
Appeal Decision

Inquiry Held on 9 and 10 November 2021

Site visit made on 10 November 2021

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH

an Inspector appointed by the Secretary of State

Decision date: 10 December 2021

Appeal Ref: APP/H1515/C/20/3265150

Land at Rustic Dene, Parkwood, Doddinghurst Road, Doddinghurst, Essex CM15 0SN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr A Gonsalves against an enforcement notice issued by Brentwood Borough Council.
 - The enforcement notice, REF:19/00152/UNLCOU, was issued on 11 November 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the creation of an additional separate primary self-contained residential dwelling house known as Malaika House ie planning unit within the existing residential curtilage of the land known as Rustic Dene, shown edged in red for identification purposes only on the plan attached to the notice.
 - The requirement of the notice is to permanently cease the use of the building known as Malaika House for the unauthorised use as stated above.
 - The period for compliance with the requirements is 6 months.
 - 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 (the Act). Since an appeal on ground (a) has been made, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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Decision

1. It is directed that the enforcement notice be corrected in section 3 by the deletion of the words "within the existing residential curtilage of the land known as Rustic Dene" and by the substitution of the word "green" for "red".
2. Subject to these corrections the appeal is allowed and the enforcement notice is quashed.

Application for costs

3. At the Inquiry an application for costs was made by Mr A Gonsalves against Brentwood Borough Council. This application is the subject of a separate Decision.

Procedural Matter

4. Mrs Vint gave evidence on oath on behalf of the Council to the effect that it had not complied with the legal requirement¹ to notify local residents that an appeal had been made and how they could make representations to the Secretary State within the relevant period before the Inquiry date.

¹ Rule 4(2)(b); The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002

5. This omission was despite a reason given in the notice that it had been issued because the development was causing “considerable concern to local residents” through an alleged insufficiency of parking provision leading to an effect on local highway safety.
6. However, notwithstanding the omission, it was apparent at the Inquiry that local residents had become aware of the event (and their opportunity to participate at it) through a site notice posted outside the appeal site. Further, the residents of two properties (closest to appeal site in a southerly direction along the road) attended the Inquiry, gave live evidence at it, and were able to ask questions of all witnesses. The residents of the property closest to the appeal site in a northerly direction along the road submitted a letter directly to the Inquiry *in absentia*, which I accepted as late evidence taking into consideration that had been no earlier notification of the appeal. For these reasons, I do not consider that there is a significant risk that the interests of any interested person or party has been prejudiced by the Council’s omission to notify in full accordance with its legal obligations.

Ground (d)

7. For an appeal to succeed on this ground, the appellant must satisfy me on the balance of probabilities that it was not possible for the Council to take enforcement action on the date the notice was issued.
8. The enforcement notice, issued on 11 November 2020, alleges unauthorised development through the creation of Malaika House as an “additional separate primary self-contained residential dwelling house”. It is not in dispute that this new single dwelling house resulted through a change in use of the building that had been built as a summerhouse under permitted development² in 2008 by virtue of being required for a purpose incidental to the enjoyment of the dwelling house situated to the front of land known as Rustic Dene.
9. Therefore, the provisions of section 171B(2) of the Act mean that it was too late for the Council to have issued the notice if the change of use of the summerhouse to a single dwelling house took place before 11 November 2016 (since the Act provides that no enforcement action may be taken after the end of the period of 4 years beginning with the date of the breach). Accordingly, the appeal must succeed if the appellant can demonstrate it more likely than not Malaika House was in use continuously as a single dwelling house between 10 November 2016 and 11 November 2020 (‘the relevant period’).
10. Malaika House contains all the facilities for day-to-day private domestic existence in the *Gravesham*³ sense, and (as I saw on my site visit) it sits within its own curtilage which is distinct and separate from that of the dwelling which fronts onto the highway. It has a separate access, a separate external amenity area and its own significant boundary treatment. The Valuation Office Agency rated it as a dwelling for council tax purposes with effect from 25 June 2009, when the appellant began residing there. In 2015 its title was separately registered at the Land Registry. It has its own postal address and utility bills. Since 2011, with periods during which it has been vacant, the appellant has commercially rented the severed front dwelling at Rustic Dene to third parties.

² Class E of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 1995

³ *Gravesham BC v SSE & O’Brien* [1982] 47 P&CR 142; [1983] JPL 307

11. Taking all of these considerations into account, and in applying the *Burdle*⁴ tests, I find as a matter of fact and degree that Malaika House sits within its own planning unit due to its separate occupation and its physical and functional separation from the front dwelling at Rustic Dene.
12. I accept the considerable amount of precise and unambiguous evidence heard from the appellant and his 4 witnesses at the inquiry that he and his family occupied Malaika House continuously as a separate dwelling within its own planning unit for the relevant period (and before). That evidence is supported by council tax and electoral records.
13. I also note the significant amounts of documentary evidence (including correspondence with letting agents and tenancy agreements) which corroborates the separate use and occupation of the front dwelling by non-family members and which leads me to the view that during the relevant period it was not used incidentally by the appellant in connection with his use of Malaika House but was separately occupied by tenants, or being adapted for their use or was on the market for sale or rent.
14. Conversely, the Council and third parties have provided no substantive evidence which might cause me to be dissuaded in the light of the appellant's evidence that Malaika House was being continuously used as a physically and functionally separate dwelling during the relevant period. The Council's case that there was a 'reversion' to a single planning unit between January 2016 and September 2017 when the front dwelling was on the market for sale or rent⁵ – and by implication therefore that the immunity 'clock' must start from the end of that period – is not one that I find has any significant merit. Simply because the front property was unoccupied for a period does not mean that it 'reverted' to or otherwise became part of the planning unit of Malaika House (since in my judgement upon the evidence it remained physically and functionally separate). Accordingly, the use of the separate dwelling at Rustic Dene does not affect the accrual of immunity in respect of the continuous separate residential use of Malaika House during the relevant period. This is consistent with the case law cited by the Council⁶.
15. The outcome of the lawful development certificate application in 2015 is not relevant to the accrual of immunity within the relevant period, nor is the Zoopla advert in 2011 (which in any case does not establish an incidental relationship between the buildings marketed), nor are future intentions of use asserted in the letter from Mr Gunn of 16 October 2012 (which are in any case disputed by the appellant as reflecting his own). Also outside of the relevant period are the neighbouring third parties' stated observations as to use of the front dwelling between 2012 and 2014.
16. Consequently, the appeal succeeds as I find it more likely than not Malaika House was in use continuously as a single dwelling house between 10 November 2016 and 11 November 2020 and therefore it was too late for the Council to take enforcement action when it eventually did so.
17. I have a duty to put the notice in order before quashing it. As I have found that Malaika House is situated within its own curtilage, I have deleted reference to it

⁴ *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

⁵ Response to Planning Contravention Notice on 2 December 2019

⁶ Council's Statement of Case, 3.5 to 3.13

being situated within the existing residential curtilage of the original dwelling at Rustic Dene. I have also corrected the notice to reflect that Malaika house is identified in green on the plan attached to the notice, rather than in red. Given my findings, I use my powers to make these amendments to the notice without causing injustice to any party.

Conclusion

18. For the reasons given above I conclude that the appeal should succeed on ground (d). The enforcement notice will be corrected and quashed. In these circumstances the appeal under ground (a) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

Andrew Walker

INSPECTOR

APPEARANCES

FOR THE APPELLANT: Richard Wald QC (39 Essex Chambers)

He called

Anthony Keen
Alfred Gonsalves
Nicholas Papaphilippou
Prashant Patel
Elvin D'Cruz

FOR THE LOCAL PLANNING AUTHORITY (LPA): Steven Bell (Birketts LLP)

He called

Richard Bates
Carole Vint

INTERESTED PERSONS: Russell Jaques, Stephen Dempsey

DOCUMENTS submitted at the Inquiry

- 1 "Bundle of Documents for Public Inquiry" passed up by LPA
- 2 "Objection to allowing summer house at Rustic Dean to be used as a separate dwelling" (Script used by Stephen Dempsey in giving oral evidence to the Inquiry)
- 3 Unsigned letter apparently from "Suzanne and Pascal", passed up by Russell Jaques
- 4 Opening submissions on behalf of the appellant
- 5 Case of R(Ocado Retail Ltd) v Islington LBC [2021] EWHC 1509 (Admin) passed up by appellant
- 6 Opening for the LPA
- 7 Photocopy showing text of Regulation 4(a) of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002
- 8 Signed letter from Suzanne & Pascal Fargeot, passed up by Russell Jaques
- 9 Proposed conditions – Malaika House, passed up by LPA
- 10 Closing for LPA
- 11 Closing submissions on behalf of the appellant
- 12 Costs submissions on behalf of the appellant