
Appeal Decision

Site visit made on 7 September 2021

by Roy Curnow MA BSc(Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 25 October 2021

Appeal Ref A: APP/G1630/C/21/3276207

Appeal Ref B: APP/G1630/C/21/3276456

**Slate Mill, Tewkesbury Road, Elmstone Hardwicke, Cheltenham,
Gloucestershire GL51 9TA**

- Appeals A and B are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mr Ryan Kenny against an enforcement notice issued by Tewkesbury Borough Council ('the Notice').
 - Appeal A is made by Mrs Natalie Kenny against an enforcement notice issued by Tewkesbury Borough Council.
 - The enforcement notice, numbered 20/00067/ENFC, was issued on 30 April 2021.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land showed edged red on the attached plan from agricultural use to use for residential purposes and the consequent erection of a new residential dwelling thereon as shown edged blue on the said attached plan.
 - The requirements of the notice are: (1) Cease the residential use of the land; (2) Demolish the new residential dwelling situated on the Land in its entirety and restore the land to agricultural use; (3) Remove all residential service connections to the land; and (4) Remove all debris, resultant from compliance with steps (1) to (3) above, from the land.
 - The period for compliance with the requirements is 11 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decisions

1. It is directed that the enforcement notice is corrected by: the deletion of the words "and restore the land to agricultural use" from the second requirement in section 5 of the Notice, 'Steps Required to Rectify the Breach'. Subject to the correction, the appeals are dismissed and the enforcement notice is upheld.

Reasons

2. Slate Mill comprises a collection of buildings, in residential and agricultural uses, that lies in the open countryside. Access is gained via a track from the A4019.
3. The appeal site comprises a single storey building with an 'L'-shaped plan form. It is in use as a dwellinghouse. It is served by a private garden area and appears to share a further amenity area in the yard that lies between it and a building that has been converted to residential use.

The Notice

4. The second requirement of the Notice includes the phrase “and restore the land to agricultural use”. As there is no scope for a Notice to require reversion to the lawful use of the land, I will omit this phrase from the Notice.

Ground (d)

5. An appeal under this ground 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 alleged in the Notice. The onus to prove the case lies with the Appellants, with the case having to be made on the balance of probability.
6. Time limits after which no enforcement action may be taken against a breach of planning control are set out in s171B of the 1990 Act. Its terms that are relevant to this appeal are:

S171B(1) “Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed”

S171B(2) “Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach”; and

S171B(3) “In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach”.

7. Essentially, the Appellants’ case is that they accept that there was a change of use of the building, and the relevant time limit in S171B(3) applies to the material change of use (mcu). However, they go on to say that as the operational development is subject to the 4-year time limit in S171B(1), there is “obvious conflict”.
8. Firstly, I need to assess whether a mcu has occurred. The primary evidence in this regard are a number of photographs submitted by the Council. These were initially provided in support of earlier applications for certificates of lawfulness relating to the appeal building. Amongst these are photographs of the cattle shed prior to the works that were undertaken to create a dwelling, and a series of photographs showing works throughout this process.
9. The original building comprised a steel portal frame, which supported timber roof trusses and a corrugated roof covering. It appeared that the elevations facing onto the yard area, comprised walls and doors formed from wooden boarding. What might be termed the rear elevations, that is to say those facing in the opposite direction to those with wooden boards, appeared to have comprised of about two-thirds blockwork with vertical timber slats above.
10. Although the entire building is not shown clearly, the evidence shows that the works entailed the removal of the boarded walls and doors, the timber slats

and a significant part of the blockwork walls, and the corrugated roof covering. The concrete slab, timber trusses and portal frame were retained.

11. The walls were rebuilt using cavity blockwork and brick facing, with some areas clad in timber boarding; these had new window and door openings. Blockwork internal walls were erected to create rooms. The roof was clad in tiles and its northernmost part, where it adjoins another residential unit, was raised and reconfigured.
12. A letter that accompanied application 20/00330/CLE, from C & D Bricklaying Specialists Ltd which carried out the works, states that "the whole build was carried out as a conversion of the original farm building" where a "large amount of the original structure was retained within the resulting house". It further states that the company's work reflected the client's request that "as much of the building be retained and used within the conversion as possible". This latter point is reflected in statutory declarations submitted with that application.
13. The question of whether what occurred amounted to the conversion of the building or whether it should be classed as a new build is a matter of fact and degree and will be specific to each individual case. Although different from the case before me, inasmuch as it assessed whether the conversion of an agricultural building to a dwelling under the terms of Schedule 2, Part 3, Class Q of the GPDO was permitted development, the judgement in *Hibbitt v SSCLG* [2016] EWHC 2853 is relevant here. Amongst its terms, that judgement set out that a conversion was conceptually different to a "rebuild", with the latter starting where the former finished and the line between the two was a matter of planning judgement.
14. Rather than finding that the retention of a large amount of the original farm building occurred, I find that very little of it was retained. Whether it was intended to retain a large amount of it is immaterial, this was not what happened. The works carried out crossed the line from conversion to new build. This being the case, the terms of S171B(3) are relevant, and the time limit for enforcement is 10 years.
15. The parties cite established case law¹ in their respective cases. The cases that have been referred to are all relevant to the matter before me.
16. The cases relate, amongst other things, to the suggested conflict between the time limits in S171 where both operational development and a material change of use has occurred. It was held, in *Murfitt*, that where an EN is issued in respect of an MCU, and works were carried out to facilitate the MCU, the EN may require that the works are removed in order that the site is restored to its previous condition and the breach is thereby remedied. Following from this, it was held in *Somak Travel* that an EN could require the removal of works which did not amount to 'development' at all, but had facilitated an unauthorised MCU of the first floor of the building. The *Bowring* decision held that where an EN alleges an MCU and requires that certain works are removed, those works must have been integral to or part and parcel of the making of the MCU. The EN cannot require the removal of works that were undertaken for a different and

¹ *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598; *Somak Travel v SSE & Brent LBC* [1987] JPL 630; *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15; *Bowring v SSCLG & Waltham Forest LBC* [2013] EWHC 1115 (Admin) and *Kestrel Hydro v SSCLG & Spelthorne BC* [2015] 1654 (Admin), [2016] EWCA Civ 784

lawful use and which could be utilised in that other lawful use if the unauthorised use ceased.

17. Whether the works were undertaken as part of the mcu and their removal is necessary to remedy the breach are matters to be assessed on a fact and degree basis. I find here that the extensive works carried out were done to facilitate the mcu and were integral to it.
18. Thus, following the judgement in *Welwyn*, as the building was constructed unlawfully and used as a single dwellinghouse from the outset, there was no change of use. Therefore, the time limit in S171B(2) is not relevant. The implication of that judgement is that the 10 year rule under S171B(3) applies here.
19. In *Welwyn*², Lord Mance suggested that when a local planning authority “has allowed the four year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless”. The Appellant states that, although acknowledging that the building has been substantially complete for over 4 years in earlier applications for certificates of lawfulness, the Council has ignored the principles of fairness and good governance.
20. I do not agree that those comments made by Lord Mance should be described as “just a matter of judicial opinion”, as opined by the Council; this is too dismissive. However, the judgement in *Kestrel Hydro* set out support for the approach in *Murfitt* and *Somak*. It referred to works that might ordinarily be immune from enforcement action, but were integral to a mcu; and determined that it was lawful for an enforcement notice directed against the mcu to seek their removal.
21. In any event, what is before me is a Ground (d) appeal which relates to immunity from enforcement action and turns on the facts of the case. Therefore, the questions of fairness and good governance on the part of the Council, referred to by Lord Mance, do not enter into it.
22. The operational development that has occurred was integral to the mcu and was carried out to facilitate it. The mcu had not occurred for the ten years required by S171B(3). Therefore, the Notice was issued in a timely manner and the Ground (d) appeal fails.

Ground (f)

23. An appeal under this ground is made on the basis that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. In this case, I read the purpose of the Notice as being the remedying the breach.
24. As I have said, there is a mixture of residential and agricultural uses in Slate Mill and a small amount of the former agricultural building has been incorporated into the dwelling. Notwithstanding this, the building bears very little resemblance to an agricultural building. Externally, its openings are

² Paragraph 17

overtly residential. Internally, the manner of its sub-division into a number of relatively small rooms linked by a narrow corridor is such that it is difficult to see how it could practically be used for agricultural purposes in its present condition. Furthermore, no information has been supplied by the Appellants to show how this might be the case.

25. The ground (a) appeal was not pursued and the purpose of the Notice is to remedy the breach of planning control. As such, any lesser step that would not remedy the breach cannot be accepted through ground (f). As I do not have an obvious alternative or lesser step in front of me, so the ground (f) fails.

Conclusion

26. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with a correction.

Roy Curnow

Inspector