appeal, for some 9 years and has not undertaken any works to the building that fall within the definition of operational development since he purchased the property, which includes the four years prior to the date when the LDC application was made.

7. The Council points out that what is currently constructed on site is unauthorised as it differs from what may have been permitted under later planning permissions. The Council also asserts that neither of the two later permissions granted in 1996 and 2000 has been implemented and have expired, given the time that has passed from the grant of the permission and the conditions requiring commencement within the relevant time limit.

The enforcement notice and planning history

8. It is necessary to examine the planning history in some detail. Planning permission was refused in 1988 for conversion of a redundant farm building to a dwelling (Ref DF5155/B). Investigations from 1990 revealed the building had been reconstructed with a significantly enlarged structure and an enforcement notice was served.

9. The enforcement notice is dated 15 October 1993, expressed to take effect on 17 November 1993. It alleges a breach of planning control: "*without planning permission, the erection of a building designed for residential and workshop use and not being specifically designed for agricultural purposes*." The notice states that the land and premises affected by the notice are edged blue on the attached plan. The plan identifies a large area of land edged red and within it, edged blue, a smaller rectangular area marked "site" and an access from the site to the main road or path, marked "access track".

10. The requirements of the notice are: "*within 3 months from the date this Notice becomes effective 1. Completely demolish the building 2. Remove the*

constructed access to the building 3. Remove all debris and materials from the site 4. Grass over the site."

11. The notice was subject to an appeal and, subject to an extended compliance period of 6 months, was upheld by the Inspector on 27 September 1994 (T/APP/C/93/P1615/631204). The dimensions of the building as found by the Inspector were 17.1m x 7.3m x 8.7m. Since then the building has been reduced in height and width. However measurements were taken on my site inspection and it was agreed that the length of the building was some 18.05m.

12. The building as described by Inspector Whalley was:

- "*a stone clad lock and stone structure…incorporating part of an old stone barn*." "*Although parts of the north east and north west walls of the old barn have been incorporated in the outer walls of the appeal building, most of it is new. The building, nearing completion when seen, measures 17.1m long, 7.3m wide and about 8.7m high at the south eastern end*." (Paragraph 4)
- *"The building also incorporates some of the old barn walls as internal divisions. The new construction consists of…A steel trussed and purlin roof with timber rafters and profiled red clay tiled cover. Most of the walls are new, built of a concrete block of inner skin with a stone faced outer. About 8 of the window openings formed as the building was put up have been filled in…An uncompleted first floor has been fitted. The building was mostly empty when inspected."* (Paragraph 5)
- "*The new building's volume…is some 1085m3. I consider this to be a new building*." (Paragraph 11)
- Further, he found in terms that this new building was not designed for the purposes of agriculture. He drew attention to its domestic appearance, citing "*The insulated cavity wall construction, the felted, profiled tile roof, the provision of small rooms and doorways in the north western end, and the fitting of numerous window openings*."

Permission E

13. Permission was granted on 4 June 1996 Ref DF5155E (Permission E) for a scheme for partial demolition, part rebuilding and retention of the amended and smaller building for agriculture, to smaller dimensions 10.2 x 5.7 x 6.8m.

14. Condition a) required commencement by 1.9.1996. Condition b) prohibited commencement before approval of a landscaping scheme. Condition c) required that the development shall not be carried out otherwise than in complete accordance with the approved plans, the reason being that the Council wished to ensure that the development was completed in strict accordance with the approved plans. Condition d) required that the building shall only be used for agricultural purposes in connection with the farming of the agricultural holding nearby.

15. Condition b) was a condition precedent, attached in the interests of visual amenity. So far as relevant it read:

    "The development for which permission is hereby granted shall not be commenced until a scheme for the landscaping of the site (incorporating

existing flora) has been submitted and approved by the Local Planning Authority."

16. Condition a) required the development to be commenced not later than 1 September 1996, therefore the landscaping scheme must have been submitted and approved by then. I have considered Drawing T1118.03E February 2016, Rev E 20.06.18, "Proposed Block Plan", submitted with the current s78 appealed application, which shows an "*area of landscaping agreed in 2000 between FODDC…and previous owner*." The original drawing dates from 2015 or 2016 and in 2016 the Appellant submitted what he regarded as a similar proposal under Ref P1210/16/FUL. The landscaping in question relates only to an elliptically shaped area adjacent to one side of the building. It purports to reflect what was agreed several years ago, but there is no other supporting information. I am doubtful that the scheme if submitted and approved would have focussed only on this side of the building; for example the current proposals include a new boundary hedge on the other side of the building partially replacing the "scattered scrub" identified in the ecological survey. But in any event and, more significantly, no persuasive information exists that would support the appellant's position that condition b) had been discharged.

17. Some forms of development where a condition requires landscaping may go to the heart of the scheme and others may not. This was a permission for a single building in a location not at grade and within a locally valued landscape where rural character would have been a significant issue. Two appeal decisions, one before and one after Permission G was granted, have expressed a view that a large building on the site would be harmful to the rural character of the area. The 2006 decision noted that the building as it then existed was highly visible from the surrounding area.

18. A successful landscaping scheme would have gone to the heart of establishing a built form development on this site that did not unacceptably harm the character or appearance of the countryside. Thus the importance of the condition is apparent from the site's particular location. In my opinion Condition b) is a condition precedent that goes to the heart of the planning permission. The timing of the works once approved would have no greater importance than establishing the detail of those works before development was permitted to be commenced. As such failure to comply with the condition means that Permission E would have expired without having been implemented and no part of the building in situ can benefit from it.

19. I should add that I am conscious of the fact that the later Permission G had attached to it a landscaping condition that was not couched in condition precedent language. The reason for that is unclear but firstly, it cannot undermine the importance attached to the condition in Permission E, and secondly, if Permission G operates only on the "store", its first floor room and the roof over, (as to which see further below) the conditions on Permission E would still have subsisted in relation to the rest of the building approved thereunder which was for the main part of the building.

20. As to condition c) Mr Pearce offered no evidence that the permitted building had been built out in exact accordance with the approved plans. However he said that a later permission (Permission G) "supercedes" Permission E.

21. The earliest drawing submitted that shows the structure in its then existing state appears to be dated May 1995, Drawing 430-01 which is similar to SP1 a drawing dated November 1995 and part of Permission E. Drawing SP1 is entitled "Survey as Existing" and "Change of use of existing building to agricultural barn". That plan is stamped received 15 April 1996 and annotated with the reference for Permission E. This was to all intents and purposes the structure that was the subject of the enforcement notice and which the Inspector had deemed to be a new building compared to the old barn which had works done to it that had "*gone well beyond normal works of repair*"[1]. The Inspector's recording of measurements corresponds to a fair degree with the dimensions of the structure in Drawing SP1, of 18.1m long, 7.6m wide and 8.35m high at the SE ridge.

22. There is then Drawing SP3, March 1996 entitled "Proposed" and "the rebuilding of an agricultural barn". That plan is also stamped 15 April 1996 and annotated with the reference for Permission E. Drawing SP3 shows the proposed floor plans and elevations and by a dotted line the "outline of former building to be demolished". The proposed dimensions are 10.2m long, 5.7m wide and 6.7m at the SE ridge.

23. I should add for the sake of completeness that Drawing SP3.B dated March 1996, is entitled "Proposed" and "the rebuilding of an agricultural barn". That plan is stamped received 24 December 1998 and by a later hand written annotation appears to be part of the refused application (Refusal F) which if approved would have permitted the building to be retained with a length of some 17-18m.

24. From the foregoing I find that Permission E had not been implemented by the required time limit and has lapsed.

Permission G

25. Permission G was granted on 19 January 2000 for "retention of and part re-building of agricultural barn", subject to a condition that if it were no longer required for agriculture it should be demolished and the remains of the building removed from the site (Ref DF5155/G).

26. Condition g) attached to Permission G was explicit as to what the decision was permitting: "*This permission relates solely to the addition marked 'store' on the approved drawings, its first floor and the roof over*."

27. In light of this condition it would appear incorrect to suggest that Permission G somehow superceded Permission E. Any parts of the building not consisting of the addition marked 'store' on the approved drawings, its first floor and the roof over, would therefore still have fallen to be considered under Permission E (assuming of course that those parts as built did indeed correspond to Permission E and that Permission E was extant).

28. Permission G also has a condition (b) which states:

"the building hereby permitted shall be used for agricultural purposes directly associated with farming of this land only. If, in the fulness of time, the building is found to be surplus to requirements and no longer required for agricultural

[1] Paragraph 11, Decision Letter.

purposes then <u>it shall be demolished and the remains of the building removed from the site</u>." (My emphasis).

29. In connection with this condition an application received on 10.9.2004 (Ref DF5155J) was refused permission (Decision J) for "*conversion of redundant agricultural barn to create a holiday let accommodation*". An appeal by the previous owner of the site was dismissed on 3 January 2006. The Inspector noted that the then appellant stated:

"*the barn is no longer needed in association with the agricultural use of the surrounding field…there is no demand for the barn to be used by other farming enterprises in the area and that the building was therefore redundant for agricultural purposes*." (APP/P1615/A/04/1169163).

30. Condition b) in Permission G is not too vague to be properly enforced. Although the phrase "in the fulness of time" adds little if anything to its meaning, circumstances might arise under which the condition bites. The Council told me it would be in the then appellant's interests to make this statement, which may well be so, although there is no reason to doubt the veracity of the statement made at the time. It is equally plausible that the building's redundancy was the very reason why another use was sought for it.

31. The Council's report[2] on the appellant's previous application in 2016 P/1210/16/FUL to convert the building to a dwelling contains a statement from a local farmer who rented the land from the previous owner and between 1998 and 2007 used the barn for general husbandry and winter animal housing. From what the current appellant and his agent told me, although the former only bought it in November 2007, prior to then there may have been a "*low intensity of use*" for the "*storage of hay*". Yet now the appellant states[3] in terms that the building "*has become redundant to an ongoing agricultural use. The Appellant has not used the building for agriculture since his purchase of the property in November 2007*" but "*instead [it] has been used for low-intensity storage of building sundries*."

32. It might therefore be said that there was been a breach of condition b) for over ten years such that, if extant, Permission G can be operated without this restriction (including the requirement to demolish). However, also among the applicant's representations in the report on application P/1210/16/FUL is a statement that:

"Under the ownership of the current applicants the barn has been used for drying and storing of rushes. As you will be aware rushes are used for chair seating, hats, matting, small soft baskets etc. Rushes are harvested in June/July and then laid out in the barn to dry until ready for use. This is an agricultural activity. The rushes are harvested locally."

33. A neighbour commented that if true, there would have been some evidence of this to the neighbourhood, but in my view the relative seclusion of the site does not make it unlikely to have happened and again there is no reason to doubt the veracity of the statement. At the time of the application however the applicant contended that the building's status was that of a redundant agricultural building.

[2] Appendix 2, Supporting Statement
[3] Supporting Statement, paragraph 5.7

34. Some of the land surrounding the building contains or contained rushes.[4] The use of the barn for the drying and storing of rushes in the circumstances described is capable in my opinion of being an agricultural activity.

35. From the foregoing I find that condition b) probably became redundant within its terms when acquired by the appellant in 2007 but no enforcement action was then taken. However the statement as to subsequent use for processing rushes and the assertion that this is an agricultural activity came from the applicant. If true and I have no reason to doubt it, that must have occurred sometime between 2007 and the 2016 application and would have protected the building from demolition under condition b) because the period when this use was ongoing would have been within ten years from 2007 when enforcement action could have been taken under condition b).

36. In his present statement that the building has become redundant to an ongoing agricultural use and has not been used as such since his purchase in November 2007, it is to my mind significant that the appellant has made no reference to the earlier statement on the use of the building at the time of the 2016 application.

37. There is of course no necessary contradiction between a more recent use of the barn to store at a low level “building sundries” and a previous agricultural use for the storage and processing of rushes harvested locally. Whether or not the latter was designed to overcome the potential effects of condition b) is nothing to the point, the upshot is that this intervening activity would have prevented the Council from taking enforcement action at least under the second limb of condition b).

38. Therefore if extant Permission G could not have operated from about 2017 free from its requirements (which was when the application was submitted for the LDC in this appeal, on 12 May 2017). There is no dispute that as of now, the building is surplus to requirements and no longer required for agricultural purposes. At the very least therefore if Permission G were still extant enforcement action could be taken by way of alleging a breach of condition b) for failing to demolish it. This in itself puts the lawfulness of the building in jeopardy: s191(2) would not render the building lawful because enforcement action could then be taken against that part which benefits, putatively, from Permission G.

39. Turning to the approved elevations plan for Permission G this is unclear. I was supplied with a drawing SP3c, which is said to reflect what was approved, in effect a two-storey extension to the development permitted by Permission E. However SP3c is dated March 1996. If correct it provides for in effect an extension on the ground floor one of the previously proposed pens (in fact one of the two small ground floor storage rooms) to be enclosed, but still reduced in size to conform to the reduced footprint of the building approved in Permission E.

40. It can be seen from Drawing SP3c that the outline of the former building to be demolished has a different roof height and a shallower pitch than that proposed. But significantly, the length of the building has remained more or

[4] For example cf paragraph 3.1 of Ecological Appraisal - update Survey dates: 23-24th May 2018: at the northwest end of the barn a small, damp hollow with sparse cover of Bullrush (Typha sp), various rushes (Juncus sp) and Willowherbs (Epilobium sp).

less consistent with that the subject of the notice. Therefore the fabric of the extra length is beyond that permitted in Permission E or Permission G, and does not benefit from any form of planning permission.

41. That the length was maintained subsequently can be seen through various subsequent documentation, for example one can see from the existing and proposed elevations in drawing 524 A, dated April 2004, a drawing identified by the Inspector in the appeal decision of 3 January 2006 upholding Refusal J, that the building then existing had dimensions of some 18.1m long, 5.2m wide, and a SE ridge height of 6m, with 4.2m height to the eaves.

42. The Appellant contends that the accommodation approved in drawing SP3c is that which exists on site today but clearly that is not correct. Furthermore the supposed corroboration by reference to the survey drawings T1118.01E and T1118.01C reflects at least the length of the building which exists today which appears not to have changed. Clearly the north west end part of the building must be measured as part of the building notwithstanding that the overall eaves section has a reduced length of some 14m. Moreover it is incorrect to state as the appellant does[5] that the planning permissions indicate that the existing form of the building did not offend against the enforcement notice. Permission E had an informative that clearly indicated:

"The Local Planning Authority will expect the works to be completed within six months of this permission to avoid the need to continue Court proceedings to ensure compliance with the Enforcement Notice dated 15th October 1993 and relating to the demolition of the existing building."

43. Returning to the apparent ambiguity thrown up by the wording of condition g) in Permission G, the issue is whether the permission can stand in light of the contradiction between its wording and the description of the development permitted which would suggest that it is partly retrospective in effect as far as concerns that which was then in situ. A possible approach, bearing in mind the correct approach in relation to the interpretation of conditions on a planning permission distilled by Lord Hodge in *Trump International Golf Club Ltd v Scottish Ministers* [2015] UKSC 74, is that it may be reasonable to imply the words "*as it relates to the new build element approved*" or similar after "*This permission*", on the basis that is what an ordinary reading of the condition implies.

44. But looking at the drawing understood to apply to Permission G, Drawing SP3c, one can see that "*outline of the former building to be demolished*" is annotated within the drawing itself and shown with a dotted line. Although clearly the building has undergone changes to reduce its size, it is impossible to tell with any certainty from the available evidence, when those changes took place. At face value the drawing implies that the reduction in size had yet to take place which would call into question the notion that one was seeking retrospective approval for anything.

45. Moreover the permission has an "informative" note on it that states "*This permission relates to amended plans received by the Local Planning Authority on the 6th January 2000*." There is no evidence of such plans before me. Drawing SP3c is date stamped by the Council 22 September 1999, and the

[5] Supplementary Comments, paragraph 15.0

drawing itself bears the intrinsic date March 1996. It bears, again intrinsically to the date of the original drawing, a note "C- as built" and "B -as built" but it is unclear exactly to what part or parts of the structure depicted such note refers.

46. Overall, the position with Permission G is wholly unsatisfactory as a basis on which to infer any likelihood that what is built in situ has clearly and lawfully complied with its terms. In any event as I have found, since the building has clearly become redundant as provided for in condition b) but only in the last ten years, it is unlawful by virtue of s191(2) of the 1990 Act because enforcement action may be taken in respect of it.

Section 180 and relevant principles

47. Section 180 of the 1990 Act states that where, after the service of a copy of an enforcement notice planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission. An enforcement notice ceases to have effect only "to the extent that" its requirements are inconsistent with the permission; it does not cease to have effect altogether: *R v Chichester Justices Ex p Chichester DC [1990] J.P.L. 820*.

48. The questions to ask were set out in *London Borough of Brent v Adil [2010] EWHC 3654 (Admin):* a) was planning permission granted after the enforcement notice was served; b) was permission granted for any development carried out before the grant of the permission; and c) to what extent can the steps required to be taken in the enforcement notice be imposed consistently with the retrospective permission that has been granted?

49. *Adil* reflects the approach in *Chichester* to analyse which parts of the buildings the subject of the enforcement notice, are to be retained pursuant to the permission, ie are there elements of the building common to the permission and the notice such that, if there is fabric to be retained under the permission, its removal cannot be required under the notice.

50. *Rapose v LB of Wandsworth [2011] J.P.L. 600* considered the effect of a previous enforcement notice requiring parts of a building to be demolished but shown as retained in a later permission. It was held that whether the notice was inconsistent with the permission, and the precise extent to which it was, were matters of fact and degree to determine subject to review on public law principles. The practical implications of s180 must be considered: protection under s180 is activated not on implementation of the subsequent permission but upon its being granted, a point emphasised by the appellant who notes Lindblom J's dictum in *Rapose* that:

"*the effect of this provision in the legislation is to cancel – not merely to suspend – the effect of an enforcement notice*"

51. For the appellant this was perhaps the single most important point. He says the notice is all embracing in requiring demolition of the whole building enforced against and removal of debris and the grassing of the site, unlike in some cases where the notice relates to part of a larger building such as an extension to a

house. So here, any grant of planning permission for retention of part of it or to allow any rebuilding is "*wholly inconsistent*" with the terms of the notice[6].

52. In *Goremsandu v Secretary of State for Communities and Local Government [2015] EWHC 2194 (Admin)* works were undertaken without permission, an enforcement notice served and then planning permissions were granted but not implemented as approved. There was no extant permission authorising the construction or retention of anything on site. Assuming the building had been substantially completed, a key issue was whether it would have acquired immunity from enforcement or whether the notice was still effective. Detailed drawings attached to the permissions showed "*precisely where the retained sections of the building are, and the intended roof line*". The extension was not built as a store, but most likely as additional accommodation for the main house, but not substantially complete within 4 years prior to the notice's issue.

53. I do not agree with the appellant concerning what might be called a "clean-sweep" notice: it reminds me of the contention in *Goremsandu* that depended critically on the idea that an enforcement notice must be capable of being acted upon in full or not at all. Of this the court said:

"it is commonplace for an enforcement notice to require removal of the buildings erected in breach of planning control…Suppose, to take commonplace examples, that in an operational development case there was more than one unauthorised building: or that in an unauthorised use case there was a mixed use, or different uses on different parts of the site. If Mr Davis' approach was correct, a step in an enforcement notice requiring that all the buildings were demolished, would mean that if permission were granted subsequently to retain one of the buildings, it would then vitiate the effectiveness of the enforcement notice against the remainder; otherwise, a landowner could vitiate the effect of an enforcement notice directed at the unauthorised construction of a building simply by obtaining a planning permission for the retention of a smaller and less intrusive building which included part of its predecessor, but which the landowner then did not implement." [31]

54. Part of this clean sweep approach contended for in *Goremsandu* was that it would be an absurd and undesirable result in that case if the notice required removal of parts of the building whose retention was not permitted, leaving it open to the elements.

55. However in *Rapose* Lindblom J accepted that *"there will be cases in which the consequences of the exercise which the Council has failed to perform in the present case will be unintended or artificial, or both."* He held that the cancellation is:

"*to no greater and no lesser extent than the notice is 'inconsistent' with a subsequent grant of planning permission 'for any development'*" [28] and that *"if there is fabric which forms part of that which the planning permission approved, the enforcement notice cannot thereafter be relied upon to attack that much of the development. Conversely, however, the enforcement notice continues to be effective against so much of the fabric as is not approved by the planning permission." [29]*

[6] Appellant's legal opinion, paragraph 5.

56. Noting this judgment Gilbart J in *Goremsandu* said [27] that there was no rule that the steps in an enforcement notice have to be exercised in full for it to remain effective and:

"*if the effect of the subsequent permission is to vitiate the enforcement notice in relation to those building works where the planning control system has determined that they should be removed, that would undermine another important part of the code."*

57. *Rapose* also clarifies that retention of previously unauthorised wall sections are not to be seen as inconsistent with the later planning permission on the grounds that they are not the same height as now permitted, and so cannot be seen as "*constituting a wholly different element of structure*" [33].

What congruence is there between the building required to be demolished under the enforcement notice and development approved by Permissions E and G?

58. The question of congruence between the requirements of the enforcement notice and the retention permitted by the planning permission is a matter of fact and degree- see *Rapose* per Lindblom J at [39].

59. Clearly there are elements of development common to both permissions and the building enforced against. The elevations have been altered and in some respects they conform to the approved drawings in Permissions E and G in as much as the height has been reduced and the width reduced so as to maintain the line of the front elevation but to bring in the rear elevation. However as mentioned above the overall length of the building as enforced against and as it exists now, is significantly more than was approved in Permissions E and G taken together, by some 4m.

60. Also, looking at the rear elevation Permission E (SP3) had three narrow windows but the drawing assumed to be for Permission G (SP3c) shows a new door opening, possibly converted from one of the windows. At any rate as seen on site, the door opening is still in place, however this was not approved by either permission. It materially affects the appearance. Therefore although the enforced against elevation will have been removed at some point, what has replaced it is itself unlawful.

61. The north elevation enclosed the two storage rooms that became known as the store and pen, the latter having become dilapidated. That elevation appears to have been largely removed leaving the remains of what had become known as the pen which, certainly by the time of Permission G, had become open to the elements. It nevertheless forms part of the structure.

62. The south elevation as it existed (Drawing SP3) bears no resemblance to what is there now but the three slit windows approved in Permission E, although appearing on the current building, are differently located being clearly asymmetrical and appearing significantly wider than originally approved. This has had a materially significant effect on the appearance of that elevation.

63. Internally, the new loft would entail construction of stairs and completion of the floor which clearly has not been effected.

64. Furthermore and, as pointed put by the Council, the pitch of the roof approved under Permission G (approximately 45 degrees as shown on Drawing SP3c) is clearly different from that which appears on site and shown on the appellant's survey drawing T1118.01c which is at an angle significantly more oblique. A similar situation obtains with respect to Permission E and Drawing SP3. The roof is in my judgement a wholly different element from the approved structure.

65. The building the subject of the LDC application is outlined in red on the location plan with no area of curtilage. It covers the extent of the building in situ, however I note there is a black line across it, presumably intended to delineate the enclosed part of the structure. However no distinction or qualification is made in the application or supporting statement as to the extent of the building for which a certificate is sought, indeed it is emphasised that the whole of the building as it exists should benefit from a certificate.

66. I find that the existing structure is not that which was approved under Permission E or Permission G or under both permissions taken together but has materially departed from the approved drawings.

67. Therefore, subject to the point about substantial completion discussed below, it would appear (although it is not strictly necessary to decide the appeal solely on this point) that the enforcement notice continues to be effective against so much of the fabric as is not approved by the planning permissions. I would think this is so whether such non-approved fabric was part of the original "new" building enforced against or whether it was subsequently altered outwith the terms of either permission. Where an enforcement notice properly requires an existing structure to be removed, it continues to be effective against not only the exact form it was in when issued, but against further alterations of that structure which constitute essentially the same breach of planning control, unless they will have achieved congruity with later planning permissions and thus become subject to s180 of the 1990 Act.

Substantial completion

68. The issue here is whether the building the subject of the LDC application was substantially completed by 12 May 2013, that is 4 or more years before the date of the application. Paragraph [24] of *Goremsandu* points up that the question of substantial completion becomes relevant if there were no extant permission authorising the construction of the building and 4 years elapsed without enforcement action being taken.

69. Section 171B(1) provides that no enforcement action may be taken in respect any unauthorised operational development after the end of the period of four years beginning with the date on which the operations were substantially completed. "Substantially completed" has the meaning established in *Sage v SSETR & Maidstone BC [2003] UKHL 22*: in the case of building operations, what is required is "*a fully detailed building of a certain character*".

70. If a building operation is not carried out, internally and externally, fully in accordance with the permission, the whole operation is unlawful. Thus consideration is required of the totality of the operations intended to be carried out, internally and externally.

71. The current owner, the appellant has owned the building since 2007. It was constructed as a new building as found by the first Inspector in 1994. Also as found by him, its size, shape, layout and appearance before 8 of the window openings were closed up were domestic in appearance and the insulated cavity wall construction, the felted profiled tiled roof, small rooms and doorways were more suited to a house. Many of these features remain. It may have been reduced in size since the notice was issued but I find it still has the appearance of an incomplete building of a domestic-like character.

72. The appellant and previous owners have made repeated attempts to gain permission to convert the building to a residential use. I have no reasonable doubt that from the date of its acquisition by the present owner in 2007, the question of what further works would be done to it has been put on hold until such a permission materialised. I am not persuaded that the building has yet been substantially completed whether as a dwelling or as a barn approved under Permissions E and G.

73. I would be reluctant to place too much emphasis on the owner's intentions as an overriding factor, but as the House of Lords in the Sage judgment[7] demonstrates (paragraph 36):

"classification of the building as a dwelling or as a barn is a question of fact, dependant on the permanency of the use to which it is being put and the intentions of the owner in that regard."

74. In the present case I have no doubt that the building was and remains a "work in progress" for whatever purpose. The LDC application for "a building" seems to me to be but a stepping-stone along the path to a residential consent. As such it is not a fully detailed building of any character. Accordingly s171B(1) does not assist the appellant because enforcement action may be taken in respect this unauthorised operational development that has not yet been substantially completed.

Summary

75. There is a high degree of correlation between the survey drawing SP1 and the description of the building given by Inspector Whalley. Comparing this to Permissions E and G and assuming them to be extant, I accept that there are elements of development common to both the permission and the enforcement notice. However I have described some elements that have remained on site that are inconsistent with Permissions E and G and where no other permission exists. Consequently the building in situ is unlawful.

76. Notwithstanding my finding as to the lawfulness of the building in its current form, Permission E is no longer extant because it expired without an important condition precedent being discharged. Permission G cannot be acted upon in any meaningful way because as it appears to me, condition b) has been breached within the last ten years and the building is liable to be the subject of separate enforcement action requiring it to be demolished and the remains removed from the site.

77. Without the benefit of those permissions s180 does not affect the lawfulness or otherwise of the building. And in any event, even if either or both permissions

[7] Sage v Secretary of State for the Environment, Transport and the Regions and Others [2003] UKHL 22

were extant, there is still an incomplete building on site that has not been constructed in accordance with those or any other permissions for the reasons given above. Therefore I am not persuaded as a matter of fact and degree that on the balance of probability the current building in situ is lawful.

Conclusion on Appeal A

78. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a building was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Appeal B

Preliminary matters

79. The description of the proposal on the application form was "the change of use of redundant agricultural building to form single dwelling with ancillary works". The wording in the banner heading above appears on the refusal notice and is understood to be agreed by the parties and is used on the appeal form: "*change of use of agricultural barn to residential dwelling with associated parking and ancillary works*".

80. The National Planning Policy Framework (NPPF) was revised in July 2021. I am grateful to both parties for providing their comments on the revisions which I have considered. In the end I find there are no material changes relevant to the main issues in this appeal which cause me to reach a different conclusion thereon. However for the sake of clarity, the relevant paragraph numbers have been updated.

Main issues

81. The Council has withdrawn its reason for refusal No3 and now confirms that it has no objection to the proposal on grounds of impact on highway safety.

82. The main issues are

    1. whether in principle the proposal is appropriately located having regard to national and local planning policies, including whether it would re-use a redundant or disused building; and

    2. the effect of the proposal on the character and appearance of the appeal site and its surroundings.

Principle of development

83. The development plan includes the Forest of Dean Core Strategy 2012 (CS) and Forest of Dean Allocations Plan 2006 to 2026 adopted in June 2018 (AP). AP Policy AP1 makes it a primary consideration whether the proposed development is sustainable with the aim of improving economic, social and environmental conditions of the area.

84. CS Policy CSP1 requires to be taken into account important characteristics of the environment so as to maintain or enhance their contribution to the environment, including their wider context. The supporting text to Policy CSP1 indicates that rural areas can be especially sensitive to small changes such as

the redevelopment of dwellings or the conversion of rural buildings and that much of the local distinctiveness of an area depends on the cumulative effects of features which may appear to have little individual significance, and the erosion of these should be resisted.

85. CS Policy CSP4 makes it clear that new development must contribute to reinforcing the existing settlement pattern in a manner which emphasises the importance of the towns. It states that most changes in towns and villages will be expected to take place within the existing settlement boundaries. Areas outside will be treated as part of the open countryside. Exceptions are made for limited forms of development including building conversions.

86. National Planning Policy Framework (NPPF), Paragraph 79, states that rural housing should be located where it will enhance or maintain the vitality of rural communities. Paragraph 92 aims to achieve healthy, inclusive and safe places which promote social interaction, are safe and accessible and address local health and well-being needs. Paragraph 130 states that planning decisions should ensure that developments "(f) create places that are safe, inclusive and accessible and which promote health and well-being…".

87. The appellant accepted that the new dwelling would be outside the existing settlement boundary and it is clear that the proposal would be contrary to Policy CSP4.

88. The appellant's landscape architect Enderby did state that the area had a dispersed settlement pattern and that this was in itself a key part of the locally valued landscape. AP Policy AP.14 (Locally Valued Landscape - May Hill) indicates that this area is a distinctive and prominent feature within the district's landscape, recognised for its settled nature and tranquillity. Proposals are required to demonstrate how they contribute to or enhance the landscape character. Unlike Policy CSP4, as there is no presumption against development so the policy does not militate against the proposal in principle, but is a matter to be considered under character and appearance.

89. Whilst the Council argues that the site is isolated from services and facilities required to support the day to day needs of future occupants without being highly reliant on the motor car, the appellant said that it was part of a hamlet and not isolated development for the purposes of Paragraph 80, NPPF which lists circumstances where new isolated homes in the countryside may be acceptable, especially sub-paragraph 80(c): "*the development would re-use redundant or disused buildings and enhance its immediate setting*".

90. I accept that the building in situ is redundant or disused for these purposes, however although the appeal site is not isolated from other sporadic rural housing in the area, it is clearly not within a settlement boundary for the purposes of Policy CSP4. I regard that policy as an important part of the statutory development plan to support the strategic aim of reinforcing the existing settlement pattern. Exceptions do include the conversion of buildings but proposals will be expected to improve the quality of their environment with special regard being paid to the quality of the general rural character of the district.

91. Of the large number of very small villages and hamlets that have no facilities or very few and no defined settlement boundaries, Paragraph 7.75 of the supporting text to Policy CSP16 states:

"In many cases these settlements look like part of the countryside with a dispersed built form and frontages punctuated by agricultural land or forest waste…they are small and not intensively developed. Very few could be described as being sustainably located in terms of being within easy reach of a range of transport alternatives or having easy access to some basic facilities. The Core Strategy will not treat these small settlements in any way different to their treatment in national and regional planning policy and for most purposes therefore they will be regarded as part of the open countryside. The settlements concerned will not be generally suitable for new housing, with the possible exception of very modest developments of affordable housing under policy CSP5, and exceptionally conversions."

92. The building the subject of the proposed conversion is an unauthorised structure. The Council in its delegated report on the previous application for conversion to a family dwelling, appears to suggest that an unauthorised building could be considered for conversion under national and local planning policies. It was differentiating the position from the then relatively new prior approval rights to convert barns to residential use, but that does not seem to me a compelling reason to accept unlawful buildings in its conversion policy where there is no clear justification within the policy itself.

93. In any event as the supporting text to Policy CSP1 (the overarching policy on design and environmental protection) states at Paragraph 6.2:

"Rural areas can be especially sensitive to small changes such as the redevelopment of dwellings or the conversion of rural buildings. Particular care will be taken to ensure that such proposals do not adversely affect the traditional, settled appearance of the many small settlements and of the countryside."

94. I accept that whilst an exception might conceivably be made exceptionally for conversions of unlawful buildings, such a proposal would still be subject to other policies such as Policy AP.14 and an assessment of its effect on local character and appearance.

Character and appearance

95. Policy CSP1 and Policy AP4 seek to ensure that new development takes into account important characteristics of the environment and contributes to environmental enhancement. As noted, Policy AP14 states that May Hill is a Locally Valued Landscape, a distinctive and prominent feature of the District's landscape. Development proposals will be required to demonstrate that they will not adversely affect the character and landscape setting of May Hill and should show how they add to the overall quality of the area.

96. I have also had regard to the Council's Landscape Supplementary Planning Document (SPD), adopted March 2007, and the Landscape Character Assessment (LCA) 2002, which identifies the appeal site as coming within the Wooded Hills landscape character type, and May Hill and Outliers landscape character area, a wooded landscape with sloping and often steep and

undulating landform. The intrinsic character of the landscape is derived from the pronounced relief and the dominant, flowing woodland cover, which I found on my visit to the site and its surroundings, to be a positive feature.

97. The appeal site is within a sheltered narrow valley within a landscape of small fields and orchards and blocks of woodland. It is within a strategic nature area the priority habitat for which is woodland mosaic including traditional orchards. In my view, and having inspected the site and its surroundings, the proposed conversion would erode the local distinctiveness of this area by introducing an undesirable residential development that would alter its character substantially from the tranquillity and rural nature of the immediate setting. The landscaping scheme proposed would not successfully overcome these adverse impacts.

98. The building itself has been a feature of the landscape for several years but within a scattering of mostly long-established houses. It is visible from a number of public viewpoints as demonstrated by the photographs submitted but sits in what is to my mind an intimate landscape where built development would intrude into the open countryside and where the context is not so much other existing built development but the pleasing appearance of continuous landscape of woodland and small fields with established hedgerows and trees, of which the appeal site is an integral part. Therefore I do not find as suggested that the proposal would become a key part of the locally valued landscape. Rather it would introduce a new domestic use into the area that would unacceptably erode its rural and tranquil character.

99. No doubt the proposal could be a means to secure the perry orchard as a means of improving the environment but there is no reason to suppose that feature would be lost in any event and as a benefit it does not in my view outweigh the harm described.

100. The Council relies, and with some justification, on the previous appeal decisions which found that a new building here would have an adverse impact on the landscape. The substance of the national and local policies has not materially changed since then to provide a compelling counter argument to such findings.

101. I would add that NPPF Paragraph 80 does represent a change in government policy, however whilst it states decisions "should avoid the development of isolated homes in the countryside" unless a listed exception applies, Paragraph 5.9 of the appellant's statement characterises Paragraph 80 as the relevant development plan policy which is of course a slip of the pen and readily understandable as such. But it does serve to underline that it is too often assumed that the NPPF is to treated as tantamount to a development plan when it is not. Decisions are still made principally in accordance with the development plan unless other material considerations, which I find insufficiently compelling in this case, indicate otherwise.

Conclusions

102. I find that the proposal conflicts with a key policy, CSP4 of the development plan, in that it is not within a recognised settlement boundary and having particular regard to the quality of the general rural character of the appeal site and its surroundings, it would not improve the quality of the environment.

103. It would also conflict with Policy CSP1 in failing to maintain the local distinctiveness of its surroundings, including the wider context, and with AP Policy AP1 and Policy AP5 in failing to achieve a sustainable development that would preserve the rural tranquillity of its immediate surroundings or improve environmental conditions of the area. It would also, and not least, fail to comply with Policy AP 14 by adversely affecting the character and landscape setting of the May Hill Locally Valued Landscape.

104. The harm caused by the conflict with these policies is significant and not outweighed by other considerations advanced in this appeal, whether under provisions of the NPPF or otherwise.

Other matter - fallback position

105. I have found that the structure in situ is an incomplete building. If an agricultural building had been established and as the appellant states, it is correct that the Town and Country Planning (General Permitted Development) (England) Order 2015 Sch.2 Pt 3 paragraph Q (Class Q) permits a change of use of agricultural buildings to dwelling units if the floor space of the building does not exceed 450 square metres. This is one of a number of permitted development rights that may require prior approval of the local planning authority. If so, prior approval is subject to several matters such as transport and highways impacts, noise impacts, contamination risk, flooding risks and whether location or siting makes the proposal impractical or undesirable.

106. I was referred to *Mansell v Tonbridge and Malling BC and others [2017] EWCA Civ 1314.* That case confirmed that a fallback position had to be lawful, and there had to be a real prospect of it occurring. The case was put to me in order to refute the opinion I ventured at the hearing, that where a prior approval process had yet to be gone through before a permission crystallised, there was still no permission that could be implemented immediately.

107. That a permitted development through Class Q would be potentially available is of course a relevant consideration to weigh in deciding whether in all the circumstances, there is a real prospect of it occurring. Mr Pearce did not direct me to what he considered was the relevant passage(s) of *Mansell* in this regard, but he was probably referring to what the court said at [37]:

It was not a precondition to the Council's consideration of the fall back option that the interested party had made an application indicating an intention to take advantage of Class Q. There was no requirement that there be a formulated proposal to that effect.

108. Also I accept that it is not a precondition as such, to consideration of whether a realistic fall-back position exists, that there is an "oven ready" scheme. The court did state [41] that (on the facts of that case) "*it was plain that development was contemplated and that some development could have taken place pursuant to Class Q*". However the judgment was not fastening on the distinction that exists between a yet-to-be-realised permitted development right and an extant and implementable permission.

109. I think it is also important to have regard to the context in which those views were expressed. Firstly, the court was occupied with whether an officer's report properly explained the fall-back position under Class Q to councillors,

and where the focus of dispute was not with prior approval matters but with the criteria at the threshold of Class Q, namely the computation of floor space and whether the limit on floor space related only to the part of the building changing use.

110. Secondly, it seems to have been assumed within the report, no doubt for understandable reasons, that prior approval would be given, it being stated in the report [27] that "*In practical terms for this site, the new permitted development rights mean that the existing agricultural barn could be converted into three residential units*." Although expressed in stark terms, it was the view of an officer who would probably be cognisant of the circumstances and would be instrumental in deciding, if and when it became necessary, those prior approval matters.

111. In those circumstances it is unsurprising that the court did not go behind the assumptions made about prior approval for Class Q being forthcoming. I find nothing in *Mansell* that conflicts with the proposition that, simply as between an extant full permission and an uncrystallised permitted development right subject to prior approval, the former has an in-built advantage when it comes to assessing how realistic is the prospect of its coming about.

112. All that said, my decision on Appeal A still means in effect that for the purposes of Class Q there is no lawful building on the appeal site from whose putative use as an agricultural building, a change to use as a dwelling might be advanced.

Conclusion on Appeal B

113. For the reasons given above I conclude that the appeal should be dismissed.

Formal Decisions

Appeal A

114. The appeal is dismissed.

Appeal B

115. The appeal is dismissed.

Grahame Kean

INSPECTOR

FOR THE APPELLANT:

Ben Pearce	Land Development & Planning Consultants Ltd
Peter Wadsley	Barrister, St Johns Chambers, Bristol
Chris Enderby	Landscape architect, Enderby Associates Ltd
James Wynter	The Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Chris Wood Senior Planning Appeals Officer

ADDITIONAL DOCUMENTS SUBMITTED AT THE HEARING:

1. *Mansell v Tonbridge and Malling BC and others [2017] EWCA Civ 1314*
2. Legal opinion on behalf of the appellant
3. Bundle of “Drawings_ Referenced_ Compressed” submitted by appellant:
    a. SP1 Nov ’95 “Change of Use of Existing Building to Agricultural Barn - Survey As Existing” received 15 April 1996 and annotated DF5155/E;
    b. SP3 March ’96 “Proposed - Rebuilding of an agricultural barn” received 15 April 1996 and annotated DF5155/E;
    c. SP3b March ’96 “Proposed – Rebuilding of an agricultural barn” stamped received 24 Dec 1998 and annotated DF5158/P with the “P” obliterated and replaced by a “F”;
    d. 430-01 May 95 “Change of Use of Existing Building to Agricultural Barn - Proposed Alterations to Existing Building”, stamped as received 19 June 1995 and annotated “As Existing”;
    e. SP3c March 96 “Rebuilding of an agricultural barn – Proposed”, stamped received 22 September 1999;
    f. Location Plan;
    g. T1118.02F August 2015, Rev F 20.06.18, “Proposed Drawing”;
    h. T1118.02G August 2015, Rev G 17.10.18, “Proposed Drawing;
    i. T1118.02E August 2015, Rev E 20.06.18, “Proposed Block Plan”
4. Drawing SP3c March 96 (this, a clearer version, was supplied by the Council following the adjournment of the hearing).