



Appeal Decision

Inquiry held on 12 April 2024

Site visit made on 11 April 2024

by D Boffin BSc(Hons), DipTP, MRTPI, DipBldg Cons(RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 13/05/ 2024

Appeal Ref: APP/H1515/C/23/3333784

Land known as Fantails, Hook End Road, Hook End, Essex CM15 0HB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended) (the 1990 Act). The appeal is made by Mr Mark Sully against an enforcement notice (EN) issued by Brentwood Borough Council.
 - The EN was issued on 1 November 2023.
 - The breach of planning control as alleged in the EN is: Without planning permission, operational development on the land i.e. the carrying out of engineering or other operations on the land, shown edged in red on the attached plan, including the construction of an agricultural barn building to be used for the storage of machinery and hay (as shown on the site plan attached to this report as shaded blue in the approximate position) and also the construction of a hardstanding area immediately adjacent and to the south of the barn building and an associated hardstanding access path (both as shown on the site plan attached to this report as shaded orange in the approximate position).
 - The requirements of the notice are:
 1. Demolish the unauthorised agricultural barn building (shown for the purposes of identification only in the approximate position shaded blue on the attached site plan).
 2. Permanently remove the associated hardstanding area immediately adjacent to the south of the barn building and also the associated hardstanding access path to the barn building (both shown for the purposes of identification only in the approximate position shaded orange on the attached site plan).
 3. Permanently remove from the land all detritus arising from compliance with Steps 1 and 2 above.
 - The period for compliance with the requirements is: 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(d) and(g) of the 1990 Act.
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Decision

1. It is directed that the EN is corrected by:
 - the deletion of the word "including" and its substitution with the word "comprising" in the description of the alleged breach.
2. Subject to the correction, the appeal is allowed and the EN is quashed.

Preliminary Matters and Background

3. The Inquiry sat for one day and all oral evidence was affirmed at the Inquiry. At the request of the main parties, I carried out an accompanied site visit on the 11 April 2024.

4. Since there is no ground (a) appeal, and hence no deemed planning application, I cannot consider matters of planning merit. My decision rests on the facts of the case, on relevant planning law and judicial authority. Several listed buildings are cited within the evidence before me. Nonetheless, as there is no ground (a) appeal section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, which requires the decision maker, in considering whether to grant planning permission for development which affects a listed building or its setting, to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest, does not apply in this case.
5. The appeal site comprises Fantails a former farmhouse, numerous outbuildings, the garden associated with Fantails, and a paddock/field to the south of that house and garden. The appellant purchased Fantails and its associated land and outbuildings in 1989. The EN attacks a barn that has been constructed, adjacent to the boundaries between the garden, the field/paddock and the neighbouring property, within the field/paddock and an access path and hardstanding that leads from Fantail's parking area to the barn.
6. In March 2020 the Council received a complaint that a house was being constructed to the rear of Fantails. Mr Bates on behalf of the Council visited the site in July 2020. On 30 August 2020 a Mr Nick Howard submitted a planning application for '*retrospective permission for an agricultural building to be used for the storage of machinery and hay*' on behalf of the appellant. That application was refused on 30 October 2020 (the 2020 refusal). The subsequent appeal¹ (the appeal) was dismissed on 4 March 2022. After the appeal decision the appellant submitted pre-application documents and the appellant was advised of the outcome of the discussions about those documents in October 2023. A subsequent planning application was submitted by SPD Studio, on behalf of the appellant, on the 8 November 2023 and the Council exercised its powers under section 70C of the 1990 Act and declined to determine that application (the 2023 application).

The Notice

7. On an appeal any defect, error, or misdescription in an EN may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority.
8. Within the description of the alleged breach the word 'including' is utilised to indicate what operational development is attacked by the EN. At the Inquiry, Mr Atkinson, indicated that the word 'including' normally is regarded to cite an open list whereas in this case there is no dispute that the EN only attacks the operational development that is referred to. As such, it was suggested that the word 'including' should be substituted with the word 'comprising' within the description of the alleged breach to ensure no misunderstanding occurs.
9. Given that the overall effect of the EN would not be altered I consider that the EN can be corrected in this way without any injustice to either main party. Therefore, I intend to delete the word 'including' in the description of the alleged breach and substitute it with 'comprising'.

¹ Ref No: APP/H1515/W/21/3273491

The ground (d) appeal

Reasons

10. The appeal on ground (d) is made on the basis that, at the time the EN was issued, it was too late to take enforcement action against the matters stated in the EN. The relevant time limit within which enforcement action must be taken in respect of the breach of planning control is set out in section 171B(1) of the 1990 Act and the burden of proof lies with the appellant. The EN was issued on 1 November 2023, so to succeed on this ground the appellant needs to show, on the balance of probability, that the operational development attacked by the EN was substantially completed by 1 November 2019. However, the Council considers that the appellant positively concealed the date of substantial completion therefore the appellant should be deprived of the immunity offered by section 171B of the 1990 Act.
11. The appellant has submitted several invoices and dated photographs to corroborate his evidence that he commenced constructing the barn/hardstanding in May 2018 and continued constructing the barn throughout the summer of 2019. Further invoices and photographs indicate that the access path was constructed during the winter of 2018/2019. I heard at the Inquiry from various people who had worked on the development, what parts they had constructed and when they had carried those works out. It is not surprising that they remembered it was *'the summer prior to Covid happening'* given the impact and nature of the Coronavirus Pandemic.
12. The Council does not dispute the accuracy of the invoices and photographs. The Council's evidence includes aerial photographs dated 26 June 2018 and 10 April 2020. The earlier aerial photograph is after the appellant's dated photograph of 3 May 2018 which shows groundworks being carried out and a piece of machinery. The features in the May photograph, the retaining 'wall' and the building, indicate that the photograph was taken within the area where the barn has been constructed facing north. The patch of lighter coloured material, in the area where the barn has been built, on the 2018 aerial photograph could correlate to those ground works.
13. The 2020 aerial photograph appears to indicate that part of the lower pitch roof on the south side of the barn was not covered with slate. However, the appellant's dated photographs from September 2019 clearly indicate that the roof slope was covered with slate at that time. The appellant stated at the Inquiry that the junction between the tile roof and the slate roof had developed a leak during the winter of 2019/2020 and that he had to strip back part of the slate roof to fix it. That explanation of why the discrepancy between the aerial photograph and the appellant's photographs is plausible. In any case I heard at the Inquiry that it has been shown previously that the dates of Google Earth aerial photographs can be misleading and not precise due to the way they are produced.
14. Mr Bates visited the site in July 2020 and his photographs from that visit show that the large wood and steel door to the main entrance to the barn was not in place at that date. Whereas the appellant's photographs dated September 2019 indicate that it was in place at that time. The appellant stated at the Inquiry that due to the size and design of that door it had been necessary to remove the door several times to alter its design and detailing to enable it to

- open and close correctly. In my experience, this explanation of why the door was missing in July 2020 is reasonable given the size of that door.
15. Whether operational development is substantially complete and how that is to be assessed was considered by the *Sage* judgment. Lord Hope stated within that judgment *'that the language of the statute is open to a different interpretation and that it makes better sense of the legislation as a whole to adopt the holistic approach which my noble and learned friend has described. What this means, in short, is that regard should be had to the totality of the operations which the person originally contemplated and intended to carry out. That will be an easy task if the developer has applied for and obtained planning permission.'* In this case the development was undertaken without planning permission.
 16. However, the 2020 refusal indicates that the development was intended to be *'an agricultural building to be used for the storage of machinery and hay'* and the subsequent appeal was determined on that basis. The access path and hardstanding were constructed in the winter of 2018/2019 and the walls and roof to the barn were in place by September 2019. All the glazing and the majority of the doors had also been completed by that time. Furthermore, the appellant's photographs from September 2019 show the building in use to store hay and machinery.
 17. I acknowledge that the complainant stated that the building was still being constructed in March 2020. The repairs/alterations cited above may have been underway at that time. In any case, they considered a house was being built and it is clearly apparent that a house has not been constructed. Overall, the appellant's evidence is precise and unambiguous and there is no evidence to indicate the appellant's version of events is less than likely. Therefore, based on the evidence before me I conclude that on the balance of probabilities that the building, access path and hardstanding were substantially completed prior to 1 November 2019. The works to the large barn door and part of the roof would, more likely than not, have constituted repairs/alterations after the building had been substantially completed.
 18. Yet, the Council say the appellant is unable to benefit from the immunity period within section 171B(1) of the 1990 Act due to the four factors laid out in paragraph 56 of the *Welwyn Hatfield* judgment². At paragraph 54 of that judgment, it states *'whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. Here, the four-year statutory periods must have been conceived as periods during which a planning authority would normally be expected to discover an unlawful building operation or use and after which the general interest in proper planning control should yield and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale.'*
 19. The four factors laid at paragraph 56 of the *Welwyn Hatfield* judgment are:
 - there must be positive deception in matters integral to the planning process;

² *Welwyn Hatfield v SSCLG v Beesley* [2011] UKSC 15

- such deception has to be directly intended to undermine the planning process;
 - it did undermine the planning process; and
 - the deceiver would profit directly from the deception, if the normal limitation period were otherwise to apply.
20. The Council have also cited an appeal decision³ and that in that case the Inspector stated that *'there are other notable features of the decision in Welwyn, including, as pointed out by the appellant, that only truly "egregious" cases should be regarded as subject to the principle, which should be invoked only in exceptional circumstances...However insofar as the appellant argues that the present alleged deception discloses no exceptional circumstances, and on that account alone the Welwyn principle cannot apply, I do not agree. No good reason is given why the Council's allegations, if correct, should not be regarded as a particularly serious case in which the appellant should be deprived of the statutory protection in s171B(2).... This "exceptionality" point is not precisely defined or developed and, in my opinion, it is likely that if the four factors are clearly present as described above, they will together constitute the necessary seriousness or exceptional nature of the wrong doing...'*
21. In this case, the Council considers that the dates within section 5 of the application forms relating to the 2020 refusal and the 2023 application and the appellants comments to Mr Bates at the visit in July 2020 constituted positive deception. Furthermore, the Council submits that the dates on the application forms invokes the prospect of allegations of making false representations pursuant to section 2 of the Fraud Act 2006. It therefore considers that that conduct will on public policy grounds disentitle the appellant from relying upon an apparently unqualified statutory provision.
22. The dates on those application forms relate to the commencement and completion of the development. The date given for both commencement and completion on both sets of forms is 1 January 2020. The appellant stated at the Inquiry that he did not know where the original agent, Mr Howard, had got that date from. Moreover, Ellen Nicholson who works for SPD Studio, the firm who completed the 2023 application forms, did not know where the date came from as she did not personally complete them. The date is clearly inaccurate as it would be obvious to any planning professional that a building of the size, design and materials of this building would not be started and completed in one day. As such, if it was designed to act as positive deception integral to the planning process it was more likely than not that it would be ineffective.
23. The appellant also stated that he told Mr Howard that the date was incorrect when he discovered how the form had been completed. However, no evidence from Mr Howard is before me. There is no dispute that the appellant informed Mr Bates at the visit in July 2020 that the development had been started 2 or 3 years previously. Nevertheless, the appellant does not recall that he stated the building was not finished at that visit as Mr Bates indicates. In any case, the appellant is not a planning professional and there is little to indicate that he would have understood what substantial completion constituted at that point in time. Furthermore, Mr Bates had been told that the development had been commenced years before July 2020 and it would have been clearly apparent to

³ Ref No: APP/Y3940/C/19/3225770

him that the commencement date of 1 January 2020 was incorrect. However, Mr Bates did not deal with the 2020 refusal application. Moreover, it is plausible that the person from SPD Studio that completed the 2023 application simply transposed the information from the 2020 refusal application forms.

24. The evidence suggests that Mr Howard entered a random date within section 5 of the application form whether that was by error or design. It has been suggested that he may not have considered it was relevant at that time as he was submitting a retrospective application for planning permission where the issue of the section 171B (1) time limit was not relevant. Nonetheless, there is no way to discern if that is correct based on the evidence before me.
25. Moreover, if that date was completed incorrectly as part of positive deception to undermine the planning process the appellant would have had to delay and frustrate the planning process for 4 years as part of a long-term plan. Nevertheless, the appellant submitted the 2020 refusal application within a short time of the Council's visit in July 2020. The appeal did take some time to determine but there is no evidence to indicate that this time was unduly delayed. I acknowledge that the insertion of the correct date for the completion of the development on the planning application forms would have alerted the Council to the impending deadline for the relevant time limit. In addition, the facts within the application form are normally relied upon, given that the forms had been signed and completed as being true and accurate. Moreover, the Council considered that pre-application discussions may have been able to resolve the situation. Yet, the Council could have issued an EN at any time after the appeal was determined in March 2022.
26. It is more likely than not that the dates, in section 5 of the 2020 refusal application forms, were mistakenly completed and that mistake was compounded by the dates being transposed on the 2023 application. The incorrect dates on those forms could invoke the prospect of allegations of false representations. However, based on the evidence before me it is highly unlikely that the appellant directly intended in 2020 to undermine the planning process by positive deception even though there is no dispute that the wrong dates were inserted. Consequently, on the balance of probabilities, the incorrect dates on the planning application forms in combination with the appellant's alleged comments at the July 2020 visit did not amount to positive deception directly intended to undermine the planning process. The factors set out in *Welwyn Hatfield* are not engaged, and the appellant is not deprived of the immunity offered by section 171B (1) of the 1990 Act.

Conclusion

27. On the balance of probabilities, the appeal on ground (d) should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control. The EN will be corrected and quashed. In these circumstances, the appeal on ground (g) does not need to be considered.

D Boffin

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Giles Atkinson

Counsel instructed by Ellen Nicholson, SPD Studio

He called:

Dennis Sully

Factual witness

Glenn Scott

Factual witness

Luke Sully

Factual witness

Matthew Sully

Factual witness

John Snooks

Factual witness

Tom Barber

Factual witness

Mark Sully

Appellant

Ellen Nicholson

Senior Town Planner, SPD Studio Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Steven Bell

Solicitor instructed by Brentwood Borough Council
(BBC)

He called:

Richard Bates

Senior Enforcement Officer, BBC

DOCUMENTS SUBMITTED AT INQUIRY

Doc 1: Photograph dated 1 June 2019

Doc 2: Excerpt from Encyclopedia of Planning Law and Practice: Time Limits

Doc 3: *Welwyn Hatfield* judgment

Doc 4: *Sage* judgment

Doc 5: Appeal decision - APP/Y3940/C/19/3225770