The Planning Inspectorate

Appeal Decision

Inquiry Held on 14 and 15 June 2022
Site visit made on 15 June 2022

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 29 June 2022

Appeal Ref: APP/H1515/C/18/3214872
Land at the north east side of Ashwells Road, Pilgrims Hatch, Brentwood, Essex CM15 9SG (known as Karma Court)

- 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 William Lunnon against an enforcement notice issued by Brentwood Borough Council.
- The enforcement notice was issued on 28 September 2018.
- The breach of planning control as alleged in the notice is the making of a material change of use of the land from agricultural use to a mixed use of agricultural use and residential use and car sales and car storage use and also unauthorised operational development by the siting of a mobile home on the land which, given its degree of permanence, facilitates the unauthorised residential use, shown for the purposes of identification only on the attached plan and shaded brown, and also the siting of a portacabin which is used as an office for the car sales/car storage business on the land, shown for the purposes of identification only on the attached plan and shaded green, to facilitate the unauthorised material change of use of the land.
- The requirements of the notice are:
  1. Permanently cease the use of the land for residential purposes.
  2. Permanently remove the mobile home building (shaded brown on the attached plan) from the land, together with all fittings, fixtures and furniture associated with the residential use.
  3. Permanently cease the use of the land for car sales and car storage associated with the car sales use.
  4. Permanently remove the office portacabin building (shaded green on the plan) from the land, together with all fixtures, fittings and office equipment associated with the car sales/car storage use.
  5. Permanently cease the use of the land for private residential garden use, including the permanent removal of all domestic paraphernalia associated with the use of the land as private garden land.
- The period for compliance with the requirements 1, 2 and 5 is six months and the period for compliance with requirements 3 and 4 is one month.
- The appeal is proceeding on the grounds set out in section 174(2) (b), (d) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with variations.

The appeal on ground (b)

1. The ground of appeal is that the breach of control alleged in the enforcement notice had not occurred. With regard to this ground the appellant advances two main arguments. Firstly, that the Council is incorrect in regarding the siting of the mobile home and portacabin as operational development as they

are not buildings. Secondly, that the Council is incorrect in stating that there is a mixed use because the site is formed of two planning units; a small area in the south eastern corner which contains the mobile home and ancillary uses and the remainder of the site which is used for commercial storage with sales with no residual agricultural use on any part of the site.

2. Under s55(1) of the Act operational development may comprise a building, engineering, mining or other operation. With specific reference to a building operation, this may include demolition, rebuilding, structural alterations of or additions to buildings and other operations. Such operations are normally carried out by a person carrying out a business as a builder. Under s336 of the Act a building is any structure or erection, and any part of a building. Consequently, the key question to answer when considering whether or not the mobile home and portacabin are "buildings" is whether they have resulted from operations. Case law[1] indicates that whether something is a building depends on its size, permanence and degree of physical attachment.

3. Taking these factors into account I do not consider that either the mobile home or the portacabin are buildings. Both are of relatively modest size and, although they are connected to services (electricity, water and septic tank in the case of the mobile home and electricity and water in the case of the portacabin) neither are otherwise physically attached to the ground. In my judgement, no building operations have taken place and therefore in this regard it cannot be said that they are actually buildings. Furthermore, both could quite easily be removed from the appeal site without being taken apart. I accept that they would need to be disconnected from services and that a crane may be needed to lift and/or manoeuvre them, but they could easily be removed in a short period of time.

4. The Council also argues that the mobile home and portacabin have a degree of permanence in that, according to the Planning Contravention Notice (PCN) response dated 27 February 2017 they have been on site since 2015. However, this does not in itself mean that building operations have taken place and consequently, taking the factors together, and, as a matter of fact and degree they are not actually buildings.

5. Nonetheless, pursuant to s176(1) of the Act an enforcement notice may be corrected if there is no injustice to the appellant or local planning authority. Such power extends to correcting any defect, error or misdescription in a notice or vary its content. In this case, the Notice relates to both the material change in the use of the land and operational development comprising the siting of the mobile home and portacabin. It is very clear in the Notice that both the mobile home and portacabin are integral to the use of the land and, therefore, in accordance with case law[2] their removal is justified. As such, only relatively straightforward changes are needed to the Notice to remove reference to operational development in paragraph 3 (The matters which appear to constitute the breach of planning control) and remove the word "building" from requirements 2 and 4 as set out in paragraph 5 of the Notice (What you are required to do). Such changes would not extend the requirements of the Notice and, in this case, I do not consider that any injustice to parties would arise.

[1] Skerritts of Nottingham Ltd v SSETR & Harrow LBC (No. 2) [2000] JPL 1025
[2] Kestrel Hydro v SSCLG & Spelthorne BC [2015] EWHC 1654 (Admin), [2016] EWCA Civ 784

6. The appellant's second argument under ground (b) is that the site comprises two separate planning units. I have noted that this has not been suggested in any of the appellant's previous CLEUD applications and there does not appear to be any argument that the site was previously a single unit when used for agricultural purposes. However, the appellant's evidence now is that prior to the enforcement notice being issued the site was divided into two; one in residential use and the other in commercial use. The courts have held[3] that the planning unit should be determined by identifying the unit of occupation and whether there is physical and/or functional separation of primary uses as a matter of fact and degree. In that case Bridge J suggested three broad categories of distinction. Firstly, a single planning unit where the whole unit of occupation is used for one main purpose and any secondary activities are incidental or ancillary; secondly, a single planning unit that is in mixed use because land is put to two or more activities and it is not possible to say whether one is incidental to another; and thirdly, the unit of occupation comprises of two or more physically separate areas that are occupied for substantially different and unrelated purposes. In such a case, each area used for a different main purpose, together with any incidental activities, ought to be considered as a separate planning unit. In the *Ocado Retail Ltd* case[4] Holgate J emphasises that the identification of a planning unit is a case of fact and degree and also that occupation is a significant consideration as it signifies control of an area of land by an occupier.

7. I observed at my site visit that a fence has been installed on two sides of the mobile home but that does not in itself clearly distinguish the residential use of the site with commercial uses. Indeed, the site has a single access point and access to the mobile home is across other areas of the appeal site. The residential use is not contained within one specific area of the site but other parts of the site are used for residential purposes including the timber shed, storage containers and other parts of the wider site where the appellant parks his vehicles. These are not physically separated from areas where car sales and car storage take place. In addition, the evidence before me is that the utility building is used by users of the mobile home and commercial users.

8. In addition, although the evidence is that MV Cars are informal lessees of part of the site, the appellant owns and controls all of the land. There is no evidence of the terms of any lease that is in place and no evidence that MV Cars have exclusive possession of any particular part or parts of the site. Therefore, I conclude that based on the tests set out in case law and as a matter of fact and degree and planning judgement, there is one site.

9. There is one item of vintage agricultural machinery on site (a plough) but that is used for show purposes only and has no function in agricultural activity. The Council also argues that there is a direct link between the appeal site and the agricultural field to the east. That may be the case, but there is insufficient evidence before that there was agricultural use of the site at the time the Notice was served. As such, the assertion that alleges agricultural activity as part of the new mixed use of the site is incorrect. However, there is no argument that amending section 3 of the Notice, which would not expand the requirements of the Notice, would cause injustice to any party in this case.

[3] Burdle & Williams v SSE & New Forest RDC [1972] 1 WLR 1207
[4] R (Ocado Retail Ltd) v Islington LBC [2021] PTSR 1833

10. Therefore, subject to variations to the enforcement notice, the appeal on ground (b) does not succeed.

The appeal on ground (d)

11. The ground of appeal is that at the date when the Notice was issued, no enforcement action could be taken. Under ground (d) the burden of proof is on the appellant and the test is the balance of probabilities. Since I have already determined under ground (b) that the mobile home and portacabin are not "buildings" and therefore do not constitute operational development, the four year immunity period does not come into play in this case. In any case it is common ground that they had not been on site for four years when the Notice was served on 28 September 2018.

12. The time limit for a mixed use under s171B(3) of the Act is ten years beginning with the date of the breach of planning control. Also, for there to be immunity from action, the use must have been carried out continuously for ten years. Any break in continuity before lawful use is established stops the clock.

13. With specific reference to the residential use of the land, the evidence provided by the appellant is that the mobile home was moved onto the land on 2 April 2015 and it has been occupied for residential purposes since 5 April 2015. There is agreement between the two parties on that key matter, but there is disagreement with regard to what may or may not have happened prior to that date. The appellant's evidence on what happened is weak and there is no documentary evidence of what occurred in the form of tenancy agreements, utility bills or photographs of the site from ground level. There is no evidence that Council tax was paid before 1 May 2018. Letters from witnesses who have now sadly deceased suggest that a caravan may have been occupied on the site for a ten or eleven year period between 1990s to the early 2000s, but the evidence is not at all clear or indeed, whether or not it was continuous occupation. Of significance is the apparent gap between the occupation of the site during that period and the appellant's occupation in April 2015. The appellant has stated that there were other occupants, but there is a distinct lack of evidence to support this claim.

14. The aerial photography does not show any residential caravan, mobile home or other place of residential occupancy on the site until 2017. The appellant's witnesses' evidence seems to be that it was hidden under the canopy of a mature tree, but that does not satisfactorily explain why it suddenly became visible in 2017. I accept that some of the aerial photographs are not clear, but that does not adequately account for the presence of a mobile home which can very clearly be identified on the site after 2017. Therefore, with particular reference to the residential use, there may have been some historic residential occupancy on part of the site, but the extent of that occupancy is unclear and there is no evidence of residential use between around 2000 and 2015.

15. With reference to commercial uses, it is the appellant's case that there has been significant commercial use of the site for many years, including storage and sales of materials and storage of vehicles and equipment. However, business rates have only been paid since 11 November 2017 and the aerial photographs are inconsistent with the oral and written evidence given by the appellant and his witnesses. There may have been some storage of roof tiles and builder's materials during the 1990s as is evidenced by two different

CLEUD applications, but aerial photographs do not show such storage on the land.

16. Other than an unidentifiable white structure the aerial photographs show that the site is covered in grass with no evidence whatsoever of equipment, vehicles or even movement of vehicles across any part of the site. This remains the case in 2006, 2008 and 2010 but there is some evidence of piles of materials, but certainly no commercial activities. By 2013 the aerial photographs show that the grass cover has been reduced as is the case with the agricultural land to the east of the site. The imagery for 2014 tells a similar story with more materials on the site, but no vehicles. These images give no indication whatsoever of any scale of commercial of storage and even less of specific commercial storage of materials, vehicles and equipment described in the appellant's evidence. The evidence is far more aligned to the Council's comment that in January 2015 the site did not have the appearance of a commercial storage yard.

17. The appellant's evidence is that storage of building materials etc ceased around the time he purchased the site. Whilst it is not entirely clear whether or not there had been storage of building materials immediately prior to his purchase, it is clear that commercial use for the storage and sales of cars started at some point following the purchase. This is shown in aerial photographs dated 2017 and 2018. However, the evidence suggests to me that in 2015/2016 he was parking vehicles on the land but parking of vehicles and storage of vehicles is not Mr Lunnon's business and that such use by Bettercar Ltd started in October 2016 and that the office portacabin was installed on site on 29 August 2015. This demonstrates a gap in the continuity of commercial use because there is a material difference in parking private vehicles and commercial storage of vehicles.

18. In addition, there may have been some limited storage use across the site periodically over a period of time, but low key storage of the type that may have occurred is not necessarily inconsistent with the former use of the site for agricultural purposes. Even if such inconsistency did exist, the sales and storage that did occur were not on a scale so as to amount to a material use of the site having occurred over a continuous material period of time.

19. The current use of the site for car sales and storage has a very different character in the previous storage use on the site, if such a use did exist. The sales element of the use is materially different from the storage of vehicles for commercial purposes, even if the sales use constituted on line sales with only a few visits to the site from potential purchasers in contrast with the frequent visits described the appellant in relation to the alleged historic uses. Case law[5] confirms that the proportion of on line sales is capable of leading to a material change of use of land. Aerial photographs show that in 2017/2018 the intensity of use of the site was significantly greater when compared to use of the site previously which also demonstrates a material change in the use because the character of the use is materially different.

20. Therefore, the appellant's evidence does not discharge the burden of proof since there is very little documentary evidence and the relatively weak witness evidence is contradicted by other evidence available, including satellite photography.

[5] Snook v Secretary of State for the Environment (1977) 33 P & CR

The appeal on ground (g)

21. The ground of appeal is that the period specified in the notice falls short of what should be reasonably allowed. The appellant's case relates to requirements 1, 2 and 5 of the Notice which relate to ceasing the use of the land for residential purposes, permanent removal of the mobile home from the land, together with all fittings, fixtures and furniture associated with the residential use and ceasing the use of the land for private residential garden use, including the permanent removal of all domestic paraphernalia associated with the use of the land as private garden land.

22. The six months given would be sufficient to cease the residential and related uses. The appellant argues that the period is too short in the context of the reasonable housing needs of the family, the limited availability of suitable housing in the Brentwood area and the price of accommodation in the area. Therefore, it is suggested that 12 months should be allowed. The appellant indicates that additional time would be used to search for housing or a lawful site for the mobile home and, if it comes to it, to approach the Council for help in finding accommodation on the grounds of homelessness.

23. None of the appellant's statements, statutory declarations and letters submitted cover the appeal on ground (g) and of greater relevance is the lack of evidence to support the claims under ground (g) and justification for the additional time period being sought. Other than reluctant acceptance that the appellant and his son could move in with his parents who live nearby, there is no personal financial evidence, details of searches of alternative accommodation options or searches for alternative land for siting the mobile home. Furthermore, few details were given of what difference an additional six months would make.

24. As such the appellant has not clearly made a case that the six month period would conflict with the best interests of him and his son. Because Mr Lunnon's son is a child, in accordance with case law[6] his best interests must be treated under Article 8 of the Human Rights Act 1998, as a primary consideration. Article 8 states that everyone has a right to respect and family life, and their home, among others. However, these are qualified rights, whereby interference may be justified if in the public interest, but the concept of proportionality is crucial. In this particular case it is in the public interest and proportional to control the development that has occurred in order to protect the openness of the Green Belt and in the interests of protecting the character and appearance of the area.

25. That being the case, I agree that the Council's position strikes an appropriate balance between the appellant's rights and the wider public interest which, in this case, is the ongoing harm caused by the unauthorised development. The appeal on ground (g) does not succeed

Conclusions

26. For the reasons above I conclude that the appeal should not succeed. I shall uphold the notice with variations.

[6] Collins v SSCLG [2013] EWCA Civ 1193

Formal Decision

27. I direct that the enforcement notice shall be varied by:

a) the deletion from paragraph 3 of the words "agricultural use and";

b) the deletion from paragraph 3 of the words "operational development by";

c) the deletion from paragraph 3 of the ", given its degree of permanence,";

d) the deletion from paragraph 4 of ", given its size and degree of permanence on the site";

e) the deletion from the second from last section of paragraph 4 of the "built and";

f) the deletion from requirements 2 and 4 of paragraph 5 of the word "building"

Subject to these variations, the appeal is dismissed and the enforcement notice is upheld.

A A Phillips

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

John Dagg of Counsel — Instructed by William Lunnon

He called

William Lunnon
M Hayes
A Marven
R Laws
J Brodie
K Parker

FOR THE LOCAL PLANNING AUTHORITY:

Ned Helme of Counsel — Instructed by Brentwood Borough Counsel

He called

Richard Bates

INTERESTED PERSONS:

William Russell
William John Lunnon