
Appeal Decisions

Hearing held on 10 January 2017

Site visit made on 11 January 2017

by Diane Fleming BA (Hons) MRTPI

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

Decision date: 24 February 2017

Appeals A and B, Ref: APP/M1595/C/16/3152062/3 Bulimba, Butts Road, Stanford-Le- Hope, Essex SS17 0JH

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Acorn Packaging Services Limited and Mr Darren Matthews against an enforcement notice issued by Thurrock Borough Council.
 - The enforcement notice was issued on 11 May 2016.
 - The breach of planning control as alleged in the notice is the change of use of the land from a residential garden to commercial use for open storage of wood and timber products and the erection of a 3m high metal fence to enclose and delineate the land.
 - The requirements of the notice are :
 - (i) Cease the unauthorised commercial use of the land;
 - (ii) Remove the 3m high fence installed to create a new boundary for the unauthorised commercial use of the land;
 - (iii) Remove the hard standing and break up any concrete surfacing; and
 - (iv) Remove all rubbish and resultant materials arising from compliance with steps (i), (ii) and (iii) above to restore the land to a residential garden.
 - The period for compliance with the requirements is two months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (d) and (f) of the Town and Country Planning Act 1990 as amended.
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Appeal C, Ref: APP/M1595/W/16/3152056 Bulimba, Butts Road, Stanford-Le-Hope, Essex SS17 0JH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Darren Matthews of Acorn Packaging Services Limited against the decision of Thurrock Borough Council.
 - The application, Ref 15/01342/FUL, dated 10 November 2015, was refused by notice dated 11 March 2016.
 - The development proposed is described as 'Retrospective 2.7 metre high fence and non retrospective change of use of part of residential garden to commercial open storage. Amendment to previous application by reducing the fence height and increasing the distance from the residential property by an additional 2.4m'.
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Appeals A and B

Decision

1. It is directed that the enforcement notice is corrected: by inserting 'The material' before 'Change' in paragraph 3 of the notice. Subject to this correction the appeals are allowed and the enforcement notice is quashed. Planning permission is granted on the applications deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already
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carried out, namely the material change of use of the land from a residential garden to commercial use for open storage of wood and timber products and the erection of a 3m high metal fence to enclose and delineate the land at Bulimba, Butts Road, Stanford-le-Hope, Essex SS17 OJH subject to the conditions set out in the schedule attached to this decision.

Appeal C

Decision

2. The appeal is dismissed.

Procedural Matters

3. Whilst the Council sent the required two letters of notification in respect of Appeals A and B, they failed to send the second letter of notification in relation to Appeal C. However, as the occupiers of both neighbouring properties attended the hearing together with the owner of a nearby block of flats, I am satisfied that third parties in the area were adequately informed and were not at any disadvantage.
4. Paragraph 4.1. of the notice states that the breach of planning control has occurred within the last ten years. However, the allegation relates to operational development as well as a material change of use and the relevant time period for that is four years. At the hearing the Council recognised this oversight and the appellant accepted that no injustice was caused as the time period was now reduced for that breach.
5. The Council's committee report and the enforcement notice refer to Policies PMD1 and PMD2 from the Council's Core Strategy (Focussed Review, January 2015) (CS). However, the version of the policies sent with the questionnaire was from the Local Development Framework 2011 (LDF). The gist of the specific policies referred to by the Council has not changed following their assessment in the light of the publication of the National Planning Policy Framework (the Framework). At the hearing I received the relevant copies of the policies from the CS, as referred to in the notice, and I am satisfied that the appellant was not prejudiced by this oversight.

Appeals A and B

The ground (d) appeal

6. This ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. The appellant has only pursued this ground of appeal in respect of the 3m high metal fence that encloses three sides of the yard. The burden of proof in an appeal on this ground lies with the appellant. He needs to show, on the balance of probabilities, that no enforcement action may be taken after the end of the period of four years beginning with the date on which the erection of the fence was substantially completed. The relevant date in this context is 11 May 2012.
7. Bulimba and Shirley are a pair of semi-detached houses situated on the east side of Butts Road, backing onto a railway line. The appellant's business premises, a wooden packaging services operation, are situated to the north of Bulimba and additional wood associated with the business is stored to the

south of Shirley, on a former coal yard. Opposite this and further along Butts Road are houses and flats.

8. I consider the purpose of the fence is to screen the adjacent residential uses from the commercial use and provide a degree of security for the stored timber. The fence has a uniform appearance, neatly finished with a cap rail, and whilst its erection was carried out over a period of time I regard it as one entity.

The appellant's case

9. The appellant put forward no documentary evidence to support his case. He carried out the work of erecting the posts and fencing himself, in stages. The first stage was the erection of two parallel lines of fencing to divide the former garden of Bulimba in two. This was to provide screening between that part of the garden that was to become the yard and the rear of Bulimba. The first line of fencing is about 2m high and is wooden. This borders the courtyard garden to Bulimba. Immediately adjacent to it is the first section of the 3m high metal fencing referred to in the notice. These initial works were done some time towards the end of 2011. The current tenants of Bulimba viewed the property in December 2011 and saw both parallel lines of fencing in position. The appellant was not clear when the entire fence enclosure was substantially completed around the rest of the yard.

The Council's case

10. A Council officer visited the site in December 2014, after the alleged breach of planning control was first raised with them in November, and saw all of the 3m high metal fencing in position. At the hearing the Council submitted two additional aerial photographs¹ of the site dated 2012 and 2014 to accompany the two aerial photographs dated 2008 and 2010 that accompanied their Statement of Case.
11. Mrs Mann, the occupier of the neighbouring property, known as Shirley, recalled that the portion of the unauthorised fence alongside her garden was erected while she was away on honeymoon in September/October 2013.

Assessment

12. As the Council's earlier photographs are dark and indistinct it is not possible to see any detail. I therefore find that they are of little assistance. It is only on the 2014 photograph that a fence between Bulimba and the yard can be discerned.
13. The Planning Practice Guidance advises² that if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to reject it. This is provided the appellant's evidence alone is sufficiently precise and unambiguous, on the balance of probabilities.
14. In this case there is a lack of documentary evidence from the appellant regarding the erection of the fence. He admitted he had an unclear recollection of events other than in respect of when he began to erect the fencing. This memory was associated with his tenants viewing the property and also

¹ Document No 1

² Reference ID: 17c-006-20140306

recollected by his tenants. There was clear evidence from Mrs Mann, in relation to the erection of a section of fencing adjacent to her boundary in 2013.

15. I therefore consider the appellant has not satisfied the requirement to submit evidence that is sufficiently precise and unambiguous, on the balance of probabilities, in respect of the substantial completion of the fence that was erected. He freely admitted he could not recall when the works were completed. Consequently, he has not discharged the onus of proof to demonstrate that the erection of the fencing was substantially completed before the relevant date. Therefore the appeal on ground (d) fails.

Appeals A, B and C

The appeals on ground (a), the deemed planning applications (Appeals A and B) and the refusal of planning permission (Appeal C)

Main Issue

16. The main issue in these appeals is the effect of the development on the living conditions of neighbouring occupiers, having regard to outlook, noise and disturbance.

Appeals A and B

Reasons

17. The appeal site lies within a mainly residential area that is interspersed with commercial uses. Background noise levels are noticeable during the day and emanate from the surrounding area including from traffic along the A13 road, the passage of trains and the activities associated with the appeal site and other commercial uses in the area. Butts Road terminates at a large, open site occupied by the National Grid. The former coal yard also has a wide frontage and is a largely open site used for storage. The western side of Butts Road comprises in the main terraced housing and presents a more solid frontage.
18. The appeal site has been in use as a packaging business for 34 years and the former coal yard appears to have a long use for open storage. Mrs Mann bought Shirley approximately 15 years ago in the full knowledge that one side of her garden flanked the coal yard and that the residential area also contained other businesses such as the appeal site. Shirley has an open aspect towards the railway line, which was shielded by a large tree at the time in the garden of Bulimba; an open aspect across the coal yard, depending on the height of stored materials, and an open aspect across the appeal site, framed by a number of trees within both gardens. Whilst there was commercial activity along the northern boundary of Bulimba, this was offset by the open aspect across the length of a substantial rear garden abutting the railway line. The Council advise this was approximately 231 sq m in area.
19. After the appellant bought Bulimba he subdivided the rear garden into two areas and began to use the majority of the garden for storing timber, which the Council estimate as 170 sq m. This involved removing the trees and shrubs, laying a hard standing and erecting a 3m high fence around three sides. This brought the commercial activities of the packaging business closer to the residential properties of Bulimba and Shirley. In particular, Bulimba is now flanked on two sides by the packaging business and has a much reduced area

of outside space. Whilst the current tenants of Bulimba have raised no objection to this, one of the purposes of planning is to consider the living environment for not only existing but future occupiers. For the occupiers of Shirley the unauthorised change of use has now encroached upon the majority of the north side of their garden. The former garden of Bulimba now no longer acts as a protective break between Shirley and the commercial activities.

20. The expanded business use is made noticeable by the erection of the 3m high metal fence which harms the outlook from both properties, notwithstanding its dark green colour. Having regard to its solid form, its height as well as its extent, I consider it has the appearance of a building and results in an unacceptable degree of enclosure. This is in stark contrast to the previous open outlook for both properties. In particular, its height and position near the rear elevation of Bulimba is oppressive. Furthermore, its extent along the northern boundary of Shirley results in harmful changes to the character and setting of this property in that the garden is now, more or less, sandwiched between commercial premises. I therefore find the development causes harm to the living conditions of neighbouring occupiers, having regard to outlook.
21. It is understood that the purpose of the fence is also to minimise the transmission of noise from the yard. The appellant has submitted a BS4142 Noise Assessment³ to demonstrate that the use of the appeal site has no adverse effects on the living conditions of neighbouring occupiers with regard to noise and disturbance. The assessment was made because a previous application to retain the unauthorised development was refused by the Council and dismissed on appeal in 2015⁴. The Inspector who determined that appeal considered, in the absence of any technical assessment to the contrary, that the use of the yard creates a material degree of noise and disturbance in close proximity to residential properties.
22. The Council made a number of comments on the assessment but did not take issue with it and submitted no evidence of their own to support this reason for issuing the notice. The assessment identified background noise levels including the operation of the fork lift truck both within the existing and extended yard area and looked at the attenuation provided by the 3m high fence. The conclusion was that the use of the appeal site results in a noise rating in the order of 11dB(A) below background noise levels. I am therefore satisfied that the use of the appeal site does not cause harm to the living conditions of neighbouring occupiers, having regard to noise and disturbance.
23. The previous Inspector recognised that Bulimba and Shirley are situated in an already compromised environment and the Council have stated, in the reason for issuing the notice, that the commercial use is unacceptable in principle. The preamble to Policy PMD1 also states that the Borough has a history of incompatible land uses which the Council wants to move away from to improve the environment for the community.
24. During the hearing a solution was suggested by Mrs Mann, and was accepted by the appellant, which would allow for the expansion of the business whilst protecting the living conditions of the nearest occupiers. The depth of the yard could be reduced by 4.5m and the fence could be reduced in height to 2.7m. This would re-locate the prominent corner of the fencing, which contributes to

³ BS4141: 2014 Methods for rating and assessing industrial and commercial sound

⁴ Ref: APP/M1595/W/15/3005448

its appearance as a building, as viewed from Shirley, significantly further away from the property. Mrs Mann explained that this would position the corner of the fencing adjacent to a fir tree in the garden which would provide some screening of the fence when viewed from the house and patio. Whilst this would be welcome, there is no guarantee that the tree would always remain. In any event, I consider just the proposed 4.5m set back and the reduction in fence height would lessen the harmful effect of the development, including in terms of its non-domestic appearance. From within the garden the use of a smaller part of the appeal site would also be acceptable in terms of outlook as the garden would not be so enclosed. In addition, the appellant's acoustic consultant confirmed that a reduction in the height of the fence to 2.7m would not affect the acoustic performance of the fence.

25. For the occupiers of Bulimba, I find the combination of the more generous set back of 4.5m together with the reduction in the height of the fencing would have a greater effect on improving the outlook from this property. There would also be a significant reduction in the sense of enclosure by using a smaller part of the appeal site.

Conditions

26. A number of conditions have been suggested by the Council and the appellant in the event of planning permission being granted and I have considered these against the requirements of the Planning Practice Guidance, (the Guidance). In the interests of clarity and precision, and as discussed at the hearing, I have altered some of the conditions to better reflect the relevant Guidance.
27. To protect the living conditions of neighbouring occupiers it is necessary to impose conditions limiting the use of the site to the storage of timber and timber products; the height of stored materials; the hours of use of the business and the installation of external lighting. It is also necessary to require that a scheme be submitted to show a reduction in the height of the fencing to 2.7m and to require it to be re-positioned around the 4.5m reduced depth of the yard.
28. The purpose of this last condition is to require the appellant to comply with a strict timetable for dealing with a reduction in the size of the site and a reduction in the height of the fence which needs to be addressed in order to make the development acceptable. The condition is drafted in this form because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matter. This is because the development has already taken place. The condition therefore provides for the loss of the effective benefit of the grant of planning permission where the detailed matters in question are not submitted for approval during the time set by the condition, approved (either by the local planning authority or by the Secretary of State on appeal), and then implemented in accordance with an approved timetable. Should the requirements of the condition not be met in line with the strict timetable, then the planning permission falls away.
29. The Council suggested the submission of details of the internal layout of the site to show racking, storage and circulation areas. However the appellant submitted that he does not use racking as timber packages are simply stored on top of each other and he already has an enclosed plywood storage area

elsewhere on his site. I consider it is not necessary to impose such a condition as this is a small site and storage and circulation areas are dictated by the operation of the small forklift truck.

30. The parties also suggested a condition for the submission of details of fencing to be affixed to the outward face of the metal fencing to improve its appearance. However, given my findings on this matter, I consider that this is also not necessary.

Conclusions on the ground (a) appeals and the deemed planning applications (Appeals A and B)

31. In conclusion I have found that the unauthorised use of the appeal site does not harm the living conditions of neighbouring occupiers, having regard to noise and disturbance. As such, this aspect of the development accords with that part of Policy PMD1 of the CS which seeks to minimise noise pollution.
32. However the unauthorised use of the appeal does harm the living conditions of neighbouring occupiers, having regard to outlook and therefore does not accord with Policies PMD1 and PMD2 of the CS. These policies require, amongst other matters, that development must contribute positively to the character of an area in which it is proposed and to surrounding areas that may be affected by it. I have found, though, that conditions can enable the development to proceed where it would otherwise have been necessary to refuse planning permission. As such the appeals succeed on ground (a) and planning permission will be granted. The appeal on ground (f) does not therefore need to be considered.
33. I recognise that the Council consider the principle of the use to be unacceptable. As the previous Inspector noted, there is a balance to be found between supporting an established business and ensuring that such activity does not adversely affect the living conditions that residents can reasonably expect to enjoy. This was reiterated by the appellant in his closing submissions. On the basis of the evidence that is before me I find that the conflict with the Council's policies can be overcome with the imposition of conditions.

Appeal C

Reasons

34. Prior to the issue of the notice the appellant submitted a revised planning application and proposed a reduction in the height of the fence to 2.7m and a reduction in the depth of the yard by 2.4m. These figures are derived from the length and height of the wrapped timber as bought by the appellant. He proposes to store one less row of timber packages, which are each 2.4m in length but wishes to continue double stacking them. When stacked they have a height of 2.5m and the appellant would not wish to reduce the height of the fence any lower than 2.7m otherwise there would be a risk of seeing the stored timber.
35. When viewed from Bulimba and Shirley these proposed reductions would only result in a marginal improvement to the outlook from these properties. Whilst the courtyard garden to Bulimba would be slightly increased in size, which would be a benefit, the property would still be largely bounded on two sides by commercial premises. In isolation a reduction to a height of 2.7m is acceptable

but in combination with a set back of 2.4m it is not as the fence would still be in close proximity to the rear of the house and therefore in view. It would also still result in an unacceptable degree of enclosure, foreshortening the outlook from the property. With regard to Shirley, the proposed reduction in the length and height of the fence would do little to reduce the harm to the outlook from this house and garden given the harm that would continue to exist by the remaining extensive length of fencing.

Conclusion on the refusal of planning permission (Appeal C)

36. I have already found in respect of Appeals A and B that that the unauthorised use of the appeal site does not harm the living conditions of neighbouring occupiers, having regard to noise and disturbance. I draw the same conclusion in respect of Appeal C on this matter as this development is no different from those appeals on this point. However, the proposed reduction in the height of the fence to 2.7m together with the set back of 2.4m would harm the living conditions of neighbouring occupiers with regard to outlook. As such, the development would not accord with Policies PMD1 and PMD2.

Conclusions

Appeals A and B

37. It is clear that the description of the development in the enforcement notice is incorrect in that it omits the word 'material'. It is open to me to correct the allegation in the notice. I am satisfied that no injustice will be caused by this and I will therefore correct the enforcement notice in order to clarify the terms of the deemed applications under section 177(5) of the 1990 Act as amended.
38. For the reasons given above I conclude that the appeals should succeed on ground (a) and I will grant planning permission in accordance with the applications deemed to have been made under section 177(5) of the 1990 Act as amended, which will now relate to the corrected allegation.

Appeal C

39. For the reasons given above I conclude that the appeal should be dismissed.

D Fleming

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr N Kingsley-Smith	Solicitor
Mr D Matthews	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Miss M Ager	Planning Enforcement Officer
Mrs M Aleshinloye	Planning Officer
Mr J Keen	Principal Planning Officer
Ms V Williams	Legal Services

INTERESTED PERSONS:

Mrs J Mann	Local resident
Mr and Mrs S Dodkins	Local residents
Mr S W Pook	Local landlord

Documents submitted at the hearing

1. Two aerial photographs of the site dated 2012 and 2014.
2. Policies PMD1 and PMD2 of Core Strategy and Policies for Management of Development (as amended) Adopted January 2015.
3. Suggested conditions.

Schedule of conditions for Appeals A and B References APP/M1595/C/16/3152062/3

1. The site shall be used for the storage of packed timber and timber products only and for no other purpose (including any other purpose in Classes B1, B2 and B8 of the Schedule to the Town and Country Planning (Use Classes) Order 1987, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification).
2. Packed timber and timber products shall not be stacked or deposited to a height exceeding 2.5m.
3. No external lighting shall be installed on the site unless details have firstly been submitted to and approved in writing by the Local Planning Authority.
4. Machinery shall be operated, processes shall be carried out and deliveries shall be taken at or despatched from the site only between 0800 - 1800 on Mondays-Fridays, and not at any time on Sundays or on Bank or Public Holidays.
5. The storage use hereby permitted shall cease and the erection of the fence also permitted shall be removed and all materials brought onto the land for the purposes of the use shall be removed within 28 days of the date of failure to meet any one of the requirements set out in i) to iv) below:

- i) Within 2 months of the date of this decision a scheme to show
- A new alignment of the western boundary of the site which is to be 4.5m nearer the eastern boundary;
 - The re-position of the metal fence along the new alignment;
 - A reduction in height to 2.7m of the metal fence along the new western boundary of the site and the southern boundary with Shirley; and
 - The removal of the 3m metal fence on the southern boundary between the point of the existing western boundary and the new western boundary

shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.

- ii) If within 4 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
- iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
- iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be retained. In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

END