Appeal Decision

Site visit made on 27 February 2019

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 April 2019

Appeal Ref: APP/V2255/C/18/3203845
Land situated at Hole Street Farm, Kingsdown Road, Lynsted, Sittingbourne, Kent ME9 0XQ

- 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 appeal is made by Mr Duncan Anderson against an enforcement notice issued by Swale Borough Council.
- The enforcement notice was issued on 9 May 2018.
- The breach of planning control as alleged in the notice is: Planning permission for the use of the barns as holiday lets was granted by the Council under reference SW/11/0517 on the 14th July 2011. The permission contained a condition restricting use of the four barns as follows:

  The holiday accommodation hereby permitted shall be used solely for the purpose of the holiday accommodation, shall not be used by any person or persons as their sole or main residence and shall not be let or occupied by any person or group of persons for more than four weeks in any calendar year.

- The requirements of the notice are:
  (i) Cease the use of all four holiday lets as the sole or main residence of any person.
  (ii) secure compliance with condition 14 of Planning Permission SW/110517.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) and (g) of the Town and Country Planning Act 1990 as amended.

Summary Decision: the appeal is dismissed and the enforcement notice is upheld with corrections

The Enforcement Notice.

1. The breach of planning control alleged in paragraph 3 of the notice is purely descriptive. The first part advises that planning permission for the use of the barns as holiday lets was granted by the Council in July 2011. The second part sets out in full a condition to which that permission was subject and which, to summarise, restricted occupation of the accommodation to holiday lets. Paragraph 3 does not itself identify the specific number of the condition that is quoted in full there, albeit it may be ascertained from paragraph 5 of the notice that the relevant condition is condition 14 of Planning Permission SW/110517.

2. My difficulty is that paragraph 3 of the notice does not then go on to allege that there has been a breach of planning control or precisely what that breach of control might be. By reading paragraphs 3 of the notice in conjunction with the requirements to comply with it set out in paragraph 5, it may be ascertained that the breach of planning control alleged is intended to be a failure to comply

with condition 14 of Planning Permission SW/110517. Indeed, it appears that this is what the appellant has understood to be the case.

3. It is well-established case law that the drafting of an enforcement notice demands clarity and precision. The absence of a discernible breach of planning control in paragraph 3 of the notice does not accord with that principle. In that context, it is no answer that the recipient was able to 'guesstimate' the breach of planning control alleged by reading paragraph 3 of the notice in conjunction with paragraph 5. The recipient of an enforcement notice is entitled to be able to discover from within the four corners of the document precisely what he or she is said to have done wrong, in no small part because their decision to lodge an appeal against that notice may be entirely dependent on that information. As drafted, the notice in this case does not enable to recipient to do that.

4. Furthermore, paragraph 1 of the notice purports that there has been a breach of planning control under Section 171A(1)(a) of the Town and Country Planning Act 1990 (the 1990 Act). Section 171A(1)(a) the 1990 Act only applies when the breach of planning control alleged comprises the carrying out of development without the required planning permission. If the Council was intending to allege a failure to comply with condition 14 of Planning Permission SW/110517, then the notice should have been issued under Section 171A(1)(b) the 1990 Act.

5. This leads me to the conclusion that the notice is invalid as drafted. Nevertheless, I have wide-ranging powers under section 176(1)(a) of the 1990 to correct a notice, provided that doing so does not cause injustice. I have therefore carefully considered whether the notice can be corrected.

6. The appellant has responded to the notice on the basis that the alleged breach of planning control is a failure to comply with condition 14 of Planning Permission SW/110517. In doing so, the appellant has not made an appeal on ground (b) as set out in section 174(2) of the 1990 Act: specifically, that the matters alleged in the notice have not occurred. To my mind, this indicates that the breach of planning control may be properly described as being a failure to comply with a condition or limitation subject to which planning permission is granted, and therefore falling within Section 171A(1)(b) the 1990 Act.

7. The time-period specified in paragraph 4(i) of the notice is 10 years, and therefore consistent with a notice issued under Section 171A(1)(b) the 1990 Act. Had he considered it prudent, the appellant would have had an opportunity on first receipt of the notice to make an appeal on ground (d) as set out in section 174(2) of the 1990 Act: specifically that, on the date the notice was issued, no enforcement action could be taken. In the event, unsurprisingly so given that planning permission SW/110517 was only granted in July 2011 and therefore well within the 10 year period, no appeal on ground (d) was made.

8. Having regard to the above, I am satisfied that I can correct the notice to allege a breach of planning control under Section 171A(1)(b) of the 1990 Act comprising a failure to comply with condition 14 of Planning Permission SW/110517. I am also satisfied that no injustice would be caused by so doing.

The appeal on ground (a) and the deemed planning application

9. The ground of appeal 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. The Council has stated one substantive reason for issuing the enforcement notice, from which two main issues are raised:

   - whether the use of the barns as residential accommodation represents a sustainable form of development, and
   - the effect of the use of the barns as residential accommodation on the rural economy.

   For reasons that will become apparent, it is convenient to consider the second of these main issues in the first instance.

   Effect of the use of the barns as residential accommodation on the rural economy

10. Planning permission for the conversion of the buildings to holiday lets was granted in July 2011 (Council Ref: SW/11/0517). That permission subject to conditions, including condition 14 which requires that the holiday accommodation shall not be used as a sole or main residence. The implication is that the Council must have considered the imposition of that condition to be necessary in order to make the development acceptable in planning terms, in order to satisfy the tests for imposing conditions set out in national guidance. The Council explains in its evidence that permission was granted as an exception to the policy restricting new development in the countryside on the basis of adopted planning policy for sustainable tourism and economic development through the use of rural buildings.

11. The appellant explains that the conversion of the barns to holiday lets formed part of a diversification plan for the farm to support and maintain the farm business. The appellant explains that he set out with every intention of implementing the planning permission for holiday lets as granted but that, due to a series of unforeseen circumstances, it became clear that the holiday let project was no longer financially viable. Those circumstances included the relatively low projected occupancy rates due in part to the availability of other holiday accommodation in the area and the poor location of the appeal site in relation to the main tourist attractions in the county. This leads the appellant to the view that the holiday let use was redundant and that the building would have been disused if permanent occupation had not commenced.

12. I am not convinced by the appellant's position in this respect. The Council maintains that there is a 'dire need' for holiday accommodation in the area and Policy DM3 of the Local Plan states that planning permission will not be granted for residential development where this would reduce the potential for rural employment. The supporting text to Policy DM3 explains that, in order to retain the availability of rural buildings for employment, including tourism, residential use will only be granted where evidence is provided that there is no demand for the building for employment use or if the buildings are wholly unsuitable for employment use.

13. There is no evidence to show, and the appellant does not contend, that the barns are wholly unsuitable for employment use. Indeed, the granting of planning permission SW/11/0517 demonstrates that the building was physically

capable of conversion to holiday lets. It is therefore necessary to consider whether there is demand for employment use, in this case for tourism.

14. Although the appellant contends that the holiday let project was financially unviable, I have been provided with no evidence in support of that position. For example, I have not been provided with details of the marketing of the holiday lets, either in terms of the marketing information employed, the extent and duration of that marketing or the actual level of interest in the holiday lets in response to that marketing. The appellant suggests that the projected occupancy of the holiday lets was for fifteen or twenty weeks per annum, but again that assertion is not supported with evidence. Furthermore, I have not been provided with details of the financial return that would have accrued from the occupancy for the projected occupancy and which, if achieved, it seems to me could potentially have made a significant contribution to the objective of the diversification plan in terms of supporting and maintaining the running of the farm.

15. Neither have I been provided with any details of travel times/routes to the main tourist attractions, including Canterbury and its cathedral, Leeds Castle and Dover Castle. Given the location of the appeal site, it is likely that visitors using the holiday lets would need to have had the benefit of a car and it appears to me that all these tourist attractions, and others referred to by the appellant, would be potentially accessible to those visitors. The appellant has not therefore provided any evidence to support his contention that the appeal site is poorly located in relation to those visitor attractions.

16. In the absence of evidence in relation to the above, the appellant has not made out his case that the holiday let use was redundant when the building was first converted or is redundant now. It follows that the loss of the holiday lets represents a commensurate loss to the rural economy, not only in terms of the income that might have been generated directly by the holiday lets but also the income to the local economy arising from visitor spending in the area.

17. I conclude that the use of the barns as residential accommodation is harmful to the rural economy. I therefore conclude that the development in contrary to Policy DM3 of the Local Plan.

Whether the use of the barns as residential accommodation represents a sustainable form of development

18. Policy ST3 of the Swale Borough Local Plan (Local Plan) sets out the Swale settlement strategy and provides that, amongst other things, at locations in the open countryside and outside built-up area boundaries development will not be permitted unless supported by local policy and would contribute to protecting the intrinsic value of the countryside and the vitality of rural communities. This policy is underpinned by Policy ST1 of the Local Plan which provides, amongst other things, that to deliver sustainable development all development proposals should accord with the Local Plan settlement strategy and support a prosperous rural economy.

19. There is no dispute that the appeal site is outside of a defined built-up area boundary and within the open countryside. Nevertheless, the site is located on the edge of the hamlet of Kingsdown. The latter comprises a cluster of residential properties on either side of Kingsdown Road and, whilst the hamlet does not provide any services, it does in my view constitute a settlement. For

that reason, the appeal site is not in an isolated position for purposes of paragraph 87 of the National Planning Policy Framework (Framework).

20. Nevertheless, given that there are no services in Kingsdown itself, the appeal site is not within walking distance of any services or public facilities. Neither is the appeal site situated on a bus route, nor is it within walking distance of a railway station. The corollary is that occupiers of the site would require the use of a private car for most if not all their requirements for day-to-day living, including shopping, education, employment, health and leisure needs. Consequently, whilst there is some benefit of the residential use of the barns in terms of supporting social inclusion within the settlement of Kingsdown, in overall terms I consider that the appeal site is not a sustainable location and that the residential use is not supported by national policy as set out in the Framework.

21. There is, I accept, a sustainability benefit to be gained from the re-use the existing building. However, for the reasons that I set out above and on the evidence before me, I am not convinced that the use of the barns as holiday lets is not a viable option. For that reason, neither I am persuaded that the barns would be redundant if not occupied for residential purposes on a permanent basis, or that they would remain disused. The corollary is that any sustainability benefit arising from the re-use of the building for residential accommodation could equally be secured through the re-use of the building as holiday lets. Accordingly, I attach very limited weight to the sustainability benefit that would arise from the re-use of the building for permanent residential accommodation.

22. There is a further aspect of Policy ST3 of the Local Plan that I must also consider. This further aspect is whether, to summarise, the development would contribute to protecting and enhancing the intrinsic value of the countryside and the vitality of its communities. I have already found that the residential use would support social inclusion within the settlement of Kingsdown. To that extent, the development makes a positive contribution to the vitality of communities within the countryside.

23. The conversion of the building has resulted in an improvement in the immediate setting and this is a matter to which I return below in other contexts. Consequently, whilst I consider that any enhancement to the intrinsic value of the wider countryside is limited, I am satisfied that the intrinsic value of the countryside is protected.

24. Notwithstanding that the development complies with some aspects of Policy ST3, I conclude that the use of the barns as residential accommodation does not represent a sustainable form of development. I therefore conclude that the development conflicts with Policy ST3 of the Local Plan when read as a whole, as well Policy ST1 that underpins it.

25. In the reasons for issuing the notice, the Council also cites Policy DM14 of the Local Plan. This policy sets out general development criteria with which all developments are expected to comply. The Council has not drawn my attention to any particular aspects of this policy with which the breach of planning control is said to conflict in relation to either of the two main issues that I have identified. Consequently, I have focused my consideration on the policies highlighted above.

Other considerations

26. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. I have found that the use of the barns as residential accommodation fails to accord with the development plan. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.

27. Paragraph 8 of the Framework indicates that there are three dimensions to sustainable development: economic, social and environmental. There are elements of the breach of planning control that provide benefits in relation to each of these three dimensions.

28. In terms of economic benefits, as a matter of principle I can accept that the income gained from the residential accommodation to some extent supports the farm business. I also recognise that the tenants of the residential units are employed locally and as such contribute to the local economy. My difficulty, however, is that the appellant has not sought to quantify that economic benefit or to explain how and to what extent the revenue gained assists or facilitates the continuation of the farm business. For that reason, I am only able to afford the economic benefit that arises from the residential use limited weight.

29. The residential use of the barns provides a total of four small housing units and to that extent contributes to meeting the housing needs of the Borough. However, the recent Housing Delivery Test (HDT) revealed that Swale Borough Council has an identifiable 4.6 years supply of housing land or, put another way, a shortfall of 0.4 years against a five-year supply of housing land. I consider that this constitutes a limited shortfall and that the provision of four units would represent only a modest contribution towards meeting that shortfall. Accordingly, having regard also to any benefit arising from social inclusion within the hamlet of Kingsdown, I attach only limited weight to the social benefit arising from the development.

30. The appeal site is within the Kingsdown Conservation Area. The character and appearance of the Kingsdown Conservation Area derive, in part, from the quality of the buildings within it and their disposition in relation to Kingsdown Road.

31. The appellant contends that the conversion of the barns to residential accommodation enhances the character and appearance of the Kingsdown Conservation Area. However, I have not been provided with any photographic or other evidence by which to assess the comparison between the buildings as converted and before they were converted. I can accept that the conversion of the barn to residential accommodation is likely to have improved the appearance of the building and therefore of the conservation area although, without the benefit of a comparative assessment, am not persuaded that the same is necessarily true of the character of the conservation area.

32. In terms of the statutory duty under section 72 Planning (Listed Building and Conservation Areas) Act 1990, and having regard to the attributes that define the character and appearance of the conservation area, I am satisfied that the

development would at least preserve the character and appearance of the Kingsdown Conservation Area. For that reason, the development also accords with Policy DM33 of the Local Plan which, amongst other things, requires development preserves or enhances features that contribute positively to the character or appearance of conservation areas. However, without a detailed comparative assessment, I am not able to determine whether the development would enhance that character and appearance and, if so, attribute the weight that may be afforded to any enhancement.

33. Similarly, the appellant contends that the conversion of the barns to residential accommodation enhances the setting of the adjacent listed building, described on the listing description as the Oast granary and stores. I have a duty under section 66(1) of the Planning (Listed Building and Conservation Areas) Act 1990 to pay special regard to the desirability of preserving a listed building or its setting. Having regard to the qualities of the building described in the listing description, I am satisfied that the improvements to the appearance of the barns through conversion to residential accommodation have at least preserved the setting of the listed building and, as such, accord Policy DM32 of the Local Plan. Nonetheless, the absence of detailed comparison of the building before and after conversion means that I am unable to go on assess whether the conversion has resulted in an enhancement to the setting of the listed building and, if so, how much weight I can attach to that enhancement.

34. The appellant explains that he has undertaken a number of environmental and biodiversity enhancements on his land and the general area of these enhancements was pointed out to me at the site visit. My attention was also drawn to a bio-mass boiler on the appeal site that uses off-cut waste from forestry, and which is used to provide heating and hot water to all four residential units. I accept that the above contribute to the sustainability credentials of the site as a whole, although I am not convinced that these benefits arise directly from the alleged breach of planning control. For example, the bio-mass boiler could equally be used to provide heating and hot water for holiday lets. This limits the weight that I can afford to these benefits.

35. Looked at in the round, I attribute limited weight to the environmental benefits arising from the breach of planning control alleged in the notice.

36. The appellant has referred me to an appeal decision in relation to a property known as 'Chesley Oast' in Newington, also within the administrative area of Swale Borough Council (APP/V2255/W/17/3175199). The development in that case similarly involved the use of the building for residential purposes otherwise than in accordance with a condition on a planning permission limiting use to holiday lets. The appeal was allowed. The building in question is located outside of a built-up area, and the appellant draws a parallel between the circumstances in that case and those in this appeal.

37. On reading that decision, it appears to me that there is a significant difference between the two situations. In the case of 'Chesley Oast', the Inspector was presented with evidence of the unsuccessful marketing of the property for holiday lets. The Inspector describes that evidence as being "persuasive". By contrast, whilst the unsuccessful marketing of the property has been alluded to by the appellant in this case, I have not been provided with any actual evidence of that marketing and certainly not to the extent that I would describe as being persuasive.

38. In addition, there are a number of other site-specific differences between the circumstances in 'Chesley Oast' and those surrounding the current appeal, all of which lead me to the view that two situations are not directly comparable. I therefore consider that the circumstances that applied in the 'Chesley Oast' decision can be distinguished from those in this appeal and that the 'Chesley Oast' decision does not provide justification, or indeed support, for allowing this appeal.

39. As the appellant points out, Class Q, Part 3, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) provides that the change of use of an agricultural building to a use falling within Class C3 (dwelllinghouses) is permitted. The provisions in Class Q are subject to limitations and to conditions, and the appellant fairly concedes that the appeal site would not benefit from the provisions of Class Q because it is on article 2(3) land and therefore does not accord with the limitation at Q.1(j). Nevertheless, the appellant puts forward Class Q as indicative of Government support for the conversion of agricultural buildings to residential use, as in this case.

40. However, the conditions to which Class Q is subject include conditions Q.2(a) and Q.2(e). The former requires the developer to apply for prior approval of the transport and highway impacts of the development. The latter requires consideration through prior approval of whether the location of the building makes it impractical or otherwise undesirable for the building to change from agricultural use. To my mind, the inclusion of these conditions in Class Q is an indication that the conversion of agricultural buildings to residential use in unsustainable locations requires, at the very least, careful consideration. I therefore consider that Class Q of the GPDO does not automatically support the principle of residential conversion of the appeal property, and for that reason I afford only limited weight to the provisions within that class.

41. I acknowledge that the use of the barns as residential accommodation enjoys support from the local community, both from occupiers of the properties themselves and the occupiers of other properties in Kingsdown. The letters supporting the residential use refer, amongst other things, to the benefit derived from an influx of new residents of various age groups into the local community. It is also emphasised that the barns provide relatively low-cost housing for people that are employed in the local economy. These are all benefits that I have already taken into account.

42. I note the concern that the use of the barns as holiday lets would result in noise disturbance to the occupiers of nearby properties, but have been provided with no evidence to support that view. Moreover, in granting planning permission for the use as holiday lets, the impact on the amenities of adjoining occupiers is a matter that the Council would have taken into account, and evidently found that any impact on adjoining residential properties would no be so significant as to justify the refusal of planning permission. In the absence of evidence to the contrary, I see no reason to take a different view.

43. I am fully aware that the dismissal of this appeal would result in the occupiers of the residential accommodation losing their homes. This would interfere with their rights under the European Convention of Human Rights (ECHR), as incorporated into domestic law by the Human Rights Act 1998. In particular, their rights under Article 8 (right for respect for private and family life, home

and correspondence) and Article 1 of the First Protocol (right to respect to property) would be interfered with. Both of the above are qualified rights, and interference with them may be justified where lawful and in the public interest.

44. In this case, the breach of planning control is alleged in an enforcement notice. The issue of an enforcement notice is in accordance with the law, specifically section 172 of the Town and Country Planning Act 1990, such that there is a clear legal basis for the interference with the rights under Article 8 and Article 1 of the First Protocol held by the occupiers. I have found that the breach of planning control alleged in that notice conflicts with planning polices in the development plan and fails to accord with the objectives of National planning policy. Consequently, I am satisfied that the interference with the rights of the occupiers under the ECHR is both lawful and in the public interest, and as such is justified.

Conclusion on ground (a) and the deemed planning application

45. For the reasons set out above, the breach of planning control alleged in the notice is contrary to the development plan when read as a whole. I have not been advised of any material considerations of sufficient weight, either taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan. Accordingly, I conclude that planning permission ought not be granted for the breach of planning control alleged in the notice.

The appeal on ground (g)

46. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notice is six months.

47. The essence of the appellant's case on this ground of appeal is that the compliance period of six months is too short to allow the occupiers to find alternative accommodation. A period of compliance of 12 months is sought.

48. The appellant explains that the occupiers of the residential accommodation are not in a position to purchase housing on the open market, and I have no reason to question that. However, I have been provided with no evidence to support the appellant's contention that there is a shortage of rented housing in the local area, to the extent that it would prevent the occupiers from finding alternative accommodation with six months. In the absence of that evidence, I am not persuaded that there is need to extend the period for compliance with the notice. I am satisfied the period of compliance of six months stated in the notice is a proportionate response to the breach of planning control that has occurred.

49. Accordingly, the appeal on ground (g) fails.

Conclusion

50. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice subject to corrections, and refuse to grant planning permission on the deemed application.

Formal Decision

51. It is directed that the notice be corrected by:

- deleting the words 'Section 171A(1)(a)' in paragraph 1 of the notice and substituting the words 'Section 171A(1)(b)'
- inserting the words in paragraph 3 of the notice 'The breach of planning control alleged is a failure to comply with condition 14 of Planning Permission SW/110517'.

52. Subject to those corrections, the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the Act as amended for the development already carried out, namely use of the barns as residential accommodation otherwise than in accordance with condition 14 of planning permission SW/11/0517 dated 14th July 2011.

Paul Freer

INSPECTOR