The Planning Inspectorate

Appeal Decisions

Site visit made on 10 January 2023

by M Madge Dip TP MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 April 2023

Appeal Ref: APP/A2470/X/22/3295641
Hazel Hill Farm, Wing Road, Morcott LE15 9DA

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Paul Bird against the decision of Rutland County Council.
- The application ref 2021/1350/CLE, dated 11 November 2021, was refused by notice dated 11 February 2022.
- The application was made under sections 191(1)(a) and 191(1)(b) of the Town and Country Planning Act 1990 as amended.
- The use and development for which a certificate of lawful use or development is sought is (1) The erection of a building and its subsequent change of use as a single dwellinghouse, (2) the conversion and change of use of an underground agricultural vegetable storage clamp to a basement for the dwellinghouse, (3) operational development comprising the installation of a septic tank and drainage system, and (4) the associated use of land as curtilage to the dwelling shown edged red on the application plan.

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the existing operations which are found to be lawful.

Applications for costs

2. An application for costs was made by Mr Paul Bird against Rutland County Council. This application is the subject of a separate Decision.

Preliminary matters

3. This appeal is travelling with appeal references APP/A2470/C/22/3295642 and APP/A2470/C/22/3295643. Those appeals are against an enforcement notice issued by the Council, following their refusal to issue the LDC the subject of this appeal.

4. There is no planning definition of a dwellinghouse. *Gravesham*[1] found that whether a building was or was not a 'dwellinghouse' was a question of fact, and the distinctive characteristics of a dwellinghouse were *'its ability to afford to those who used it…the facilities required for day-to-day private domestic existence'*. I saw that the structure to which this appeal relates contains cooking, washing, living and sleeping facilities. Whether the structure affords those who use it the facilities required for day-to-day domestic existence is not disputed, and I see no reason to disagree. The structure was in use as a dwellinghouse at the time the application was made.

[1] *Gravesham BC v SSE* (1982) 47 P & CR 142

Main Issue

5. The main issue is whether the Council's decision to refuse to issue the LDC was well-founded.

Reasons

6. The onus of proof is on the appellant to show, on the balance of probability, that the works and uses applied for have achieved immunity from enforcement. The relevant periods of immunity are 4 years for building operations and the material change of use of a building to a dwellinghouse. The period for any other breach of planning control is 10 years. The material dates are 11 November 2017 for building operations and use as a single dwellinghouse, and 11 November 2011 for any other breach of planning control. Any 4-year period is relevant for the use of a building as a dwellinghouse.

Erection of a Building

7. The structure's walls are constructed of pre-formed insulated timber panels. Each of the insulated timber panels was manufactured on site and then fastened together. Drawings and information provided show that the walls are fastened to the structure's timber base plate, which is fixed to the foundation using bolts and resin, and mechanically bonded to the walls of the underground vegetable storage clamp using concrete screws and chemical adhesive. Joists are laid on the base plate, with steel 'c' section cladding screwed to the outside of the joists and glued to the foundation base plate. Joists fixed to the insulated timber panels, are topped with insulation boards sandwiched between 2 layers of plywood deck and a rubber membrane to form the roof. There is nothing to show me that this method of construction did not occur.

8. Given the structure's means of construction, its physical attachment to the land and underground vegetable storage clamp, and its associated degree of permanence, I find that the structure is a building. Furthermore, the receipts and photographs, in conjunction with the various statutory declarations, show that the building was erected between January and April 2016. The building was therefore erected before the material date and no enforcement action may be taken in respect of it.

Use of the building

9. The building has a pedestrian access door, patio style glazed doors and other windows that are of a size and style commonly associated with residential buildings. The presence of the adjoining timber deck and external domestic paraphernalia compound its residential appearance, but I accept that these were added later. While the building is timber clad, it is not readily identifiable as an agricultural store from its external appearance.

10. The sworn declarations state that it was the appellant's intention to erect a new agricultural store, which could be used for the preparation of root vegetables and other crops to facilitate the production of preserves in the future. The photographs showing the various stages of construction do not show the completed interior of the building. There is also nothing to show how the timber building was originally laid out internally, whether water and electrical services were installed, or what other facilities had been installed to require the main waste pipe connection to the septic tank.

11. The statutory declarations of the appellant, Miss Holland, the appellant's father, and Mr Turner confirm that tools, agricultural machinery, irrigation pipe rolls, fertilizer, etc. were moved into the building in April 2016, after it was complete. While the appellant may be conversant with the planning system, failing to apply for planning permission for this building does not show that it was not first used as an agricultural store. There is nothing before me to show that the use of the building as an agricultural store did not occur.

12. The statutory declarations go on to state that in August 2016 the appellant converted the building into accommodation for himself and Miss Holland to live in. To facilitate the conversion, it is claimed that additional internal walls were built to provide a bedroom and a bathroom, the appellant's parents provided kitchen and bathroom 'components', hot and cold-water pipework was installed along with the heat tank located in the former underground vegetable storage clamp, and additional light switches and sockets were installed. While the appellant's evidence or that of other parties with an interest in the land does not have to be corroborated, it does have to be sufficiently precise and unambiguous. However, simply saying something is so, reduces its reliability. The lack of receipts for the kitchen or bathroom 'components' is to be expected as they were 'spares' provided by the appellant's parents. Receipts for building materials, plumbing or electrical materials or the heat tank would have strengthened the reliability of the statements relating to when the conversion took place.

13. The Council first received complaints that someone was living at the site in April 2017. While the Council failed to contact the appellant until August 2017, it was verbally confirmed that the appellant was living at the site, albeit in a 'mobile home'. The appeal parties agree that the 'mobile home' referred to is the structure, which I have found to be a building. The complaint and telephone conversion occurred before the material date, and they lend credence to the evidence contained in the statutory declarations.

14. The Instagram photographs, showing various Christmas trees from 2016 up to 2021 provide only a limited view of the building's interior. Invoices issued by Miss Holland, in her capacity as a freelance designer, do contain the site address, but this is not evidence of residential occupation. A commitment to pay Council Tax from 1 September 2016, again does not demonstrate residential occupation from that date.

Assessment of the use evidence

15. There is a lack of photographic evidence showing the internal completion of the timber building and its first use as an agricultural store. However, the statutory declarations of the appellant, family members and an interested party state that agricultural tools, equipment and fertilizer were stored within the building after its completion. In the absence of evidence to the contrary, I give the statutory declarations significant weight in respect of the use of the building as an agricultural store.

16. There is also a lack of photographic or other documentation to show when the works were undertaken to facilitate the material change of use to a dwellinghouse. Photographs of Christmas trees do not demonstrate residential occupation, as they are commonly erected in other buildings such as offices and shops. There are no invoices, receipts or other documentation to support the statements in the statutory declarations that the conversion to a

dwellinghouse took place in August 2016 and that it has been used as a dwellinghouse since 1 September 2016.

17. However, the Council's receipt of a complaint in April 2017 that someone was living on the site is unlikely to have been made lightly. The foundation for suspecting that someone was living on the site is unlikely to have been seeing the building erected, as that had occurred approximately a year earlier. The appellant confirmed to the Council in August 2017 that he and Miss Holland were living on the site, notwithstanding the misdescription given to what they were occupying. While not corroborating that the building was occupied as a dwelling from 1 September 2016, it does show that the building was, more than likely being occupied as a dwellinghouse from at least April 2017.

18. The appellant's father's statutory declaration refers to him and his wife occupying the dwelling for one week each year to give the appellant and Miss Holland 'time off'. The statutory declarations from friends refer to occasionally helping around the farm and seeing that the appellant and Miss Holland continue to live on site. Specific details of the dates or frequency of visits may not be provided, but in the absence of any evidence that the appellant and Miss Holland could have been living elsewhere, I give this moderate weight.

19. Taking all these factors together, I find the evidence sufficiently precise and unambiguous to demonstrate, on the balance of probability that the conversion to a dwellinghouse took place before the material date and that it has been used since as a dwellinghouse, without significant interruption. No enforcement action may be taken in respect of the material change of use from an agricultural store to a single dwellinghouse.

Use of the underground vegetable storage clamp

20. The underground vegetable storage clamp (the clamp) was constructed with planning permission in 2012. It consisted of a concrete underground chamber, accessed via a staircase enclosed within a timber building. The clamp and the building were erected as two separate building operations, years apart. It is not claimed that the building was erected as an extension to the clamp. The clamp may be located partly beneath the new building, but there is no internal means of access between them. While physically attached to one another, as a matter of fact and degree, in my judgement they remain two separate buildings.

21. A 'basement' is a floor of a building which is partly or entirely below ground level. The clamp is below ground level, but it is not a floor within the same building that contains the dwellinghouse. It is not therefore a basement to the dwellinghouse. The clamp does not contain all the facilities for day-to-day domestic existence. It does however contain equipment incidental to the use of the new building as a dwellinghouse, and ancillary domestic paraphernalia. A material change of use of this building from agriculture to purposes incidental to a dwellinghouse has therefore occurred. The relevant period to achieve immunity from enforcement action is therefore 10 years.

22. Given the appellant's contention that the building has been used as a dwelling since August 2016, the material change of use of the clamp to an incidental domestic store could not have occurred before the new building was first used as a dwellinghouse. The change of use of the clamp to an incidental domestic store therefore occurred after the material date. Enforcement action may be

taken in respect of the material change of use of the underground vegetable storage clamp to an incidental domestic store.

Septic tank and drainage system

23. The appellant asserts that the septic tank and drainage system were installed in 2010 to serve the toilet facilities located in the main barn. No evidence is provided to show when these engineering operations were carried out. However, it is likely that toilet facilities would have been required to serve those employed in the agricultural activities taking place on the land. The logical place to locate such facilities would have been the main barn.

24. A drainage connection from the building to the septic tank was installed as part of the build process. Given that I have found that the building was erected before the material date, the drainage connection from the building to the septic tank was also installed before the material date. In the absence of any evidence to the contrary, on the balance of probability, I find that the septic tank and drainage system were installed before the material date. No enforcement action may be taken in respect of the septic tank and drainage system.

Curtilage

25. An irregular shaped area surrounding the building is edged red on the site location plan and it is claimed that this is used as curtilage to the dwellinghouse. Notwithstanding the stance taken by the Inspector in APP/D0840/X/09/2103602, 'curtilage' is not a use of land, it is a legal concept usually applied when determining whether something is permitted development or not. The supporting statement advises that part of the red edged area is used for parking and access associated with the use of the building as a dwellinghouse, and the rest is kept as lawn/garden. I find it likely therefore that, rather than 'curtilage', the appellant is seeking to establish whether the red edged area is used for purposes incidental to the use of the building as a dwellinghouse.

26. The appellant acknowledges that the red edged area is not demarked by any physical feature but claims it *'is easily identified as land that is not 'in use' in the same way as the rest of the site is given to agriculture, the grass is mown and its proximity to the dwelling demonstrates it is incidental and enjoyed as such'*. I saw that the area between the building and the main barn is used by pedestrians and vehicles accessing both the dwelling and the main barn, polytunnels and other parts of the land holding. The area of mown lawn also forms part of a larger area of mown lawn. I saw no discernible difference in the appearance of the land within the red edged area and the land immediately adjoining it. The red edged area is not being used for the growing of produce or other essentially agricultural activity, but then neither is all the land outside the red edged area.

27. It may be preferable to have an area of land identified around the building to be used for purposes incidental to the use as a dwellinghouse. However, I have been provided with insufficient evidence to show how this land has been used for incidental purposes throughout the time that the building has been used as a dwelling. The appellant has therefore failed to show, on the balance of probability, that the red edged area has been used for purposes incidental to the use as a dwellinghouse.

28. For the above reasons, and on the balance of probability, the timber building was erected and first used as an agricultural store, that the building was converted into a dwellinghouse and occupied as such since, and that the installation of the septic tank and drainage system all occurred before the material date. The evidence relating to the use of the clamp and the use of the red edged land for purposes incidental to the use as a dwellinghouse, however, lacks precision and is ambiguous.

Deliberate concealment

29. In *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15, the Supreme Court held that the time limits in s171B should not apply in cases of positive deception designed to avoid enforcement action within those time limits. It was also held in *Bonsall v SSCLG and Jackson v SSCLG [2015] EWCA Civ 1246* that Parliament did not intend to remove the effect of the decision of the Supreme Court in *Welwyn Hatfield* in relation to deliberate concealment, but intended the Planning Enforcement Order procedure as an alternative, and additional, means of permitting enforcement action outside the normal time limits in cases of deliberate concealment, thereby being consistent with the legislative objective of strengthening local planning authorities' enforcement powers. The Council relies on *Welwyn Hatfield* to support its refusal of the LDC.

30. The Council contends that as a result of deliberate concealment of the building's means of construction, the period to take enforcement action has not expired and the appellant should not benefit from the concealment on public policy grounds. The Council considers that the appellant was conversant with the planning system, that the building was sited so as to be hidden from public view, and that the appellant purposefully referred to the building as a 'mobile home', benefitting from permitted development rights while other building operations were on going.

31. The principles on deception and public policy derived from *Welwyn Hatfield* are: that positive deception is a matter integral to the planning process; that deception was directly intended to undermine the planning process; it did undermine that process: and, the wrong-doer would profit from the deception if the normal limitation period were to enable him to resist enforcement.

32. The intention of the appellant was originally to erect an agricultural store, which I have found to have occurred. That agricultural store has since been converted into a dwellinghouse. The Council was first made aware that the appellant may have been living at the site in April 2017. Despite some initial difficulties communicating with the appellant, telephone contact was made in August 2017. It is not disputed that the appellant advised the Council that he and Miss Holland were living in a mobile home while he was carrying out repairs and other works on the land. The Council knew the appellant had previously occupied a caravan for similar purposes in a similar location, but the appellant confirmed that they were not occupying the same caravan.

33. The Council attended a site meeting in September 2019 and the structure that the appellant was living in was inspected. The structure's size and the presence of 'lifting cleats' may have given the impression it was 'mobile'. However, enquiries could have been made as to how the structure was brought to site, which would have revealed that it had been built on site. This site meeting was within the 4-year time frame when the Council could have pursued enforcement action.

34. Given that the appellant erected the building as an agricultural store, subsequently telling the Council that the converted building they were living in was a mobile home is a misleading statement. That statement could have successfully prevented discovery if no further investigation was carried out. However, while the appellant's statement may have clouded the Council's judgement as to whether the building was 'mobile', the site meeting in September 2019 provided an opportunity to discover the breach of planning control.

35. The appellant's failure to register for Council Tax is not an act of deception nor is it integral to the planning process, although it could be regarded as ancillary to a plan of deception. The failure to apply for planning permission for the erection of the agricultural store or its subsequent change of use does not represent an act of deception. In my judgement, these acts indicate that the appellant was seeking to maintain a low profile to avoid detection.

36. I do not condone the actions of the appellant in failing to apply for planning permission for the building, or its subsequent use as a dwellinghouse. I believe that there would have been sufficient understanding by the appellant for the need for planning permission. Indeed, the appellant had obtained planning approval previously for the main barn, polytunnel, additional vehicular access and customer car park. The planning system is only effective where abuse of the system does not lead to an advantage.

37. The facts of this case are that there has been concealment of the erection of an agricultural store and its subsequent change of use to a dwellinghouse. The erection of the agricultural store was difficult to detect due to its position behind the main barn and the high boundary hedgerow. The installation of metal sheeting to prevent access for rats to the wooden floor supports also concealed how the structure is fastened to the ground and the clamp. Furthermore, 'lifting cleats' are not something commonly found on a building. I therefore have some sympathy with the Council's position.

38. However, while I conclude that there has been concealment of the erection of an agricultural store and its subsequent change of use to a dwellinghouse, I consider on the balance of probabilities that this has not represented positive deception in the planning process as set out in the *Welwyn Hatfield* case. S171 (B) (1) and (2) sets out the time limits for taking enforcement action against operational development and a change of use of any building to use as a single dwellinghouse and the appellant should not be disentitled to this provision of planning law.

39. The Council served an enforcement notice on 25 February 2022 in relation to the erection of the timber building and the material change of use from agricultural use to a mixed use of agriculture and residential occupation. Regardless of the outcome of the appeal against that enforcement notice, it was not in force at the time the application for an LDC was made.

Conclusion

40. For the reasons given above I conclude, on the evidence now available, that the Council's refusal in part to grant a certificate of lawful use or development in respect of the erection of a building and its subsequent material change of use to a self-contained dwellinghouse, and the installation of a septic tank and drainage system was not well-founded and that the appeal should succeed to

that extent. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

M Madge

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 11 November 2021 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and hatched in black on the plan attached to this certificate, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The agricultural store was erected and subsequently used as a single dwellinghouse, and the septic tank and drainage system were installed before 11 November 2017, the material date.

Signed 11 April 2023

M Madge
Inspector

Date: [ ]
Reference: APP/A2470/X/22/3295641

First Schedule
The erection of a building and its subsequent material change of use to a self-contained dwellinghouse, and the installation of a septic tank and drainage system.

Second Schedule

Land at Hazel Hill Farm, Wing Road, Morcott LE15 9DA

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 11 April 2023

by M Madge

Land at: Hazel Hill Farm, Wing Road, Morcott LE15 9DA

Reference: APP/A2470/X/22/3295641

Scale: Not to Scale