Appeal Decision

The inquiry was held on 11 and 12 November 2008

A pre-inquiry site visit was made on 10 November 2008

by Colin A Thompson **DipIArch DipTP RegArch RIBA MRTPI IHBC**

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

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Decision date:
5 December 2008

Appeal Ref: APP/L1765/C/08/2068258
Sunnybank, Gravel Hill, Shirrell Heath, Hants SO32 2JQ

- The appeal is under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act).
- The appeal is by Richard Stone against an enforcement notice (the notice) issued by Winchester City Council (the Council).
- The Council's reference is 05/351.
- The notice was issued on 4 February 2008.
- The breach of planning control as alleged in the notice is the erection of a dwelling house on the land (its approximate position shown hatched black on the attached plan).
- The requirements of the notice are:
  (i) cease the residential occupation of the dwelling house, and;
  (ii) demolish the dwelling house to ground level and hard-standing /sub-base, and remove from the land all the resulting materials.
- The period for compliance with the requirements is 6 months after this notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f) and (g) of the Act. Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act, does not fall to be considered.

Summary of Decision: the appeal is allowed.

Application for costs

1. At the inquiry an application for costs was made on behalf of Mr Stone against the Council. This is the subject of a separate Decision.

2. All references to the General Permitted Development Order (GPDO) in this appeal relate to the previous Order dated 1995 which was the one in force at the time the appeal building was first erected.

Procedural Matters

3. Because matters of fact were in dispute all evidence was taken under oath.

The Notice

4. There were 2 matters raised under this head.

5. The first went to the validity of the notice. The appellant's position was that there had been no erection of a dwelling house. Rather there was a change of use of a lawful residential curtilage building to something that was in

residential use but was less than a dwelling house. Mr Stone further asserted that correcting the breach to a material change of use, instead of operational development, would be such a fundamental change that it would be beyond my powers. However, the main parties did agree that if I was minded to allow the appeal there would be no problem in that it would be open to me simply to quash the notice as it stands.

6. The second point was a relatively minor one about part (ii) of the requirements where, unbeknown to the Council, the appeal building was constructed on the walls of a disused swimming pool. It followed, as a matter of fact, that there was no hard-standing /sub-base to be removed. Correcting this part of the requirements, if needed, would be a minor matter which would not cause injustice.

Ground (b) Appeal

7. This ground is that *the matters which might give rise to a breach of planning control have not occurred as a matter of fact*.

8. From what I saw and heard the appeal building was constructed in the back garden of Sunnybank on land which clearly could be described as *a piece of ground attached to the dwelling house*. It follows that the building was then in the curtilage of Sunnybank. After hearing Mr Stone's evidence, given under oath, the Council helpfully conceded that the factual disagreement they had had with him fell away. It was now accepted that the appeal building was properly erected and used as a gymnasium, games room, storage space /office (gym). So at least initially the building was used for a purpose incidental to the enjoyment of the dwelling house. I saw that it was also: not nearer to any highway than any part of the original dwelling house; not within 5m of any part of the dwelling house or more than 4m high to the top of the ridge, and; the total ground covered by buildings or enclosures within the curtilage (other than the original dwelling house) would not exceed 50% of the total area of the curtilage (excluding the ground area of the original dwelling house). This puts the appeal building within the allowances set out in the then GPDO Schedule 2, Part 1, under Class E.

9. Once such a lawful building had been constructed, and used, for a purpose incidental to the dwelling house then any changes to the use of the building, for extra residential accommodation associated with the main house (residential being the lawful use of the site), where the changes to the structure were limited just to internal ones, which was the case here, then such works might not be development (section 55(2)(a) of the Act).

10. However, a legal disagreement between the parties under this ground remained. This centred on the length of time that such a building should be used, for a purpose incidental to the enjoyment of the dwelling house, before it could lawfully be converted to a residential use without planning permission.

11. The lawful use of the curtilage gym lasted for some 3 months (from towards the end of February to approximately the middle of May, 2005). The main reason Mr Stone gave as to why he wanted the gym was because he needed to get fitter. At that time he had extremely high cholesterol levels, was in a sedentary job, and his doctor advised that he needed more exercise. Mr Stone

also wanted additional office storage space to support his business and other activities.

12. In *Rambridge v SSE and East Herts DC (1997) 74 P&CR 126 QBD*, the judge made it clear that 1 day was not long enough before there could be a lawful change, without planning permission, to a residential use of a curtilage building erected under the Schedule 2, Part 1 Class E, of the GPDO. Indeed the judge referred to such a short period as a *sham*. Regarding the need for a longer period the Council asserted that a minimum of 12 months was necessary.

13. Mr Stone explained why, so soon after starting to use the Class E building, he wanted to convert it into extra residential accommodation. This explanation centred on a surprise announcement by his daughter Katie of her second pregnancy (she now has 3 children) and the shortage of residential accommodation in the nearby Care Home where she lived and which she then helped her father to run. The appellant's preferred solution involved enlarging an existing flat at the Care Home but this was rejected because more detailed investigations discovered structural problems (I saw that the rooms involved were indeed in poor structural condition). The conversion of the newly constructed gym at Sunnybank was one of the fall-back options: the appeal site being only a few hundred metres from the Care Home.

14. In this regard it should be noted that in the intervening period (between the conversion of the Class E building to residential use and now) Mr Stone had less need for a gym because he has taken a more physically active job and his health had improved. Nevertheless the treadmill, which I was told had been taken from the former gym and was still in use, has been repositioned in the conservatory of the main house. That the appellant still has office storage problems was evidenced by the large quantities of papers I saw stacked around some of the ground floor rooms of the main house.

15. I agree that some 3 months is not a long time to use a Class E building for its original purpose before converting it to a residential use. But Mr Stone's explanation on how this change came about seemed to me to have the ring of truth and there was no substantial contrary evidence. To my mind, therefore, there was a genuine use, incidental to the residential use of the main house, which was implemented prior to conversion to a residential use. This case is not the same as in *Rambridge* where there was apparently no such genuine non-residential use and no alteration of a building, which was plainly built for residential purposes as an obvious, and blatant, attempt to circumvent planning controls.

16. I was not directed to any case law that supported the need for any specific period of incidental GPDO use, longer than 1 day, before conversion could lawfully take place to a residential use without planning permission. The Secretary of State's decision in *Carolan* (*Reference APP/X/94/K0615/002129*) made reference to the need for a *significant period* but precisely what this meant was not quantified. In Mr Stone's appeal, as a matter of fact and degree on the balance of probability taking account of what happened and the reasons behind the conversion to residential use, it seems to me that about 3 months was a significant period and was sufficient time for the GPDO permitted use to be considered to have been genuinely implemented prior to its conversion to a residential use. In considering this I see nothing wrong with

using the word *genuine*, in regard to any implementation works, because this is simply the opposite of the *sham* which was referred to in *Rambridge*.

17. It follows that the allegation is wrong in that what took place was not operational development, for the erection of a dwelling house on the land, but was a material change of use of an existing lawful building. The matters which could give rise to a breach of planning control did not occur in the way the notice alleged so, as a matter of fact, the appeal under this ground would succeed, at least in part. But such success would not be determinative. I have a duty to get the notice right if I can. Because to my mind it was obvious what the Council was trying to do, prevent the creation of a separate dwelling house in the countryside, I fail to see what injustice would be caused by correcting the notice so that a material change of use, rather than operational development, is alleged. Such action seems to me to be entirely within my wide powers under the Act. I will deal with the ground (c) appeal on the basis of such a corrected notice.

Ground (c) Appeal

18. This ground is that *those matters if they occurred did not constitute a breach of planning control.*

19. The appeal building had all the facilities necessary for independent living when I saw it. Internally there was a kitchen /diner /lounge, 3 bedrooms and a bathroom, and externally some raised decking and a small grassed enclosure. The appellant explained that he owns the whole of the appeal site as well as additional land to the north-west.

20. Mr Stone was adamant that he did not want to create a second dwelling house at Sunnybank. Some physical factors I saw support this contention. These included the following matters. Firstly, the main house and the appeal building are physically close together, and overlook one another, so that any separate residential use would not allow for much privacy and would be functionally chaotic. Secondly, the 2 buildings share services. There was only one main electricity, and gas, supply with one set of meters for each of these services. Thirdly, there was only a single vehicular access /parking area with one set of rubbish bins. Fourthly, I was told that water and drainage services were also shared although I could not see them because the pipes and connections were underground.

21. Socially and functionally I was told that the appeal building was occupied by the appellant's daughter (Katie), her husband and 3 children, for whom no rent was paid and no contributions were made to the costs of the services. Mr Stone said that the occupants of the main dwelling and the appeal building lived together as a single household. Katie does all the washing and the shopping is shared. Most nights Katie cooks the evening meal which the appellant and his partner share with his daughter's family. Because the appeal building is relatively small (only some 4.9m by 13.2m or about 64.68 square metres) the children spend a lot of time with their grandparents in the main house. The decked area allows some outside living (meals are consumed there weather permitting). The fenced external area allows the children to play in safety unsupervised: supervised play spreads out into the wider garden as the photographic evidence confirms. Mr Stone's sworn evidence in these regards

was not significantly challenged and seemed to me to be sufficiently precise and unambiguous not to need corroboration to be accepted (as in *F W Gabbitas v SSE & Newham LBC [1985] JPL 630*).

22. Class C3 of the Town and Country Planning Use Classes Order 1987, as amended, refers to people living together as a single family, and residents, living together as a single household. Because of the shared services and the strong social links between those living in the main house and the appeal building, together with their close blood ties and the way they interact, it appears to me, as a matter of fact and degree on the balance of probability, that the 2 buildings are presently used as a single residential entity (as found in *Uttlesford DC v SSE and White QBD [1992] JPL 171*). I come to this conclusion recognising that the appeal building has all the necessary facilities, and the potential, to be used as a separate dwelling house. But it presently is not so used so there has been no unlawful material change of use at the time when this appeal was heard. The fact that most evening meals are cooked and eaten in the appeal building or on the decked area outside, rather than the main house, does not change my view on validity of this finding.

23. In forming this opinion I have considered the relevance of the outside decking area and the small fenced enclosure. But these features do not alter my assessment that there is presently just one planning unit on the site where *it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary* (as in the first example of *Burdle v SSE and New Forest RDC [1972] 1 WLR 1207; [1972] 3 All ER 240; 70 LGR 511; (1972) 24 P&CR 174; 116 SJ 507, DC*).

24. Taking account of all the above circumstances the matters alleged do not constitute a breach of planning control so the appeal under ground (c) succeeds.

25. It should be noted as a matter of fact that the appeal accommodation is only about half the size of a *caravan*, or mobile home, allowable under the Caravan Sites Act 1968 (where the maximum permitted size is about 111.5 square metres). The Council agreed that such a *caravan* (which would also be likely to have all the facilities necessary for independent living) could lawfully be sited at Sunnybank, and used as ancillary residential accommodation, without the need for planning permission. The appellant made it clear that if this appeal failed then he would have to buy a caravan and bring it onto the site for a residential use associated with the main house to satisfy his family needs.

26. I also acknowledge that the present close personal relationships, and the single Class C3 use at Sunnybank, could change in the future. Mr Stone and his daughter may fall-out or other persons, not linked to the appellant and his partner, may move in. This could create an enforcement problem for the Council requiring it to monitor the site very closely, and regularly, asking searching questions of the occupiers if necessary. But this is no different from the position the Council would find itself in should a *caravan* be lawfully moved onto the site and used as additional residential accommodation for Sunnybank. This potential problem is not sufficient to alter my opinion that, at the time of the inquiry, there had been no breach of planning control.

Ground (f) and (g) Appeals

27. Because of the success under ground (c) these other grounds do not fall to be considered.

Conclusion

28. Although I have dealt with ground (c) on the basis of a corrected notice there is no need formally to correct it because the notice will be quashed (see my paragraphs 5 and 17 above).

Decision

29. I allow the appeal and direct that the enforcement notice be quashed.

Colin A Thompson

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr E Cox, Planning Consultant DMA ACIS (Retired)	St Catherines Way, Down End, Fareham, Hants PO16 8RL
He called	
Mr N Hecks	Planning Witness
Mr R F Stone	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Ms E Dehon, of Counsel	Instructed by Winchester City Council
She called	
Mr R Riding BSc(Hons) MA	Planning witness

DOCUMENTS

1 Letter of notification of the inquiry and the list of persons notified
2 Attendance lists
3 S of CG
4 Bundle of papers put-in by the appellant
5 Email trail regarding S of CG put-in by the Council

PLANS

A Bundle of agreed plans
B Plan of the Class E building before conversion

528 05/351

4 February 2008

WINCHESTER CITY COUNCIL

ENFORCEMENT NOTICE

relating to land and premises situated at

Sunnybank, Gravel Hill, Shirrell Heath, Hampshire, SO32 2JQ.

H. N. Bone, Head of Legal Services, Winchester City Council, City Offices, Colebrook Street, Winchester, Hampshire, SO23 9LJ

IMPORTANT – THIS COMMUNICATION AFFECTS YOUR PROPERTY

TOWN AND COUNTRY PLANNING ACT 1990
(as amended by the Planning and Compensation Act 1991)

ENFORCEMENT NOTICE

ISSUED BY: WINCHESTER CITY COUNCIL

1. THIS IS A FORMAL NOTICE which is issued by the Council because it appears to them that there has been a breach of planning control, under Section 171A(1)(b) of the above Act, at the land described below. They consider that it is expedient to issue this notice, having regard to the provisions of the development plan and to other material planning considerations. The Annex at the end of the notice and the enclosures to which it refers contain important additional information.

2. **THE LAND AFFECTED**

Sunnybank, Gravel Hill, Shirrell Heath, Hampshire, SO32 2JQ, shown edged red on the attached plan ("the Land").

3. **THE BREACH OF PLANNING CONTROL ALLEGED**

Without planning permission, the erection of a dwelling house on the Land (its approximate position shown hatched black on the attached plan)

4. **REASONS FOR ISSUING THIS NOTICE**

It appears to the Council that the above breach of planning control has occurred within the last four years.

The Council considers it expedient to issue this Notice because:-

The erection of a separate self contained unit of residential accommodation is contrary to the countryside policies of the Winchester District Local Plan Review in that it would represent an additional dwelling unit within an unsustainable location in the countryside for which there is no overriding justification. The unauthorised residential use along with the associated paraphernalia is harmful to the character and appearance of the site and the wider area. Furthermore, it sets an undesirable precedent which would make it difficult to resist similar inappropriate developments in the future.

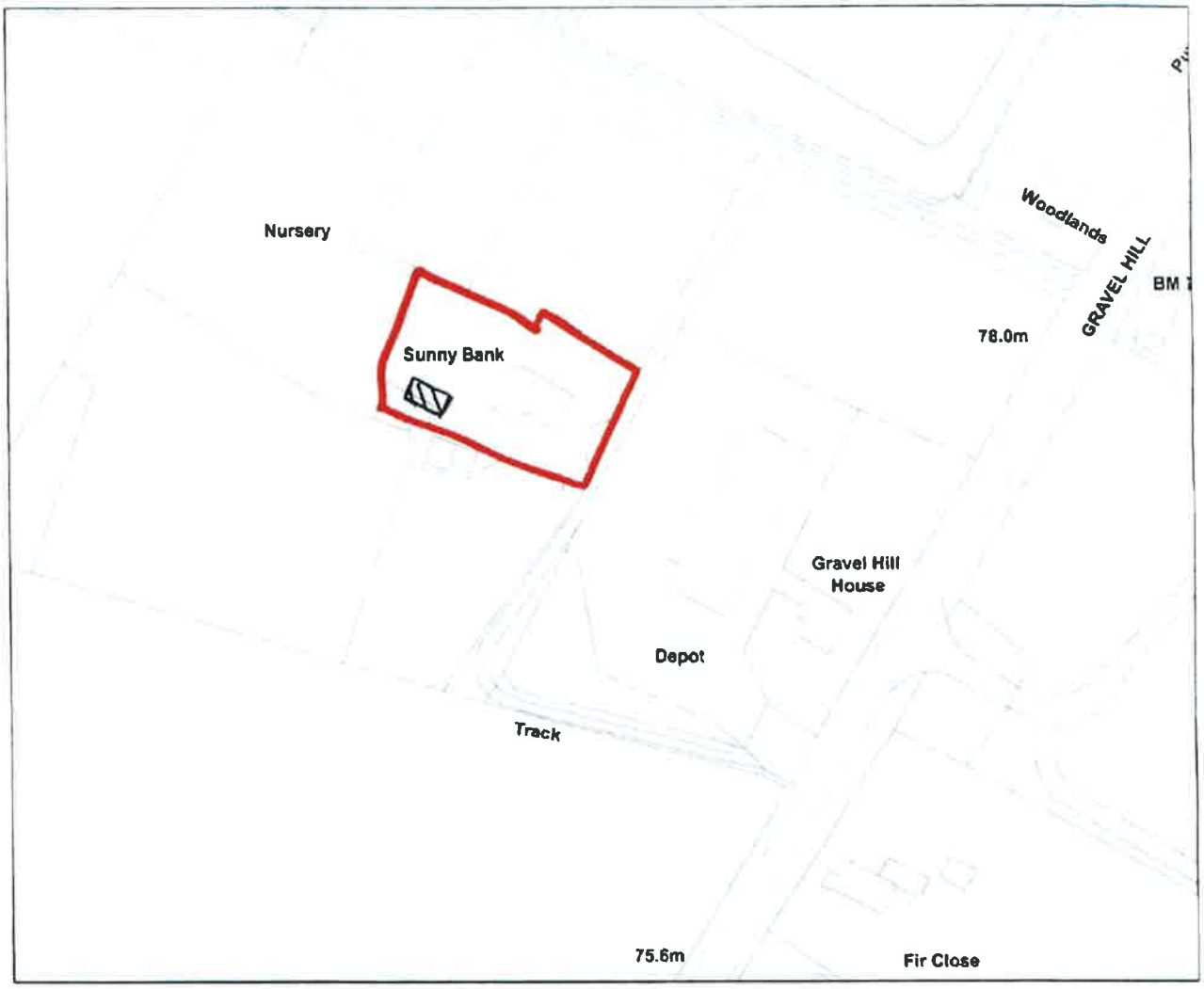
The development is therefore contrary to Policy H4 of the Winchester District Local Plan Review (Adopted 2006).

The Council do not consider that planning permission should be given, because planning conditions could not overcome these objections to the development.

Sunnybank

Gravel Hill, Shirrell Heath

Winchester City Council



Legend
Scale: 1:1250

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Organisation	Winchester City Council
Department	Developement Services
Comments	
Date	12 October 2007
SLA Number	00018301

5. **WHAT YOU ARE REQUIRED TO DO**

(i) Cease the residential occupation of the dwelling house

(ii) Demolish the dwelling house to ground level and hardstanding/sub-base, and remove from the Land all the resulting materials

6. **TIME FOR COMPLIANCE**

6 months after this notice takes effect.

7. **WHEN THIS NOTICE TAKES EFFECT**

This notice takes effect on 7 March 2008 unless an appeal is made against it beforehand.

Date 4 February 2008

Signed [redacted] .....
Head of Legal Services

on behalf of: Winchester City Council
City Offices
Colebrook Street
Winchester
Hampshire
SO23 9LJ

ANNEX

YOUR RIGHT OF APPEAL

You can appeal against this notice, but any appeal must be received or posted in time to be received by the Secretary of State before the date specified in paragraph 7 of the Notice. The enclosed booklet **"Making your Enforcement Appeal"** sets out your rights. Read it carefully. You may use the enclosed appeal forms.

(a) One is for you to send to the Secretary of State if you decide to appeal, together with a copy of this Enforcement Notice

(b) Send the second copy of the appeal form and notice to:-

Head of Legal Services, Winchester City Council, City Offices, Colebrook Street, Winchester, Hants, SO23 9LJ Ref: FS/PL1/11/747

(c) The third copy is for your own records.

WHAT HAPPENS IF YOU DO NOT APPEAL

If you do not appeal against this enforcement notice, it will take effect on the date specified in paragraph 7 of the Notice and you must then ensure that the required steps for complying with it, for which you may be held responsible, are taken within the period(s) specified in paragraph 6 of the notice. Failure to comply with an enforcement notice which has taken effect can result in prosecution and/or remedial action by the Council.