
Appeal Decision

Site visit made on 2 August 2017

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 25 August 2017

Appeal Ref: APP/N1025/C/16/3163408

Land at 71 Holly Avenue, Breaston, Derbyshire, DE72 3BR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by David Taylor against an enforcement notice issued by Erewash Borough Council.
 - The notice was issued on 21 September 2016.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the Land from residential to a mixed use for residential and the keeping of dogs.
 - The requirements of the notice are:
 - i) Cease the use of the Land for the keeping of more than six dogs
 - ii) Permanently reduce the number of dogs kept on the Land to a maximum of six.
 - The period for compliance with the requirements is:
 - i) 9 months after this Notice takes effect.
 - ii) 9 months after this Notice takes effect.
 - The appeal is proceeding on the ground set out in section 174(2)(a) of the 1990 Act.
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Summary of Decision

1. The appeal is dismissed and the enforcement notice is upheld with corrections.

Hidden ground (c) – that there has not been a breach of planning control

2. No appeal has been lodged on ground (c), that the matters stated in the notice do not constitute a breach of planning control, however in the appeal form it is asserted that there has been no breach, no planning conditions are broken and there is no law governing how many dogs are allowed in a private dwelling.
3. The Council has replied to this argument. If this ground had been advanced the appellant would have had to show on the balance of probability that the use of the dwelling for keeping dogs goes no further than what is reasonably incidental to the enjoyment of this dwelling. I will therefore examine the principles that apply and assess the evidence submitted on this issue.

How is a material change of use to be determined in this appeal?

4. Planning permission is required for development which includes the making of any material change in the use of any buildings or other land (s55(1) of the 1990 Act as amended). There is no statutory limit on the maximum number of dogs that can be kept in a dwelling. Whether a material change of use has taken place is a matter of fact and degree in each case but generally it would require a significant change in the character of the activity compared with what
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went on previously. No 71 and its grounds, the land identified in the notice, is the appropriate planning unit against which to assess the materiality of change.

5. There is a specific exception in s55(2)(d) which states that the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such, shall not be taken to involve development of the land. In this case it is convenient to consider this criterion first since, if the use goes beyond a purpose incidental to the enjoyment of the dwelling, a material change of use is likely to have occurred.
6. In *Wallington v Secretary of State for Wales and Montgomeryshire District Council [1991] JPL 942* the Court of Appeal upheld an enforcement notice requiring the number of dogs being kept at a private dwelling-house to be reduced from 44 to 6. The court gave examples of factors that may be relevant as to whether an activity is incidental to the enjoyment of the house as a dwelling-house. These included the location and size of the dwelling and its curtilage, the nature and scale of the activity, as well as the disposition and character of the occupier. I consider these matters under a single heading.

Character of the property and its use by the appellant

7. The appeal site is a chalet-style detached bungalow with a linked garage in a quiet cul-de-sac of a residential suburban area of Breaston. Other surrounding bungalows are 1½ or 2 storeys of similar appearance to No 71 and form a low-key residential environment with the detached dwellings set close together and set back from the road. To the rear of No 71 and adjoining plots lies open countryside, some 45 acres of which are leased by the appellant.
8. The total curtilage area of No 71 is estimated by the Council at about 350m² of which the appellant states the ground floor area of the dwelling is 58.5m². The dogs are normally kennelled in the house, mainly in cages, whilst the rear garden and part of the adjoining field beyond, are used to exercise them.
9. When the notice was issued there were 19 dogs at the property, lurchers and terriers. It is undisputed that up to 22 dogs have been kept there, although when I visited there were 14 dogs present. They occupied most of the ground floor rooms: in the room next to the kitchen there were 5 dogs in cages and 1 in a basket, two dogs were in the kitchen itself, and in the front room were four puppies in cages. In another room two larger dogs were uncaged, and "doggy" smells were particularly noticeable within this room. There were no dogs or cages upstairs which consisted of two bedrooms and a bathroom.
10. The dogs are kept as a hobby and not for profit or breeding. Some are shown at dog shows and others are used for pest control at farms but not on a commercial basis. During the day the dogs are kept inside when the appellant is at work and it is said that only 3 to 4 dogs at a time are exercised outside.
11. The appellant lives alone in the property. The Council acknowledges that he loves his dogs and is devoted to them, and would rather move house than be forced to part with any of them.

Whether a material change of use

12. Whilst acknowledging that the keeping of dogs at the appeal site is a genuine hobby of the appellant, the number of dogs kept there has clearly overwhelmed the normal use of the premises for residential purposes. The keeping of

nineteen dogs is in my opinion significantly in excess of what might reasonably be considered to be incidental to the normal enjoyment of a property of this particular size and in this quiet residential location.

13. Therefore the current use of the appeal site does not benefit from the exception in s55(2)(d) of the 1990 Act. As a matter of fact and degree, I find that the keeping of nineteen dogs at the appeal site has materially changed the character of the property from a residential use which involves development for which planning permission is required.
14. In these circumstances I conclude, on the balance of probability, that even if ground (c) had been lodged it would not have succeeded as no planning permission exists for the change of use, and by s171A(1)(a) the carrying out of development without the required planning permission constitutes a breach of planning control.

Ground (a) and the deemed application for planning permission

15. The main issue is the effect of the development on the living conditions of occupiers of nearby residential properties with reference to any increased levels of noise and odours.
16. The main areas of canine activity on the appeal site are within the bungalow and in the rear yard and the properties most affected appear to be those on either side of No 71. Other residents who live further away from the appeal property have not experienced any form of odours and relatively little noise from the use. Having regard also to the width of Holly Avenue at this location and the representations made, there is no evidence that unacceptable noise or other adverse impacts, other than the occasional barking of dogs, are experienced within dwellings across the road from the appeal site.
17. A brief statement has been signed by five persons to the effect that they have not had any problems with noise or odour from the dogs. They have each signed their name alongside the house number of Holly Avenue to indicate where they live, including for No 69. There is no reason to doubt the accuracy of the document, however a more detailed representation has been provided from another person at the same property expressing concern at the noise from barking and crying of the dogs left alone at numerous times throughout the day. It would seem that although the dogs are let outside in small numbers, they bark or cry to be let inside. It is clear to me from what I have read that occupants of Nos 69 and 73 are concerned as to the noise.
18. Of particular concern is the proximity of the living areas at No 73 to the rear yard of the appeal site. The yard includes a return area between the single storey rear projection of the bungalow and the boundary with No 73. This and the area immediately beyond, are close to living space inside the bungalow at No 73 and the garden area just outside. The evidence suggests that barking is heard regularly inside the living room whether the patio door is open or closed.
19. The appellant has erected a tall screen mainly of timber, on this boundary that runs the length of the return yard area. I am unaware of its acoustic protection properties but in my view it is unlikely that it provides an effective barrier against the barking and crying of dogs when this occurs. I am satisfied from the evidence that the increase in noise from the dogs has had an unacceptably detrimental impact on the enjoyment of neighbouring property.

20. The evidence also suggests that urine odour, stronger in warm weather affects the enjoyment of external amenity areas of No 73. The appellant washes the outside with disinfectant, but it is claimed that this does not mask the urine smell which makes it undesirable to open windows or to sit out in the garden. The Council has noted, from visits to the premises the pungent smell of urine mixed with the chemical smell of the detergent used in the yard.
21. I am sure that every effort is made to care for the dogs which would include regular washing and cleaning of the premises. However the paved areas of the yard cannot be kept permanently free of faeces and urine, as evidenced by the photographs supplied. The keeping such a large number of dogs makes it inevitable in my view that odours will be generated, even if intermittently, that are capable of significantly intruding upon the enjoyment of neighbouring land.
22. I have carefully considered the evidence of residents who support the appellant. However it is unsurprising that they are less affected by the use than some of the more immediate neighbours whose evidence carries significant weight due to the direct impact on their living conditions.
23. Mindful of the advice in National Planning Practice Guidance as to the use of planning conditions I have considered whether any conditions can be imposed that would overcome the increased noise or odour from the dogs. I am not however persuaded on the information supplied that a reduction in the numbers of dogs to any number above six would effectively reduce the harm.
24. I conclude that the modest size and residential location of the appeal site make it unsuitable for accommodating nineteen dogs. The mixed use of the property has unacceptably adverse effects in terms of increased noise and odours on occupants of nearby residential dwellings, especially 69 and 73 Holly Avenue.
25. The harm caused to living conditions is substantial and contrary to the aims of Policy 10 of the Erewash Core Strategy 2014. These include ensuring development creates a safe and healthy environment having regard to the living conditions of nearby residents. It also conflicts with the Erewash Borough Local Plan 2005, Policy DC4 which aims to prevent uses in residential areas that harm living conditions due to unacceptable noise or other disturbance.
26. These parts of the policies are broadly in line with the core planning principle in the National Planning Policy Framework, Paragraph 17 that seeks high quality design and a good standard of amenity for all existing and future occupants of land and buildings.
27. Therefore the appeal on ground (a) does not succeed.

Other matter – clarification of the notice

28. Minor amendments to the notice are necessary to clarify for the avoidance of doubt, the description of the breach of planning control. I will make these under powers in s176(1)(a) of the 1990 Act.

Overall Conclusion

29. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and refuse to grant planning permission on the deemed application.

Formal Decision

30. It is directed that the allegation of the breach of planning control in the enforcement notice be corrected as follows:

- After "from residential" insert "use"
- After "mixed use for residential" insert "purposes"

31. Subject to these corrections the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Grahame Kean

INSPECTOR