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## Appeal Decisions

Site visit made on 23 January 2024

**by S A Hanson BA(Hons) BTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date 18 April 2024**

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### **Appeal A: APP/G1630/X/23/3330942**

**Foxhill, Plot 19 Warren Fruit Farm, Evesham Road, Greet, Gloucestershire GL54 5BN**

- 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.
  - The appeal is made by Mrs Rachel Keen against the decision of Tewkesbury Borough Council.
  - The application ref 23/00242/CLE, dated 9 March 2023, was refused by the Council by notice dated 13 September 2023.
  - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
  - The use for which a certificate of lawful use or development is sought is the change of use of an agricultural building to residential use C3.
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### **Appeal B: APP/G1630/C/23/3327305**

### **Appeal C: APP/G1630/C/23/3327306**

**Plot 19, Warren Fruit Farm, Evesham Road, Greet, Gloucestershire GL54 5BN**

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended. Appeal B is made by Mrs Rachel Keen and Appeal C is made by Mr Graham Keen against an enforcement notice issued by Tewkesbury Borough Council.
  - The notice, ref 22/00216/ENFB was issued on 12 July 2023.
  - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the building and land edged red on the attached plan, from agricultural to residential use.
  - The requirements of the notice are to:
    1. Cease the residential use of the building.
    2. Cease the residential use of the Land and;
      - a. Remove all residential and domestic paraphernalia associated with the residential use of the land including but not limited to:
        - i. Washing machine
        - ii. Washing Line
        - iii. Garden Furniture
        - iv. TV Aerial
      - b. Remove from the land all items and materials resulting from compliance with steps 1 and 2.
  - The period for compliance with the requirement is: 6 (six) months.
  - The appeals are proceeding on the grounds set out in section 174(2)(d). 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) have lapsed.
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## **Decisions**

### **Appeal A**

1. The appeal is dismissed.

### **Appeals B and C**

2. It is directed that:
  1. the notice be corrected by deleting the breach of planning control at part 3 and substituted with: "Without planning permission, the material change of use of the agricultural building, hatched black on the attached plan, to a single dwellinghouse."
  2. the requirements at part 5 of the notice be deleted and varied by substituting them with:
    1. Cease the use of the building as a single dwellinghouse.
      - a. Remove all residential and domestic paraphernalia from the land including but not limited to:
        - i. Washing machine
        - ii. Washing Line
        - iii. Garden Furniture
        - iv. TV Aerial
      - b. Remove from the land all items and materials resulting from compliance with step 1.
  3. Subject to the correction and variation the appeals are dismissed and the enforcement notice is upheld.

### **Preliminary Matters**

4. The LDC application sought to determine whether the residential use of the agricultural building was lawful. The reasons for issuing the notice refer to four-years which relate to a change of use of any building to use as a single dwellinghouse (SDH) (s171B(2) of the Town and Country Planning Act 1990 as amended (the Act)). The appellants' and Council's submissions reflect this and therefore I consider that the terms of the notice should be confined to the building. By correcting the notice and omitting the land from the allegation there would be no injustice caused to either party<sup>1</sup>. The requirements of the notice would need to be varied accordingly.
5. The appeals relate to the matter that at the date when the application for the LDC was submitted or the date when the enforcement notice was issued, no enforcement action could be taken in respect of the material change of use (MCU) of the building to an SDH. Accordingly, it seems sensible to consider the appeals in one decision.
6. An application under s191(1)(a) of the Act seeks to establish whether any existing use of buildings or other land is lawful at the time of the application.

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<sup>1</sup> Section 171(1) of the Act

Section 191(2)(a) and (b) sets out that uses and operations are lawful at any time if: a) No enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and b) they do not constitute a contravention of any enforcement notice then in force.

7. A certificate of lawful use or development (LDC) is not an application for planning permission and the planning merits of the matter applied for do not fall to be considered. The decision is based strictly on factual evidence, the history and planning status of the site in question and the application of relevant law or judicial authority to the circumstances of the case. Evidence to support the case must be sufficiently precise and unambiguous and the onus is on the appellant to show that, on the balance of probabilities, the use would have been immune from enforcement action on the date of the application.
8. The main issue concerning the first appeal in the banner heading is whether the Council's decision to refuse to issue an LDC was well-founded. This turns on whether the appellant can show that the residential use of the building has continued for 4 years prior to the date of the application, that is 9 March 2023, without any other intervening uses, so as to be immune from enforcement action in accordance with s171B(2) of the Act. Section 171B(2) provides that 'no enforcement action may be taken in respect of any change of use of any building to use as a single dwellinghouse after the end of the period of 4 years beginning with the date of the breach'.
9. The appeal on ground (d) is that at the time that the notice was issued, it was too late to take enforcement action. As set out above, under s171B(2) the period for taking enforcement action is four years, beginning with the date of the breach. The notice in this case was issued on 12 July 2023, so to succeed on ground (d) the appellants would need to demonstrate that the alleged breach took place before 12 July 2019, and continued for a period of four years, during which the Council could have taken enforcement action at any time<sup>2</sup>.
10. Once it has acquired lawfulness, it would be too late for the Council to take enforcement action so long as the use is not subsequently abandoned, superseded by an MCU, or a new planning unit is formed<sup>3</sup>. In legal grounds of appeal such as this, the burden to make the case rests with the appellant and the test is one of a balance of probabilities.

## **Appeal A (the LDC appeal) and Appeals B and C on Ground (d)**

### **Reasons**

#### *The appellants' case*

11. The appeals relate to a wooden cabin building. There is no dispute that the structure is a building and has been on the land since around 2008. The building benefits from a generous area of decking which is covered by the extended roof and enclosed by railings with steps to the front. The building has electricity and water and is connected to a septic tank. The internal space is modest providing limited space for living with one room housing the kitchen,

<sup>2</sup> *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226

<sup>3</sup> *Panton & Farmer v SSETR & Vale Horse DC* [1999] JPL 461

living area and bedroom and a separate shower room. Within a lean-to section to the side there is space for domestic storage and white goods. The decking to the front provides additional living space and an area for domestic storage.

12. The appeal site, Plot 19, was purchased on 15 June 2022 by the appellants and occupied in a residential capacity from 1 August 2022. The appellants claim that prior to their involvement, the building had been continuously occupied on a residential basis from 19 July 2015 to 21 August 2019, a period of more than four years. After that, the building remained empty and unused between August 2019 and April 2022. It is the appellants' case that four years of residential use had been established by August 2019 and the building had been put to no other use until it was occupied in a residential capacity once more in April 2022. Thus, their claim is that the lawful use of the building as a SDH has been established and the breach of planning control, as alleged, is immune from enforcement by virtue of s171B(2) of the Act.

### *The evidence*

13. The appellants have provided copies of statutory declarations (SD) and copies of licences signed by some who are said to have resided in the building since July 2015. Copies of the licences are titled 'property licences to occupy the agricultural land' and refer to the use of the land for agricultural use only and that the 'mobile shed' (referred to in the notice as 'the building') is to be used only in conjunction with the agricultural use of the land and not for permanent residential use.
14. From 19 July 2015 to 3 October 2016 the building is said to have been occupied by Mr H. A signed notarised SD dated 29 March 2023 declares that Mr H (and his partner) lived at Plot 19 and farmed the small holding. The SD states that Plot 19 was Mr H's only residence at that time. A copy of the licence to occupy the agricultural land is signed and dated 19 July 2015. An animal health registration form dated 12 May 2016 registers that chickens were being kept on the land. A letter from the Rural Payments Agency dated 5 April 2016 confirms that a County Parish Holding (CPH) number and Single Business Identifier had been allocated to the business address Plot 19.
15. From 10 October 2016 to 30 October 2016 Mr McC is said to have resided in the building in association with the agricultural use of the land. The only document provided is a property licence for Mr McC signed on 10 October 2016.
16. During the period between 12 November 2016 and 25 October 2018 Mr T is said to have inhabited the building in association with the agricultural use of the land. The evidence provided in support of this is a photograph of a signed statement dated 19 May 2023 from Mr T in which he claims to have lived at the 'cabin' on a permanent basis. The statement is headed 'statutory declaration' but does not include reference to the Statutory Declarations Act 1835. Furthermore, the statement has not been witnessed by a solicitor despite including a Spanish legal firm's address. A photograph of Mr T's passport accompanies the documents.
17. A notarised SD dated 2 August 2023 declares that Plot 19 was the full-time residential address for Ms S and that she lived at Plot 19 from 1 November 2018 until 21 August 2019. A signed copy of the property licence dated 2 October 2018 is also provided. The licence is recorded as having been

terminated on 20 August 2019 due to the threat of enforcement action on the grounds of minimal agricultural activity.

18. From August 2019, the appellants state that the residential use of the building ceased due to the threat of enforcement action. Nevertheless, it is claimed that by that time, the building had been used as an SDH for more than 4 years, with minor gaps in between occupants. The evidence provided by the appellants is considered to demonstrate that an MCU had occurred, and the building had been occupied as an SDH for a continuous four-year period prior to the LDC application and prior to the date of the notice. Thus, the appellants consider that lawfulness of the building (as sought by the LDC application) had been established and that immunity from enforcement action had been gained.

#### *Analysis of the presented evidence*

19. There are two SDs that are signed, dated and witnessed for the periods between 19 July 2015 and 3 October 2016 and between 1 November 2018 and 20 August 2019. There are also signed licences for these periods. While I find the SDs vague and very limited in detail considering the time that the parties were said to occupy Plot 19, I do afford them weight. However, I cannot afford weight to the SD for Mr T who was said to have lived at Plot 19 from 12 November 2016 and 25 October 2018. This is because the SD is not witnessed by a legal representative. Furthermore, although copies of licences have been provided for others, one has not been provided for Mr T.
20. There is also a significant gap between 3 October 2016 and 12 November 2016 when it is claimed that Mr McC occupied the land between 10 October and 30 October. Although there is a signed licence, there is no cogent evidence to show that he occupied the building for residential purposes. I note that an undated letter from a close friend has been provided stating that "Mr McC" lived at Plot 19 during October 2016, however the writer refers to the gentleman by a different name. This does not provide any certainty that the building was being used as an SDH.
21. Aside from the SDs and licences, a photograph (said to have been taken on 16 August 2018) shows the rear end of the building with a flue projecting from the roof, albeit in a different position to its current location, and a TV aerial. Although the flue and aerial are domestic features, there is no evidence to show that the building was being lived in at that time. Another photograph dated 5 June 2019 shows the side and front of the building. It is noted that the use is recorded by the Council as 'residential' although a word in brackets has been redacted. I note that in this photograph the 3 drainage pipes for the kitchen and bathroom, which I observed on the side of the building at the time of my visit, are not in place. This casts some doubt concerning the claimed use of the building as an SDH.
22. The residential use of the building is not endorsed through any further evidence except for 2 letters addressed to Plot 19 in April and May 2016. Five individuals are listed as having lived in the building over a period of four years, yet there is limited evidence to support that claim. If Plot 19 was their main residence one would expect there to be evidence in the form of photographs and/or official correspondence pertaining to matters such as Council Tax, vehicles, finance, work, insurance or bills for services such as electricity, particularly as electricity is noted as not being included in the monthly rent for the land.

23. From the evidence, it seems to me that at times between July 2015 and August 2019, the Council could not have taken enforcement action against a residential use of the building, even if it was available to use as such because it probably was not being lived in. The evidence as detailed above, falls short of demonstrating that on the balance of probabilities the residential use of the building was continual for the requisite period for the use to become lawful and thus immune from enforcement.
24. However, even if the use as an SDH had been affirmatively established by a continual use over a four-year period, the lawfulness of that use may be lost by abandonment, superseded by a material change of use, or if a new planning unit is formed.
25. After the building had been vacated in August 2019, it is claimed that it remained available for use as an SDH with its bathroom and kitchen, including white goods, remaining in place. At a visit in August 2019, the Council confirmed the building to be vacant. However, on 22 September 2019 a licence for the land was signed by Ms L. This specified that the licensee would have access to the 'mobile shed' only for the storage of agricultural equipment and animal feed and the use of the toilet facilities and electricity for a period of 6 weeks. After that, the licensee would have full use of the mobile shed in conjunction with the agricultural use of the land.
26. While there is no further information concerning this occupation of the land, the terms of the licence differ significantly from the others in the specific use of the building for agricultural storage purposes. It seems to me that it is likely that the use of the building reverted to agricultural at this point and that this commenced a new chapter in the land use history of the appeal site.
27. The only evidence supplied by the appellants for the 'vacant period' is a photograph, purportedly taken on 2 February 2022. While this shows the exterior of the building and no sign of domestic paraphernalia or use, there is nothing to demonstrate that the building is not being used for other purposes.
28. In April 2022, the land was subsequently licenced to Mr C<sup>4</sup> who says that he lived at the building from April until 6 June 2022 when the appellants moved to the land. A copy of the licence signed by Mr C is similar to those issued previously 'to occupy agricultural land' with the same terms which state that the land shall be used only for agricultural use and the building shall be used in conjunction with the agricultural use of the land.
29. Drawing this all together, I consider that there is an absence of precise and unambiguous evidence, and that which has been submitted to support the appellants' case has failed to demonstrate that, on the balance of probabilities, the building has been used for residential purposes without interruption for the necessary period of four years prior to the date of issue of the enforcement notice or the date of the LDC application. In these circumstances, I find the appellants' evidence falls short of discharging the burden proof.

### **Conclusion on Appeal A (the LDC appeal)**

30. For the reasons given above and having regard to all other matters raised, I conclude that the Council's refusal to grant an LDC in respect of a change of use of the agricultural building to a residential use (C3) was well-founded and

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<sup>4</sup> A signed copy of the property licence dated 13 April 2022 for 6 months is provided by the appellant.

that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act as amended.

**Conclusion on Appeals B and C - Ground (d)**

31. Having regard to the evidence before me, I conclude on the balance of probabilities that the breach of planning control as alleged and as amended has not been continuous for a period of four years prior to the date of issue of the enforcement notice. The breach of planning control is not immune from enforcement action and the appeals on ground (d) therefore fail.

*S A Hanson*

INSPECTOR