
Appeal Decision

Site visit made on 4 April 2016

by Simon Hand MA

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

Decision date: 25 April 2016

Appeal Ref: APP/B9506/C/15/3134559

Land to the rear of Kingfisher Cottage, Salisbury Road, Burgate, Fordingbridge, SP6 1LX

- 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 Keith Pritchard against an enforcement notice issued by New Forest National Park Authority.
 - The Authority's reference is EN/15/0037.
 - The notice was issued on 26 August 2015.
 - The breach of planning control as alleged in the notice is without planning permission the material change of use of the land affected from agriculture to that for domestic purposes and the erection of a greenhouse shown in the approximate position coloured green on the plan attached to this Notice.
 - The requirements of the notice are 1) Cease the use of the land affected for domestic purposes. 2) Demolish the greenhouse shown in the approximate position coloured green on the plan attached to this Notice to ground level and remove all resultant materials and debris from the land affected. 3) Remove all domestic paraphernalia including the vegetable beds, trees and plants and any items unconnected with agriculture from the land affected. 4) Restore the land affected to its former condition.
 - The period for compliance with the requirements is 8 weeks.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The enforcement notice is varied by deleting "8 weeks" from the sentence beginning "Time for Compliance" and replacing it with "6 months". Subject to this variation the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Costs Applications

2. Applications for a full award of costs have been made by both parties against each other. These are the subject of a separate decision.

Background to the Appeal

3. Kingfisher Cottage is in the small village of Lower Burgate and stands next to the River Avon, between it and the main road. In this area the river channel is braided, creating a number of streams and islands. To the east of the river lie extensive water meadows and to the west is a narrow strip of land with several dwellings, the main road and then the rest of the village. Kingfisher Cottage is

right on the main road, and has a small back garden running down to the river. At this point a narrow channel separates the garden from a long thin strip of land that runs north and south of the cottage. A wider channel separates the thin strip of land from a substantial island, which in turn is separated from the water meadows beyond by a further channel.

4. The island itself is owned by several parties; the bulk of it by the appellant, but the southern tip by at least two other people. It is the main part of the island owned entirely by the appellant that is covered by the enforcement notice. Access to the island used to be solely across a sluice gate at its southern end, which linked it to the narrow strip of land and a further bridge over a piped stream to the appellant's garden. This access takes one round to the southern part of the island and across what appears to be the back gardens of other properties to the south of Kingfisher Cottage, across which the appellant has right of access. Recently he has built two bridges, a simple flat bridge linking his garden to the thin strip of land and a more elaborate arched bridge linking the thin strip to the island itself. This enables him to drive a sit-on mower across to the island. A further bridge lies some 2-300m to the south, a suspension bridge, which takes a public right of way across the river and into the water meadows beyond.
5. The thin strip of land has been mowed, and appears to have been mowed regularly, and has been for much of its length almost as far as the suspension bridge. The island, as I saw on my site visit has three distinct characters. The appellant's section is completely flat and has been mowed and is down to very short grass, but of poor quality. The eastern bank is fringed by rushes, and there is a scattering of large trees, plus a number of smaller ornamental trees that have been recently planted around the circumference of the island and protected by small fences. The western bank was fringed by rushes but these have been cut down to the ground. The southern end of the appellant's section has a series of raised beds, in which various plants are growing and a domestic style greenhouse. Next to this, to the south, is a wild strip of land, mostly overgrown but accessed by a wooden walkway, with a decked sitting out area, and on the eastern side a small clearing with an ornamental tree planted, linked to the decking by mown paths. Beyond that the southern tip of the island is more domestic, with rough mown grass filled with daffodils, a decking area and a small brick building.

The Appeal on Grounds (b) and (d)

6. Ground (b) is that the breach as alleged has not occurred and (d) is that it has occurred for 10 years or more. In this case the appellant accepts the island is not within his curtilage but argues the area covered by the notice is in the same planning unit as the dwelling at Kingfisher Cottage and so use for private amenity land (or "domestic purposes" as it is described in allegation in the notice) is not a material change of use.
7. The way to determine what constitutes a planning unit was settled many years ago in the *Burdle*¹ case. In that the courts laid down the matters to be considered as a starting point and I quote the most relevant part: "*The unit of occupation is the most convenient starting point in identifying the planning unit, because that is normally the largest unit in which there is being carried on a set of functionally and physically interdependent activities. It is only*

¹ *Burdle v SSE* [1972] 3 All E.R. 240, 244

normally possible to select a smaller unit in the same occupation where there is a functional and physical separation of activity." The key sentence is the last one which I have highlighted.

8. In this case the unit of occupation, Kingfisher Cottage, is not the largest unit, as the island is significantly larger than the curtilage of the cottage, but the principle holds good. In my view the part of the island owned by the appellant is clearly physically separated from the cottage and its garden. The question is therefore whether it is functionally separated. At the moment it is not, as the appellant has clearly incorporated it into his garden and it is being used for domestic purposes, but, the Authority argue that has not always been the case.
9. An aerial photograph from 2012 shows the island prior to the recent works of domestication. It is difficult to distinguish it from the rough grazed water meadows to the east. The southern part I described above with the daffodils appears to be green and is probably roughly mown as I saw on the site visit, but the appellant's part of the island appears to be rough scrub. A close up from the photograph suggests much of this would have been reeds and bulrushes. There is a narrow mown path around the edge of the island and one track across the middle. It is possible the central path has a small log bridge to carry it over a depression in the middle of the island, and there is a small cluster of objects on the western junction of that track with the perimeter track, possibly bee hives or a small shed, but it is far from clear. The Authority have provided a statement from one of their officers who visited the site in 2010 and 2011 which confirms there was no evidence of any domestic use then and that the island was clearly "riparian grassland".
10. There is evidence therefore that the island was accessed, presumably regularly enough to warrant maintaining a mown path around it, but that otherwise it was essentially unmaintained. Provision of a grass path is not the same as suggesting it was being used for domestic purposes as part of the same planning unit as the cottage. A key issue for owners of these riverside properties is flooding and various sluices and spillways are located along the river. The island has a sluice at its southern end, referred to above, and a spillway with a sluice at the northern end. There is at least one other sluice belonging to a neighbour on one of the channels by the narrow strip of land. I would be surprised if some access was not regularly required onto and around the island to maintain and operate these sluices etc and this would seem to be the likeliest explanation for the state of the island in 2012.
11. The appellant has provided a statutory declaration from Mrs McKeown. She says that the former owners of the island allowed her to exercise her dog, almost every day, from 2006 until they sold the house, which I believe was in 2010. Her husband also fished from the island up to his death in 2007. She also explains how her husband helped the neighbour to Kingfisher Cottage construct decking and carry out some planting on the island and that the neighbour kept his part of the island mown. However this would seem to refer to the tip of the island I saw on my site visit which was planted with daffodils, not the part owned by the appellant.
12. The sum total of evidence for the use of the island owned by the appellant is that a path was mown around its edge and across its centre, that for 4-5 years a lady walked her dog on it and for a year or so her husband occasionally fished from it. The appellant notes that various locals were used to walking on

the riverbank and he had some difficulty in persuading them to stop when he moved in. If anything, the use by neighbours for walking suggests the land was not considered as part of the residential planning unit by the previous owners of Kingfisher cottage. There seems to be no evidence that the previous owners treated the land as either part of their garden or in a looser amenity sense. The evidence suggests to me that it was hardly used at all. Whether the previous use was agricultural or not is irrelevant. The issue is whether it is part of the planning unit of Kingfisher Cottage and it seems to me that, until recently, it was both physically and functionally separate. It was not used as a residential amenity land until after the appellant purchased Kingfisher Cottage in 2010. Occasional dog walking and fishing is not a residential amenity use. The appeals on both grounds (b) and (d) fail.

The Appeal on Ground (a)

13. The site lies within the National Park boundary and the river that flows around it is a Site of Special Scientific Interest (SSSI). The Authority's core strategy is from 2010 and contains policies to protect the quality of the National Park, the SSSI and the natural environment. DP1 requires that all development (and that would include a material change of use to domestic purposes) must enhance local character and distinctiveness. CP2 requires that important sites and features of the natural environment (and that includes SSSIs) should be protected, maintained and enhanced. DP12 discourages domestic outbuildings outside of the residential curtilage. The NPPF, at paragraph 115, requires that great weight is given to protecting landscape and scenic beauty in National Parks.
14. The island is part of a series of islands and channels formed by the braiding of the river which is characteristic of its character for much of its length from Salisbury to Ringwood. In the vicinity of the site the land is characterised by the road and dwellings to the west and the meadows to the east. Where dwellings are on the river their gardens tend to be lawned and domesticated down to the riverbank, which provides a stark contrast to the wild beds of rushes and the water meadows beyond. As I conclude above the Island formerly belonged to the wilder eastern part of the landscape. The island is large, and while a small part of the southern tip does seem to have been included within the gardens of several dwellings, the level of domestication is low key. The appellant however, has a much larger area and has removed all trace of its former wild character apart from a narrow fringe of reeds on the eastern bank. The land was levelled as part of an agreed programme to reduce flooding, but now that it has been cleared this creates a flat, green, wide open space that is wholly uncharacteristic of the river, especially with the raised beds and greenhouse at its southern end. I agree with the Authority that it has been turned into a contrived garden landscape which appears starkly out of place.
15. I accept that once the extensive laurel hedge has matured it would be difficult to obtain views of the island from the road. It can be seen, but somewhat in the distance, from the public footpath that crossed the meadows via the suspension bridge. Nevertheless, the fact that it can't be readily viewed does not detract from the substantial harm caused to the very attractive natural landscape. The development is contrary to DP1 and the NPPF.

16. The loss of habitat caused by the clearance of the site would also be likely to have a harmful effect on the SSSI. The wildlife interests of the SSSI require clean water and little human interference supported by scrub and marginal vegetation. The vegetation has been largely removed and the use as a garden will inevitably increase human activity. The fact that the Environment Agency has been happy with the works undertaken to the river channel and the sluices as part of flood prevention works does not mean they are content with the domestication of the island. Turning the island from largely unused scrubland to a garden would not protect or maintain the SSSI and so is contrary to CP2.
17. The appellant suggests there is a fallback position which would be even worse than allowing him to use the land as a garden. As the Authority alleges the use of the land is actually agricultural then he would use it intensively for horticultural production or as an orchard while selling produce from his door, increasing traffic on the main road. To be given any weight a fallback position has to be both likely as well as possible. While I agree intensive horticultural use of the island would be harmful, I am not convinced the appellant would be likely to carry this out. He would first have to return the island to its previous state, removing the trees, raised beds and greenhouse, and then turn it back into a horticultural use or plant more trees to create an orchard. There is no suggestion he has any experience of horticulture or has wanted to do this or to create an orchard in the past so it is unclear why he would wish to carry out intensive horticulture or plant an orchard in the future. I cannot give the threat of this fallback position any great weight.
18. Consequently, I find the material change of use for domestic purposes and the erection of the greenhouse are harmful and contrary to the Authority's policies and the NPPF and the appeal on ground (a) is dismissed.

The Appeal on Ground (f)

19. The appellant argues that the requirements are unclear as he does not know what "domestic purposes" are that should be ceased, nor does he know what the previous condition of the land is.
20. It is clear to me that by "domestic purposes" the Authority means the current use as a garden. The appellant argues it would be unreasonable to prevent him from maintaining the grass, trees and shrubs at all, but I am not sure why. The Authority clearly considers the lawful use of the land is agricultural, and so the appellant can do anything "agricultural" on it. That would include keeping any trees and shrubs that were left in a safe condition, removing those that weren't, and so on. I am not sure why the appellant would wish to do any more, but if he does, as long as it does not amount to a material change of use then that should be acceptable.
21. The appellant is best placed to know what the previous condition of the site was when he purchased the land. From the aerial photographs and the condition of the immediate neighbour's plot it would seem to be overgrown with rushes and scrub and just the edges maintained as an access path to the sluices and spillway.
22. I do not consider the notice requires any on-going maintenance, merely a restoration to its original condition. The appellant will know what works he undertook to turn the island from the wild place it was to the domestic garden it now is. They simply need to be undone. The appeal on ground (f) fails.

The Appeal on Ground (g)

23. The time allowed is 8 weeks. I agree with the appellant that this is not a long time to remove the trees and shrubs and it is likely to be too late to safely carry out those works without threatening the future of the plants removed by the time this decision is available. I shall therefore extend the compliance period to 6 months.

Conclusion

24. I shall uphold the notice, vary the compliance period and dismiss the ground (a) appeal.

Simon Hand

Inspector