The Planning Inspectorate

Appeal Decisions

Site Inspection on 17 June 2019

by Graham Self MA MSc FRTPI

Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 02 July 2019

Appeal Reference: APP/B9506/C/18/3216011
Site at: Ashley View Farm, Hyde, Fordingbridge SP6 2QE

- The appeal was made by Mr David Cotter under Section 174 of the Town and Country Planning Act 1990 as amended against an enforcement notice issued by the New Forest National Park Authority.
- The authority's reference is EN/18/0060.
- The notice is dated 26 October 2018.
- The breach of planning control alleged in the notice is: "Without planning permission the erection of a self-contained unit of accommodation shown in the approximate position coloured blue on the plan attached to this Notice".
- The requirements of the notice are:
  1. Demolish the self-contained unit of accommodation shown in the approximate position coloured blue on the plan attached to this Notice to ground level.
  2. Remove all materials and debris arising from compliance with requirement (1) from the land affected.
  3. Restore the land to surrounding ground levels.
- The period for compliance is four months.
- The appeal was made on grounds (a), (b) and (f) as set out in Section 174(2) of the Town and Country Planning Act 1990 as amended. An application for planning permission is deemed to have been made under Section 177(5) of the Act.

Summary of Decision: The appeal fails and the enforcement notice is upheld.

Appeal Reference APP/B9506/W/18/3211011
Site at: Ashley View Farm, Road from Hyde to Ogdens, Hyde, Fordingbridge, Hants SP6 2QE

- This appeal was made by Mr David Cotter (but see paragraph 3 below) under Section 78 of the Town and Country Planning Act 1990 as amended, against a refusal of planning permission by the New Forest National Park Authority.
- The application for planning permission was dated 21 June 2018. The development subject to this appeal was described in the application as: "Retention of replacement building to provide Holiday let (C1 use)."
- The planning authority's refusal notice was dated 4 September 2018.
- The authority's reference is 18/00400/FUL.

Summary of Decision: The appeal fails.

Costs Application

1. An application for an award of costs in respect of both appeals has been made on behalf of Mr David Cotter (see also paragraph 5 and footnote 2 below). The application will be the subject of a separate decision to be issued at a later date.

Procedural Matters

Site Address

2. The address of the site as stated in the headings to the summary details for each appeal above is different. This is because I have recorded the different addresses as specified in the enforcement notice and in the application for planning permission respectively. The actual location of the site is the same for both appeals.

Identity of Appellant(s) and Agent

3. The Section 78 appeal as submitted purported to be by Mr David Cotter. The right of appeal under Section 78 of the 1990 Act lies with the original applicant, or joint applicants where the relevant application was made jointly. The application now subject to the Section 78 appeal was made jointly by Mr and Mrs Cotter, so they have a joint right of appeal.[1] Although there is no statement formally confirming that Mr Cotter acted on behalf of Mrs Cotter as well as himself, I am treating the appeal as if that agency existed.

4. The Section 78 appeal also purported to have been submitted by an agent - in Part B of the appeal form, the question "Do you have an agent acting on your behalf?" was answered "Yes" and the agent's details were specified ("Draycott Surveyors"). The appeal form was "signed" with a typed-in name (Ms Deborah Slade) stated to be on behalf of Mr Cotter. A later statement submitted by a different agent (Foot Anstey LLP, Solicitors) states that the appeal was submitted by Mr Cotter without involvement by an agent.

5. There are some unexplained issues here. Normally the Planning Inspectorate cannot accept notification of a change of agent without written confirmation by the appellant (this is to prevent attempted "poaching" by agents); but in this instance it seems that when Mr Cotter submitted the Section 78 appeal, he inserted the name of the agent for the earlier application. He should not have "signed" the appeal form by entering the name of Ms Deborah Slade (who is evidently a Chartered Town Planner employed by Draycotts), when as far as I can tell he had not engaged her or Draycotts as agent for the appeal. However, I have decided that this can be treated as a mistake which does not invalidate the appeal. I am proceeding on the basis that Draycott Surveyors were never engaged as the agent for the appeal and that Foot Anstey have acted from the start as agent for the joint appellants for the Section 78 appeal as well as for Mr Cotter on the enforcement appeal.[2] I have also taken into account the statement of case for the Section 78 appeal submitted by Foot Anstey even though it was not submitted in accordance with normal timescale requirements when the appeal was lodged.

[1] In this decision I refer to Mr and Mrs Cotter for the sake of simplicity, though the enforcement notice was served on Mr D W H Cotter and Ms N A Caton, presumably after a Land Registry search, and the appellant's agent has stated that she acts for Mr Cotter and Ms Caton. I understand that Mrs Cotter is also known as Ms Caton.

[2] I consider that the same principle should apply to the application for costs relating to the Section 78 appeal, even though Mr Cotter is named as the sole claimant in the costs application for both appeals.

Sequence of this Decision Notice

6. I record below some key aspects of the development history of the appeal property, then discuss some legal points raised on the appellants' behalf before turning to other grounds of appeal. The grounds of appeal against the enforcement notice are considered in logical, not alphabetical, sequence.[3]

History

7. "Prior approval" under Part R of the Town and Country Planning (General Permitted Development) (England) Order 2015 was issued in 2016 for the proposed change of use of the former piggery building on the site to a flexible use class C1 (hotels). Planning permission for related physical works to the building ("re-roofing and cladding to the existing building plus alterations to fenestration") was granted in October 2016. For simplicity I use the term "conversion" when referring to these permissions, since taken together they amounted to permission to convert the former piggery building - the Section 78 appeal statement also refers to the development as a "conversion".[4]

8. During the work the structure evidently became unstable when the roof was removed, with cracking in several parts of the walls. Mr and Mrs Cotter decided to replace the walls. The planning authority later told them that the development was in breach of the 2016 permission. The application for planning permission for "Replacement building to provide holiday let (C1 use)" as recorded at the start of this decision was then made. This was refused. The enforcement notice was issued. The two appeals before me are the eventual outcome.

Section 174 Appeal - Expediency, Nullity and Validity

9. The appellant (through his agent) has argued that the planning authority did not properly consider whether it was expedient to issue the enforcement notice before doing so. The appellant has also referred to the concepts of nullity and invalidity, and has contended that the enforcement notice may be invalid because it failed adequately to set out the reasons for issue and why the planning authority considered it expedient to issue it.

10. On the matter of expediency, evidence has been submitted of email exchanges and a telephone conversation[5], from which it is apparent that the National Park Authority's Executive Director for Strategy and Planning had not read the Section 78 appeal statement before the enforcement notice was issued. This evidence also shows that the reasons for issuing the notice were based on the reasons for refusal of the application subject to the Section 78 appeal.

11. In my judgment the reasons for issuing the notice and the expediency of issue are adequately stated in the notice. Most of the text repeats the reasons for refusal of planning permission; then the last sentence ("The Authority do not consider that planning permission should be granted because conditions could not overcome the objections referred to above") is a statement of the authority's view on expediency. It is no more than adequate, but that is enough.

12. The fact that the authority's executive director had not read the Section 78 appeal statement before the notice was issued does not show that the authority

[3] This is because if, for example, an appeal on ground (b) of a Section 174 appeal succeeds, the enforcement notice is quashed and ground (a) becomes redundant; then if ground (a) succeeds, ground (f) becomes superfluous.

[4] This is in paragraph 2.1 of the statement - although it wrongly refers to "proposed" development.

[5] The telephone conversation appears to have been recorded by the appellants' agent.

had not considered expediency, in the sense of carrying out the balancing exercise referred to by the appellant.[6] The authority evidently took the view that a clear breach of policy had occurred, a retrospective application had been refused, and therefore it was expedient to issue the enforcement notice. There is also positive public interest expediency in the authority's timing, enabling the Section 78 and Section 174 appeals to be conjoined, instead of waiting for the Section 78 appeal to be determined and then (depending on its outcome) taking enforcement action.

13. There is nothing about the enforcement notice itself which makes it a nullity or invalid. The notice contains a heading "Reasons for Issuing the Notice" and text which states those reasons. Whether the reasons are right or wrong, they are clearly set out. The notice is not a nullity; nor is it invalid.

Section 174 Appeal, Ground (b)

14. Under this ground of appeal it is claimed that the development enforced against has not occurred. There are two main aspects of the appellant's case as put forward in the agent's statement: first, that what has happened is not the erection of a unit of accommodation, but the conversion of a redundant piggery; second, that the works have been carried out with the benefit of planning permission, except for the replacement of the block walls which are unlawful unless the Section 78 appeal renders them lawful.

15. Those arguments are unfounded. There is abundant evidence that the piggery building which at one time stood on the site was taken down to foundation slab level. New concrete was then laid on top before the building which now exists as a completed shell structure was built. Indeed, the planning statement prepared for the 2018 application by Draycott Chartered Surveyors (which is headed "Replacement Buildingfor use as holiday let") contains the following statements (the italics are mine):

> "This statement supports an application for a *replacement building*…..the site *previously* included a piggery building….the piggery building has been taken down to slab level and Mr and Mrs Cotter now propose to construct *a replacement building* in the same location and of exactly the same size and dimensions as their approved plans."

16. Additional evidence about the demolition down to slab level is provided by the planning authority's photographs and written statements by local residents. But this extra evidence is hardly needed when the statement quoted above, made on behalf of Mr and Mrs Cotter, is itself so clear.

17. In later comments, the agent for the appeal has argued that at no point was the redundant piggery demolished to the extent that the foundations were removed and the ground reinstated to its former condition. Other later comments include the statements that the block walls were "renovated" without planning permission, that "the structural walls were taken down and reconstructed in stages" and that "there was always some part of the original foundation and/or old or new structural walls in situ".

18. I judge these later statements - particularly the use of the oblique stroke punctuation - to be a subtle attempt to re-interpret what happened, compared with the statement quoted in paragraph 15 above. Moreover, Mr Cotter himself (through his agent, in the initial statement for the enforcement appeal) had

[6] The appellant has referred in particular to the court judgment in the case of *R (Ardagh Glass Ltd) v Chester CC* [2009] Env LR 34.

previously stated that he "decided to replace the block walls entirely". The later assertion (made without any supporting evidence) about reconstruction in stages is unconvincing bearing in mind that a new concrete slab was laid above the old one, which would be difficult to do with some old walling remaining in place.

19. Some of the third party evidence suggests that the new building may be higher than the piggery building was. Be that as it may, it is clear that what was done went far beyond removing and replacing the roof, cladding the external walls and altering windows. After the old piggery was demolished to slab level, to all intents and purposes it ceased to exist. What was then built, including new concrete slab covering, walls and roof, was a replacement building. Whether it was built to the same dimensions as the previous building is irrelevant as far as ground (c) is concerned.

20. Some of the appellant's submissions for the Section 78 appeal relate to ground (b) of the enforcement appeal. One of these is the statement that:

> "If the Case Officer's arguments were to be followed to their logical conclusion, it would mean that in all instances where planning permission was granted for conversion works, you could at the point when the building was at its most deconstructed, argue that the original building is no longer in existence and the subsequent building which appears following completion of the conversion works is therefore unlawful because it is a "new" and "different" building to that which was the subject of the original permission. That cannot be right."

21. This statement is flawed. Determining whether a building has been demolished to the point where it no longer exists, and whether what then happens is new building or conversion, are matters of fact and degree in each case; so the reference to "all instances" and "most reconstructed" have to be interpreted with reservations accordingly. Subject to that proviso, the agent's claim "That cannot be right" is wrong. Where a building has been - to use the same term - "deconstructed" to the point where as a matter of fact and degree it no longer exists, and a subsequent building is erected, the subsequent building is a new building. If planning permission has only been granted for conversion of the original building (re-roofing, cladding walls and window alterations), any such permission is not capable of being implemented and the new building is unauthorised.

22. The argument that only the replacement walls are unauthorised is misguided, since it is not possible to have a "part-permitted" building where only the walls are unauthorised - either a building is authorised or it is not. The appellant's agent's contention that "the breach of planning relates to internal supporting structural walls"[7] is also erroneous. The breach of planning control relates to the erection of the whole building.

23. Although the building is at present only a bare shell with no internal fittings (and the same apparently applied when the enforcement notice was issued), it is clear that the physical layout and accommodation is intended to be as shown in the submitted drawings, with two bedrooms, a bathroom, and a kitchen and dining room. There is no dispute about the facilities which the building is intended to contain. In these circumstances I consider that the description in the allegation referring to a "self-contained unit of accommodation" is reasonably apt. The precise nature of the "accommodation" and its future use is a point I comment on further below.

[7] Paragraph 5.13 of the statement for the Section 78 appeal.

24. In summary, the available evidence indicates that the building was demolished to slab level. The fact that the original foundations remain intact underneath the new foundation slab does not mean that the piggery was "converted". As for the 2016 permission, once the walls and roof had been removed, there were no walls to "re-roof" or clad, and no windows to alter. What was constructed was a new building. There is no planning permission for the new building. I conclude that ground (b) of the appeal does not succeed.

Section 174 Appeal Ground (a) and Deemed Application, and Section 78 Appeal

25. Under ground (a) of the enforcement appeal and the related deemed application, planning permission is sought for the development enforced against. The planning permission sought by the Section 78 appeal ("retention of replacement building to provide holiday let (C1 use")) is not identically worded, but it is convenient to consider the developments together here.[8] This is in effect how the appellant has treated the appeals, since his agent's initial statement for the enforcement appeal referred to the statement submitted for the Section 78 appeal as setting out his case on ground (a) of the enforcement appeal.

26. I need first to explain some points of planning law. One of the appellant's arguments is that the 2018 application "was not submitted as a retrospective application, but rather a full application for the retention of the piggery including the block walls". That argument is mistaken. For a start, the mere retention of something is not "development" as defined in Section 55 of the 1990 Act. It is not uncommon for planning applications to refer to "retention", but what is really being applied for is retrospective planning permission for the development which has been carried out - in this instance the operational development of constructing the building. The appellant's agent apparently believes that there is no right of appeal against decisions on retrospective applications.[9] That belief is incorrect - the right of appeal under Section 78 applies to applications for planning permission whether made prospectively or retrospectively.

27. The appellant has tried to argue that the construction of the building implemented the October 2016 permission and so the prior approval authorising change of use of the former piggery to flexible hotel (C1) use has been implemented, taking the start of construction as the start date for implementation. I do not accept that argument, for the reasons explained above - the construction of the building was unauthorised and did not implement the 2016 permission. Indeed the 2018 application itself referred to a "replacement building".

28. Setting aside those legal points, the main issue raised by these appeals is the effect on the rural character and landscape quality of the area or on nature conservation interests, having regard to relevant planning policy.

29. One aspect of the dispute is whether the building should be regarded as a dwelling or as a hotel. A note submitted by the agent who dealt with the 2018 application does not supply convincing support for the "hotel" argument. This note explained that the applicants intended to provide "serviced holiday

[8] References to the "appellant" and "appellant's" in this section should therefore be treated as applying to both joint appellants (or appellants' for the plural possessive) where appropriate.

[9] Paragraph 5.14 of the statement on the Section 78 appeal contains the statement: "There is no right of appeal against retrospective planning applications". The last three words are obviously meant to mean "*refusals* of retrospective planning applications". Later rebuttal comments seek to divert from this statement by referring to the obvious point that an appeal cannot be lodged against an enforcement notice until the notice has been issued.

accommodation….they would manage and run it from the main house, providing bedding, breakfast, cleaning, sheets and towels…..a wholly serviced holiday unit". The reference to breakfast did not specify how or where breakfast would be provided. There has been no suggestion, for example, that breakfast would actually be prepared and served in the house, as opposed to being "provided" in the building by supplying ingredients for self-catering. Bearing in mind the distance between the building and the house, and the provision of a kitchen and dining room in the building, it also seems inherently unlikely that holiday let customers would take meals in the house, especially as it has not been argued in any of the appeal statements that the claimed hotel use would extend to the house. In any case, a building used as a "holiday let" or "serviced holiday unit" is not a hotel. The building when completed internally would provide all the necessary facilities for independent day to day living, and the authority were right to treat it as a dwelling.

30. I am not persuaded otherwise by the evidence that the application fee paid for the 2018 application related to Class C1 hotels, since the authority seem to have merely calculated the fee according to what was described in the application. As the authority point out, if a fee for a dwelling had been required it would appear to have pre-judged the application. It also seems to me that the applicants may have paid the higher C1 fee for tactical reasons relating to the fact that a change of use to a dwelling is not permitted under the "flexible commercial use" provisions of Class R of Part 3 of Schedule 2 of the GPDO. The description "holiday let", which has been used frequently in connection with this development, indicates to me a self-catering type of arrangement, and the building is clearly not laid out for use as hotel bedrooms. Occupiers would probably be living there only for short periods each, but that does not affect the fact that for planning purposes the building would be used as a dwelling. Nevertheless I shall consider the planning merits both for a dwelling and for hypothetical hotel use.

31. The appeal site is part of the New Forest National Park where under national and local planning policies there are stringent controls over most urban types of development, including dwellings and hotels. The general thrust of policy, as expressed, for example, in policy CP8 of the Core Strategy (part of the development plan for this area[10]), is to prevent built development or changes of use which would cumulatively or individually erode the Park's character or result in a gradual suburbanising effect. Policy CP12 of the Core Strategy sets out criteria against which new residential development is to be assessed. This development does not meet any of the criteria subject to which new residential development will be permitted.

32. Tourism development is supported under Policy CP16, subject to provisos. One of the provisos is that the development either enhances or does not detract from the special qualities of the National Park. This policy also provides that new tourism development will be facilitated by (among other things) supporting small scale development in four defined villages or through the re-use of existing buildings as part of a farm diversification scheme outside these villages. Even if the disputed development in this case were treated as providing hotel accommodation, it would conflict with the aims of this policy - the site is not within one of the "defined villages" and for the reasons explained in relation to ground (b) of the enforcement appeal, the development does not involve the re-use of an existing building as part of a farm diversification scheme.

[10] The full title is evidently the New Forest National Park Local Development Framework Core Strategy and Development Management Policies.

33. Although the effect of this small-scale development on the rural character or landscape of the wider National Park might not seem very great, it would be significant, bearing in mind the need to consider the cumulative impact and gradual suburbanising effect mentioned in Core Strategy policy, and the high priority given to conservation interests in National Parks by national policy guidance. The development would contribute to that suburbanising effect, and thereby harm the rural quality of the National Park, contrary to local and national planning policies.

34. As regards nature conservation interests, the main concern is the proximity of the site to a Special Area of Conservation (a European-designated site) and requirements for payment towards habitat mitigation. A contribution apparently been previously paid in respect of a development which does not now exist. The authority's case is weakened by the fact that an ecological assessment was not required for the 2018 application - the email exchanges on this topic seem to have been about roof design details rather than the wider impact of human activity on the nature conservation interests of the National Park.

35. If all other aspects of the development had been acceptable it might have been possible to establish adequate ecological safeguards through conditions and a legal undertaking. On the basis of all the information before me, I find that the planning authority's objection on nature conservation grounds is of supplementary rather than decisive weight.

36. I conclude that planning permission should not be granted in response to either the ground (a) appeal against the enforcement notice and deemed application, or to the Section 78 appeal against the refusal of permission. Therefore the enforcement appeal on ground (a) fails, as does the Section 78 appeal against the refusal of planning permission.

Section 174 Appeal, Ground (f)

37. This ground of appeal concerns the requirements of the enforcement notice. The appellant claims that the requirement to demolish "a building which, prior to the conversion works, was not unlawful" is excessive. This claim is partly an attempt to re-run the ground (b) arguments. The appellant also tries to repeat ground (a)-type arguments, for example by suggesting that the "conversion works" have brought back to life a redundant, unused agricultural building. On the contrary, as explained above, the demolition of a redundant former agricultural building has been followed by the erection of a new building.

38. A ground (f) appeal is not an opportunity to re-argue earlier grounds or to obtain planning permission "by the back door". No realistic lesser steps as substitute requirements have been suggested on behalf of the appellant. The building is unauthorised and unlawful. The requirements of the enforcement notice do not go beyond what is appropriate to remedy the breach of planning control. Therefore ground (f) of the appeal does not succeed.

Other Matters

39. As has been pointed out for the appellants, court judgments have held that where there is a prospect of a so-called "fall-back" position - in essence meaning a possibility of alternative development which could be carried out and which would be less harmful than development previously permitted - such a prospect is a material consideration. The appellants say that the authority were misdirected in law and that had they considered the relevant fall-back position it is highly likely they would have decided that planning permission for the 2018 application would be less harmful.

40. There is no merit in the arguments about a fall-back position. Once the former piggery building no longer existed and the unauthorised building had been erected, the idea of a retrospective planning permission for what the appellants' agent describes as "the replacement block walls" would have been nonsense. The same applies to the suggestion that enforcement action could have been taken against just "the unlawful block walls". As I have explained, an unlawful building is an unlawful building.

41. In assessing the fall-back issue, I have noted the references by the appellants' agent to the judgments in the *Samuel Smiths Brewery* and *Mansell* cases.[11] In return, the appellants and their agent may wish to note the principle established in the well-known *Sage* and *Copeland* judgments[12]. In *Sage*, the court (the House of Lords) held that where a building operation which requires planning permission is not carried out, both externally and internally, fully in accordance with the permission, the whole operation is unlawful. Applying that principle: a building with what the appellants apparently accept are "unauthorised walls" is unauthorised.

42. In reaching my decision I have taken account of all the other matters raised, including the appellants' comments about non-payment of money due under a Section 106 undertaking being a breach of contract rather than a breach of a "condition precedent". I have also noted the comments about planning policy not being raised by the planning authority when the prior notification applications were considered. The scope for applying development plan policy during the prior notification procedure under Class R of the GPDO is not the same as a normal application for planning permission. Developments elsewhere have also been mentioned in some of the submitted documents, but I do not consider that any of these have set such a precedent as to affect my decisions.

43. I also appreciate that the demolition of the former piggery building down to floor-slab was not done with any deliberate aim to flout planning controls. Mr and Mrs Cotter may well have started out with the intention of - as their agent puts it - "breathing new life into an old derelict building"; but that is not what happened. There have been numerous instances around the country of planning permissions for conversions becoming "lost" and incapable of implementation when it has transpired that the building involved could not be safely or satisfactorily converted, or when a structure being converted has collapsed. Mr and Mrs Cotter may not, until now, have been aware of this, or of the importance of the warning issued as part of the prior notification procedure.[13] The fact remains that once there is no longer a building to convert, the provisions of the GPDO and planning policies under which conversion would have been acceptable no longer apply, and new-build policies apply instead. There were sound reasons why the planning authority in this instance applied those policies, refused planning permission, and issued the enforcement notice.

[11] *R (Samuel Smith Old Brewery (Tadcaster) v Secretary of State* [2009] JPL 1326 and *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314.

[12] *Sage v Secretary of State for Environment, Transport & Regions and Maidstone BC* [2003] UKHL 22; and *Copeland BC v Secretary of State for the Environment* [1976] JPL 304. In the latter case, a house was built with the "wrong" roof tiles and the whole house was held to be unauthorised.

[13] This "informative" stated: "This document relates to change of use and does not permit the demolition and re-build of the structure in question, which would require planning permission in its own right".

Formal Decisions

Section 174 Appeal Against Enforcement Notice

44. I dismiss the appeal, uphold the enforcement notice, and refuse to grant planning permission on the application deemed to have been made under Section 177(5) of the 1990 Act.

Section 78 Appeal Against Refusal of Planning Permission

45. I dismiss the appeal.

G F Self

Inspector