
Appeal Decisions

Site visit made on 9 March 2023

by Nick Fagan BSc (Hons), DipTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 May 2023

Appeals A & B Refs: APP/P2114/C/21/3285537 & 3285538

Appletree Barn, Appleford Lane, Whitwell, Isle of Wight, PO38 2PH

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended. The appeals are made by Mr David Heath & Mrs Teresa Jayne Heath respectively against an enforcement notice issued by Isle of Wight Council.
 - The enforcement notice was issued on 14 September 2021.
 - The breach of planning control as alleged in the notice is failure to comply with Condition 3 imposed on planning permission ref P/01012/16 granted on 16 September 2016.
 - The development to which the permission relates is described as: 'Variation of condition 2 on P/00181/16 – TCP/07826/L to allow alterations to approved holiday accommodation', the original description being: 'Demolition of outbuilding; proposed unit of holiday accommodation'.
 - The condition in question states: 'The building hereby permitted shall only be occupied for holiday purposes and shall not be used for any other purpose, including as permanent or ancillary residential accommodation.'
 - The reason given is: 'To protect the tourism economy in line with Policy SP4 (Tourism) of the Island Plan Core Strategy.'
 - The notice alleges that the condition has not been complied with 'because the approved holiday accommodation known as Appletree Barn is being occupied on a permanent basis.'
 - The requirement of the notice is: 'To cease the use of Appletree Barn as shown edged red on the attached plan, for permanent or ancillary residential accommodation.'
 - The period for compliance with the requirement is 6 months.
 - The appeals are proceeding on the grounds set out in section 174(2)(a), (c), (f), 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.
-

Appeal C Ref: APP/P2114/W/21/3285619

Appletree Barn, Appleford Lane, Whitwell, Isle of Wight, PO38 2PH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr and Mrs D Heath against the decision of Isle of Wight Council.
 - The application Ref 21/00504/RVC, dated 5 March 2021, was refused by notice dated 11 May 2021.
 - The application sought planning permission for: 'Removal of conditions 3 and 4 on P/00181/16 [dated 6 April 2016] restricting the premises to holiday accommodation.'
 - Condition 3 states: 'The building hereby permitted shall only be occupied for holiday purposes and shall not be used for any other purpose, including as permanent or ancillary residential accommodation.'
 - The reason given for the Condition 3 is: 'To protect the tourism economy in line with policy SP4 (Tourism) of the Island Plan Core Strategy.'
-

- Condition 4 states: 'The Operator and/or manager of the holiday cottage hereby permitted shall maintain a comprehensive up-to-date register listing occupiers of the holiday cottage hereby permitted, their main home addresses and the dates of occupation at the site. The register shall be made available to the Local Planning Authority for inspection following reasonable notice.'
 - The reason given for Condition 4 is: 'To ensure that the holiday lodges [sic] would continue to be used as holiday accommodation in the interests of the tourism economy and to comply with the aims of policy SP4 (Tourism) of the Island Plan Core Strategy.'
-

Decisions

1. In respect of Appeals A and B, it is directed that the enforcement notice is corrected by substituting the appellants' appeal site plan (Appendix 1 of its Statement of Case) for the plan currently attached to the notice.
2. Subject to this correction, the appeals are dismissed, the enforcement notice 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.
3. Appeal C is dismissed.

The Notice

4. The appellants argue that the plan attached to the notice is incorrect because it is out of date in that the building on the land shows the outline of the original stable block rather than the correct outline of Appletree Barn, the dwelling completed in 2017 the subject of the notice, and that consequently the requirement to cease the use of Appletree Barn for permanent or ancillary residential accommodation is defective.
5. I disagree. The red outline of the appellants' (Appendix 1) appeal site plan and the notice's plan show exactly the same piece of land. The fact the notice shows the outline of the original stable block does not make it defective because the notice refers to 'Appletree Barn', the dwelling which replaced the stable block on that part of the land.
6. Nonetheless, I acknowledge that the appellants' Annex 1 Plan is more accurate and that it could and should be substituted for the old plan. This can be done without any injustice to the appellants because they have been able to fully address the Council's reasons for issuing the notice in these appeals.

Appeals A & B

Ground (c)

7. Ground (c) is that the matters stated in the notice – in this case the alleged breach of condition 3 of P/0102/16 – do not constitute a breach of planning control.
8. The condition restricts the dwelling to use for holiday purposes and specifically prevents its use for permanent or ancillary residential occupation. As the Concise Oxford English Dictionary states, a 'holiday' is 'an extended period of recreation away from home'. On the appellants' own admission, they have been permanently living in it since late 2018 (a year after it was built/completed) and registered it as their place of residence for the purposes of the electoral register in November 2019. They say that they have no other place to live unless and until they sell this dwelling.

9. Consequently, they are not themselves using it for holiday accommodation and it is not being let out to any other holidaying occupants. Self-evidently there is therefore a continuing breach of the condition because to qualify as holiday accommodation, the dwelling can only be occupied by people who permanently live elsewhere, as reinforced by Condition 4 of permission P/01012/16, which requires a register of holiday occupiers listing their dates of occupation and their permanent addresses.
10. Whilst the appellants may well have no intention of living in Appletree Barn indefinitely, they have done so for several years already and if the Council had not issued the notice, such unauthorised occupation would become immune from enforcement action in due course. The fact that condition 3 does not restrict the occupation of the dwelling to a commercial holiday let operation does not help the appellants' case; on the contrary, it simply reinforces the point that occupation of it for non-holiday purposes by anyone – including them – is a clear breach of the condition.
11. For these reasons there is therefore clearly a breach of planning control and the appeals under ground (c) must fail.

Ground (a)

12. Ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged.
13. The Council accepts that it does not have a 5-year supply of deliverable housing sites and that consequently its spatial strategy policies, in particular Policies SP1 (Spatial Strategy) and SP2 (Housing) of the Island Plan (adopted in 2012) are out-of-date. It also accepts that there is a need and demand for housing within the Island's Wider Rural Area, within which the site lies. I accept that the appeal dwelling would in principle contribute towards satisfying such a need. I give this considerable weight in terms of the presumption of sustainable development and the objective of significantly boosting the supply of homes set out respectively in paragraphs 11 d) and 60 of the National Planning Policy Framework (NPPF).
14. Nonetheless, the site is a considerable distance from local facilities predominantly situated in Whitwell, Rookley, Niton, and Godshill. It is approximately 2½ to 3½ miles, on the appellants' admission, to two doctors' surgeries (including pharmacies), three post offices and three general convenience stores. But these facilities are only accessible via rural lanes, including Appleford Lane, that are narrow, winding, unlit and lacking any pavements.
15. The nearest bus stops are on the main road next to Fairfields and Holden Farm but I observed that the sign at these bus stops states: 'For Buses that run on School Days Only', which implies that the only available services are for school buses, despite the appellants' claim that drivers can stop for members of the public. Even if public buses do actually run along this road, to reach these bus stops would involve a walk either down narrow Appleford Lane or along the public footpath to Holden Farm. Both are unlit and the footpath was very boggy and almost impassable at points when I walked down it. Consequently, the

necessary day-to-day facilities including grocery shops are only practically accessible via private car journeys.

16. The appellants state that there are approximately 20 dwellings and 8 self-contained holiday units situated within the local area, including Little Dolcopice Farm previously owned by them adjacent, Lower Dolcopice Farm, Great Appleford Farm and the farms listed above. But the appeal dwelling is clearly located in an isolated rural area of undulating farmland dominated by St Catherine's Down to the southwest within the Isle of Wight Area of Outstanding Natural Beauty.
17. NPPF paragraph 80 states that the development of isolated homes in the countryside should be avoided. The word 'isolated' in this sense simply connotes a dwelling that is physically separate or remote from a settlement¹, which is clearly the case here; the series of freestanding farms and isolated dwellings in the local area cannot by any stretch of the imagination be called a settlement, nor can this property and the next door Little Dolcopice Farm dwelling even realistically be called a cluster of dwellings. Unlike the appeal decision referred to me by the appellants in Chillaton in West Devon², where the appeal site was behind a row of eight semi-detached houses 700m from a village down a lit level road, Appletree Barn is considerably more isolated.
18. The appellants argue that granting permission for permanent residential occupation would comply with NPPF paragraph 80 c) – re-use of redundant or disused buildings – because they have tried and failed to sell it with the holiday occupancy conditions restricting its wider use. However, the dwelling would only be redundant as holiday accommodation in terms of paragraph 80 c) if it has been adequately marketed as per the requirements of Island Plan Policy SP4 (Tourism).
19. Policy SP4, although it supports sustainable growth in high quality tourism including accommodation, allows the loss of tourism bed spaces 'where it can be demonstrated that the use is no longer viable and that the premises/site has been marketed for at least 12 months at an appropriate price.'
20. Explanatory paragraph 5.166 of the Island Plan uses the following criteria to establish the viability of tourist accommodation:
 - a. Proof of marketing for sale at a reasonable market price (for a minimum of 12 months).
 - b. Evidence of attempts to save or reposition the business.
 - c. Evidence of business performance when set against local and regional benchmarks, such as the levels of occupancy relevant to South East average.
 - d. Evidence of professional and competent management.
21. In terms of criterion a, the appellants maintain that the dwelling has been marketed at a reasonable price for at least 12 months. They document that Country Homes marketed the property between January and June of 2019 and

¹ As per the judgement in *Braintree DC v SSCLG, Greyread Ltd & Granville Developments Ltd* [2018] EWCA Civ 610

² APP/Q1153/W/20/3245715, allowed 20 July 2020

Fine & Country since then up to the present time, albeit the latter has removed it from online marketing since January 2022.³

22. Both agents say they placed the property on the market at a 20% discount to reflect the holiday occupancy condition. However, that is unclear for the reasons raised by the Council, in particular as set out in the Council's joint appeal statement and in its pre-application advice ref G.0042.21⁴, as detailed below.
23. The holiday home can either be used as a holiday home by the appellants or it can be run as a business offering holiday lettings, as it was for about the first year following its completion in November 2017. The appellants, for understandable personal reasons, have been occupying it as their permanent home since November 2018 and have been trying to sell it in order that they can buy on the Island a permanent dwelling free of any restrictive occupancy conditions. It is currently and has been since January 2019 on the market for £595,000.
24. Having inspected the property and been able to attest to its high quality of accommodation and the attractiveness of the site and locality within which it sits, I would nevertheless question whether this price, allegedly discounted by 20% of market value due to the holiday occupancy condition, is actually realistic. That is because the property is in effect a two double-bedroom house, albeit one that is well designed with high quality finishes. The Council pointed out in mid-2021 that a number of houses were then for sale on the Island with a greater number of bedrooms that were considerably cheaper, even without the application of a discount for the restrictive condition.
25. I accept that those houses for sale may have been very different in terms of the quality of their accommodation or the attractiveness of their location, but the point is that it is the market that determines the price that any property will finally sell for. The fact that Appletree Barn has failed to secure a buyer at that asking price or indeed at all, signifies that the price it is being advertised at is likely to be too high. Being advertised at too high a price will put off many would-be buyers from even looking at it in the first place.
26. As the Council officer made clear in his email to the appellants' planning agent on 28 July 2021, taking into account all the agents' guide prices of £625-650,000, then without the holiday occupancy restriction the appeal property would have a potential market value of at least £775,000. It is certainly beyond the Council's powers, and beyond mine, to force the appellants to dispose of it at an undervalued price. But, as I set out above, its value, with the holiday occupancy restriction, will be determined by the market, whatever any number of agents value it at.
27. I am also conscious that the appellants let out the property for commercial lets, between November 2017 and May 2018. But it was only commercially let out 8 short times during this period. I agree with the Council that this was probably because it was not marketed very effectively as a holiday let – it was not advertised via any local popular tourism accommodation companies, but only in two tourism-unrelated newsletters, in the restroom of Goldman Sachs (not a

³ As per the letters from both these agents attached as Appendix 1 to the Planning Statement from BCM dated February 2021, submitted with the planning application re Appeal C

⁴ Attached at the end of Appendix 3 – Post-determination Correspondence with the Council – to the appellants' Grounds of Appeal re Appeal C

tourism business) and at the local Chale Green convenience store. None of these marketing routes would have been likely to be very successful in attracting many bookings. For these reasons I conclude that its viability as a commercial holiday letting operation has not been adequately tested.

28. I agree with the appellants' point that they do not have to let the dwelling out for commercial holiday lets, since it could be occupied by them for holiday purposes. But, first, they are not doing so – they are occupying it as their main dwelling. Second, they argue⁵ that it does not stack up as a trading asset since, even if its capital value were only £595,000 (as opposed to the agents' median guide price of £627,500), the return (yield) on commercial holiday lets would only be 2.7% rather than a typical yield rate of 7% applicable to the leisure industry sector.
29. Of course, that financial viability analysis is dependent on the property's capital value, which, as I have indicated above, is likely to have been considerably overvalued, which therefore undermines its conclusions. In any case, as the appellants say, there is no requirement to operate it on such a trading basis. Furthermore, the appellants should have been aware of all of this when they considered the investment, secured planning permission for the holiday dwelling in 2016 and built it in 2017, especially since the rental values for such prime holiday accommodation on the Island have increased markedly since that time, in part driven by the Covid-19 pandemic. Additionally, even if a commercial let trading business at the property did not reach a typical 7% yield rate in the leisure sector, that does not mean that it would not still be a profitable business, particularly if it was marketed effectively.
30. The pandemic is also relevant in terms of the marketing period. Although the property has been marketed at £595,000 since January 2019, a large part of this marketing period was adversely affected by the pandemic in that the lockdown periods would have considerably diminished the periods of time in which prospective purchasers or potentially interested parties were able to view the property. So, as well as my concerns at the price the property was marketed at, there are also questions as to whether its marketing outside the Covid-19 pandemic restrictions has actually been of sufficient length.
31. In summary, in terms of whether the property has been marketed for sale at a reasonable market price for a minimum of 12 months (sub-paragraph a. of Island Plan paragraph 5.166), I conclude that it has not for the above reasons.
32. The appellants maintain that they do not have to satisfy sub-paragraphs b, c and d because they do not have to let Appletree Barn out for commercial lets. As set out above, whilst the appellants could live in Appletree Barn whilst on holiday, that is not how that have been occupying it since November 2018. These other sub-paragraphs continue to be relevant in terms of the assessment of whether the property is viable as tourism accommodation. The fact that it has never been adequately let or marketed as commercial holiday accommodation only serves to confirm that the appellants have not demonstrated it is unviable for holiday accommodation per se.
33. Accordingly, granting planning permission for Appletree Barn as a permanent dwelling without a condition restricting its use to holiday accommodation would conflict with Island Plan Policy SP4, which aims to support growth in high

⁵ Via the Hose Rhodes Dickson financial viability of Appletree Barn as a trading asset, dated 19 October 2021

quality tourist accommodation – as this property provides – throughout the calendar year and thereby boost the Island's economy, which is dependent to a large extent on such tourist accommodation.

34. The appellants' argument that there are plenty of other tourist accommodations in the area is self-defeating and contradictory because if the unjustified loss of this dwelling was to be allowed on such a basis, that would justify the approval of the loss of every such subsequent application for other holiday occupancy dwellings in order to ensure consistency of decision making by the Council, as the appellants have argued should be the case here because the Council has allowed other such examples.
35. Since there is no compliance with Policy SP4, the dwelling is not redundant as holiday accommodation and so its loss as such is not justified by exception c) of NPPF paragraph 80. Furthermore, in terms of the dwelling's inaccessible rural location remote from day-to-day services except via the use of private car journeys, allowing its use for non-holiday purposes would be contrary to NPPF paragraph 79 since it is located distant from nearby villages. Although the Council's lack of a 5-year housing land supply means that Island Plan policies SP1 and SP2 are out-of-date, that does not mean that the purpose of the Plan's spatial strategy is irrelevant. It is still highly relevant because failure to comply with such policies would mean failure to comply with NPPF paragraphs 79 and 80, which means, in this context, with the NPPF as a whole.
36. In essence, Appletree Barn, completed as recently as November 2017, was only allowed in this remote countryside location because it was purpose-built high-quality tourist accommodation. It would simply not have been allowed otherwise. Since its unviability as tourist accommodation has not been demonstrated, there is no reason to grant planning permission for it for permanent (non-holiday) residential use, because that would not comprise sustainable development.
37. In terms of the tilted balance set out in NPPF paragraph d) ii, the adverse impacts of such unsustainable development would significantly and demonstrably outweigh the very modest benefit of providing an additional dwelling to the stock of unrestricted permanent dwellings on the Island, which does not have a 5-year housing land supply at present. The appeal on ground(a) therefore fails.

Ground (f)

38. Ground (f) is that 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.
39. The appellants argue that the Council should have drafted the notice to require compliance with Condition 3 rather than requiring the cessation of the residential use of Appletree Barn, because residential use is the lawful use. However, what the notice requires, in Section 5, is to cease its use for permanent or ancillary residential use, rather than just residential use. That is exactly what is presently occurring, contrary to Condition 3. Accordingly, the steps required by the notice do no more than require compliance with Condition 3 and so do not exceed what is necessary to remedy the breach of planning control.

40. The appeals on ground (f) do not therefore succeed.

Ground (g)

41. Ground (g) is that the notice's compliance period falls short of what should reasonably be allowed.

42. The appellants argue that the timeframe to sell the property and buy another place to live is too short, given that they claim they are unable to purchase another property until the appeal site has been sold, and accordingly seek a 12-month compliance period.

43. I am unclear why it is necessary for the appellants to sell Appletree Barn before looking for and making an offer on their new chosen dwelling. It is of course common for sellers to make offers to buy another house once their property is on the market and so I see no need for the appellants to pre-sell Appletree Barn before they look for another property; peoples' former and new dwellings are customarily sold and bought simultaneously. I do of course acknowledge the appellants' loss of their previous chosen property of choice because of the would-be vendor withdrawing their offer on the appeal property. However, if it was more competitively priced the appellants would be likely to receive more offers in the future and there would be more likelihood of one of these proceeding to completion than occurred in the past.

44. I note that the appellants' estate agent is not currently marketing the property online, allegedly because of the complaints from neighbours and because of the service of the notice. But neither is a reason not to market it effectively, especially since the appellants maintain that they must sell it to buy another dwelling to live in permanently on the Island. It seems to me that the appellants require some spur to enable them to sell it as soon as practically possible. I am confident that if it was marketed at a more realistic price, a buyer would soon be found.

45. In any case, even if the appellants had not managed to complete the sale of Appletree Barn and purchase of another property within 6 months, the Council would, I submit, be very unlikely to immediately prosecute them for breach of the notice if they had taken substantial steps to market the appeal property at a realistic price, especially if that had resulted in multiple viewings and hopefully some offers to buy it. Given that it is necessary to establish the effective marketing of the property at a more realistic price as soon as possible, I consider that 6 months is a sufficient period.

Human Rights

46. In terms of the appellants' human rights, I am not convinced that they would be homeless if they don't succeed in selling Appletree Barn within 6 months. I understand that they don't want to live in their Newport flat because of their concern for the elderly tenant and the fact that they cannot keep their animals there, though that option clearly remains because they own that flat. But I also understand that they sold their property in France after they relocated back here in 2018. They are likely therefore to have sufficient funds to at least rent another property in the interim period before they sell Appletree Barn, should that take longer than 6 months.

47. In any case, the holiday occupancy restriction imposed by Condition 3 is a necessary, legitimate and proportionate interference with Article 8 (right to

respect for private and family life) and Article 1 of the First Protocol (protection of property) of the Human Rights Act 1998 because adopted planning policies in the Island Plan and the NPPF apply a presumption in favour of sustainable development, including restricting new dwellings in isolated countryside locations like this, that benefit the wider public interest in a democratic society.

Appeal C

48. As set out in the headings above, Condition 3 in this appeal is the same as Condition 3 in Appeals A and B because Conditions 3 and 4 in permission P/00181/16 are the same as Conditions 3 and 4 in permission P/01012/16. Consequently, my above reasoning in relation to ground (a) in the enforcement appeals applies equally to this appeal, which should likewise be dismissed.
49. Additionally, as the Council has pointed out, the *Finney*⁶ judgement made clear that applications to vary or remove conditions under Section 73 (or 73A) of the Act cannot legally be used to vary the 'operative' part of a planning permission. Operative in this sense in effect means any substantive variation to the description of the development. In this case the original description of the development specifically referred to the appeal property as a 'unit of holiday accommodation'. This is clearly the 'operative' part of the development since if the reference to holiday accommodation in the description, enforced by Conditions 3 and 4, had not been included, the permission would not have been granted. Consequently, because of *Finney*, I would be unable to allow this appeal, even if that was justified by the facts of the case.
50. Appeal C is dismissed for these reasons.

Conclusion

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

Nick Fagan

INSPECTOR

⁶ *Finney v Welsh Ministers & Carmarthenshire CC & Energiekontor (UK) Ltd* [2019] EWCA Civ 1868; [2020] JPL 524