



Appeal Decisions

Inquiry held on 2 July 2024

Site visit made on 3 July 2024

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 August 2024

Appeal A Ref: APP/D0840/C/23/3331623

Appeal B Ref: APP/D0840/C/23/3331624

Land to the rear of Oak House, Four Turnings, Feock, Truro, Cornwall TR3 6QR.

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended. The appeals are made by Mr Joachim Stolte (Appeal A) and Mrs Juliane Stolte (Appeal B) against an enforcement notice issued by Cornwall Council.
 - The notice was issued on 20 September 2023.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land from agricultural land to domestic recreational use associated with the dwelling known as 'Oak House', and associated operational development comprising of the construction of wooden decking, shed, pond, swing and shepherds hut.
 - The requirements of the notice are to:
 - 1) Cease the domestic recreational use of the land outlined in red on the attached plan.
 - 2) Remove from the land, the shepherds hut shown in the approximate location by a blue 'A' on the attached plan.
 - 3) Remove from the land, the wooden shed shown in the approximate location by a blue 'B' on the attached plan.
 - 4) Dismantle and fill in the pond and restore the land to its original level.
 - 5) Dismantle and remove the wooden decking and swing from the land outlined in red on the attached plan.
 - 6) Remove from the land all materials, paraphernalia and debris resulting from the domestic recreational use of the land; including but not limited to: picnic table, outdoor furniture etc.
 - 7) Remove from the land all materials and debris resulting from the above works and restore the land to its former condition and use before the breaches took place.
 - The period for compliance with the requirements is 5 months after the notice takes effect.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a) and (d) 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 B is proceeding on the ground set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: The appeals are allowed and the notice is quashed.

Preliminary Matters

1. In addition to the grounds of appeal referred to above, both appeals had originally been made on ground (f) of section 174(2) of the Town and Country Planning Act 1990 as amended (the 1990 Act). During the case management

conference (CMC) held prior to the start of the inquiry¹, the parties agreed that the appeals should also proceed on ground (b) of section 174(2). However, during the inquiry the appellants confirmed that they wished to withdraw their ground (b) and (f) appeals. This was later confirmed in writing².

2. In addition to the above, at the inquiry the Council confirmed that it no longer wished to pursue its defence of the remaining ground (a) and (d) appeals. This was also confirmed by the Council in writing³.
3. In view of the above, I have determined Appeal B on the basis of a ground (d) appeal alone and Appeal A on the basis of a ground (a) and (d) appeal, as set out in the header above.

The Notice

4. Before considering the grounds of appeal, I have a duty to put the notice in order, if necessary. The powers transferred to Inspectors under section 176(1)(a) of the 1990 Act include to correct any defect, error or misdescription in the enforcement notice or, under section 176(1)(b), to vary the terms of the enforcement notice. In each case, the only test is whether the correction or variation would not cause any injustice to the appellants or the local planning authority.
5. At the CMC I advised the parties of my concerns with regard to the description of the development that is the target of the notice and whether or not this is sufficiently precise. In particular, I do not find the term 'domestic recreational use' sufficiently precise as a description of the current use of the land. A more precise description of the use of the land would be 'for purposes incidental to the enjoyment of the dwellinghouse known as Oak House'. I have been given no reason to conclude that correcting the allegation, along with the associated requirements, to include this would cause injustice to either party.
6. In the interests of precision, I will also correct the notice to describe the previous use as a use for the purposes of agriculture, rather than 'agricultural land'. I am satisfied that such a minor correction would not cause injustice.
7. Having sought clarification, the Council confirmed that the associated operational development referred to in the notice is not a separate allegation, rather that this is part and parcel of the material change of use. As such, I am satisfied that the notice needs no correction in this regard.
8. Turning to the alleged operational development, I cannot find the description of the shepherd's hut as operational development to be correct. At the inquiry the appellants described having brought the unit onto the site as a whole and since having moved the unit about the site. The unit is still on its chassis and wheels, and only made level by blocks. The hut is small, and there is no obvious means of attachment to the ground, such that I could regard the unit as having the character of a permanent structure. Whilst it has been in its current location for a while, as a matter of fact and degree I cannot conclude that the unit is an operation that falls within the meaning of development in section 55 of the 1990 Act.

¹ Case management conference held on 23 January 2024.

² Email to the Planning Inspectorate dated 11 July 2024.

³ Email to the Planning Inspectorate dated 2 July 2024.

9. Notwithstanding this, the evidence indicates that its use is for a purpose incidental to the enjoyment of the dwellinghouse at Oak House. Accordingly, I intend to correct the notice by removing it from the list of operational development in the allegation, but will retain the requirement to remove it. Having discussed this matter with all parties at the inquiry, I am satisfied that no injustice would be caused by doing so.

Ground (d) – Appeals A and B

10. An appeal on ground (d) is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters. The test of the evidence is the balance of probability and the burden of proof is on the appellants. The ground (d) appeal relates to both the material change of use and operational development alleged. I deal with each in turn as follows.

Material Change of Use

Preliminary Matters and Main Considerations -

11. In order to succeed, the appellants must show that the use of the land for purposes incidental to the enjoyment of the dwellinghouse at Oak House had been continuous for the relevant period, beginning with the date of the breach.
12. Section 171B of the 1990 Act sets out the relevant time limits for the taking of enforcement action. The appellants suggest that, in accordance with section 171B(3), at the time the enforcement notice was issued, no enforcement action could be taken in respect of the use as a period of 10 years has passed since the use commenced. However, in the alternative, they have made the case that a 4 year time period applies to the material change of use. In claiming as such, the appellants have drawn to my attention the case of *Caldwell & Timberstore Ltd v SSLUHC & Buckinghamshire Council* [2024] EWCA Civ 467 and suggest that this is of relevance, in view of the Council's suggestion that the material change of use of the land occurred when the tool shed was erected in 2018.
13. In *Caldwell*, along with reviewing other relevant caselaw, the Court of Appeal considered the principle established in the case of *Murfitt v SSE & East Cambridgeshire CC* [1980] JPL 598, which is that an enforcement notice directed at a material change of use can require the removal of ancillary operational development within the ten-year immunity period that applies to a material change of use, even if the four year limit set out in section 171B(1) has passed. In short, in *Caldwell* it was held that the 'Murfitt principle' only applies where the operational development is deemed 'ancillary' to the change of use. Where operational development is fundamental to or causative of the change of use, then the *Murfitt* principle cannot apply.
14. Applying this to the case before me, there is no dispute that the tool shed was substantially completed more than 4 years prior to the issue of the enforcement notice. If the Council's case prior to its withdrawal were correct, that the erection of the tool shed was the source of the making of the material change of use, it follows from *Caldwell* that the enforcement notice cannot require the removal of the shed.
15. The appellants appear to have understood the above, but suggest that, in these circumstances, both the operational development and the material

change of use targeted by the enforcement notice are subject to the 4 year immunity period. If I have understood the appellants' case correctly, it is suggested that where operational development is the cause of a material change of use, only the time limit set out in section 171B(1) is relevant when considering whether or not, on the date on which a notice is issued, enforcement action could be taken in respect of a material change of use.

16. I do not read the *Caldwell* judgment in this way. The enforcement notice in that case alleged both a material change of use and operational development to facilitate that use. The operational development was the subject of that judgement and the principal matter considered was whether the notice could have required its removal, despite it having been substantially completed more than 4 years prior to the issue of the notice. The judgment does not concern itself with the time period relevant to the material change of use. Indeed, at paragraph 43 of the judgement, Sir Keith Lindblom states that 'under the different time limits in section 171B(1) and (3) it was inevitable that in some cases a building erected without planning permission would become immune from enforcement but the material change of use generated by the construction of the building would not'.
17. In view of the above, the only time period relevant to the matter of the material change of use is 10 years, as set out in section 171B(3) of the 1990 Act, and the main considerations in this case are:
 - whether or not the use of the appeal site for a purpose incidental to the enjoyment of the dwellinghouse at Oak House commenced more than 10 years prior to the issue of the enforcement notice; and
 - if so, whether this use continued substantially uninterrupted for a period of 10 years or more prior to the issue of the enforcement notice.
18. Before moving on, I note that some interested parties refer to a complaint made to the Council in July 2020 about the use of the land, and refer to this date as being less than 10 years after the appellants allege that the current use of the land began. To be clear, the making of a complaint does not amount to the taking of enforcement action. The relevant date in this ground (d) appeal is the date the enforcement notice was issued, not the date on which this matter was first brought to the Council's attention.

Reasons -

19. The appellants suggest that the last known use of the site for the purposes of agriculture was in July 2011, when the owner at the time (Mr Wilkes) grazed sheep on the land. This comes from the evidence of Mr Timothy Vigus, who has provided a statutory declaration and gave evidence under oath at the inquiry. Mr Wilkes use of the site for grazing is corroborated by him in an email, which includes photographs showing the grazing sheep.
20. Mr Vigus was the former owner of the land before he sold it to Mr Wilkes in 2007. Mr Vigus has retained ownership of the land adjoining the appeal site. He says that he lives in the village and regularly walks his dogs, sometimes twice a day, on the land he has retained. He says that prior to the growth of the hedge along the boundary of the appeal site with his land, he has been able to view into the appeal site from his land. His observations of the appeal site since 2007 have, therefore, been at close range and on a regular basis.

21. The appellants' evidence shows that Mr Wilkes sold the land and Oak House to Mr Sexton in 2011. Mr Vigus says that since 2011 he has observed the land being regularly mown and occupied by garden furniture, goal posts and a trampoline. In addition to this, he describes seeing the Sexton family children playing and using the play equipment he observed. Mr Vigus also says that he has not observed the land being used for any purpose other than as 'residential amenity land' since it was sold in 2011.
22. In an email from Mrs Sexton⁴, she describes how the land was maintained and how her family played on the land. Her photograph shows the children playing on the trampoline and the football goal posts in the background. The appellants point to aerial images taken during the Sexton family's ownership of the site where I can see a circular object that appears to be the trampoline shown in Mrs Sexton's photograph. Mr Stolte also said that he recalls the presence of the trampoline at the time of his purchase of the land.
23. The appellants purchased the appeal site and Oak House in April 2017 and in both is written and oral⁵ evidence Mr Stolte describes using the land as garden associated with Oak House since that time. He has provided a series of photographs showing his family playing, as well as eating and sitting out on the land since 2017. In these photographs I can see garden furniture and play equipment. He also says that the land was enhanced with planting and that he laid paths, erected a swing for his daughter, and built a garden shed on the land to house his ride on mower.
24. All of the above points to a use of the land since 2011 that is materially different to a use for the purposes of agriculture. The description from Mr Vigus, Mrs Sexton and Mr Stolte, of how the land has been used and maintained since 2011 indicates a use for purposes incidental to the enjoyment of the dwellinghouse at Oak House.
25. Notwithstanding the above, I have had regard to the evidence of interested parties, and the suggestion that the current use of the land only commenced on the appellants' ownership of it. They have referred to grazing sheep on the land to demonstrate the continued agricultural use of the land. There is, however, nothing to suggest that this grazing was more recent than that during Mr Wilkes ownership, which ended in 2011. Although the use of the land as an orchard has been referred to, fruit trees are common within a domestic garden and there is nothing to suggest that fruit was grown for anything more than domestic consumption. There is no substantiated evidence to demonstrate, on the balance of probability, that an agricultural use of the land continued after 2011.
26. I note how the land has been described in the sales particulars and in a planning application. I also note the suggestion that, even if the land was only occasionally used prior to 2017 for play by the Sexton family, this does not amount to a change of use of the land. It might well be the case that the use of the site since the Stolte family's purchase of it has been more obvious than before. Indeed, I note that the aerial photographs before and after 2011 show the land in a similar condition. However, the evidence indicates that the Sexton Family play equipment was permanently sited on the land and that the land was maintained for a purpose associated with Oak House. Indeed, I find

⁴ Provided with Mr Stolte's proof or evidence.

⁵ Given under oath.

the evidence of Mr Vigus to be precise and unambiguous in his observations of the appeal site during the time prior to 2017 and since then. I also find Mr Stolte's evidence to be particularly detailed and unambiguous with regard to how his family have used the site since their purchase of it in 2017. I am mindful of the significant weight that is carried by evidence provided in statutory declarations and that given under oath, in view of the sanctions that could be imposed should false or misleading evidence be given. Furthermore, this evidence is not opposed by the Council.

Summary -

27. Bringing all of the above together, I find the evidence of the appellants to be sufficiently precise and unambiguous in demonstrating that, on the balance of probability, the use of the appeal site for a purpose incidental to the enjoyment of the dwellinghouse at Oak House commenced in 2011, when Mr Sexton took ownership of the site. This was a material change of use from the former use, which was for the purposes of agriculture. I also find it more likely than not that the use of the land for a purpose incidental to the enjoyment of the dwellinghouse at Oak House continued substantially uninterrupted since it began in 2011.
28. I have had regard to the evidence of interested parties, but do not find this sufficient to make the appellants' version of events less than probable. For this reason, I conclude that, at the date on which the notice was issued, no enforcement action could be taken in respect of the material change of use of the land from a use for the purposes of agriculture to a use for purposes incidental to the enjoyment of the dwellinghouse at Oak House. Accordingly, the ground (d) appeals succeed in so far as they relate to the alleged material change of use.

Operational Development

Main Considerations -

29. The allegation, as I intend to correct it, refers to operational development comprising wooden decking, a shed, a pond and a swing. The main consideration in this case is whether or not, prior to the issue of the notice, 4 years has passed beginning with the date on which these operations were substantially completed⁶.

Pond -

30. Mr Stolte's evidence indicates that the works to construct the pond commenced in October 2020 and were completed by the end of November of the same year. This demonstrates that the development had not, therefore, been substantially completed more than 4 years prior to the issue of the enforcement notice on 20 September 2023.

Decking -

31. The appellants show a photograph⁷ of a historic wooden decking area to the rear of Oak House during Mr Wilkes ownership. Having extended the property to the rear in 2017, Mr Stolte suggests that a separate decking area was constructed adjoining this extension, and was completed in August 2019. The

⁶ Section 171B(1) of the 1990 Act.

⁷ Image No. 7 of the Mr Stolte's proof of evidence.

appellants provide a photograph (image No 25) showing a completed area of decking that is physically separate from the historic decking also visible in the photograph, to the left.

32. Mr Stolte has also provided photographs of substantial works to the historic decking area (image No 33 and 34). In his oral evidence he said that these works were completed in August 2020.
33. Having viewed the site, I noted that all of the decking present to the rear of Oak House projects into the appeal site. Whilst the decking now forms a complete area, there is clearly a point at which the most recently constructed decking joins the completed decking to the rear of the extension. Having regard to this and the photographic evidence before me, I am satisfied that the two decking areas are two separate operations.
34. The appellants' evidence is precise and unambiguous in demonstrating that the first was substantially completed in August 2019. Without any evidence to contradict the appellants' claims, I can only conclude that, on the balance of probability, on the date the notice was issued, no enforcement action could be taken in respect of this decking. I cannot, however, conclude the same with regard to the second area of decking. When the notice was issued, a period of four years had not passed since its substantial completion.

Shed and Swing -

35. Mr Stolte says that works to erect the shed started with the construction of its base in November/December 2017 and that the building was completed in January 2018. He has provided a photograph he dates as 26 February 2018 (image No 17) in which a completed shed is visible. The shed is also visible in a photograph he dates as early September 2019 (image No 26).
36. Similarly, image No 25 is dated by Mr Stolte as 31 August 2019, in which the swing is visible to the right. This is the swing set I observed at the site visit.
37. All of the above considered, it is more likely than not that the shed and the swing set were substantially completed more than four years prior to the issue of the enforcement notice. For this reason, on the date the notice was issued, no enforcement action could be taken in respect of them.

Summary -

38. For the reasons given above, the appeals on ground (d) succeed in respect of the shed, the swing, and the area of decking to the rear of the extension. I do not conclude the same with regard to the remainder of the decking and the pond.

Ground (a) and the deemed application for planning permission – Appeal A

Main Issues

39. The appeal on 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. Having regard to my conclusions on the ground (d) appeals, the only elements of development that remain to be considered under this ground (a) appeal are the pond and the decking, excluding that to the rear of the extension.

40. Having regard to the substantive reasons for issuing the enforcement notice, I have identified the main issue as the effect of the development on the character and appearance of the surrounding area and the setting of the Cornwall National Landscape.

Reasons

41. My conclusions on the ground (d) appeals mean that the use of the appeal site for purposes incidental to the enjoyment of the dwellinghouse at Oak House is lawful. In view of this, both the decking that extends into the appeal site and the pond are features that are ordinarily found on land in such a use. They are not, therefore, out of keeping with the existing use of the land.
42. The extent of decking that extends into the site is minimal, and both it and the pond are discreet, low level forms of development that have little effect on the surrounding area. Indeed, I was not able to view them from any public vantage points outside of the appeal site.
43. The boundary of the Cornwall National Landscape runs along the highway to the east of the appeal site. Having stood at points along this highway, I had difficulty viewing Oak House, let alone the appeal site and the works that are the subject of this ground (a) appeal. In view of this and for the reasons given above, whilst the appeal site might well be within the setting of the National Landscape, I cannot regard the development as having an adverse impact on the designated area, in conflict with the National Planning Policy Framework (the Framework).
44. For the reasons given above, the decking and the pond are development that have an acceptable effect on the character and appearance of the surrounding area and the setting of the Cornwall National Landscape. The development is not, therefore, in conflict with Policies 2 (Spatial Strategy) and 12 (Design) of the Cornwall Local Plan Strategic Policies 2010 – 2030, adopted November 2016 (CLP); Policy D1 (Design Quality) of the Feock Neighbourhood Development Plan 2017 – 2030 (FNDP); or the guidance on design in the Framework. These require, amongst other matters, that the design of development is high quality, that it demonstrates a cultural, physical and aesthetic understanding of its location, and that it respects and maintains the special and distinctive character of Cornwall.
45. I find no conflict with Policy 23 (Natural Environment) of the CLP and its requirement for development to be of an appropriate scale, mass and design that recognises and respects landscape character of both designated and un-designated landscapes. Similarly, the development also accords with the requirements of Policy LS2 (Protecting and enhancing the landscape) of the FNDP, which are to safeguard the significance and conserve the natural beauty and special qualities of the Cornwall National Landscape and its setting.
46. The development accords with the presumption in favour of sustainable development, as set out in the Framework and Policy 1 of the CLP. Furthermore, I am unable to find conflict with any of the climate change principles, set out in Policy C1 of the Cornwall Council Climate Emergency Development Plan Document, dated February 2023, including the objective to conserve and enhance the natural environment.

Other Matters

47. The appeal site is within the setting of the grade II listed building, Bywell Cottage and Mount Pleasant. For this reason, I have a duty to consider whether or not the development preserves the setting of the heritage asset. The Council suggest that the significance of the building derives from its historical use as a school and its architectural interest, including its features and details, its age and its traditional construction materials. The appellant's Heritage Impact Assessment, dated January 2024, also refers to the aesthetic interest of the building. Having viewed the listed building on site, I can agree with the parties on this. I would also add that, in view of the location of the building within the rural landscape, the immediate setting of the building, which includes the appeal site, allows for an appreciation of the special interest of the building. Accordingly, the building's setting adds value to the significance of the heritage asset, although the contribution made by the appeal site is limited.
48. The appeal site is used as a residential garden and, as I have noted above, the development comprising the pond and an area of decking are low level and have a character that is in keeping with the existing use of the site. Whilst the development subject of this ground (a) appeal has made the domestic use of the appeal site more prominent, this has not resulted in an adverse effect on how the heritage asset is experienced. I conclude, therefore, that the development preserves the setting of the grade II listed building, Bywell Cottage and Mount Pleasant.
49. The decking that extends into the appeal site may well allow for an elevated view. However, any views towards the adjoining properties are limited and at such a distance so as not to unacceptably affect the privacy of the adjoining occupiers.
50. I have seen reference in third party evidence to other matters, including the laying of a gravel path and tree planting. As these are not the subject of the enforcement notice, I have not considered these matters in this appeal.

Conditions

51. No conditions have been suggested by the parties, in the event that I grant permission for the operational development that is the subject of this ground (a) appeal. Furthermore, as this development is on site and complete, the need for any conditions is not obvious to me.

Planning Balance and Conclusion

52. I have concluded that the development comprising the pond and the decking within the appeal site is in accordance with the development plan, when read as a whole. Having had regard to all matters raised, including the comments of interested parties, I have been unable to identify any material consideration to indicate that my determination of the appeal should be made otherwise than in accordance with the development plan. For the reasons given, I conclude that the ground (a) appeal should be allowed and planning permission should be granted.

Formal Decision - Appeals A and B

53. It is directed that the enforcement notice is corrected by:

- The deletion from part 3 of the words 'agricultural land to domestic recreational use associated with' and their substitution with the words 'a use for the purposes of agriculture to a use for purposes incidental to the enjoyment of'; and
- The deletion from part 3 of the words 'swing and shepherds hut' and their substitution with the words 'and swing'.

54. Subject to the correction, the appeals are allowed, the notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act for the pond and wooden decking on land to the rear of Oak House, Four Turnings, Feock, Truro, Cornwall TR3 6QR.

J Moss

INSPECTOR