



Appeal Decision

Site visit made on 15 November 2022

by S A Hanson BA(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 January 2023

Appeal Ref: APP/Q3115/C/22/3297770

Land adjacent to Island Reach, Wargrave Road, Henley on Thames, Oxfordshire RG9 3JD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mrs Rebecca Tison against an enforcement notice issued by South Oxfordshire District Council.
 - The notice, numbered SE17/713, was issued on 23 March 2022.
 - The breach of planning control as alleged in the notice is: Without planning permission, the fencing off of the Land to create a separate planning unit and the material change of use of that Land from use as garden land to an independent and separate leisure plot for use for leisure purposes with associated buildings, decking and other paraphernalia to enable and facilitate the leisure purposes use.
 - The requirements of the notice are to: (i) Cease the use of the Land for leisure purposes. (ii) Remove from the Land all buildings, decking and other paraphernalia associated with the leisure use. (iii) Dig up and remove from the Land any hardstanding/hardcore or other materials that has been laid either to enable the erection of the buildings or the decking. (iv) Remove all resultant debris and materials associated with undertaking steps (ii) and (iii) above. (v) Return the land affected to grass.
 - The period for compliance with the requirements is: 3 (three) months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (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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Decision

1. The appeal is allowed, and the enforcement notice is quashed. 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 the fencing off of the Land to create a separate planning unit and the material change of use of that Land from use as garden land to an independent and separate leisure plot for use for leisure purposes with associated buildings, decking and other paraphernalia to enable and facilitate the leisure purposes use on land adjacent to Island Reach, Wargrave Road, Henley on Thames, Oxfordshire RG9 3JD as shown on the plan attached to the enforcement notice.

Background

2. Rod Eyot is a small island in the River Thames. It consists of privately owned land which is divided up into residential plots. The appeal site is an L shaped parcel of land on the south side of the island which was formed from the subdivision of two neighbouring domestic gardens, Island Reach and Willow Cottage. Within the site is a summerhouse, with decking to the front and rear,

positioned on the waterfront. To the rear of the summerhouse is a pergola structure, a small wooden shed and there is a larger wooden shed on the northwest boundary. High level timber fencing separates the land from its neighbours.

The appeal on ground (b) and ground (c)¹

3. An appeal on ground (b) is a legal ground of appeal and is a claim that the matters alleged at Section 3 on the enforcement notice have not occurred as a matter of fact. The appeal concerns the circumstances leading up to, and at the time of the issuing of the enforcement notice. The appeal on ground (c) is a claim that the development does not constitute a breach of planning control. In pursuing an appeal on these legal grounds, the onus firmly rests with the appellant to show, on the balance of probabilities, that the matters stated in the notice have not in fact occurred and, if they have, do not constitute a breach of planning control.
4. The notice attacks the material change of use (MCU) of the land from garden land to an independent plot of land for leisure purposes with no functional association to a residential dwelling. The buildings on the land and the decking are purported to facilitate the leisure use and therefore, they are incorporated in the notice under an MCU rather than operational development.
5. The appellant disputes the alleged breach concerning the MCU to a leisure plot and considers it to be a misdescription or may not have occurred, or if it has it is not a breach of planning control. The gist of the argument is that they consider the use of the land for pleasure and enjoyment to be one which is similar to how one would use a domestic garden, albeit no longer incidental to a residential use. They consider the change to be not materially different as a matter of fact and degree.
6. They also argue that the erection of the fence in February 2015 to subdivide the garden land and the erection of the summerhouse, completed in July 2015, were permitted under the Town and Country (General Permitted Development) (England) Order 2015 as amended (the GPDO) and under s55(2)(d) of the Act², until the change in ownership took place. The appellant says that the fence was erected by the owners of Island Reach to keep building materials and extra soil separate while building Island Reach, which commenced in November 2014. They also say that the summerhouse was used by the owners of Island Reach before it, along with the land, was sold to the appellant.
7. The Courts have established that in order to determine whether there has been an MCU of the land the planning unit must be identified. The appeal site is physically and functionally separated from the adjacent residential properties. It falls in a different ownership and its primary use is one of leisure rather than residential. The site is physically separate and distinct and has been occupied for different and unrelated purposes since the land was severed and acquired by the appellant. As such, I consider that the land covered by the notice forms a single planning unit. I note that the appellant, in their statement at

¹ There is significant overlap between arguments advanced on grounds (b) and (c) and the appellant in their appeal has grouped them together due to the way the breach has been described, therefore I too will combine them.

² (2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land - (d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such.

paragraph 4.6, agrees that a new planning unit has been created resulting in uses no longer incidental to the residential use of the neighbouring properties.

Has a material change of use occurred?

8. While the meaning of 'use' is provided in s336(1) of the Act, the concept of an MCU is not defined in statute or any statutory instrument. The basic approach is that, for an MCU to have occurred, there must be some significant difference in the character of the activities from what has gone on previously, as a matter of fact and degree. It is necessary to consider whether there has been a change in the definable character of the use of the land in relation to the whole planning unit.
9. Although the use of the appeal site may be analogous to an extent with its former use as domestic garden where one would spend leisure time in a similar way, the primary use of the site differs. Formerly the land was part of the domestic gardens belonging to Island Reach and Willow Cottage. The land formed part of their domestic curtilages and was therefore in a residential use. Since the land has been functionally and physically separated from the two properties, it no longer forms part of a domestic curtilage. In the absence of an association with a domestic property, its primary use is no longer residential. The change in the use of the site from residential to a site that is simply visited for leisure purposes demonstrates that the land operates for a different function. The change is material in planning terms and the buildings and decking on the site facilitate the intermittent leisure use by providing shelter and storage and a place to relax.
10. While planning permission may not have been required to erect the fence, that is not relevant as the notice does not allege or concern the erection of a fence. However, the subdivision of the land in February 2015 divided the appeal site from the domestic garden land thereby removing it from the curtilage of Island Reach. In such circumstances, the plot would no longer benefit from permitted development for curtilage buildings under Part 1 Class E of the GPDO. Furthermore, such a building would only be considered permitted by the Order if it was required for a purpose incidental to the enjoyment of the dwellinghouse as such.
11. Given the very short time between construction of the summerhouse and sale I consider that to be indicative of the owner's intentions, and thus it is more likely than not that the summerhouse was constructed to facilitate the leisure use of the plot in anticipation of the sale of the land rather than being required for a purpose incidental to the enjoyment of the dwellinghouse. Moreover, I find it doubtful that one would use the appeal site for leisure purposes without there being somewhere comfortable to shelter in inclement weather. This is particularly so when accessibility to the site is by boat.
12. With regard to the storage sheds which are positioned to the rear of the summerhouse and to the northern end of the site, from the submissions and what I observed on site, these are buildings that have been erected since the land has been within the ownership of the appellant. While the replacement shed on blocks may have replaced a dilapidated structure, it is a new building. Both sheds would have required express planning permission because they are not within the curtilage of a dwellinghouse and therefore do not benefit from permitted development rights set out in Part 1 Class E of the GPDO.

13. Overall, I consider that the matters alleged have occurred and do constitute a breach of planning control. The associated buildings are integral to and solely for the purpose of facilitating the unauthorised use. The MCU of the land is development as set out in s55 of the Act and express planning permission is required.

14. The appeal on ground (b) and (c) therefore does not succeed.

The appeal on ground (d)

15. An appeal under this ground is made on the basis that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control alleged in the notice. The onus to prove the case lies with the appellant, with the case having to be made on the balance of probability.

16. Time limits after which no enforcement action may be taken against a breach of planning control are set out in s171B of the 1990 Act. Its terms that are relevant to this appeal are:

S171B(1) "Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed"

S171B(2) "Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach"; and

S171B(3) "In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach".

17. The appellant, in their ground (d) appeal considers that the development carried out, mainly consisting of the summerhouse and the larger shed, is not incidental to an MCU of the land and does not facilitate the leisure use. They argue that it is visible operational development in its own right and therefore, being constructed more than 4 years ago, immune from enforcement action under s171B(1) of the Act.

18. My attention has been brought to established case law *Murfitt*³ and *Kestrel Hydro*⁴. It was held, in *Murfitt*, that where a notice is issued in respect of an MCU, and works were carried out to facilitate the MCU, the notice may require that the works are removed in order that the site is restored to its previous condition and the breach is thereby remedied. The judgement in *Kestrel Hydro* set out support for the approach in *Murfitt*. It referred to works that might ordinarily be immune from enforcement action but were integral to an MCU; and determined that it was lawful for a notice directed against the MCU to seek their removal.

19. I have already considered this argument under grounds (b) and (c), concluding that the buildings are integral to and solely for the purpose of facilitating the

³ *Murfitt v SSE and East Cambridgeshire DC (1980) JPL 598*

⁴ *Kestrel Hydro v SoS [2016] EWCA Civ 784*

leisure use. The construction of the buildings on the land is not alleged in its own right or thereby subject to the four year rule. The notice is directed at the MCU and requires the removal of works integral to and solely for the purpose of facilitating the unauthorised use. Even if such works on their own were not to constitute development, or they would be permitted development or immune from enforcement, the notice can require that the land is restored to its condition before the change of use took place.

20. Therefore, the appeal on ground (d) fails.

The appeal on ground (a) and the deemed planning application

Main Issue

21. This is the effect of the development on the character and appearance of the island with particular regard to its relationship with adjacent plots and the special landscape character of the River Thames.

Reasons

22. The island of Rod Eyot is populated by a small number of private residential properties with private moorings. Some front the water to the south of the island and some to the north. A few have a waterfront position both to the north and south side. There is variety in the design of the buildings and variety in the size of the properties and the individual private outdoor space associated with each plot. Land to the northwest part of the island, where the appeal site is located, is more densely developed where it is likely that land has been developed through the subdivision of plots. Although the appeal site is modestly sized, it has a frontage to the river and is not significantly smaller than some of the other plots on the island.
23. While the appeal site lies within a visually prominent position on the south facing bank of the island of Rod Eyot, it is only the summerhouse which is visible. The remainder of the site being to the rear is not evident from the public realm and would be overlooked only by occupiers of neighbouring properties.
24. The summerhouse itself is viewed mainly by those using the river and those enjoying the open space on the opposite bank. What is seen is a modest sized timber building with a low level pitch roof and a small deck area to the front. In essence, it is viewed against a backdrop of buildings, and it is likely that it is regarded as an outbuilding to one of the residential properties on the island. Its design is such that it blends with the development on the waterfront, which ranges from the more traditional to modern structures with some raised off the ground and surrounded by decking. Some buildings sit cheek by jowl and protect views through while others provide gaps and open vistas.
25. Although the plot may seem contrived due to its limited width and L shape and having been created from neighbouring gardens, I did not get the sense of a cramped relationship with adjacent plots. The summerhouse to the front of the site is a suitable distance from Island Reach, and the pattern of the built form on this part of the island is undisturbed by this addition. The other structures within the site have a limited effect on the character and appearance of the built form on the island mainly due to their siting, but also their size and the nature of their purpose.

26. Overall, I consider that the MCU of use of the site to a leisure plot with associated buildings, decking and other paraphernalia, does not detract from, or fail to be in keeping with the character and appearance of the built form on the island and the special landscape character of this part of the River Thames.
27. The development respects the local context, is sensitive to the character of the surrounding area and is not harmful to the nature and quality of the landscape and waterscape and to the user enjoyment of the River Thames. To this extent the development accords with the essence of Policies ENV1, DES1 and DES2 of the South Oxfordshire Local Plan 2011 - 2035, Policy DQS1 of the Henley and Harpsden Neighbourhood Plan, the National Planning Policy Framework and the South Oxfordshire Design Guide 2016.

Other Matters

28. The development has generated comment from third parties, some supportive and others against. I have read each representation and have considered them carefully. However, in the light of my reasoning above, I am not persuaded to form a different opinion concerning the development that has occurred and which is the subject of the deemed planning application.

Conditions

29. The council has not provided any suggested conditions. While I am aware the summerhouse does contain basic facilities that may enable overnight stays, I consider that a condition to restrict such a use would not be deemed necessary because the use of the site for residential purposes would be an MCU and one that would require express planning permission. I consider it unnecessary to withdraw permitted development rights as these would be limited considering the use of the site is for leisure purposes only.

Conclusion on ground (a)

30. For the reasons given above, I conclude that the appeal on ground (a) and the deemed application for planning permission succeed. Consequently, the enforcement notice is quashed, and planning permission is granted on the deemed application.
31. The appeal on ground (g) does not fall to be considered.

S A Hanson

INSPECTOR