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## Appeal Decisions

Inquiry held on 5 and 6 March 2024

Site visit made on 6 March 2024

**by Chris Baxter BA (Hons) DipTP MRTPI**

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

**Decision date: 09<sup>th</sup> May 2024**

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**Appeal A Ref: APP/X1545/C/23/3326403**

**Appeal B Ref: APP/X1545/C/23/3326404**

**Land North West Of Riversleigh, Nipsells Chase, Mayland, Essex CM3 6EJ**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act).
  - The appeals are made by Mrs Susan Paton (3326403) and Mr Kenneth Paton (3326404) against an enforcement notice issued by Maldon District Council.
  - The notice was issued on 29 June 2023.
  - The breach of planning control as alleged in the notice is the unauthorised erection of a C3 residential dwelling house on the 'Land'.
  - The requirements of the notice are to:
    - a. Remove from the 'Land' in its entirety, the unauthorised structure.
    - b. The removal of all vehicles, equipment, materials, paraphernalia, and waste associated with the completed compliance with requirement a. as detailed above.
  - The period for compliance with the requirements is three months.
  - The appeal is proceeding on the grounds set out in section 174(2)(b), (f), (g) of the Act.
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### Decision

1. It is directed that the enforcement notice is corrected by the deletion of the word "structure" from sub-paragraph 5.a. and its substitution with the words "C3 residential dwelling house".
2. Subject to the correction, the appeals are dismissed and the enforcement notice is upheld.

### Applications for costs

3. An application for costs was made by the appellants, Mrs and Mr Paton, against Maldon District Council. This application is the subject of a separate Decision.

### Enforcement Notice

4. Section 176(1) of the Act provides a wide-ranging power to correct or vary the terms of an enforcement notice provided that it would not result in injustice to the parties.
5. The requirement in sub-paragraph 5.a. of the notice did not align with the alleged breach of planning control. I have corrected the notice, so the requirements represent the description of the breach. I am satisfied that no injustice to the appellant or the Council would arise by me correcting the notice in terms I have set out in paragraph one of this decision.

## Preliminary Matter

6. At the Inquiry, I allowed an additional period for the appellants to provide a signed and dated Unilateral Undertaking (UU) as well as written submission with regards to the ground (f) appeal. I also allowed a further period for an opportunity for the Council to respond to the ground (f) submissions and to submit their response to the appellants cost application. All the submissions were received within the prescribed time scales. The appellants also confirmed that they were no longer submitting a UU as evidence.

## Ground (b)

7. An appeal on ground (b) is a claim that the matters stated in the notice (which may give rise to the breach of planning control) have not occurred as a matter of fact. The burden of proof falls on the appellants and the relevant test of the evidence is on the balance of probabilities.
8. Enforcement notices may not be issued until sometime after a breach is detected. In the meantime, appellants may make changes on site. Section 174(2)(b) of the Act is worded in the past tense, and the question is whether the breach **had** occurred by the date of issue of the notice. If the allegation had taken place on site, an appeal on ground (b) cannot succeed simply on the basis that activities or structures were removed or a use has ceased. An appeal Decision<sup>1</sup> has been brought to my attention specifically relating to the ground (b) relevant date which the Inspector of this decision states "*the appellant must satisfy me... that matters stated in the notice had not occurred... on the date it was issued*". This matter, however, does not alter the wording of the Act in Section 174(2)(b) being in the past tense and whether the breach **had** occurred **by** the date of issue of the notice. I have therefore determined this appeal in accordance with the wording of the Act.
9. Evidence presented confirms that the appeal building was completed in June 2021 and it is an agreed matter that the appeal building has not been lived in, therefore the building has not been used as a residential property. The breach described in the notice is the erection of a C3 residential dwellinghouse. It is not necessary for a use to have commenced for operations to have occurred and therefore in this case, the question is whether the appeal building as constructed and completed was the apple storage barn (as approved in the Original Permission<sup>2</sup> and Variation Permission<sup>3</sup>) or a dwellinghouse.
10. The appeal building was not constructed in accordance with the approved plans of the Original or Variation Permission but instead included additional rooms that resembled the layout submitted with application 23/00076/FUL for a change of use of the building to a residential bungalow. Appendix 10 of the appellant's Proof of Evidence (PoE) provides a floor plan which shows the layout of the building as it was originally constructed, prior to some of the internal walls being removed. This layout has rooms for a lounge, bathroom, bedrooms and a kitchen, which are rooms required for a residential property. The building had electricity in the whole of the building and a fully functional kitchen was installed in the room to the east. The submitted photographs show a kitchen with cupboards and worktops, a large oven and cooker, sink, kettle,

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<sup>1</sup> PINs reference APP/L3625/C/19/3233726

<sup>2</sup> LPA reference 18/00280/FUL as described in paragraph 3.2 of the Statement of Common Ground

<sup>3</sup> LPA reference FUL/MAL/20/00574 as described in paragraph 3.3 of the Statement of Common Ground

worktop appliances, kitchen roll, cups, glasses and tea towels. I also heard at the Inquiry that the building had central heating installed. It was accepted in *Gravesham*<sup>4</sup> that the distinctive characteristics of a dwellinghouse was its ability to afford to those who used it the facilities required for day-to-day private domestic existence. The appeal building had electricity, a fully working kitchen, central heating and shower/toilet facilities. Whilst rooms were not specifically furnished with items such as beds, the layout of the building provided rooms that could have been used for bedrooms. The building did have facilities required for day-to-day private domestic existence.

11. The appeal building is timber frame construction, has plumbing for commercial sinks, commercial 3-phase electricity supply (installed by a commercial electrician) which is wired for chiller/air cooling with external trip switch and the building has never been registered for Council Tax, listed on the electoral role or has a registered postal address. At the Inquiry the appellant stated that while all the features in building could be regarded as residential, they could also be found in commercial buildings. The appellant also stated it would be difficult to obtain a mortgage on the building however, I do not consider this to be a distinctive characteristic of whether a building can or cannot be a dwellinghouse.
12. At the Inquiry, I heard evidence relating to the use of the building. The appellant states that the building has been used (since before 2 June 2021) for any or all of fruit storage, fruit juice production, cider production and jam production. Appendix 2 of the appellant's PoE has photographs annotated as showing orchard drainage, cider making and apple mulching. Only three of these photographs are taken within the building, and they are taken in the kitchen of the building with two of the images showing cider being poured into a single demijohn with the other photo having only two demijohns in view. The pouring of cider into single demijohns is not compelling evidence that there has been substantial fruit production, nor do these photographs show any fruit storage.
13. Appendices 3 and 4 of the appellant's PoE have photographs that show cider decanted into small demijohns and equipment including Stihl strimmer, part of sprayer, Stihl battery equipment, pasteuriser, roller, mower, apple mulcher and mill. Whilst all these photographs are of the internal parts of the building, they only show storage of equipment and of three demijohns of cider. These photographs are not dated, neither do they show active fruit production or substantial storage of fruit. These photographs do not provide compelling evidence of fruit production or fruit storage within the building.
14. The appellant has provided photographs outside of the appeal building from 2017 and 2021 which show the orchard and drainage, apple picking and apple mulching. The appellants have a pruning fruit tree certificate and a level 2 food hygiene and safety for catering certificate. Photographs of moulds stored in boxes have also been submitted. These matters, however, do not provide substantial evidence that the building was used for the purposes approved in the Original and Variation Permissions. Invoices for cider and apple juice equipment have been provided however they are dated 2017 prior to the development of the appeal building.

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<sup>4</sup> *Gravesham BC v SSE & O'Brien* [1983] JPL 306

15. I have had regard to letters submitted in appendix 14 of the appellant's PoE which are statements from visitors to the site. Around five of the letters state that the building was used for storage of fruit and equipment with little detail on the amount of fruit storage that took place. There is limited evidence within these letters indicating that food production took place within the building. These letters are not convincing evidence that establishes that the building was used for the purposes approved in the Original and Variation Permissions.
16. From the evidence before me, I am not satisfied that the building has been used for the purposes approved in the Original and Variation Permissions. Nevertheless, even if I accepted such use did occur, the breach does not allege any unauthorised uses, as it describes operational development (the erection of a dwellinghouse).
17. It was the appellant's sworn evidence, when questioned at the Inquiry, that the building was not deliberately constructed to be a dwellinghouse although the appellant later admitted that they would have liked a house. As I set out earlier, a different building was constructed to that approved in the Original and Variation Permissions. Having regard to all the evidence before me, in particular the layout of the building as it was constructed which included electricity, a fully working kitchen and central heating, I find as a matter of fact and degree and on the balance of probability, that a C3 residential dwellinghouse was erected.
18. The buildings at Clayhill Vineyard, Crouch Ridge Vineyard and View Garden Centre as shown in photographs in appendix 11 of the appellant's PoE was discussed at the Inquiry. The appellant described that the appeal building was designed according to similar buildings in the local area. These other buildings and the extent of design input does not alter my findings above with regards to the type of building that was constructed.
19. Consequently, the appellants have failed to demonstrate that by the date the notice was issued the matters alleged had not occurred, and the appeals on ground (b) must fail.

### **Ground (f)**

20. An appeal on ground (f) is that requirements of the notice exceed what is necessary in order to remedy the breach of planning control or, as the case may be, the injury to amenity that is caused by the breach.
21. In this regard the notice requires the removal of the unauthorised dwellinghouse along with associated vehicles, equipment, materials, paraphernalia and waste. It is therefore clear that the purpose of the notice requirements falls within section 173(4)(a) of the Act – to remedy the breach of planning control.
22. The appellants consider the requirements of the notice are excessive and that lesser steps could be undertaken. They consider the notice should be varied to include five requirements<sup>5</sup> which effectively would remove residential features from the building such as kitchen and bedroom fixtures and fittings and require the building to accord with approved plan 1161/07 of the Variation Permission.

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<sup>5</sup> See paragraph 17 of appellants ground (f) submission

23. It was held in *Elmbridge*<sup>6</sup> that in situations where it is asked for requirements to be varied to allow for what is alleged to be modified in accordance with a planning permission, the permission must be extant and not have lapsed. Given my findings above, an unauthorised dwellinghouse has been constructed and neither the Original Permission nor the Variation Permission has been implemented. The timescales for the Original and Variation Permissions have since lapsed and therefore the permissions are not extant and cannot be implemented.
24. Accordingly, I conclude that the notice requirements are not excessive and the appeals on ground (f) fail.

**Ground (g)**

25. Ground (g) is that the period for compliance with the notice falls short of what is reasonable. In this notice, the time to comply with the requirements is three months. The appellants seek a time period of six months in which to comply with the requirements of the notice.
26. The appellants case for ground (g) is that three months is not sufficient time to arrange for storage of equipment either on-site or off-site, as well as off-site commercial storage being unaffordable. The appellants state that they cannot personally carry out all of the requirements and that it is doubtful they could organise builders and contractors within three months to complete the requirements of the notice. Limited information has been provided in terms of costings for off-site storage and availability of building contractors. There is minimal evidence before me that convinces me that the requirements cannot be carried out within a three month time period.
27. The appeals on ground (g) therefore fail.

*Chris Baxter*

INSPECTOR

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<sup>6</sup> *Elmbridge BC v SSCLG & Giggs Hill Green Homes Ltd* [2015] EWHC 1367 (Admin)

## **APPEARANCES**

### FOR THE APPELLANT:

Mr Stephen Whale of Counsel

He called

Mrs Susan Paton                      Appellant

### FOR THE LOCAL PLANNING AUTHORITY:

Dr Alex Williams of Counsel

He called

Mr William Coleman                      Local Planning Authority

Mr Ian Hayes-Fry                      Local Planning Authority

### Documents submitted at the Inquiry:

1. Appellant's opening statement
2. Council's opening statement
3. Council's closing submissions
4. Appellant's closing submissions
5. Copy of appeal decision Ref: APP/L3625/C/19/3233726

### Documents submitted after close of Inquiry:

1. Appellant's ground (f) submissions
2. Council's written submissions (ground (f) and costs)