



Appeal Decisions

Site visit made on 21 May 2024

by P N Jarratt BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 June 2024

Appeal A Ref: APP/Q1153/C/22/3313496

Meadowside, Eworthy, Germansweek, EX21 5AH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mrs Caroline Hamlyn against an enforcement notice issued by West Devon Borough Council.
 - The notice was issued on 5 December 2022.
 - The breach of planning control as alleged in the notice is the material change of use of the land from agriculture/woodland use to a mixed use comprising agriculture/woodland and use for tourism/leisure, including the use of a tree house for letting purposes and the use of a summer house in association with tourism/leisure use.
 - The requirements of the notice are
 - (i) Cease the use of the land for tourism/leisure purposes;
 - (ii) Remove from the land the tree house;
 - (iii) Remove from the land the summer house;
 - (iv) Restore the use of the land to purely agricultural/woodland use.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (f) 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.
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Appeal B Ref: APP/Q1153/X/22/3305936

Tree House, Summer House and Lake at, Meadowside, Eworthy, Germansweek, EX21 5AH

- 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 Mrs C Hamlyn against the decision of West Devon Borough Council.
- The application ref 3877/21/CLE, dated 15 October 2021, was refused by notice dated 2 August 2022.
- The application was made under section 191(1) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is operational development consisting of lake, single storey building (summer house) and residential use building (tree house).

Decisions

Appeal A Ref: APP/Q1153/C/22/3313496

1. Appeal A is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act (as amended) for the development already carried out, namely the use of land for a mixed use comprising

agriculture/woodland and use for tourism/leisure, including the use of a tree house for letting purposes and the use of a summer house in association with tourism/leisure use. on land at Meadowside, Eworthy, Germansweek, EX21 5AH as shown on the plan attached to the notice and subject to the following conditions:

(a) The development shall be occupied as holiday accommodation only and shall not be occupied as a sole or main place of residence.

(b) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 or any order revoking and re-enacting that Order (with or without modification) no development permitted by virtue of all Classes of Part 1 of Schedule 2 to the order shall be undertaken.

(c) The summer house shall not be separately occupied from that of the tree house and will remain ancillary to the tree house at all times.

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

The site and relevant planning history

3. This site is about 5.9 hectares in extent and located in open countryside with the River Wolf forming the boundary to one side. An access track from the appellant's dwelling at Meadowside leads downhill through the woodland to a lake with a treehouse to its north side and a summer house to the north east side. The tree house is elevated having a balcony, pitched roof and a stove pipe protruding above it and it is supported by a number of trees and timber posts. It is accessed by an external staircase. The summerhouse is a more conventional garden type timber building with a room and store with a decked seating area to the front.
4. A freestanding timber composting toilet building is located in proximity to the tree house. There is a small jetty at the north end of the lake and the grass on the lake surround is well maintained.
5. Two applications were withdrawn in 2018 relating to a nature tourism development including a summerhouse, treehouse and multifunctional building, with the first application also including a wildlife pond. The second application was described as partly retrospective and on this basis the council considered that the development that had occurred was unauthorised. Although an enforcement case was opened, no action was taken immediately due to the personal circumstances of the appellant.
6. The lake and the freestanding toilet building do not form part of the requirements of the notice.

Appeal B

7. For the avoidance of doubt I should explain that in Appeal B the planning merits of any use or operations are not relevant and not therefore an issue for me to consider in the context of an appeal under s195 of the Town and Country Planning Act 1990, as amended, which relates to an application for a lawful development certificate. My decision rests on the facts of the case and

on relevant planning law and judicial authority. The appellant needs to show that the claimed use satisfies s191, as amended, as being lawful. The onus of proof rests with the appellant and the level of proof is on the balance of probabilities.

8. I consider the main issue in Appeal B to be whether the Council's decision to refuse to grant and LDC was well founded.
9. The LDC application relates to operational development consisting of a lake, a single storey building (summer house) and a residential use building on stilts (tree house). The appellant and the Council agreed that the Class C3 residential use was not an appropriate description of the development and that a sui generis holiday accommodation description was more apt. It is also common ground that the tree house was built and designed for one purpose as a holiday let and because of this, the Council believes it cannot benefit from the four year protection provided for use as a single dwellinghouse as set out in Welwyn Hatfield.
10. The appellant maintains that the operational development of the summer house and tree house are immune from enforcement action by virtue of s171B(1)
11. The principle established in *Murfitt*¹ is reflected in the recent judgement in *Caldwell and Timberstore*² in which it was held that the Murfitt principle only applies where the operational development is deemed ancillary to the change of use. Where operational development has brought about the change of use then the Murfitt principle cannot apply. Earlier case law, including that in *Kestrel Hydro*,³ and the Court of Appeal and Supreme Court decisions in *Welwyn Hatfield*⁴ set out the principle that an enforcement notice directed at a breach of planning control by the making of an unauthorized material change of use may lawfully require the land or building in question to be restored to its condition before that change of use took place, by the removal of associated works as well as the cessation of the use itself, provided that the works concerned are integral to or part and parcel of the unauthorized use and are not works previously undertaken for some other lawful use of the land. It does not embrace operational development of a nature and scale exceeding that which is truly integral to a material change of use as the alleged breach of planning control, nor does it override the regime of different time limits for different types of development in section 171B.
12. The Murfitt principle operates within the bounds of the statutory scheme which sets different time limits for enforcement against operational development and unauthorised material changes of use. I find that the operational development comprising the construction of the summerhouse and treehouse is more than merely ancillary or secondary to the change of use, but is instead, fundamental to or causative of that change of use. Prior to their construction, the site had been used for de minimis leisure purposes but there is no evidence that it was used for commercial tourism purposes prior to the operational development having occurred. Whilst the buildings are immune from enforcement by virtue of s171B(1), the use of the tree

¹ *Murfitt v SSE* (1980) 40 P. & C.R. 254

² *SSLUHC v Caldwell & Timberstore* [2024] EWCA Civ 467

³ *Kestrel Hydro v SSCLG* [2016] EWCA Civ 784

⁴ *Welwyn Hatfield Council v SSCLG* [2010] EWCA Civ 26 and *Welwyn Hatfield Borough Council v SSCLG* [2011] UKSC 15

house for letting purposes and the use of the summerhouse in association with tourism/leisure use are not immune.

13. It is accepted by the Council that the lake, tree house and summer house have been substantially complete in excess of four years prior to the date of the application and that the operational development involved is therefore immune from enforcement action. Nevertheless, the use of the tree house as a holiday let and the use of the summer house ancillary to it is not immune from enforcement action by virtue of s171B(3). Whilst this may appear perverse, the courts acknowledge that the legislation can result in buildings enjoying immunity from enforcement but having no lawful use. Although the appellant stresses that the tree house 'was built and designed for one purpose as a holiday let' and has not been the subject of a change of use, this does not alter the anomaly arising between s171B(1) and s171B(3). It is interesting to note in *Caldwell & Timberstore* the reference to Lord Mance's comment in *Welwyn Hatfield* on the apparent anomaly that "...once a planning authority has allowed the four year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking steps to render the building useless."
14. On this basis I am satisfied that the operational development of the tree house and the summer house are immune from enforcement action by virtue of s171B(1) although the use of the buildings is not immune due to the application of s171B(3) as the use has not continued for a period of 10 or more years.

Conclusion on Appeal B

15. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant an LDC in respect of the operational development of a lake, a tree house for holiday accommodation and a summer house was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act (as amended).

Appeal A

Appeal A – the appeal on ground (b)

16. An appeal on this ground is that the matters alleged have not occurred as a matter of fact. The appellant relies on the argument that the lake, summer house and tree house have all been beyond the point of substantial completion for more than four years and are immune from enforcement action. In view of the Council's acceptance that these have been substantially completed for more than four years, the appellant claims that there has been no material change of use. However, the Council considers that the tree house and summer house are integral to and part and parcel of the use of the land for tourist/leisure purposes and ancillary to it although I have reached a different conclusion in Appeal B.
17. The appellant refers to the approach of the Forestry Commission/Forestry England for forests to provide places for watching wildlife, walking, riding bikes or horses and playing among the trees. The appellant argues that to sever or subdivide the woodland into different planning activities is perverse.

The appellant also refers to the Land Registry Title of the site which has been owned by the late appellant and his spouse since January 2009 and used as woodland and recreational purposes commensurate with the purposes of the Forestry Commission.

18. A distinction needs to be made between the approach taken by the Forestry Commission and the need to control development under planning legislation. Whilst recreational use of woodland may occur, if it is at a level deemed to be de minimis, it would not represent development for which planning permission is required. However, a material change of use can occur as a matter of fact and degree if it affects the character of the land and as such would require planning permission. In this case a substantial building on stilts has been erected for the purpose of providing residential holiday accommodation and advertised on AirBnB, Booking.com, Finest Retreats and Facebook, which together with the erection of the summer house, changes the character of the site from the lawful use as agricultural/woodland to a mixed use incorporating tourism/leisure and this represents a material change of use for which planning permission is necessary.
19. As a matter of fact, the alleged change of use has occurred and the appeal on this ground fails.

Appeal A – the appeal on ground (c)

20. The appeal on ground (c) in Appeal A is that there has not been a breach of planning control and the appellant relies on a similar argument to that in the appeal on ground (b) that no material change of use has occurred. However, as I have concluded above, a material change of use of the land has occurred.
21. Section 171B (3) provides that no enforcement action may be taken after the end of a period of ten years beginning with the date of the breach. The appellant has not demonstrated on the balance of probabilities that such a breach occurred prior to ten years before the service of the enforcement notice. I note also that the appellant's evidence indicates occupation from 2016 onwards although this is contradicted by Germansweek Parish Council who state that the treehouse was not finished until the end 2017 and its first known use was in autumn 2019. However, this claim does not appear to be challenged by the Local Planning Authority. The appeal on this ground fails.

Appeal A – the appeal on ground (a)

22. An appeal on this ground is that planning permission should be granted for what is alleged.
23. The main issue is whether the location of the development accords with policies in the Plymouth and South West Devon Joint Local Plan which seek to restrict tourism development in the countryside to minimise the need to travel unless an identifiable need has been adequately demonstrated.
24. The site is in a tranquil and remote location in open countryside outside any defined settlement boundary, remote from services, and no functional need has been established. Users of the land would be dependent on private motor vehicles for their needs and this contributes to the unsustainability of the development. Although there would be no significant visual amenity impact of the development, there would be some environmental impacts such as on the

rural road network, but not to a significant degree. The economic benefits are likely to be minimal but the development represents low impact tourism development, which in general terms is supported in the National Planning Policy Framework where it is found to be sustainable. It is noted that there are other similar tourist facilities in the area which cater for local need such as Wolf Wood tree houses and Devon Dens.

25. The appellant refers to policy support for the reuse or conversion of existing buildings on the basis that the operational development of the buildings is immune from enforcement action.
 26. Although there are some Local Plan Policies which go against the development, such as SPT1 regarding sustainable development, Policy DEV15 identifies a range of specific provisions relating to supporting the rural economy, such as camping and similar facilities. Such proposals should respond to an identified local need and be compatible with the rural road network. Development should also avoid incongruous or isolated new buildings.
 27. In Appeal B I have concluded that the operational development of the tree house and summer house are lawful, although the use is not. I attach considerable weight to the reality of this and conclude, on balance, that this outweighs the policy objections to the development. Although the site not in a sustainable location, the development represents a low-key form of tourism development, albeit without significant benefits to the local economy, and is not totally inappropriate to its remote location.
 28. I find that the level of any harm caused can be mitigated by the imposition of suitably worded conditions that restrict the occupation of the tree house and summer house, and the withdrawal of permitted development rights. These conditions are necessary to make the development acceptable, directly related to the development and fairly and reasonably related in scale and kind to the development.
 29. The appeal on this ground succeeds.
- Appeal A – the appeal on ground (f)*
30. An appeal on this ground is that the steps required are excessive. As I have allowed the appeal on ground (c) and allowed Appeal B, the appeal on ground (f) does not need to be considered.

Conclusion on Appeal A

31. For the reasons given above, I conclude that Appeal A succeeds on ground (a). I shall grant planning permission for the use as described in the notice. The enforcement notice will be quashed. In these circumstances the appeal on ground (f) does not fall to be considered.

P N Jarratt

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 15 October 2021 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and identified as Lake, Tree house and Summer house 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 operational development consisting of the construction of a lake, a tree house on stilts and a timber summer house are immune from enforcement action by virtue of s171B(1) although the use of the buildings is not immune from enforcement action due to the application of s171B(3) as the use has not continued for a period of 10 or more years

Signed

P N Jarratt

Inspector

Date: 7 June 2024

Reference: APP/Q1153/X/22/3305936

First Schedule

Operational development consisting of the construction of a lake, a tree house on stilts and a single storey timber summer house.

Second Schedule

Land at Meadowside, Eworthy, Germansweek, EX21 5AH

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: 7 June 2024

by P N Jarratt

Land at Meadowside, Eworthy, Germansweek, EX21 5AH

Reference: APP/Q1153/X/22/3305936

Scale: Not to Scale

