



Appeal Decision

Site Visit made on 1 September 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 September 2021

Appeal Ref: APP/X1545/C/21/3273918

**Tea Room, Sailing Club Clubhouse (East of), the Quay, Burnham on Crouch
CM0 8AS**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended ('the Act'). The appeal is made by Mr James Cumming against an enforcement notice issued by Maldon District Council.
- The notice was issued on 8 April 2021.
- The breach of planning control as alleged in the notice is the unauthorised material change of use of land to residential.
- The requirements of the notice are to: Cease the unauthorised use of the building and remove all items within the building, including any fixtures and fittings in connection with a residential use of the property.
- The period for compliance with the requirement is: Three (3) calendar months after the date this Notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a) and (d) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Decision

1. It is directed that the enforcement notice is corrected by:
 - The deletion of 'ten' from section 4 and the insertion of 'four' so that it reads *'It appears to the Council that the above breach of planning control has occurred within the last four years.'*
 - The deletion of 'land to residential' and the insertion of 'a building to a dwellinghouse' in section 3 of the notice so that the allegation reads *'The unauthorised material change of use of a building to a dwellinghouse'.*
2. Subject to the above corrections, the appeal is dismissed, 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.

Preliminary Matters

3. Since the appeal was lodged, the Government published its revised National Planning Policy Framework (July 2021) ('the Framework'). The parties have had the opportunity to comment on the implications of the changes during the appeal process.

Matters concerning the notice

4. Within the reasons for issuing the notice, it is stated that *'the above breach of planning control has occurred within the last ten years'*. The Council advise that

this was a typographical error and request that I correct the notice and change it to four years, as per the requirements of section 171B of the Act. As the appellant has advanced his case on the basis of four years and has made a ground (d) appeal, I consider there would be no injustice in amending the notice in this way.

5. Section 173(11) sets out that *'where (a) an enforcement notice in respect of any breach of planning control could have required... any activity to cease, but does not do so, and (b) all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of...the carrying out of the activities'*.
6. The notice alleges the unauthorised material change of use of land to residential. The requirement requires the unauthorised residential use of the building to cease. Were I to uphold the enforcement notice with the allegation in its current form, in the event the appellant complies with the notice, this would grant planning permission for the residential use of the land surrounding the building by virtue of section 173(11) of the Act.
7. It is clear from the evidence that it is the change of use of the building that the Council is concerned with. The residential use of the surrounding land is part and parcel of the residential use of the building. I shall amend the breach to refer to the residential use of the building. This would narrow the scope of the enforcement notice and so there would be no injustice to the appellant. Given the limited area around the building and the topography of the land, I consider it highly unlikely that it would be used for residential use independently of the building. As such, I consider it highly unlikely that amending the notice in this way would cause injustice to the Council.

Ground (d)

8. An appeal under ground (d) is made on the basis that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. Section 171B(2) of the Act sets out that where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
9. Case law has established that it is for the appellant to make their case on the balance of probabilities. The main thrust of the appellant's case is that where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
10. The notice does not allege operational development and it is not disputed that the building has been in situ in excess of four years. On 7 September 2016, the Council refused the proposed change of use of tea room and storage area to dwellinghouse, reference FUL/MAL/16/00673. This refusal was appealed, APP/X1545/W/16/3166974 and dismissed on appeal. The Inspector's visit was carried out on 8 May 2017. The Inspector states that it is *'unclear in what capacity it (the building) has been used since construction'* but nevertheless,

describes the use of the building as a dwelling as a proposed use and not retrospective.

11. The appellant states that in 2016, realising he was unable to run a commercial enterprise he put the property up for sale. The appellant has provided documentation regarding his health. Whilst the information provided may indicate that the appellant was unable to run a commercial enterprise, the documents provided are addressed to the appellant at a location in Barking and do not therefore indicate that the appellant was residing at the appeal site.
12. The appellant has provided various sale documentation, including Rightmove property details dated 22 September 2017, which show the building layout with a shopfront with toilet room at ground floor level and basement below. The property is described as a commercial building with A3 usage. Documentation pertaining to the sale of the building includes seller details, which give the appellant's address as Barking. Correspondence is also addressed to the appellant at the same address in Barking.
13. A series of electricity bills have been provided regarding electricity usage at the appeal site. Water and sewerage bills have also been provided, including hand written records, which show usage between May 2007 and October 2020. Although the bills demonstrate that electricity and water was being used at the appeal property, they do not show how the building was being used or by whom. Furthermore, although some of the water bills are addressed to the appellant at the appeal site, the electricity bills and some of the water bills are addressed to the appellant at an address in Barking, which suggests that the appellant was not living in the appeal building at that time.
14. Case law has established that a use can only become lawful if it continues throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time. The appellant has not demonstrated, on the balance of probabilities, that the building has been occupied as a dwellinghouse, by himself or anyone else, continuously throughout the relevant immunity period, such that the local planning authority could have taken enforcement action at any time.
15. The appeal under ground (d) therefore fails.

Ground (a)

Main Issues

16. The main issues of the appeal are:

- Whether the occupant of the appeal site is safe from flooding; and
- The effect of the development on sensitive interest features of the European designated sites.

Reasons

Flooding

17. The appeal site comprises a modest wooden clad building, located off the promenade, behind a sea wall, asset ID number 5487, which is identified by the Environment Agency as clay embankment – ragstone revetment and steel sheet pile/masonry parapet wall and concrete block promenade. The appeal

site is within Flood Zone 3a, which is defined in the Planning Practice Guidance (PPG) as land having a 1 in 100 or greater annual probability of river flooding, or land having a 1 in 200 or greater annual probability of sea flooding.

18. Policy S1 of the Maldon District Approved Local Development Plan 2014 – 2029¹ (LDP) seeks to ensure that new development is either located away from high flood risk areas or is safe and flood resilient when it is not possible to avoid such areas. Policy D5 of the LDP seeks to ensure development is located in areas where the use is compatible with national planning policy and reduces causes and impacts of flooding through flood resilient design and safe access and egress, amongst other things.
19. The Framework identifies buildings used for dwelling houses as 'More Vulnerable'. While the Framework advises that applications for some minor development and changes of use should not be subject to the sequential or exception tests, they should still meet the requirements for site-specific flood risk assessments (FRA).
20. The Framework sets out that development should only be allowed in areas at risk of flooding where it can be demonstrated that: within the site, the most vulnerable development is located in areas of lowest flood risk, unless there are overriding reasons to prefer a different location; the development is appropriately flood resistant and resilient such that, in the event of a flood, it could be quickly brought back into use without significant refurbishment; it incorporates sustainable drainage systems, unless there is clear evidence that this would be inappropriate; any residual risk can be safely managed; and safe access and escape routes are included where appropriate, as part of an agreed emergency plan.
21. Whilst the upper level of the building is shown to be around 5.03mAOD, the lower level is shown to be around 1.8mAOD. The appellant suggests that the lower level is non-habitable storage areas and is classified as 'less vulnerable'. However, from my inspection of the site it appears that the building as a whole is used for residential purposes, with residential paraphernalia and bathroom facilities on the lower level.
22. Given the limited size of the building, and the location of the bathroom on the lower level, I do not consider it would be reasonable to restrict the use of this part of the building by condition. Consequently, were I to uphold the notice, the appellant could choose to use the lower level of the building as living space.
23. The FRA contains a series of Environment Agency models, which show for the 1in 200 defended scenario, the site is unlikely to flood. However, when taking into account climate change, it is concluded that for the 1 in 20 defended scenario, overtopping is possible and some flooding is likely and for the 1 in 200 defended scenario, plus climate change, projected flood levels in the River Crouch would be higher than the defences and so flooding would take place.
24. The development is protected by defences, which in 2019 were identified as having defects which could reduce their performance. Although the top of the wall extends up to around 5.02mAOD, the promenade is shown to be around 4.18m AOD. Flood levels during the 1 in 200 event are shown to be around 4.46mAOD, which, in the event of a breach would cause the site to flood. Given

¹ Adopted July 2017

the above, I am not persuaded that the occupant of the building would be safe from flooding for the life of the development or that the residual risk can be safely managed.

25. The FRA states that a safe evacuation plan can be implemented by subscribing to the Environment Agency Warning Service and in the event of a severe flood warning the property should be evacuated to the North. However, this is ambiguous and does not demonstrate that safe access and escape routes are available. Given the proximity of the building to the River Crouch and the risk to life that could be posed in the event of a severe flood event, I consider the level of detail provided to be wholly insufficient.
26. In the event of a flood, given the construction of the building with timber cladding, I consider it highly unlikely that the building would be sufficiently flood resistant and resilient such that it could be quickly brought back into use without significant refurbishment.
27. Thus, for the reasons given above, it has not been demonstrated that the occupant of the appeal site would be safe from flooding. The appeal scheme therefore conflicts with policies S1 and D5 of the LDP, the requirements of which are set out above and is contrary to the expectations of the Framework with respect to flood risk.

European designated site

28. Policies S1 and D1 of the LDP both seek to protect the natural environment and policy N2 seeks to ensure that where any priority habitats or species may be affected by the proposed development, the proposal makes provision to mitigate any negative biodiversity impacts it may create.
29. The appeal site is within the Zone of Influence for one or more of the European designated sites scoped into the emerging Essex Coast Recreational disturbance Avoidance and Mitigation Strategy (RAMS). The Council advise that in the absence of a signed legal agreement to secure a financial contribution, the development would have a likely significant effect on the sensitive interest features of the European designated sites due to the scale and location of the development proposed.
30. The appellant states that there is no evidence that a change of use to a dwellinghouse would impact on any wildlife or habitats nor contravene European designated sites. However, given the location of the building, I consider it highly likely that occupants of the dwelling would choose to visit the coast for recreational purposes, thereby increasing recreational pressure.
31. In the absence of any mitigation, I cannot be sure that the appeal scheme would not have a significant effect on the sensitive interest features of the coastal European designated sites. This is contrary to policies S1, D1 and N2 of the LDP, the requirements of which are set out above.

Other Matters

32. The Council referred to Policy N1 of the LDP in its enforcement notice, however, it relates to the provision of green infrastructure and so is not relevant to the appeal scheme before me.

33. While the construction of the building pre-dates the LDP, since the appeal under ground (d) has failed, the material change of use of the building to a dwellinghouse is development which requires planning permission. Planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise. The policy position at the time the building was constructed is therefore not relevant to my decision.

Conclusion

34. I conclude that the development conflicts with the development plan as a whole and there are no material considerations which indicate that the decision should be taken otherwise in accordance with the development plan. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice as corrected and refuse to grant planning permission on the deemed application.

M Savage

INSPECTOR