



# Appeal Decision

Inquiry held on 20 April 2010 and on  
22 and 23 June 2010

Site visit made on 20 April 2010

by **George Mapson** DipTP DipLD MRTPI

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

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**Decision date:**  
**21 July 2010**

**Appeal Ref: APP/L3815/C/09/2111745**

**Land know as Birchwells Barn, Ebernoe Road, Balls Cross, Ebernoe, West Sussex, GU28 9JU**

- The appeal was made by Mr Colin Benfield under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- It was made against an enforcement notice (Council's reference is EN/8) issued by Chichester District Council on 23 July 2009.
- The breach of planning control as alleged in the notice is:  
*"Without planning permission, change of use of the building shown in the approximate position marked on the attached plan to use as a dwellinghouse."*
- The requirements of the notice are:  
*"(i) Discontinue the use of the building as a dwellinghouse and remove all furniture and plumbed fittings from the building. (ii) Remove the workbench and all power tools (associated with the occupiers [occupier's] trade as a builder) from the building. (iii) Remove the wood burning stove, cooker, fridge and kitchen cupboards from the building, and (iv) Remove the staircase and loft floor forming the first floor habitable area from the building."*
- The period for compliance with the requirements is three months.
- The appeal was made on the grounds (d), (f) and (g) set out in section 174(2) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the applications for planning permission deemed to have been made under section 177(5) of the Act as amended do not fall to be considered.

**Summary of decision: I dismiss the appeal and uphold the enforcement notice as corrected and varied.**

## Procedural matters

*Withdrawal of Appeal Ref: APP/L3815/C/10/2122461*

1. In July 2009 and January 2010 the Council issued two enforcement notices in respect of Birchwells Barn. These notices were Ref Nos. EN/8, the subject of this appeal, and EN/9, which alleged unauthorised operational development<sup>1</sup>.
2. The appellant had made appeals against both notices, and both were before me at the inquiry. However, during the inquiry the appellant formally withdrew his appeal against notice EN/9. Once an appeal is withdrawn the notice comes into effect. There is no power to subsequently re-instate an appeal once it has been withdrawn.
3. Accordingly, I shall take no further action on that appeal.

<sup>1</sup> Notice Ref No. EN/9 alleged: *"Without planning permission, the following building operations have been carried out to an existing building shown in the approximate position marked on the attached plan: 1. Construction of a brick and stonework outer skin wall with tile features and timber doors. 2. Construction of a brick chimney breast extension and insertion of a metal flue pipe on the north elevation of the building. 3. Construction of a brick and timber extension on the south elevation of the building. 4. Construction of a brick cubicle on the south elevation of the building."*

### **The appeal on ground (d)**

4. An appeal on ground (d) is that at the time the notice was issued it was too late to take enforcement action against the matters alleged in the notice.
5. An unauthorised use of land or buildings can become lawful only if it continued actively for ten years - or four years in the case of a change to use as a single dwellinghouse - without enforcement action being taken and to the extent that enforcement action could have been taken against it at any time<sup>2</sup>.

#### *Section 171B(4)(b) - The "second bite" provision*

6. The parties' advocates agreed that the second bite provisions<sup>3</sup> apply to this case because on 6 February 2008 the Council issued an enforcement notice alleging an unauthorised material change of use of the barn to use as a single dwellinghouse. The relevant date for the purposes of the ground (d) appeal is therefore 6 February 2004.

#### *The evidence before the inquiry*

7. All the oral evidence at the inquiry was taken on oath or affirmation. On behalf of the witnesses it was affirmed that the facts set out in their written evidence were true to the best of their knowledge and belief when they made them, and remain true.
8. The legal matters to be determined on the ground (d) appeal are matters of evidential fact and planning law, with the burden of proof on the appellant. The relevant test of the evidence is the balance of probability.

#### *Main issue*

9. The main issue is whether, on the balance of probability, the barn has been used as a single dwellinghouse for a continuous period of four years prior to 6 February 2008.

#### *Reasons*

##### *The appellant's case*

10. The appellant claims that the barn contained all the facilities required for day to day private domestic existence by December 2002. Those facilities have been used continuously since Christmas of that year, when he and his partner, Miss West, moved in and began to use it as their sole dwellinghouse<sup>4</sup>.

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<sup>2</sup> Section 171B(2) states that "Where there has been a breach of planning control consisting in the change of use of any building to use as single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach." This section of the Act does not protect all residential conversions or uses, just those buildings that are used as a single dwellinghouse.

<sup>3</sup> Section 171B(4)(b) provides that if within the appropriate four or ten-year period the local planning authority have taken or "purported to take" enforcement action in respect of a breach of planning control<sup>3</sup>, it has a further four years in which to issue a second or subsequent notice.

<sup>4</sup> There is no definition of "dwellinghouse" in the Act. A dwellinghouse is a building of a particular kind. In *Gravesham* the Court accepted that the distinctive characteristic of a dwellinghouse was its ability to afford to those who used it the facilities required for day-to-day private domestic existence. It is possible to use as a dwellinghouse something that is patently not a dwellinghouse and for the use to acquire immunity even though the structure never acquires the status of being a dwellinghouse for the purposes of permitted development rights. Circular 10/97 (para. 2.81) emphasises the need to distinguish between "use as a single dwellinghouse" and what might be regarded as "being a dwellinghouse", because people might adapt or use unlikely or unusual buildings or structures as their home or dwellinghouse. In addition to the Circular guidance and the *Gravesham* judgment, a number of other court cases provide guidance on the proper approach to be taken in interpreting the meaning of "use as a single dwellinghouse". In determining this appeal I have applied the principles derived from those judgments, and from *Stanway*, *Beesley* and the appeal decisions to which the parties have referred.

11. He said that at first they lived there in hiding, aware that if they evaded detection for four years the use would become immune from planning control. Once the period for enforcement action expired, in December 2006, they lived there openly.
12. He and his partner candidly confessed that they had set out to deceive people. They admitted to knowingly supplying false and misleading information to the Council's officers and others to allay suspicions that they were living in the barn. Over the years they consistently said that they were using it as a workshop or for storage purposes and that they were living elsewhere, but that was not true.
13. To support his claims, the appellant relies upon the oral and written testimonies of a number of people who know him or his partner. The conclusion that I am invited to draw from these testimonies is that they must have been living continuously in the barn from December 2002 onwards, for two reasons. Firstly, because people recall visiting them there at regular intervals. Secondly, because he and his partner had nowhere else to live after December 2002. In support of his case, he presented statements and letters from people with first hand knowledge of all the properties that he and his partner had led the authorities to believe were their home addresses. Each writer confirmed that they have never lived at those addresses.

*The Council's case*

14. The Council argues that the appellant's whole case is predicated on his deception having worked; in essence, that he was living in the barn from December 2002 and that the Council cannot prove that he was not living there. But his case is flawed because the onus is on *him* to show that he *was* living there during the relevant period and there is no extrinsic evidence to support his claims.
15. Dealing first with the appellant's claims that he was living in hiding, he has provided no relevant documentary or photographic evidence to demonstrate the truth of his assertion. There are no documents relating to the registration or insurance of any vehicles, although he and his partner both own or keep vehicles. There are no documents for insurance, telephone bills, Council Tax payments, invoices for work carried out on the property, bank statements or entries on the Electoral Role.
16. The only utility bills supplied are electricity bills dated from February 2006 onwards. Even these were not in his own name. They are in the name of his accountant, Mr P N Stanwick, who was not asked to give oral or written evidence. Although Southern Electricity confirmed that there was an account in Mr Stanwick's name from May 2000 until March 2006, all that the bills show was that electricity was supplied to the barn. This is not disputed. The photographs of the interior that the appellant's agent took in July 2000, when it was clearly being used for storage purposes, show electric lights and cables. The bills do not provide proof that the appellant used the barn as a single dwellinghouse at any time.
17. The appellant has produced no photographs to show that the barn had a residential use of any kind prior to 5 May 2007. The only photographs that show its interior before that date were taken in 2000 and 2006. Both sets of photographs show it being used for storage.
18. The Council has presented photographs of the outside of the barn which were taken in October 2005 and November 2005. In the October 2005 photographs it has a disused, derelict appearance and the land around it is overgrown. They show that the walls covered by bituminous felt, which was ripped in places. There were no signs to suggest that it was being used as a single dwellinghouse, or even capable of such a use, at that time.

19. The photographs taken in November 2005 show the site less overgrown than in October. They show a storage container and other paraphernalia nearby, but the barn itself appears to be unchanged and still in a poor state of repair.
20. The photographs of the interior taken in December 2006 show a storage use and are consistent with the officer's contemporaneous file note, which states that the barn was in use as a "*workshop and for personal domestic storage*". These photographs and the file note are also consistent with information supplied in the appellant's planning application of October 2006. The form stated that both the current and proposed main use was "*Storage and distribution: Storage - Main Use Class B8*". In answer to the question about residential use and the number of new dwellings or changes of use proposed, the answer given was zero. The declaration was signed by the appellant's agent on his behalf.
21. The appellant now claims that the photographs of October 2006 show a false situation. He said that, with the help of a friend, he removed or concealed any evidence that might cause the Council to suspect that a residential use was occurring. However, he produced no photographs of his own to show that such a use was occurring at that time.
22. The appellant also claims that the information provided in his planning application was false. His agent told the inquiry that he had not looked inside the barn before completing the application form and signing the declaration. The only time after July 2000 when he did look inside it was on 5 May 2007, by which time it was being used openly as a dwellinghouse, as his photographs of that date appear to show. He was therefore unable to say, from his own knowledge, that it was being used as a dwellinghouse at any time before May 2007.
23. Turning to the appellant's claims that he and his partner had nowhere else to live, there are several items of documentary evidence that appear to contradict those claims. Both of them have owned property in West Sussex and the appellant has or had properties in the Republic of Ireland. They have repeatedly given these properties as their home addresses on legal documents; on Land Registry title documents, on a Planning Contravention Notice, on Council tax records and, I was told, on a Sky television contract. Furthermore, both of them are known to spend frequent periods of time in Ireland. Consequently, there are good reasons to doubt their claims of a continuous use of the barn as a dwellinghouse since December 2002.
24. The documentary and photographic evidence casts substantial doubt on the appellant's assertion that he and his partner had nowhere else to live after December 2002. The appellant might well have camped in the barn at various times ("camping" was a term used by one of his witnesses to describe his overnight stay in the barn), or put it to some other ad hoc residential use from time to time, but that is not the same as a continuous use as a single dwellinghouse. The evidence is just not there to support his assertion.
25. Mr Elliot, Mr Jenman and Ms Abraham – people with knowledge of the barn during the relevant period – gave eye-witness accounts that support the Council and cast further doubt on the veracity of the appellant's claims.
26. The barn is located beside a busy public footpath and, before a fence was erected, was clearly visible to the passing public. The barn and its planning history are well-known to the SWT, and to local residents. Had it been used as a dwellinghouse at any time before 2006, local people would have known about it straight away and reported it to the Council.
27. Prior to 2006 it was a windowless barn, clad in loose, ripped material and encircled by brambles and stinging nettles. It was possible to peer through cracks in the walls and

glimpse the interior. There were no signs of residential use. The surrounding area contained some abandoned vehicles, a disused caravan and an assortment of metal, wooden and plastic items that conveyed the appearance of having been fly-tipped.

28. The old track to the barn was too muddy and rutted to be used by anything other than a 4x4 vehicle. Until it was upgraded in 2005, it had been virtually unused. In 2006 activity at the site increased significantly. A patio and extension were built, French windows were installed, and a satellite TV hatch and a small circular metal chimney or air vent appeared. This was eventually followed by a proper chimney on the eastern extension. At this time, signs of a residential use were spotted.

*Conclusions on the ground (d) appeal*

29. I can understand the Council's concern about the strategy of subterfuge that the appellant, his partner and others have pursued. That said, the simple fact that they chose to embark upon this course of action has not influenced my decision on the appeal. I am mindful of the comments about deception that Richards LJ.<sup>5</sup> made in the Court of Appeal judgment in *Beesley* and have viewed objectively all the evidence presented in this case. However, for the following reasons, I find that the appellant has failed to fulfil the burden of proof placed upon him.
30. I shall deal first with the testimonies of the appellant and his partner. Whilst I do not dismiss lightly any evidence that is given on oath, there are too many inconsistencies and areas open to doubt for me to accept, on the balance of probability, that their recollections or version of events are correct. There is a marked lack of consistency between the accounts of events that I was invited to believe and the previous accounts that they had given to the Council.
31. Their self-confessed deception undermines the reliability of their evidence, and much of it lacks credibility. Even their agent and planning witness, in cross-examination, conceded that the appellant's evidence should be treated with some caution, given his admission to having deceived him as well as the Council about the use of the building in October 2006 when his planning application was made.
32. I must also treat the evidence of Mr Wadey with caution, because he readily admitted to being unclear about dates when asked. Yet he was able to quote the Christmas 2002 start date for the appellant's occupation of the barn. When asked for an explanation for his clear recollection of this event, he candidly told me that he and the appellant had got together to agree dates. Inevitably, such collusion diminishes the weight that I might attach to his evidence in this appeal.
33. Turning to the anecdotal evidence of some of the other witnesses, I have no reason to doubt that, to the best of their knowledge and belief, their accounts were truthful. But their evidence was insufficient for me to infer from it that the barn had been used continuously as a single dwellinghouse from December 2002 onwards.
34. Several of the witnesses had been told by the appellant or his partner that they had been living in the barn since Christmas 2002 and assumed it to be true. But they had repeatedly told the Council's officers a different story, which the officers had assumed

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<sup>5</sup> *Welwyn Hatfield Council v SSCLG and Beesley (CoA)* [2010] EWCA Civ 26: Richards LJ. considered that in the earlier High Court judgment Collins J. might have been too influenced by the blatant deception of Mr Beesley. He said: "The court should not be tempted to adopt a strained construction of the section [section 171B(2)] in reaction to the deliberate deceit practised by Mr Beesley or out of concern for the difficulties that such conduct creates for local planning authorities in enforcing planning control. The outcome should be the same as if, for example, there had been a genuine change of mind in the course of construction of a building for which planning permission had been obtained in good faith. The question is whether the situation, viewed objectively, is one for which the statute has provided a four year time limit or a ten year time limit. If it is considered that there should be a different outcome in a case of dishonesty or deliberate concealment, it is for Parliament to amend the legislation accordingly."

to be true. Whilst the witnesses' accounts might well have been given in good faith, their evidence does not warrant the conclusion that I am invited to draw from it. It does not demonstrate a continuous use of the barn as a single dwellinghouse for a four year period.

35. It is worth mentioning that there is a difference between an established dwellinghouse, when an occupier does not have to be continuously or even regularly present in order for it to remain in use as a dwellinghouse, and a case where there is no established use and use rights are being accrued. Even though a building might be fitted out for residential use the question is whether it had been actually used as a dwelling for a continuous period, apart from *de minimis* breaks. In this case, there is no clear evidence that it was so used.
36. The extrinsic evidence – the description of the barn by the first appeal Inspector in 1997, the description of its appearance in 2004 and 2005 by impartial witnesses, and the photographs of 2000, 2005 and 2006 – strongly suggests that it was run down or semi-derelect until 2006. This evidence casts doubts upon the notion that it was suitable for use as a single dwellinghouse, or that it could have occupied continuously as one, from 2002 onwards without anyone in the locality noticing.
37. I have taken account of all the matters raised at the inquiry and in the written representations, including the advice in Circular 10/97 (Annex 8, paragraph 8.15) and the judgment in *Gabbitas*<sup>6</sup>. However, for the reasons given above I find that the appellant has failed to discharge the burden of proof placed upon him to demonstrate, on the balance of probability, that the use of the barn as a single dwellinghouse commenced and continued actively for a period of four years prior to 6 February 2008. Accordingly the appeal on ground (d) fails.

#### **The appeal on ground (f)**

38. An appeal on ground (f) is that the requirements of the notice are excessive and that lesser steps would overcome the objections to the development. The appellant is seeking a variation of requirements (i) and (iv).
39. Requirement (i) stipulates that the use of the building as a dwellinghouse shall be discontinued and all furniture and plumbed fittings shall be removed from the building. The appellant is seeking a variation of the wording to permit the retention of the toilet and wash basin, which he claims would be needed to facilitate an agricultural use of the building. However, no good reason was advanced as to why a simple agricultural building used in connection with a legitimate agricultural activity should require these facilities. Consequently, I do not propose to vary the wording of this requirement.
40. Requirement (iv) stipulates the removal of the staircase and loft floor. The Council has now accepted that the loft floor should be permitted to remain and that reference to it should be deleted from the notice. I shall vary the wording of requirement (iv) accordingly. To that limited extent the appeal on ground (f) succeeds.

#### **The appeal on ground (g)**

41. An appeal on ground (g) is that time given to comply with the notice is too short. The appellant argues that six months, rather than three, would provide an appropriate period in which to vacate the building, find alternative accommodation and carry out the required works. The Council has accepted that argument and, in my view, such a

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<sup>6</sup> *F W Gabbitas v SSE and Newham LBC* [1985] JPL 630. The Court held that the applicant's own evidence does not need to be corroborated by 'independent' evidence in order to be accepted. If the local planning authority has no evidence of its own, or from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided that the applicant's evidence alone is sufficiently precise and unambiguous to be accepted on the balance of probability.

compliance period would be reasonable. I shall therefore vary the compliance period accordingly. The appeal on ground (g) succeeds.

**Overall conclusions**

42. I have taken account of all the matters raised at the inquiry and in the written representations, the statutory declarations and the sworn affidavits that have been submitted. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction to the allegation, and variations to requirement (iv) and the compliance period.

**Formal Decision**

43. First, I direct that the enforcement notice be corrected by inserting into Section 3 the word 'single' before 'dwellinghouse'.

44. Next, I direct that the enforcement notice be varied as follows:

- 1) by deleting from Section 5, requirement (iv), the words "*and loft floor forming the first floor habitable area from the building*"; and
- 2) by deleting from Section 6 the words "*Three months*" and substituting "*Six months*".

45. Subject to this correction and these variations I dismiss the appeal and uphold the enforcement notice.

*George Mapson*

INSPECTOR





## DOCUMENTS SUBMITTED DURING THE INQUIRY

- 1 Documents submitted on behalf of the Council
  - 1.1 The Council's letters of notification of the appeals and the inquiry, and a list of the people notified.
  - 1.2 Enforcement notice Ref No. EN/5 – issued on 18 April 2007 (operational development at the appeal building).
  - 1.3 Enforcement notice Ref No. EN/6 – issued on 18 April 2007 (material change of use of the appeal building to use as a carpenter's workshop and for the storage of building materials and domestic items).
  - 1.4 Enforcement notice Ref No. EN/7 – issued on 6 February 2008 (material change of use of the appeal building to use as a dwellinghouse).
  - 1.5 Enforcement Notice No. EN/9 – issued on 21 January 2010 (operational development at the appeal building) including Method Statement for Bat Migration – Birchwells Farm - Daniel Whitby 2009 (Animal Ecology and Wildlife Consultants, Petworth, West Sussex).
  - 1.6 Transcript of a High Court judgment: *Stanway v SSETR and another* [QBD 16.11.00 Macleod DJ].
  - 1.7 Reported case (from 'Case Map'): *Gravesham BC v SSE* [1982] 47 P&CR 142; Times, 10 November 1982.
  - 1.8 Appeal decisions (dated 15.10.08): Ref Nos. APP/L3815/X/08/2066373; APP/L3815/C/08/2077039 and APP/L3815/C/08/2077040
  - 1.9 Extract from the Encyclopedia of Planning and Environment Law [R.155 December 2006] pp 41629/41630: Circular 10/97 paragraphs 2.80 and 2.81.
  - 1.10 Planning application EN06/04610/FUL and accompanying documents.
- 2 Documents submitted on behalf of the appellant
  - 2.1 Statement of Common Ground (signed by the parties and dated 9.6.10).
  - 2.2 Transcript of a High Court judgment: *Welwyn Hatfield Council v SSCLG and Beesley (CoA)* [2010] EWCA Civ 26.
  - 2.3 Appellant's submissions