The Planning Inspectorate

Appeal Decision

Inquiry opened on 2 August 2011

Site visit made on 27 September 2011

by Alan Woolnough BA(Hons) DMS MRTPI

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

Decision date: 22 November 2011

Appeal Ref: APP/K3605/X/11/2147586

Upper Farm, Blue Bell Lane, Stoke D'Abernon, Cobham, Surrey KT11 3PW

The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).

The appeal is made by Mr Geoff Peters against the decision of Elmbridge Borough Council.

The application ref no 2010/2684, dated 6 October 2010, was refused by notice dated 21 December 2010.

The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.

The application form states: 'This application is to establish that static caravan on the site known as Upper Farm is an independent single dwelling house with curtilage'.

Summary of Decision: The appeal is dismissed.

Procedural Matters

1. Applications for costs were made by Mr Geoff Peters against Elmbridge Borough Council, and by the Council against Mr Peters. These applications are the subjects of two separate decisions.

2. All oral evidence presented at the Inquiry was taken on oath or solemn affirmation.

3. The Inquiry sat for two days, closing on 27 September 2011.

The description of development

4. At the Inquiry it was established that, despite the terminology used in the application form, the Appellant considers that the 'static caravan' referred to therein was a 'building' rather than a 'caravan' for the purposes of the 1990 Act as amended by the time of the application. The terms are mutually exclusive, such that a unit of accommodation cannot be both a caravan and a building. Moreover, having regard to case law arising from the judgment in Measor v SSETR & Tunbridge Wells Borough Council [1999] JPL 182, a caravan cannot, for the purposes of the Act, be a 'dwellinghouse'.

5. On the Appellant's construction, operational works were carried out to the original caravan at some point in time which converted it to a building and thus created a dwellinghouse. It was further established that a LDC is sought for the use of that building as a dwellinghouse, rather than for the operational works that created the building, such that the application was pursuant to paragraph (a) of section 191(1) of the Act rather than paragraph (b). It

was agreed between the main parties that, this being so, a more apposite wording for any LDC that I might be minded to grant on the Appellant's terms would be: 'Use of the former caravan as a single dwellinghouse'. It was also agreed that there would be no need to include the phrase 'with curtilage' in the description.

6. At the Inquiry the Appellant also confirmed that he wished me to consider whether a LDC could be granted for the use of the land for the stationing of a single residential caravan, should I conclude that the residential unit does not constitute a dwellinghouse. Section 191(4) of the Act allows me to modify the terms of the original application and grant a LDC in somewhat different terms so as to accord with the facts and evidence that I am presented with. Moreover, in the light of case law arising from Panton & Farmer v Secretary of State for the Environment Transport & the Regions & Vale of White Horse DC [1999], I am obliged to do so if that is what the evidence points to. I have therefore borne this possibility in mind.

Time limits

7. It has long been accepted practice to regard a dwellinghouse as subject to a four year time bar for the purposes of immunity from enforcement action under section 171B of the 1990 Act as amended. However, the Supreme Court's recent judgment in the case of Welwyn Hatfield Council v SSCLG & Beesley [2011] UKSC 15 has cast doubt on the validity of this approach insofar as it is applied to dwellinghouses formed by means of the creation of a new building specifically for that purpose, as opposed to the material change of use of an existing building.

8. The Appellant's stance is that the original caravan at Upper Farm was converted at some point through works of operational development to form a building. I am satisfied that a conversion of this kind would be tantamount to the creation of a new building rather than a material change of use of an existing structure, irrespective of whether the pre-existing caravan was residentially occupied. The arguments before me encompass the possibility that any building so created was used as a dwellinghouse from the point of conversion. The Welwyn Hatfield judgment is therefore relevant.

9. The Council questions whether the unit constitutes a dwellinghouse even today. However, it also postulates that, if it is and has been used as such from the time the building was created, then in the light of Welwyn Hatfield that use is subject to the ten year time bar on enforcement action pursuant to section 171B(3) of the Act rather than the four year limit under section 171B(2), albeit that any operational works involved in the creation of the dwellinghouse remain subject to the four year threshold under section 171B(1).

10. The comments of Lord Mance in paragraphs 17 and 20 of the Supreme Court's judgment are cited in this regard. However, I do not find these to condone the application of the ten year time bar to the use of a dwellinghouse in such circumstances. Paragraph 30 is perhaps more pertinent in that, here, Lord Mance gives some suggestion that the ten year limit may be applicable. However, even this is by no means obvious and I find no statement anywhere else in the judgment that portrays such action as lawful.

11. Operational development remains subject to the four year time bar imposed by section 171B(1). However, it is clear in the light of the Welwyn Hatfield

decision that the four year time bar in section 171B(2) cannot apply to the initial active use of any dwellinghouse created by a new build, as no change of use of a building has been involved. Moreover, in the absence of a material change of use, there is no 'other breach of planning control' to which the ten year limitation under section 171B(3) might apply. I do not therefore endorse the Council's view.

12. Rather, the position must be that if enforcement action is not taken against a dwellinghouse within four years, whether created as a new building or by means of a material change of use, then both the operational development involved and use as a dwellinghouse become lawful and thus immune from such action. The only exception would be where there had been positive deception designed to avoid enforcement action within the relevant period. In such circumstances the principle of public policy would preclude any reliance on section 171B for purposes of immunity. However, deception has not been demonstrated in this case and, accordingly, I will determine the appeal on the basis that the four year time bar applies.

Reasoning

13. In the light of the above, and having regard to advice in Circular 10/97: Enforcing Planning Control: Legislative Provisions and Procedural Requirements, the burden of proof is firmly on the Appellant to demonstrate on the balance of probabilities that, at the time of the LDC application, there was a building on the appeal site that had been used continuously as a dwellinghouse for a period of four years. The material date is therefore 6 October 2006. Alternatively, should the residential unit be deemed a caravan rather than a building, continuous use of the land for the stationing thereof for residential purposes must be demonstrated on the same basis over a ten year period, giving a material date of 6 October 2000.

The case for the Appellant – main points

14. The unit in question has been situated on the appeal site since at least 1987, when it appeared on planning application drawings concerned with the conversion of Manor Barn and Upper Manor Barn to dwellings. The Appellant and his then wife acquired the appeal site and moved into the unit in June 1991. They occupied it as their sole home for either one or two years, Mr and Mrs Peters having given different accounts in this regard.

15. On vacating the unit in 1992 or 1993, the couple moved into the newly built garage of Upper Manor Barn whilst the barn itself underwent conversion to a dwelling. They transferred to the new dwelling once habitable. Upper Farm was registered with the Land Registry as a plot separate from Upper Manor Barn in 1992. A separate access serving the former received planning permission in 1993 and was constructed shortly afterwards. A hedge dividing the two plots was planted in or around 2000 and a fence erected on the boundary in 2002.

16. Although the unit is consistently described in the Appellant's evidence as a static caravan, he contends that it has been fixed in place so as to constitute a building for the purposes of planning law throughout his ownership by means of brick footings and permanent electricity, water and drainage connections, with separate metering for the utilities. Towing facilities were removed by 2001 at

the latest. It has therefore long been without the essential quality of mobility that would deem it a caravan.

17. The appeal site, including the unit of accommodation, was let to Mr L J Evans in 2000 for four years who, according to his unsworn statement, used it for digger and vehicle maintenance and his general enjoyment until 2004. The unit was then occupied for residential purposes by Mr W Evans from either 2004 (his statutory declaration) or 1 April 2005 (Mr Peters' proof of evidence) until 1 November 2009. Council Tax has been paid for residential accommodation at the site from 1 May 2005. Following refurbishment works, Mr Peters moved out of Upper Manor Barn and took up residence in the unit on the appeal site, which remains his sole home today. Council tax, utilities bills and various other documents bearing the Upper Farm address provide evidence of occupation.

18. Much of the Appellant's account of events is supported by his former wife and a number of friends and associates who supplied statutory declarations and/or gave evidence in person at the Inquiry. These include a professional builder, Mr Miles, who has carried out substantial works of improvement to the unit over the years. He discovered in January 2010, when refitting the kitchen and bathroom and laying replacement flooring, that the unit was, in his assessment, securely fixed to the ground as would be a normal building.

The case for the Council − main points

19. It has not been demonstrated that the unit was a building, and could therefore be used as a dwellinghouse, by the relevant material date. All the statutory declarations submitted on behalf of the Appellant, including that made by Mr Peters himself, refer to the unit as a caravan rather than a building or dwelling. Brick plinths and utility connections are common features of mobile homes and do not in themselves fix such units to the land so as to render them buildings. In any event, the plinth at the base of this unit has been added well within the last four years, as have the conservatory and timber cladding. No survey by a qualified surveyor demonstrates status as a building.

20. Although it appears that the original caravan's towing mechanism has long been removed, mobile homes can be moved by other means such as craning or winching onto a flat-bed truck. Although Mr Miles asserted in his statutory declaration that the unit was fixed in place by footings and utility connections, he acknowledged during cross-examination that it is, in fact, moveable. He also referred to metal strips that connect the unit to its brick plinth. However, there is no evidence of the degree of permanence that this form of attachment affords.

21. Nor has it been demonstrated that the site has been continuously occupied residentially for the relevant period. There are no photographic records supporting an historical residential use of the site. No evidence has been submitted to substantiate claims made orally at the Inquiry concerning the use of gas bottles. The delivery of post to the unit and addressed to an alleged occupier is not in itself evidence that someone is living there. Some of Mr W Evans' post is delivered to the unit even now. Many non-residential sites have electricity and other utility supplies. There is also an unexplained difference in electricity consumption between 2003 and 2009.

22. The unit appeared to be empty to the Inspector who visited the site in 2003, in the context of which appeal (ref no APP/K3605/A/03/1122750) the Appellant

said that he could replace the mobile home with a larger one, implying that it was not then a building. It is evident that the then tenant, Mr L J Evans, was not living or sleeping in the unit at that time and had a house elsewhere. There also appears to be a break in occupancy, residential or otherwise, for an unspecified period in 2004/2005 between the alleged tenancies of Mr L J Evans and Mr W Evans. Council Tax records do not include reference to the unit until May 2005 and indicate that it was vacant from May to November 2009. In any event, a Council Tax bill does not in itself demonstrate that the site was residentially occupied. There is no electoral role registration at Upper Farm prior to 2006.

Assessment

23. There is no dispute between the main parties that, in its original form, the unit on the appeal site satisfied the definition of a caravan for the purposes of section 29(1) of the Caravan Sites and Control of Development Act 1960. It is also common ground that the unit has been on site for at least 20 years and that, having regard to the test arising from the judgment in Gravesham BC v SSE & O'Brien [1982] 47 P&CR 142, it has long provided anyone who might use it the facilities required for day to day private domestic existence. However, there is fundamental disagreement as to whether the unit has ever constituted a building capable of being used as a dwellinghouse and whether it has been used residentially on a continuous basis. I will focus on these two issues.

24. The Council is critical of the Appellant's substantial reliance on sworn evidence unsupported by documentation. Nonetheless, case law arising from the judgment in Gabbitas v SSE & Newham LBC [1985] JPL 630 makes it clear that if the Council has no evidence of its own, or from others, to contradict or otherwise make the Appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided the Appellant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probabilities. I will consider the Appellant's account with this in mind.

25. I turn first to consider whether a building has been created and, if so, when. Measor establishes that for a structure that is prima facie a caravan to become a building, and thus operational development rather than a use of land, there must be a substantial degree of affixation to the land on which it stands. Tests arising from Cardiff Rating Authority v Guest Keen Baldwin Iron & Steel Co Ltd [1949] 1 KB 385 and Skerritts of Nottingham Ltd v SSETR & Harrow LBC [2000] JPL 1025 are also relevant. These indicate that the key considerations as to whether, as a matter of fact and degree, a building exists are size, permanence and physical attachment/mobility.

26. The length of time for which it is agreed the unit has been in situ implies a significant degree of permanence. The unit was also, even prior to alterations carried out in recent years, large enough to satisfy these tests. However, I find the position regarding its degree of physical attachment to the land and the extent to which it could be considered moveable to be less clear cut. Mr Peters claims firm affixation to the land since at least 1991 by means of brick footings and permanent utilities connections. However, it transpired that he was referring to the brick plinth that surrounds the unit rather than footings and his knowledge of any precise means of fixing was vague indeed.

27. Mr T King's evidence is of little help in this regard. Although he is a consulting engineer who had been asked to inspect the unit from a structural viewpoint, it emerged during cross-examination that he is not a building surveyor by profession and that this is not his particular field of expertise. Moreover, although he had been familiar with the unit periodically for several years, Mr King's inspection concerned the unit as it exists today, following the extensive alterations carried out by Mr Miles in 2009 and 2010. Neither he nor any other witness for the Appellant could recall convincingly whether a brick plinth existed prior to this or, if so, the form that it took. Photographic material could have assisted considerably in this regard. However, none was forthcoming.

28. Mr Miles impressed as a professional builder of considerable experience. In oral evidence he explained that the current plinth is embedded in concrete footings and that timber cladding to the sides of the unit is in turn attached to the plinth. I have no reason to question his evidence in this regard, which tallies with what I was able to see for myself during my inspection of the unit. However, these are works that Mr Miles himself carried out less than four years before the LDC application was made. His statements regarding earlier means of affixation to the land proved inconsistent and less precise.

29. In his statutory declaration, Mr Miles states that the unit is 'securely fixed to the ground as would be a normal building' and that he knows this because, when carrying out works in January 2010, he had cause to remove the old flooring. However, despite his professional expertise I would not expect Mr Miles to be aware of what might qualify as secure affixation for the purposes of planning law. It emerged at the Inquiry that the means of fixing thus identified was in all likelihood, prior to the recent works he undertook, limited to utilities connections. Although Mr Miles also observed metal strapping attached to the base of the unit, he said in cross-examination that he was 'not sure where this was going to' and, notwithstanding the Council's comment to the contrary in closing, did not suggest that it was attached to any footings.

30. Crucially, Mr Miles acknowledged in cross-examination that, in his assessment, the unit as it exists today was in fact moveable, subject to the detachment of the conservatory and disconnection of utilities, albeit that caution would need to be exercised. As the Council has indicated, the absence of a towing mechanism does not preclude mobility. Indeed, many long-established mobile homes with utility connections retain their status as caravans and these connections alone would rarely satisfy the tests of a building arising from Cardiff Rating and Skerritts as they are generally easy to sever. Whilst it was asserted on the Appellant's behalf that disconnection of drainage would amount to an engineering operation, it has not been demonstrated that this would be so.

31. In the absence of a precise description from any witness of the nature of the connections at Upper Farm and having been unable to view them for myself, I have no reason to suspect that they are in any way unusual and thus an exception to the general rule. I also find it significant that the unit is referred to throughout the previous Inspector's 2003 decision as a mobile home and that the Appellant advanced at that time the replacement of the unit with a larger mobile home as a fallback position. The fact that he now claims the unit to have long been a building by that point is a clear inconsistency.

32. The doubts thus sown render the Appellant's evidence insufficiently precise and unambiguous for the purposes of applying Gabbitas. On the evidence before me I find it possible that the degree of additional affixation to the land, comprising footings, plinth and cladding added during the last four years, has led to the establishment of a building. Nonetheless, the structure was not sufficiently exposed during my visit to enable me to ascertain this. In any event, I conclude that it is highly probable that, prior to these works taking place, the unit did not satisfy the tests arising from Cardiff Rating and Skerritts. In the light of this conclusion, it is clear that a LDC should not be granted for use as a dwellinghouse. Such use rights could not be accrued during the short time for which a residential building may have existed on the site.

33. I have considered the relevance to my decision of the recent judgment in the case of Bury MBC v SSCLG & Entwistle [2011] EWHC 2192 (Admin), as cited by the Appellant, which in turn draws on findings in Byrne v SSE & Arun DC [1997] 74 P&CR 420. In the former, an Inspector's decision to quash an enforcement notice was remitted for redetermination, on the basis that insufficient evidence had been presented on the issue of mobility to substantiate her conclusion that an alleged dwellinghouse in fact remained a caravan. The Court thus found that the Appellant had not met the burden of proof. My own conclusion in this case is consistent with the Court's reasoning. The situation before me is effectively the reverse of that which applied in Bury, in that the Appellant seeks confirmation that the unit is a dwellinghouse rather than a caravan.

34. The burden of proof therefore rests with the Appellant to demonstrate an absence of mobility and, for the reasons I have already explained, I find that he has not done so. This is quite different to the approach adopted by the Bury Inspector who, in the Court's view, found that burden to have been fulfilled without having sufficient evidence to do so. I therefore find that judgment to be of limited relevance to this appeal. I am also satisfied that numerous other items of case law cited in the Appellant's pre-Inquiry submissions, none of which were referred to on his behalf in closing, are not directly applicable to the issues on which my decision hinges.

35. Should it be the case that recent works have established a building on the appeal site, a LDC could not be granted under section 191 of the 1990 Act as amended for existing use of the site for the stationing of a residential caravan as this would not then be the use to which the land was put at the time of the application. However, if this is not the case, it would have to be demonstrated that the caravan on the site had been used continuously as a residential unit for at least ten years by the time of the LDC application. It is thus necessary, having regard to the Court of Appeal judgment in Swale BC v FSS & Lee [2006] JPL 886, to ask whether there was any spell during the relevant period when the Council could not have taken enforcement action against such a use.

36. Evidence given at the Inquiry points to significant breaks in the continuity over the years in this regard. In the absence of any indication to the contrary, it is reasonable to assume that, following an initial year or two of residential occupation by the Appellant in the early 1990s, the caravan reverted to a role incidental to the enjoyment of Upper Manor Barn as a dwellinghouse, at least until the two plots were physically severed by the planting of a hedge in or around 2000.

37. The site then appears to have been used for purposes unrelated to Upper Manor Barn by Mr L J Evans for either three or four years (Mrs Peters did not recall his presence on site before she left Upper Manor Barn in 2001) until 2004, thus becoming a separate planning unit. However, the Appellant acknowledges that Mr Evans lived elsewhere and did not sleep in the caravan. I therefore find, drawing on the limited information provided for this period, that his use of the site was more akin to that of a leisure or hobby plot, possibly with an element of business activity.

38. Use of the caravan as a residential unit did not recommence until his son, Mr W Evans, moved in during either 2004 or, on the Appellant's own evidence, April 2005. In any event, both are too recent to enable lawful residential use rights to have been accumulated. There is also a question over whether Mr Evans junior was resident from May to November 2009 as claimed by the Appellant, who was unable to explain why Council Tax records indicate that the unit was vacant for that period, albeit that conversion to a building might already have taken place by then.

39. I therefore conclude on the balance of probabilities that the Appellant has not fulfilled the burden of proof in demonstrating the lawfulness of either use as a dwellinghouse or the use of land for the stationing of a residential caravan. I am not therefore minded to grant a LDC.

Conclusion

40. For the reasons given above and having regard to all matters raised, I conclude that the Council's refusal to grant a LDC was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Formal Decision

41. The appeal is dismissed.

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Martin Edwards	Of Counsel, instructed by Sarah Youren Planning Solicitors
He called	
Mr G Peters	Appellant
Mrs S Peters	Former wife of the Appellant
Ms J Lowrie	Principal Solicitor, Lowrie & Co Solicitors
Mr E King	Friend of the Appellant
Mr W Whillock	Friend of the Appellant
Mr K Miles	Builder
Mr T King	Friend of the Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Scott Stemp	Of Counsel, instructed by the Head of Legal Services, Elmbridge Borough Council
He called	
Mrs L Davies BA(Hons) MA	Senior Planning Officer, Elmbridge Borough Council

DOCUMENTS PUT IN AT THE INQUIRY AND DURING THE ADJOURNMENT

1 Appeal notification letter dated 23 February 2011, supplied by the Council
2 Electricity bill dated 15 November 2010, supplied by the Appellant
3 Council Tax bill dated 23 September 2009, supplied by the Appellant
4 Letter to Mr W Evans from the Driver and Vehicle Licensing Agency, dated 19 July 2011, submitted by the Appellant
5 Print of e-mail exchange between Mrs D Zagrovic and Miss Knight, dated 23 & 24 May 2011, supplied by the Council
6 Planning Contravention Notice dated 18 May 2010 and related correspondence between the Appellant, the Garland Group Ltd and the Council, supplied by the Council
7 Alternative proof of evidence for Mr E King, submitted by the Appellant
8 Letter to the Planning Inspectorate from Ms S Youren, dated 19 September 2011 and statutory declaration dated 14 September 2011 by Mr C Jackson, submitted by the Appellant
9 Council proforma for site visit conducted on 13 December 2010, submitted by the Appellant

10 Authorities for Byrne V SSE & Arun DC [1997] 74 P&CR, Brightlingsea Haven Ltd & Hammerton Leisure Ltd v Morris, Foster & Clark [2008] EWHC 1928 (QB) and Bury MBC v SSCLG & Entwistle [2011] EWHC 2192 (Admin), submitted by the Appellant
11 Written application for costs, submitted by the Council

PLANS

A.1 & A.2 Application drawings comprising location plan and site layout plans
B.1 to B.6 Site location and layout plans for planning applications 2003/1047, 2004/1775 & 2004/1776, supplied by the Council

PHOTOGRAPHS PUT IN AT THE INQUIRY

A.1 to A.5 Aerial photographs of the appeal site and surroundings, supplied by the Council
B.1 to B.13 Photographs of the appeal site and surroundings taken by an officer of the Council, supplied by the Council