
Appeal Decisions

Site visit made on 7 December 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 January 2022

Appeal A Ref: APP/M0933/C/21/3268770

Land at Eden House, Conishead Grange, Red Lane, Bardsea LA12 9QH

- 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 Ernst Liehr against an enforcement notice issued by South Lakeland District Council.
 - The enforcement notice was issued on 20 January 2021.
 - The breach of planning control as alleged in the notice is, without planning permission:
 - I. Unauthorised operational development including the erection of a two-storey timber building.
 - II. Unauthorised part material change of use of the Land from holiday complex (Sui Generis) to self-catering holiday accommodation (C3).
 - The requirements of the notice are:
 - (A) Permanently remove from the land the unauthorised building.
 - (B) Permanently cease the use of the building for self-catering accommodation
 - (C) Permanently cease the use of the areas shaded yellow on the plan attached to enforcement notice for outdoor open space used in connection with self-catering accommodation.
 - (D) Permanently remove from the land all building materials, all rubble and associated materials arising out of compliance with (A), (B) and (C).
 - (E) Comply with (A), (B), (C) and (D) within 13 (thirteen weeks) from the date this Notice takes effect.
 - The period for compliance with the requirements is 13 weeks.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c) and (f) of the Town and Country Planning Act 1990 as amended.
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Appeal B Ref: APP/M0933/W/21/3268781

Eden Lodge and House, Coast Road, Bardsea, Ulverston LA12 9QZ

- 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 Ernst Liehr against the decision of South Lakeland District Council.
 - The application Ref SL/2020/0881, dated 26 November 2020, was refused by notice dated 20 January 2020.
 - The development proposed is the erection of a chalet to be used for ancillary accommodation to the manager's accommodation and for personal storage (retrospective).
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Summary Decisions

Appeal A Ref: APP/M0933/C/21/3268770: The enforcement notice is quashed.

Appeal B Ref: APP/M0933/W/21/3268781: the appeal is dismissed.

Appeal A: the enforcement notice

1. The breach of planning control as alleged in the notice is, without planning permission, the unauthorised operational development including the erection of a two-storey timber building and unauthorised part material change of use of the Land from holiday complex (Sui Generis) to self-catering holiday accommodation (C3). There is no difficulty with allegations of operational development and a material change of use being contained in one enforcement notice. Nevertheless, a number of points flow from the allegation and requirements to comply with the notice as drafted.
2. Firstly, in alleging any breach of planning control, whether operational development or a material change of use, the correct prefix is 'without planning permission'. The notice accords with that convention. However, the subsequent description of 'unauthorised' in relation to both the allegations of operational development and the material change of use is superfluous.
3. The allegation at paragraph 3(I) of the notice refers to the erection of a two-storey timber building. Although the building contains an element of accommodation at first-floor level in the form of a mezzanine, I agree with the appellant that the timber building is more accurately described as being single storey and that the allegation is therefore not correct in this regard.
4. The allegation at paragraph 3(II) of the notice is, without planning permission, the *part* material change of use of the Land from holiday complex (Sui Generis) to self-catering holiday accommodation (emphasis added). This material change of use is alleged to have occurred in two discrete areas within the site, both identified by being outlined in blue on the plan attached to the enforcement notice.
5. I take the appellant's point that the plan attached to enforcement notice is not entirely clear in above respect. Moreover, it appears to me that these 'areas' are in fact buildings: that much is apparent from the requirement at paragraph 5(B) of the notice, which specifically refers to ceasing the use of a building. The first, which is outlined in blue but with no infilling with colour, relates to Building B as identified in the Planning Contravention Notice (PCN) served on the appellant in May 2019. The second is the building adjacent to it, identified in the PCN as Building C.
6. The confusion arises, I suspect, in that Building B is outlined in blue but is also infilled with the colour green. This only becomes apparent on very close examination of the plan. I am nonetheless satisfied that the plan is adequate to identify the buildings concerned, and it is apparent that the appellant has done so. In other circumstances, in the interest of clarity, I would have corrected the notice to additionally refer to Buildings B and C respectively.
7. A more significant issue arises, however, in relation to the breach of planning control alleged in paragraph 3(II) of the notice. In cases where a material change of use has occurred, it is first necessary to ascertain the correct planning unit to which that material change of use relates.
8. In that context, the leading case for the determination of the planning unit is *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207. This case indicates that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is

physically and/or functionally separate and distinct, and/or occupied for different and unrelated purposes. In *Burdle*, Bridge J suggested three broad categories of distinction:

- a) A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary;
- b) A single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another;
- c) The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.

It is necessary to apply the principles established in *Burdle* to the facts of this case in order to establish the planning unit.

- 9. In completing the PCN, the appellant confirms that he is the owner of all the land to which the notice relates (through his company Eden Retreat Ltd). I am therefore satisfied that the land comprises a single unit of occupation for the purposes of *Burdle*.
- 10. The lawful use of land to which the enforcement notice relates (shown edged in red on the plan attached to the notice) is described in the notice as being a holiday complex (*Sui Generis*). The appellant does not contend that use as self-catering holiday accommodation (C3) is a use that falls with the use of the land as a holiday complex, or is ancillary to that use¹. This would suggest that the unit of occupation is not a single planning unit that has one primary use and any other activities are incidental or ancillary to that primary use.
- 11. I note that the alleged self-catering accommodation is itself physically contained within Buildings B and C. This tends to support a conclusion that the inclusion of the words 'part material change of use' in the alleged breach of planning control is intended to suggest the creation of a separate planning unit(s) within the single unit of occupation.
- 12. Nevertheless, it appears to me that the holiday complex use and the catering holiday accommodation use are not entirely functionally separate. There are areas of the land that are used, or which appear to be used, in connection with both uses: for example, the car park and the landscaped grounds.
- 13. An alternative interpretation of the breach of planning control alleged in the notice is therefore that the unit of occupation comprises a single planning unit that is in a mixed use because the land is put to two or more activities, and it is not possible to say that one is incidental to another. Given that the 'from' use is stated as being a holiday complex, which is accepted as being a *sui generis* use and a primary use of the land in its own right, it follows that the introduction of the self-catering holiday accommodation could be interpreted as resulting in the introduction of an additional primary use that is (to some extent at least) functionally related to the other. In that scenario, the breach of planning control alleged in the notice would more properly be described as material change of use to a mixed use comprising two primary uses: a holiday complex and self-catering holiday accommodation.

¹ The appellant has not made an appeal on ground (c) in this respect.

14. I do not reach any firm conclusions as to correct planning unit in this case: that is a matter for the Council in the first instance. However, I am concerned that the breach of planning control alleged in the notice is not sufficiently clear in this respect. This is important because the appellant might have made his appeal on different grounds, or cast his existing grounds of appeal differently, had the breach of planning control been clear.
15. The requirement at paragraph 5(A) of the notice is to permanently remove from the land the unauthorised building currently situated in the area coloured green. Two points arise from this requirement. Firstly, as indicated above, the building in question is not only coloured green on the plan attached to the notice but is also outlined in blue. Secondly, as drafted, the description of the area to which this requirement relates is in the abstract, insofar that it does not relate to any specific plan.
16. The requirement at paragraph 5(B) of the notice is to permanently cease the use of the building outlined in blue for self-catering accommodation, on the site within the red line boundary of the attached plan. The requirement is very specific in referring to the use of the 'building', in the singular. However, the attendant requirement at paragraph 3(II) refers to 'areas' (in practice buildings), in the plural. The requirement does not differentiate between those two buildings by, for example, identifying it as the building edged in blue and also coloured green. It is not therefore possible for the appellant to know with reasonable certainty which of the two buildings referred in paragraph 3(II) to requirement at paragraph 5(B) applies.
17. The requirement at paragraph 5(C) of the notice is to permanently cease the use of the areas shaded yellow on the plan attached to enforcement notice for outdoor open space used in connection with self-catering accommodation. The difficulty is that there is no corresponding allegation in paragraph 3 of the notice relating to the use of those areas. I recognise that the requirement relates to the use of this outdoor space in connection with the self-catering accommodation alleged in paragraph 5(B), but that allegation is specifically directed to the areas outlined in blue on the plan attached to the notice. Those areas are different to and separate from the area shaded yellow on that plan. In the absence of a specific allegation of a breach of planning control relating to the use of that outdoor space, it is not permissible to require a use in connection with the self-catering accommodation use to cease.
18. The requirement at paragraph 5(D) of the notice is to permanently remove from the land all building materials, all rubble and associated materials arising out of compliance with (A), (B) and (C). However, given that requirements (B) and (C) only require the cessation of a use, no building materials, rubble or associated materials would arise. The requirement is therefore defective in that regard.
19. Finally, the requirement at paragraph 5(E) of the notice is to comply with requirements (A), (B), (C) and (D) within 13 (thirteen weeks) from the date the Notice takes effect. Although there is nothing technically incorrect with this requirement, it is nonetheless entirely superfluous given that the time for compliance with the notice is set out separately in paragraph 6 of the notice.

20. Most of the defects identified above are minor and could be corrected or varied as appropriate without causing injustice to either party. It is the public interest to determine appeals expeditiously and, in other circumstances, I would have corrected and varied the notice to make that possible in this case. However, the uncertainty regarding the alleged breach of planning control at paragraph 3(II) is fundamental and could not be corrected without causing injustice to either the appellant or the Council. Similarly, I cannot be certain about the Council's intentions in relation to the requirement of paragraph 5(B) of the notice. If I attempted to vary that requirement, there would be a risk that the requirement as varied would not accurately reflect the Council's intentions in terms of remedying the breach of planning control. That could have significant implications through the provisions of section 173(11) of the 1990 Act, and would potentially cause injustice to the Council.

Conclusion on Appeal A

21. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control or the steps required for compliance. It is not open to me to correct the errors in accordance with my powers under section 176(1) of the 1990 Act as amended, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances, the appeals on the grounds set out in section 174(2) (a), (b), (c) and (f) of the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered. It is open to the Council to issue a fresh notice should it be considered expedient to do so.

Appeal B

22. This appeal relates to building C as identified in the PCN served on the appellant. The development for which planning permission is sought, and for which planning permission was refused, is the erection of a chalet to be used for ancillary accommodation to the manager's accommodation and for personal storage.
23. The proposed use is a different use to that for which planning permission was sought in the planning application deemed to have been made under the appeal on ground (a) in relation to Appeal A, had that fallen to be considered. The use for which planning permission sought under ground (a) was use primarily for the storage of linen and towels currently stored in the laundry room at Eden Lodge and Eden House, as well as for the storage of replacement mattresses and higher end replacement/spare kitchen utensils such as coffee machines, blenders, microwaves etc.
24. However, section 177(1) of the 1990 Act provides that planning permission may be granted in relation to the whole or any part of the *matters stated in the enforcement notice* (emphasis added). The storage of linen and towels currently stored at Eden Lodge and Eden House formed no part of the breach of planning control alleged in the notice. It follows that the use could not have formed any part of the application deemed to have been made under section 177(5) of the 1990 Act and that I could not have considered granting planning permission for that use under the appeal made on ground (a), if the appeal on ground (a) had fallen to be considered.

25. Nevertheless, storage in association with Eden Lodge and Eden House now appears to be the appellant's preferred use for building C. The appellant explains that, when the application now subject to this appeal was still under consideration by the Council, he sought to amend the description of development applied for from ancillary accommodation and storage for the manager to storage for the business. Whilst the Council agreed to the amendment in principle, the officer report conflates the two uses. In the event, the application was determined against the description of development originally proposed.
26. I have carefully considered whether I am able to substitute the appellant's preferred use of building C for the description of development originally applied for. However, I note that the application was subject to public consultation under the description of development originally applied for. Responses were received to that public consultation. The public consultation was not repeated for the amended description of development proposed. I therefore cannot discount the possibility that those who responded to the original public consultation would have expressed views on the proposed amended description of development, had they been afforded the opportunity to do so. Because I am not able to take those views (if any) into account, those potential respondents would be prejudiced. For that reason, I am not able to consider the proposed amended description of development in determining Appeal B, and must determine this appeal solely on the description of development originally applied for in the application and stated on the Council's formal Decision Notice.
27. I also have some difficulty with the description of development that is proposed. The development is described as the *erection* of a chalet to be used for ancillary accommodation to the manager's accommodation and for personal storage (emphasis added). However, the building was initially erected as one of four chalets to be used variously in connection with the main lawful use of the site, a separate holiday let and manager's accommodation. A retrospective planning application to retain those four chalets in their respective uses was refused in December 2019 (Council Ref: SL/2019/0615). I therefore consider that it would be more accurate to describe the development as the *retention* of a chalet to be used for ancillary accommodation to the manager's accommodation and for personal storage. I am satisfied that no party would be prejudiced by altering the description in that respect.
28. In that context, I consider the main issues raised by this appeal to be:
- whether the proposal is acceptable in principle having regard to relevant policies in the development plan, and
 - the effect of the proposed on the living conditions of the occupiers of neighbouring residential properties, specifically in relation to noise and disturbance.

The principle of the development

29. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise.

30. In the first reason for refusal, the Council cites two policies in its Development Management Policies Development Plan Document (DPD): policies DM15 and DM18. Pursuant to section 38(6) of the 2004 Act, it is convenient to consider the policies in the development plan against which the application was refused.
31. Policy DM15 relates to essential dwellings for workers in the countryside and provides, amongst other things, that dwellings in the open countryside for those working in agriculture or rural businesses who need to live at or near their place of work will be supported where there is a demonstrable essential need in relation to a permanent full time or equivalent worker, subject a number of criteria set out within the policy itself. These criteria include that an appraisal is submitted with the application which clearly establishes that there is an existing functional need for the proposed dwelling and the approximate size of the dwelling.
32. Policy DM18 relates to tourist accommodation, including new purpose-built self-catering accommodation. This policy provides that proposals for new build purpose built self-catering accommodation outside development boundaries will normally only be permitted in exceptional circumstances.
33. The appellant has not questioned the applicability of these two policies to the development for which planning permission is sought. However, it strikes me that there is an immediate tension between the two policies cited in the reason for refusal. On my reading, one of those policies (DM15) relates to permanent dwellings in the countryside. The other policy cited (DM18) relates to the provision of tourist accommodation. I have difficulty in reconciling the applicability of both those policies to the development proposed.
34. The use of building C for which planning permission is now sought is ancillary accommodation to the manager's accommodation and for personal storage. It is not for a new dwelling as such: planning permission was granted in June 2020 to retain buildings D and E as manager's accommodation (Council Ref: SL/2020/0108). The current proposal is more akin to an extension to the manager's accommodation previously approved. In my view, Policy DM15 cannot be said to be directly relevant to the development proposed under this application. I will therefore discount policy DM15 as not being directly relevant in this case.
35. This just leaves Policy DM18. However, I am not convinced that Policy DM18 is directly relevant either. That policy specifically relates, in part, to *new purpose-built self-catering accommodation* (emphasis added). Although building C was initially erected for the purpose of providing self-catering accommodation, that is not the use of the building for which planning permission is now sought. I will therefore also discount policy DM15 as not being directly relevant in this case.
36. I have not been advised of any policies in the development plan that would be directly relevant to the use of the building proposed. I therefore consider that there is no objection in principle to the use proposed.

37. The Council has not raised any objection building C on the character and appearance of the area. Similarly, the Inspector did not find any harm to the character and appearance of the area in dismissing an appeal against the refusal of planning permission the retention of 2 wooden chalets used in connection with the main lawful use of the site for ancillary holiday accommodation (APP/M0933/W/20/3246568)². Building C was one of those 2 chalets. I see no reason to take a different view.

Living conditions

38. The Council does not allege any harm arising from building C in terms of overbearing impact or loss of privacy. The occupiers of Feldgate consider that the development results in the overlooking of their property but, having viewed from within building C, I consider that any overlooking is incidental and does not result in an unacceptable loss of privacy.
39. In dismissing the previous appeal (APP/M0933/W/20/3246568), the Inspector concluded that the proposed holiday accommodation would harm the living conditions of the neighbouring residential occupiers (specifically the occupiers of the property known as Feldgate), with particular regard to noise and disturbance. It is, however, important to distinguish the facts which led to the Inspector's decision in that case, compared with the very different set of facts that are now before me.
40. The Inspector in that case was considering the use of two chalets as holiday accommodation (buildings B and C). The Inspector was considering two alternative uses for building C: one where it was proposed to be used ancillary to Eden House and one where it was proposed to be used as a separate holiday let. In overall terms, the Inspector concluded that the use of those buildings as holiday accommodation would result in an increase in activity close to the boundary with Feldgate, both in terms of the numbers of people and the timing and frequency of activity, and would contribute to cumulative adverse effects on the living conditions of the neighbouring residential occupiers.
41. However, the Inspector accepted that if Building C was let separately, the associated outdoor area would be likely to be used only by the low number of occupiers of Building C. On the other hand, at times when Building C was used ancillary to Eden House, the Inspector considered that the outdoor seating area could be used by larger numbers of people. My interpretation of the Inspector's reasoning that followed is that any adverse effects on the living conditions of the neighbouring residential occupiers would arise only in the latter scenario.
42. The proposal before me is very different in terms of the levels of activity that the use would generate if buildings B and C were used ancillary to Eden House. In my view, the proposed use is more akin to the scenario considered by the previous Inspector where Building C was let separately. Indeed, if anything, it would be a less intensive use.

² As originally submitted, that appeal was in relation to a total of four chalets. However, prior to the determination of that appeal, planning permission was granted by the Council for two of the chalets for use as managers accommodation. The Inspector therefore only considered the remaining two chalets for use as holiday accommodation.

43. The appellant is content restrict ancillary occupation by family and friends to a maximum of 30 days in any one calendar year. The appellant would be present when friends and family were in occupation, and would be in a strong position ensure that noise was kept to a minimum. At times when family and friends were not occupying building C, it would be used for personal storage, a use that would have minimal impact in terms of noise and disturbance. The use of the outside seating area to the west of building C would not be available to guests of either Eden House or Eden Lodge, which would also minimise any noise disturbance to the occupiers of surrounding properties.
44. I am therefore satisfied that the use of building C would be acceptable in terms of the impact on the living conditions of the occupiers of the surrounding properties. Provided, that is, that building C was used in accordance with the appellant's suggested restrictions.
45. Therein lies my difficulty with the proposal. The description of development is not, in itself, sufficient to control the use should planning permission be granted for it. In order not to have an unacceptable impact on the living conditions of the occupiers of the surrounding properties, the use would have to be controlled through the imposition of conditions. Each of those conditions would have to comply with the policy tests for the imposition conditions set out in the National Planning Policy Framework (Framework) and the Planning Practice Guidance (PPG). One of those tests is that the condition must be enforceable.
46. Although a condition restricting use of building C to accommodation ancillary to the manager's accommodation could be suitably worded, I perceive that difficulties would arise restricting occupation to family and friends. It would not be possible, for example, for the Council and/or local residents to know whether people occupying building C were family and friends of the appellant or fee-paying guests. The appellant's suggestion of maintaining a register of family and friends staying in the accommodation would run into the same difficulty: although a condition could be framed to require such a register to be maintained and then produced on the Council's request, on inspection of that register the Council would not know whether or not those recorded on it were family or friends rather than fee-paying guests.
47. Similarly, there would be no difficulty drafting a condition restricting use of building C as ancillary accommodation to a maximum number of 30 days in any one calendar year, as suggested by the appellant. However, given that building C is not readily visible from outside of the site, I perceive difficulties in the enforcement of that condition. Limiting the use to personal storage would also present difficulties with enforcement, and could only be achieved through regular inspections of the property. I am not persuaded that this would be a practical proposition.
48. I am therefore not convinced that conditions required to control the proposed use could be drafted that would accord with the policy tests set out in the Framework and the PPG, specifically that of enforceability. For that reason, controlling the proposed use through the imposition of conditions is not an option open me.

49. Should planning permission be granted without suitably worded conditions being in place, Building C could be used at a similar level of intensity to that which the previous Inspector considered would have an adverse effect on the living conditions of the occupiers of neighbouring residential properties. Without the ability to control the proposed use of Building C through the imposition of conditions, I conclude that the use would be contrary to Policy DM1 of the DPD. That policy requires, amongst other things, that all development delivers an acceptable level of amenity for neighbouring occupants.

Conclusion on Appeal B

50. I have found that the proposed development fails to comply with the development plan when read as a whole. I have not been made aware of any material considerations of sufficient weight, taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan. I therefore conclude that the appeal should be dismissed.

Formal Decisions

Appeal A Ref: APP/M0933/C/21/3268770: The enforcement notice is quashed.

Appeal B Ref: APP/M0933/W/21/3268781: the appeal is dismissed.

Paul Freer
INSPECTOR