The Planning Inspectorate

Appeal Decision

by Gareth Symons BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 08 February 2022

Appeal Ref: APP/J1860/C/21/3280054
Sabrina, Astley Burf, Stourport on Severn, Worcestershire, DY13 0RY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Graham Jackson against an enforcement notice issued by Malvern Hills District Council.
- The enforcement notice was issued on 18 June 2021.
- The breach of planning control as alleged in the notice is failure to comply with a condition imposed on a planning permission ref: 08/01272/FUL granted on 10 October 2008.
- The development to which the permission relates is: Demolition and removal of existing Chalet Sabrina. Erection of new Chalet Sabrina above highest design flood level).
- The condition in question is no 10 which states: The chalet hereby approved shall be occupied for holiday purposes only and shall not be occupied as a person's sole, or main place of residence.
- The notice alleges that the condition has not been complied with because, in short, the property is being occupied as a person's sole or main place of residence.
- The requirements of the notice are: Cease the use of the chalet as a person's sole or main place of residence (primary habitable living accommodation); Use the chalet for holiday purposes only.
- The period for compliance with the requirements is: Within 12 calendar months from when the Notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (e), (f) 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 (EN) is varied by deleting the words at section 5 "*Use the chalet for holiday purposes only*".

2. Subject to this variation, the appeal is dismissed, the EN 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. In legal grounds of appeal, such as under s174(2)(d) and (e), the onus to make out the case rests firmly with the appellant and the relevant test of the evidence is the balance of probability. The case made under the ground (f) appeal, in particular the personal circumstances cited, are matters to be considered as material considerations under the ground (a) appeal.

4. The appeal property's name is 'Sabrina'. I shall call it that hereafter.

The ground (e) appeal

5. For whatever reason, a first copy of the EN sent by post to the occupier of Sabrina was returned to the Council as undeliverable. To overcome that problem a copy of the EN was affixed to the gate of the property in a position clearly visible to anyone entering or leaving the site. A photograph showing the EN attached to the gate has been submitted, and in accordance with its powers under s173A of the 1990 Act the date that the EN became effective was extended by the Council to 6 August 2021.

6. It is confirmed that the appellant (the tenant) became aware of the EN and although the date of that has not been established by persons acting on their behalf, an appeal has been made within time with the permission of the owner of the building and in consultation with the appellant's immediate family. Although it is claimed that there has not been enough time to engage fully with the occupier as the appellant, and there may as a result be other matters to be considered, this is not a factor that would mean the service of the EN was defective. In any event, the appellant, via persons acting on their behalf, has had the rest of the appeal process to submit a statement of case setting out whatever information they wish me to consider under the various grounds of appeal, and to respond to the Council's statement. Whilst they have not done so, I cannot identify any prejudice to the appellant.

7. The appellant confirms that the owner of the building was also served with a copy of the EN and as a further safeguard the Council sent a copy of the EN by email to the owner's agent. The fact that the owner is/was abroad has no bearing and there is no claim by the owner that the EN was incorrectly served.

8. For the above reasons, I find that the EN was served as required and the ground (e) appeal therefore fails.

The ground (d) appeal

9. In breach of condition cases the relevant time limit for immunity from enforcement action under s171B(3) of the 1990 Act is after the end of the period of ten years beginning with the date of the breach. In this case, the EN was issued on 18 June 2021 and by virtue of s171A(2)(a) of the 1990 Act it is the issue of an EN that constitutes taking enforcement action. Consequently, despite the date that the EN became effective was pushed back due to the serving of the notice circumstances outlined above, the breach of the condition needs to have been occurring for ten years from when the breach began up until 18 June 2021. Therefore, the appellant needs to show that the breach started by no later than 18 June 2011.

10. The appellant asserts that Sabrina became habitable and occupied after 1 June 2011 but no later than 1 July 2011, which they say is apparent in the evidence provided to the Council in connection with appeal ref J1860/X/18/3203066 which was decided in 2018. Also, occupancy from the start has been as a sole or main residence. However, it is not precise enough, even when the test of the evidence is the balance of probability, to suggest that the breach began between two dates one month apart. There is, in view of the above, a fixed date that is key to success under this ground of appeal. Moreover, the evidence submitted with the earlier appeal, which related to an application for a Lawful Development Certificate (LDC), has not been supplied by the appellant. The Council has though supplied some of that LDC evidence.

11. In the supporting statement for the LDC application it is stated that "*the building was substantially complete on or before 10th July 2011".* Moreover, the Council has drawn attention to an email by the electrician who worked on Sabrina. He states that "*the house was completed and furnished 10/7/11….and at that time"* he believed that the previous owner's son *"had moved into the house".* An electrical completion certificate is also dated 10 July 2011.

12. The reference to being substantially complete "*before 10 July 2011*" could mean that it was in that state on 1 July 2011, thus making the building habitable. However, in the absence of anything else to support that assertion now, the evidence from the LDC application, as a matter of fact and degree, points towards a more likely completion and occupation being on 10 July 2011. The appellant has not responded to or explained the difference between what was said in 2017/18 and now in 2022.

13. Given the above, the appellant has not discharged the burden on them to show, on the balance of probability, that the breach of the occupancy condition had begun by 18 June 2011. Therefore, the ground (d) appeal also fails.

The ground (a) appeal – planning merits

14. The main issue is whether the original condition still fulfils a planning purpose having regard to development plan policies that seek to strictly control development in the open countryside.

15. Policy SWDP1 from the adopted South Worcestershire Development Plan (SWDP) is an overarching sustainable development policy that at criterion B sets out that planning applications according with the policies in the SWDP will be approved unless material considerations indicate otherwise. Policy SWDP2 from the SWDP establishes a development strategy and settlement hierarchy. At criterion C, open countryside is defined as any land beyond a settlement boundary where development will be strictly controlled and will be limited to only to certain types of development, such as rural workers dwellings. Being outside any settlement boundary means that Sabrina is in the open countryside for development plan purposes. Whilst Sabrina, as a dwelling is already there, the lifting of the condition would allow an unfettered open market dwelling in a location not countenanced by the SWDP development strategy.

16. Moreover, policy SWDP4 requires proposals to demonstrate genuinely sustainable travel choices and in accordance with the SWDP development/settlement hierarchy strategy to focus development largely within urban areas and settlements/villages that have good access to services to minimise travel movements. It has not been disputed that Astley Burf is a settlement with limited services and public transport provision. Whilst I recognise that occupation of Sabrina for holiday purposes would involve travel, I consider that the level of travel would be greater if occupied permanently because it would be likely to involve additional travel to services required for day to living such as schools, health provision and employment. Much of that travel, due to the site's location, would also probably be by private vehicles which is one of the least sustainable forms of travel, even though the current occupier does not have a car.

17. Although occupation of Sabrina as a second home by members of the same family for example may require a judgement about whether they were there for

holiday purposes based on the circumstances at the time, it seems to me that certain enforcement investigations could establish the type and levels of occupancy, including whether the dwelling was being occupied as a sole or main residence, in conflict with the other part of the condition. Therefore, I do not agree that the condition's requirement that Sabrina shall be occupied for holiday purposes only lacks definition and is unenforceable.

18. In view of the above, I find that condition 10 on planning permission 08/01272/FUL still serves a useful planning purpose and to lift it would conflict with the sustainable development aims of policies SWDP1, SWDP2 and SWDP4 from the SWDP. The proposal would not accord with the development plan taken as a whole.

19. I accept that dismissing the appeal will lead to the EN being upheld with the consequence that the occupier of Sabrina will be in breach of the occupancy condition. That will lead to them losing their home and risk the occupier potentially losing the support of their family. I further acknowledge that the uncertainty created by this appeal has had a detrimental impact on the mental health and well-being of the occupier which has concerned their GP. Nevertheless, the Human Rights Act rights engaged are qualified rights and a public authority may interfere with qualified rights to private and family lives, and their homes, where there is a clear legal basis for doing so and the action is necessary in a democratic society.

20. It has been held that interference may be justified if it relates to the regulation of land use using development control measures that are recognised as an important function of Government. In this case, there are several development control planning policies that the proposal conflicts with and to allow the lifting of the condition would be a clear departure from the development plan. Also, planning permission usually runs with the land, and it is rarely appropriate to provide otherwise. To impose a personal occupancy condition for the benefit of the current occupant would still mean that the property would be permanently lived in in an area that the development plan does not countenance.

21. I have also had regard to the fact that the EN has a compliance period of 12 calendar months from when the EN takes effect. That will be 12 months from the date of this decision. It seems to me that this is an appropriate timescale in which the occupier and their family can properly plan to deal with the consequences of needing to find elsewhere to live. Depending on the circumstances at the end of the 12 months, the Council also has the power to extend the compliance period if it was considered necessary. However, I would have no control over whether the Council would do that.

22. Taking all the above in the round, and in the exercise of my duty to have due regard to the circumstances of the person affected by this decision, in my view the interference with this home and the family lives concerned would be a justified and proportionate response.

23. Even if the Council cannot demonstrate a demonstrate a five-year supply of deliverable housing sites, the adverse impacts of granting planning permission arising from allowing the occupation of Sabrina as a dwelling unfettered by any occupancy restriction would significantly and demonstrably outweigh the benefits, when assessed against the policies in the National Planning Policy Framework taken as a whole. Therefore, the Framework and the other material considerations raised in this appeal do not indicate a decision other

than in accordance with the development plan. Accordingly, the ground (a) appeal fails.

The ground (f) appeal

24. An appeal on this ground is about considering whether 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

25. The EN is directed at a breach of planning control comprising non-compliance with a condition on the planning permission for Sabrina that seeks to ensure that it is occupied for holiday purposes only and thus not occupied as a person's sole, or main place of residence. The requirements of the EN correspondingly seek to cease the use of the chalet as a person's sole or main place of residence (primary habitable living accommodation) and to use the chalet for holiday purposes only. The purpose of the EN therefore is to remedy the breach of planning control under s173(4)(a) of the 1990 Act by making the development comply with the terms (including conditions and limitations) of the planning permission that was granted. It is therefore not excessive to require the occupation as a sole or main place of residence to cease.

26. However, there is no scope to require reversion to the lawful use or that another activity takes place. In this case, the EN cannot require that the chalet is used for holiday purposes only. A period of non-occupation, for example, could conflict with this requirement. The second requirement is therefore excessive, and I shall vary the EN by deleting it. Requiring that the use as a person's sole or main place of residence ceases, is sufficient to remedy the breach of planning control.

27. Based on the above, there is partial success on ground (f).

Conclusion

28. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Gareth Symons

INSPECTOR