



Appeal Decisions

Site visit made on 13 December 2022

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13TH JANUARY 2023

Appeal A Ref: APP/Y0435/C/21/3280983

Land at Pink Punters, 2 Watling Street, Bletchley, Milton Keynes MK2 2BS

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr F McMahon of Pink Punters against an enforcement notice issued by Milton Keynes Council.
 - The notice was issued on 7 July 2021.
 - The breach of planning control as alleged in the notice is (i) Without planning permission, unauthorised development (*sic*) reprofiling/terracing of the riverbank along the eastern edge of the land from the storage containers towards the Watling Street bridge in the approximate position shown coloured blue on the plan attached to the notice; and
 - (ii) Without planning permission, unauthorised development consisting of creation of hardstanding and erection of barriers/railings atop, in the approximate position shown coloured blue on the plan and as illustrated on the photograph, both of which were attached to the notice.
 - The requirements of the notice are: (a) Remove the unauthorised works as described above; and (b) Restore the ground and riverbank to its condition prior to the unauthorised development taking place.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (g) 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.
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Appeal B Ref: APP/Y0435/C/21/3280984

Land at Pink Punters, 2 Watling Street, Bletchley, Milton Keynes MK2 2BS

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr F McMahon of Pink Punters against an enforcement notice issued by Milton Keynes Council.
 - The enforcement notice was issued on 7 July 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the unauthorised development consisting of extension of the eastern wing of the main building towards the river and associated works to ground levels and the riverbank to facilitate the unauthorised extension, in the approximate position shaded blue on the plan and illustrated in the photograph, both of which were attached to the notice.
 - The requirements of the notice are: (a) Remove the extension described above; and (b) Restore the ground and riverbank to its condition prior to the unauthorised development taking place.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (g) 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.
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Appeal C Ref: APP/Y0435/C/21/3289093

Land at Pink Punters, 2 Watling Street, Bletchley, Milton Keynes MK2 2BS

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr F McMahon of Pink Punters against an enforcement notice issued by Milton Keynes Council.
 - The notice was issued on 22 November 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the placing of six steel shipping containers on the land.
 - The requirements of the notice are: (i) Cease the use of the containers and remove them from the land. (ii) Remove any supporting infrastructure and make good the land on which the containers have been installed.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.
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Decisions

1. Appeal A-The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely reprofiling/terracing of the riverbank along the eastern edge of the land from the storage containers towards the Watling Street bridge, creation of hardstanding and erection of barriers/railings atop in the approximate position shown coloured blue on the plan attached to the enforcement notice, on land at Pink Punters, 2 Watling Street, Bletchley, Milton Keynes MK2 2BS referred to in the notice, subject to the condition in the Schedule at the end of this Decision.
2. Appeal B-The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely extension of the eastern wing of the main building towards the river and associated works to ground levels and the riverbank to facilitate the extension in the approximate position shaded blue on the plan and illustrated in the photograph, both of which were attached to the enforcement notice, on land at Pink Punters, 2 Watling Street, Bletchley, Milton Keynes MK2 2BS referred to in the notice, subject to the condition in the Schedule at the end of this Decision.
3. Appeal C-The appeal is dismissed and the enforcement notice is upheld.

Appeal A

Ground (a) appeal

Main Issue

4. The main issue in this ground of appeal is whether the unauthorised works have increased the risk of flooding.

Reasons

Flood risk

5. The appeal site contains a substantial building in use as a night club with associated manager's accommodation. In the grounds between the building and the river Ouzel is an extensive split level hard surface providing ancillary vehicle parking and circulation areas. The enforcement notice attacks works

altering the levels and profile of part of the grounds on the lower level adjacent to the riverbank, including extending the hard surface by about 300 m², erecting a retaining structure, metal safety railings and an Armco-type barrier.

6. According to the Environment Agency (EA) flood map, the works are on part of the site which is in Flood Zone 3 and is therefore at risk of flooding. The approach to managing flood risk in Section 14 of the National Planning Policy Framework (the Framework) is to avoid inappropriate development in areas at risk of flooding by directing development away from areas at highest risk, but where development is necessary, making it safe without increasing flood risk elsewhere. Applications for development in flood risk areas must be accompanied by a site-specific Flood Risk Assessment (FRA) which shows how this approach will be met. As the works fall within the meaning of minor development in the Planning Practice Guidance (PPG): 'Flood risk and coastal change', there is no requirement to apply the sequential or exception tests.
7. The submitted FRA¹ concluded following a detailed analysis that the works have not adversely affected flow capacity or increased flood risk at the site or elsewhere compared to the pre-existing situation. The information in the FRA is credible, fit for purpose, proportionate to the degree of flood risk and it makes optimum use of the information available. As far as I was made aware, neither the EA nor the Lead Local Flood Authority have expressed further concern regarding an increase in flood risk in response to the FRA. Therefore, there is no firm evidence of the works having increased the risk of fluvial flooding.
8. The FRA also included details of a scheme of sustainable urban drainage (SuDS), designed to mitigate the increase in surface water run-off to the river arising from the works, in particular the hard surface extension. The scheme would restrict surface water run-off to the pre-existing rate over the entirety of the hard surface, not just the additional area created by the works. The scheme therefore represents an improvement over the pre-existing situation. The scheme includes provision of a sub-surface attenuation tank, additional drainage channels and means for capturing and restricting flows to the river. The design takes account of the increase in run-off over the lifetime of the works due to the effects of climate change. The above reflects advice on sustainable drainage systems in the PPG. Details of maintenance to ensure that the scheme continues to function effectively in future were included. In the absence of any clear and compelling technical evidence to suggest otherwise, there is no sound basis for doubting the efficacy of the scheme.
9. Therefore, provided the SuDS scheme is implemented and maintained the works have not increased the risk of flooding. It follows that the works accord with Policy FR1 of the Milton Keynes Plan (LP) as surface water drainage with acceptable flood control to attenuate run-off can be incorporated, whilst the FRA has assessed the flood risk to and from the works, demonstrating how the works are safe with no increase in flood risk elsewhere taking into account all forms of flooding and demonstrating no risk to the site or the surroundings, also taking climate change over the lifetime of the works into account. In addition, the provision of SuDS and the absence of adverse impact arising from the works on the functions and setting of the river and its associated corridor accords with LP Policy FR2.

Other matters

10. As set out in the Written Ministerial Statement (WMS), since 31 August 2015 intentional unauthorised development has been a material consideration to be weighed in the determination of planning applications and appeals. I

¹ Flood Risk and Drainage Report: Glanville Consultants December 2021.

appreciate that in undertaking the works the appellant was primarily motivated by considerations of safety and security. Given the site's lengthy planning history during the appellant's ownership however, I find it difficult to accept that they would have been unaware that the works probably required planning permission. In my view, it is highly likely that the appellant took a calculated risk by undertaking the works at a time when, as the site had to remain closed due to the COVID-19 pandemic, they could do so without having an adverse effect on business continuity and viability. It is also entirely possible that the appellant would have been mindful of the difficulties then facing the Council in terms of responding rapidly to alleged breaches of planning control. That a number of past planning applications for extensions to the building and other works at the site were made retrospectively reinforces a sense that the appellant is prepared to treat the absence of permission prior to commencing development as a routine business risk. As a result, it appears to me that undertaking the works amounted to intentional unauthorised development. This is a factor which weighs against the granting of permission.

11. Nevertheless, my understanding of the WMS is that its publication largely arose due to Government concern over the harm caused where development has been undertaken in advance of obtaining planning permission where there is no opportunity to appropriately limit or mitigate the harm that has already taken place. Consequently, the WMS is particularly concerned about the harmful effects of unauthorised development. If harm is caused intentionally and it is difficult to mitigate that harm during the normal course of the planning process due to the actions by or on behalf of an appellant, that will be a matter to which some weight can be attributed. The WMS is silent on where, as in this instance, unauthorised development has been carried out intentionally but there is an absence of planning harm. Moreover, the PPG: 'Enforcement and Post-Permission Matters' advises that enforcement action should usually be avoided where development is acceptable on its planning merits and the sole purpose of taking action would be to regularise the development. It is no longer disputed that the works can be made acceptable by imposing conditions. Therefore, having regard to the planning merits of the works, this matter carries limited weight.

Conditions

12. I shall impose a condition requiring implementation of the submitted SuDS scheme within six months and its maintenance thereafter. The condition is necessary to reduce the risk of flooding. Given the significant level of detail provided and an absence of any clear reason why the submitted scheme might not be acceptable, it is unnecessary to require its approval by the Council prior to implementation. The condition is drafted in the form set out below because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the implementation of the scheme, because the development has already taken place. The purpose and effect of the condition is therefore to ensure that the development may only remain if the appellant complies with its requirements.

Appeal B

Ground (a) appeal

Main Issue

13. The main issue in this ground of appeal is whether the unauthorised extension has increased the risk of flooding.

Reasons

Flood risk

14. The notice attacks a two storey extension of the building's eastern wing, adjacent to the riverbank. The extension is used for ancillary storage. According to the flood map the extension is also in Flood Zone 3. The FRA concluded that the extension has not increased the risk of fluvial flooding at the site or elsewhere. The bodies responsible for managing flood risk did not express concern regarding an increase in flood risk associated with the extension in response to the FRA. Therefore, there is no firm evidence of the extension having increased the risk of fluvial flooding.
15. Moreover, there is doubt over the accuracy of the flood map, when ground levels at the site in relation to the river are considered and when other areas at a similar ground level as the extension are not shown as being at risk from flooding. An Inspector expressed similar concerns over the accuracy of the flood map in a recent appeal concerning the containers positioned adjacent to the extension, which are at a similar ground level². The site is not located in a Critical Drainage Catchment identified in the Milton Keynes Surface Water Management Plan. Therefore, it is unclear whether the part of the site on which the extension stands is at greater risk from flooding in any event.
16. Given that the extension occupies an area of pre-existing hard surface, its erection has not significantly altered the pre-existing surface water drainage arrangements where, as I understand it, run-off discharged directly into the river. As a result, there has been no increase in run-off. The SuDS scheme would also direct run-off from the extension into the new drainage system, thereby also offering an improvement over the pre-existing situation in this regard.
17. Consequently, the extension has not increased the risk of flooding and there is no failure to accord with LP Policies FR1 and FR2.

Other matters

18. Similar considerations apply to Appeal A in respect of whether there has been intentional unauthorised development and the weight to be applied to that matter given the circumstances in this appeal.

Conditions

19. I shall impose a condition in line with that in Appeal A, for a similar reason.

Appeal C

Ground (c) appeal

20. The ground of appeal is that the matter alleged in the notice does not constitute a breach of planning control. It is for the appellant to show why their appeal on this ground should succeed, the relevant test of the evidence being on the balance of probability.
21. The shipping containers are finished a dark green colour. They are situated on part of the hard surface adjacent to the Appeal B extension, alongside the river. The containers are arranged end-to-end. The four ground level containers are supported by raised steel legs which are fixed to the ground. The two larger containers are stacked on top of the four ground level containers. During my visit, I observed that the containers housed props and other items associated with the night club. It was not disputed that the

² Appeal Ref: APP/Y0435/C/20/3263042.

containers are used for purposes ancillary to the primary use as a night club and there is no sound reason to find otherwise. In determining the recent appeal referred to above, the Inspector reached a similar conclusion.

22. At s55(1), the Act defines 'development' as including the carrying out of building, engineering or other operations in, on, over or under land. The definition of 'building operations' at s55(1A) of the Act is wide and includes other operations normally undertaken by a person carrying on a business as a builder. The definition of a 'building' in s336(1) of the Act includes any structure or erection and any part of a building, as so defined, but does not include plant or machinery comprised in a building. The Courts³ have identified three primary factors as being determinative of a building: that it is of a size to be constructed on site, as opposed to being brought onto the site ready-made; permanence, and; physical attachment to the ground. No one factor is decisive.
23. The ground level containers each have dimensions of around 6 m in length, around 2.5 m in width and around 3 m high, whilst the stacked containers each have dimensions of around 12 m in length, around 2.5 m in width and around 3 m high. With a total length of around 24 m, width of around 2.5 m and an overall height of around 6 m, the containers are therefore of significant overall size, individually and cumulatively.
24. I am given to understand that the containers were brought to the site by lorry individually in a pre-assembled state. Setting up the containers at the site would nevertheless have involved a significant degree of care and precision. For example, the containers would have required careful positioning to ensure that they rested properly on the raised steel legs, that they were correctly aligned with each other length-wise and so that they were stacked correctly to provide the necessary support and stability, as well as for any levelling up required so that the floor level of the stacked containers aligned with the first floor level in the adjacent extension. Lifting equipment including a crane was employed to move the containers into position. This all suggests that setting up the containers involved a significant element of activity akin to the on-site assembly of separate components and therefore was not dissimilar to building operations. It is not unreasonable to expect that it would have required a certain level of knowledge and expertise to set up the containers. As a result, the containers exhibit the characteristics of a building both in terms of their size, as well as in the nature of the activity involved in their setting up.
25. Permanence is required to be construed in terms of its significance in the planning context. The containers are constructed of permanent materials and as already noted above, they are of considerable size. Accordingly, the containers have made a significant physical change to the site. I am given to understand that the containers have already been in situ for a lengthy period, being set up in or around May 2020. Moreover, as there is no limit on how long they might remain, the physical change to the site made by the containers is more or less permanent. That the containers rest on raised steel legs fixed to the ground does not suggest any intention to move them around. Also, to move the containers it would be necessary to employ heavy lifting equipment and transport each one individually, in what would essentially be a reversal of the activity involved in setting them up. The process of moving the containers would entail an element of disassembly not unlike what would normally be involved in demolishing a building. Even if relatively straightforward, to complete this activity would take much longer than just a few minutes and would in all probability would occur over a much longer period. In any event, moving the containers within the site is unlikely to appreciably affect the

³ *Cardiff Rating Authority v Guest Keens* [1949] 1 KB 385 & *Skerritts of Nottingham Ltd v SSTER* (No 2) [2000] 2 PLR 102.

- physical change made. Consequently, although the containers are designed to be individually portable that does not reduce the significance of their presence in planning terms.
26. Furthermore, whilst the containers themselves have no physical connection with the ground, their weight, individually and in accumulation, is in all likelihood substantial. The overall weight is highly likely to be such that it affixes the containers to the ground. As a result, the containers also possess qualities of physical attachment to the site similar to those that might be associated with a building.
27. The appellant referred to a number of premises used for storage in the Council's administrative area, where no reference had been made to the setting up of shipping containers as involving building operations. In one instance, the Council had recently granted planning permission for change of use from agriculture to a 'self-storage shipping container facility'. However, the details provided do not show any consideration being required or given by the Council as to whether the development was solely a use of land or whether building operations were also involved. Furthermore, it was not clear whether containers at those premises were moved at intervals, for example to aid access or according to demand for storage. Moreover, my findings set out above are based on the available evidence of the individual site-specific facts and circumstances in this appeal. Consequently, the presence of containers at other premises carries little evidential weight. The Council were entitled to serve a 'second-bite' notice alleging that the setting up of the containers at the site involved building operations and the available evidence supports such a finding.
28. For the above reasons, as a matter of fact and degree and on the balance of probability, due to the containers' overall size, permanence and physical attachment to the ground they fall within the definition of a building and their setting up at the site has involved building operations within the definition of development. Planning permission is required for the carrying out of any development of land, having regard to s57(1) of the Act. No grant of planning permission for the development, either by a Development Order or in a grant of express planning permission following the submission of a planning application, was drawn to my attention. At s171A(1)(a), the Act defines a breach of planning control as carrying out development without the required planning permission.
29. Therefore, the appellant has been unable to show that the setting up of the containers at the site does not constitute a breach of planning control; the available evidence indicates otherwise. The ground (c) appeal fails.

Ground (f) appeal

30. The ground of appeal is that the notice requirements are excessive.
31. An enforcement notice can have the purpose of remedying the breach, including by discontinuing any use of the land or by restoring the land to its condition before the breach took place as provided by s173(4)(a) of the Act, or it can remedy any injury to amenity which has been caused by the breach as provided by s173(4)(b).
32. The purpose of the notice must be to remedy the breach. By removing the containers, the site would be restored to its condition prior to the breach taking place. As the notice cannot take away lawful rights, the requirements do not however prevent any future use of the site for storage ancillary to the primary use as a night club.

33. There is no obvious alternative to the notice requirements. Steps which stopped short of requiring all the containers to be removed from the site would not remedy the breach, as part of the building attacked by the notice would remain. Varying the notice by substituting the attached plan to reduce the area of land affected to no more than the footprint of the containers would not accurately reflect the extent of the relevant planning unit and could also conceivably defeat the operation of the notice.
34. Therefore, the requirements of the notice are not excessive, they are proportionate being the minimum that is necessary to remedy the breach. It follows that the ground (f) appeal also fails.

Conclusions

35. Appeals A and B-For the reasons given above I conclude that the appeals should succeed on ground (a) and planning permission will be granted. The appeals on ground (g) do not therefore need to be considered.
36. Appeal C-For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

Stephen Hawkins

INSPECTOR

SCHEDULE OF CONDITIONS

Appeals A and B:

- 1) Unless within six months of the date of this decision the submitted scheme for the surface water drainage of the site shown on drawing reference number 8210799-1200 Rev P2 has been implemented in full in accordance with the specified details the development hereby permitted shall be removed and the site restored to its condition prior to the development taking place. Upon implementation the surface water drainage scheme shall thereafter be maintained, with maintenance undertaken to accord in all respects with the schedule set out in paragraph 7.2 of the Flood Risk and Drainage Report prepared by Glanville Consultants, dated 1 December 2021.