



Appeal Decisions

Site visit made on 26 October 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15th November 2021

Appeal A Ref: APP/M1710/C/21/3275554

Appeal B Ref: APP/M1710/C/21/3275555

Land at 10 Kings Hill, Beech, Alton GU34 4AL

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Allen Taylor (Appeal A) and Miss Catherine Evans (Appeal B) against an enforcement notice issued by East Hampshire District Council.
- The enforcement notice was issued on 23 April 2021.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land from agriculture to recreational amenity land.
- The requirements of the notice are: (i) Cease the unauthorised recreational amenity use the land (*sic*). (ii) Remove from the land the unauthorised gazebo structure. (iii) Remove from the land the unauthorised decking. (iv) Remove all resultant materials from the land.
- The period for compliance with the requirements is three months.
- Both appeals are proceeding on the grounds set out in section 174(2)(d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed in respect of Appeals A and B.

Summary of Decisions: The appeals are dismissed and the enforcement notice is upheld as corrected in the terms set out below in the Formal Decision.

Preliminary Matters

1. The Council submitted a plan that reduces the area of the land to which the notice relates. The substitute plan is a more accurate reflection of the relevant planning unit. Accordingly, using the powers in s176(1) of the Act I shall correct the notice to substitute the plan, with consequent corrections being made to paragraph 2 and steps (ii) and (iii) in paragraph 5. Also, I shall correct the notice to insert the word "of", omitted from paragraph 5 step (i) in error. As the notice would not be more onerous, I am satisfied that there would be no injustice in making the above corrections.
2. In their ground (d) appeals, the appellants argued that the structures requiring removal by steps (ii) and (iii) of the notice were separate operations which were not integral to and did not facilitate the material change of use to recreational amenity land. However, the notice alleges a material change of use, not operational development. The structures are required to be removed by the remedial steps, as operations which are integral to and have facilitated the material change of use. Consequently, the structures do not fall within the scope of what can be considered in the context of the ground (d) appeals, being a matter more relevant to ground (f)-"*whether the steps required by the*

notice to be taken...exceed what is necessary to remedy any breach which may be constituted by those matters...". Where an argument which relates to ground (f) is raised in connection with another ground I am still bound to consider it, even where the appeal was not made under ground (f). In *Moore v SSCLG* [2012] EWCA Civ 1202, the Court of Appeal held that the fact a matter was raised under another ground is not of itself fatal to a ground (f) appeal. Therefore, although the appellants did not initially make their appeals under the ground (f) heading, I have dealt with them as if they had also been made on that ground. There would be no injustice, as both main parties have put forward their respective cases in relation to the matters in question.

Ground (d) appeals

3. The ground of appeal is that it was too late to take enforcement action against the breach of planning control alleged in the notice. The burden of proving the relevant facts is on the appellants, the test of the evidence being on the balance of probability.
4. The appeal site contains a lake and an area of surrounding land. Structures present at the site include a gazebo and an area of raised decking, both located towards the edge of the lake. The unauthorised material change of use of the site to use for recreational amenity purposes would become immune from enforcement action after the end of the period of ten years beginning with the date of the breach, having regard to s171B(3) of the Act.
5. An appeal against the Council's refusal to grant a certificate of lawful use or development (LDC) under s191 of the Act in respect of "*residential amenity use*" of land including the site was dismissed on 9 December 2020¹. In deciding that the necessary burden of proof in terms of a material and continuous use of land for a relevant period of at least ten years had not been discharged, the Inspector noted that "*...the evidence of building works relates to the period from 2013. In my view, this evidence demonstrates on the balance of probabilities a material change in the presence of residential structures and with it the associated residential character of the site, from that of the transient summer uses broadly described.*"
6. As far as I can see, the appellants' evidence regarding the longevity of the use of the site as recreational amenity land, including copies of Statutory Declarations, documents and photographs, is largely the same as that advanced in the previous appeal. I am not bound by the previous appeal decision. However, in the absence of clear and convincing further evidence which supports the appellants' version of events, there is no sound reason why I should depart from the conclusion reached by the previous Inspector that, on the balance of probability, the use claimed has not been demonstrated for the relevant continuous period.
7. Therefore, the appellants have failed to show to the required standard that it was too late to take enforcement action in relation to the unauthorised use. The ground (d) appeals do not succeed.

¹ Appeal Ref: APP/M1710/X/20/3254206.

Ground (f) appeals

8. By requiring the use as recreational amenity land to cease, together with the removal of the gazebo and decking, the notice is clearly intended to remedy the breach by restoring the site to its condition before the breach took place. Relevant case law confirms that where an enforcement notice attacks a material change of use it may also require the removal of works which are integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or be immune from enforcement action, so that the land is restored to its condition prior to the breach².
9. There is no dispute that the gazebo was under construction by December 2013 and that it was substantially completed by around June 2014. Erection of the gazebo therefore dates to at or about the time the previous Inspector considered that a material change in the character of the use of the site is likely to have taken place. This is entirely consistent with the gazebo having been erected as integral to and facilitating such use.
10. During my site visit, I observed that the gazebo is of relatively modest size, particularly in relation to the overall area of the site. The gazebo contained garden chairs and a barbecue. The Council's description of the gazebo contents is similar. Photographic evidence supplied shows the gazebo containing a patio table and chairs on or around the likely date of its substantial completion. The above is also consistent with the gazebo supporting the use of the site as recreational amenity land.
11. As the available evidence suggests that the gazebo is integral to and facilitates the unauthorised use, whether it was substantially completed more than four years prior to the date of the notice is of limited consequence. Although the Council took no enforcement action against the gazebo following a previous investigation, that has little bearing on its relationship with the use of the site.
12. The decking is also reasonably modest in scale. The garden tables, chairs and container plants I saw on the decking are consistent with it being another structure that supports the unauthorised use. Responding to a Planning Contravention Notice in 2018, one of the appellants referred to the top walking surface of the decking having been replaced on the original base in or around April/May 2017. Based on what I observed during my visit, the top parts of the decking are likely to comprise a substantial portion of the overall built fabric. Given the likely scale and magnitude of the works undertaken to the decking in 2017, as a matter of fact and degree it is probable that if the pre-existing structure was not demolished, it was nevertheless substantially rebuilt. There was little firm evidence which might show otherwise. Such rebuilding works are likely to have involved building operations falling within the definition of development in s55(1) of the Act. Incorporation of pre-existing built fabric, such as the supporting base, into the rebuilt decking does not alter my opinion in this regard. Consequently, in my view any pre-existing structure that was "*uncovered and re-established*" following the appellants' purchase of the site in 1998 has in any event been substantially rebuilt subsequent to the material change of use occurring.

² *Murfitt v SSE* [1980] JPL 598; *Somak Travel v SSE & Brent LBC* [1987] JPL 630; *Newbury DC v SSE & Mallaburn* [1994] JPL 879.

13. Whilst I was referred to judicial authority in *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15 [2011] 1183, that case was largely concerned with the relevant time limit for taking enforcement action in relation to erection of a substantial building used as a dwellinghouse. Consequently, this appeal differs significantly on its facts from those in *Welwyn*. Indeed, in this instance the factual background bears more similarity to that in *Kestrel Hydro v SSCLG & Spelthorne BC* [2016] EWCA Civ 784, where the Court of Appeal supported application of the principles established in *Murfitt* in relation to several structures erected to serve an unauthorised mixed use.
14. Drawing all of these matters together, the nature and scale of the gazebo and decking do not exceed what might reasonably be regarded as being integral to the use of the site for recreational amenity purposes. The main component of the development that has taken place at the site is, in my view, the material change of use. There is no firm evidence to show that the purpose of erecting the structures was other than to facilitate and support the unauthorised use.
15. For the above reasons, based on the evidence before me and as a matter of fact and degree, in my judgment the gazebo and decking are integral to and facilitate the use of the site for recreational amenity purposes and they are not separate developments in their own right. The appellants have not put forward clear and convincing reasons as to why I should conclude otherwise. Retaining the gazebo and decking would not remedy the breach of planning control, as structures which sustain the unauthorised use would then remain in situ. Therefore, retaining the gazebo and decking does not represent an obvious alternative to the notice requirements. There are no steps which would stop short of removing the structures whilst still remedying the breach. It follows that the notice requirements are not excessive and the ground (f) appeals fail.

Ground (g) appeals

16. The ground of appeal is that the time specified for complying with the requirements of the notice falls short of what should reasonably be allowed.
17. The gazebo and decking are relatively lightweight structures, being mostly of timber construction. Even when the works involved in removing parts of the structures at and below ground level are also considered, the remedial steps are likely to be quite small-scale and straightforward operations requiring few items of plant or equipment. Such operations would be within the competency of a suitably experienced small building contractor or perhaps even a DIY enthusiast and are unlikely to take more than a few weeks at most to complete. There was no firm evidence to suggest that appointing a suitable contractor and arranging for their assistance in undertaking the operations to comply with the remedial steps would be a particularly lengthy process.
18. As a result, three months affords ample time for the operations in the remedial steps to be undertaken. It follows that extending the compliance period to six or nine months would perpetuate the breach and the planning harm identified in the notice. The ground (g) appeals also fail.

Conclusions

19. For the reasons given above I consider that the appeals should not succeed and I shall uphold the enforcement notice with corrections.

Formal Decisions

20. Appeals A and B-it is directed that the enforcement notice be corrected by:

- Substitution of the plan attached to the enforcement notice by the plan attached to these decisions.
- Substitution of the words "edged red" by the words "edged black" in paragraph 2.
- Insertion of the word "of" between the words "use" and "the" in paragraph 5, step (i).
- Substitution of the words "marked green" by the words "shown marked with an X" in paragraph 5, step (ii).
- Substitution of the words "marked blue" by the words "shown marked with a Y" in paragraph 5, step (iii).

Subject to the above corrections, the appeals are dismissed and the enforcement notice is upheld.

Stephen Hawkins

INSPECTOR



Plan

This is the plan referred to in my decisions dated: 15th November 2021

by Stephen Hawkins MA MRTPI

Land at: 10 Kings Hill, Beech, Alton GU34 4AL

References: APP/M1710/C/21/3275554 & APP/M1710/C/21/3275555

Scale: Not to scale

