



Appeal Decisions

Site visit made on 27 June 2019

by Andrew Dale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Date of decisions: 29 July 2019

Appeal A Ref: APP/K3605/C/18/3213746

Land adjoining Burhill Kennels, Turners Lane, Hersham, Surrey KT12 4AW

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.
- The appeal is made by Mr Mark Loveridge against an enforcement notice issued by Elmbridge Borough Council.
- The enforcement notice was issued on 13 September 2018 under ref. 180808/PL/ENF.
- The breach of planning control as alleged in the notice is *"Within the last 10 years and without planning permission, the change of use of the land from B2 (limited to maintenance, repair and storage of plant and machinery) of the former planning unit to the creation of a new planning unit with a B8 (storage) use."*
- The requirements of the notice are:
 - "1) To permanently cease the use of the Land for storage; and*
 - 2) To remove all resultant materials from the Land, once the above use has ceased."*
- The period for compliance with these requirements is 3 calendar months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Appeal B Ref: APP/K3605/C/18/3213751

Land adjoining Burhill Kennels, Turners Lane, Hersham, Surrey KT12 4AW

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.
 - The appeal is made by Mr Mark Loveridge against an enforcement notice issued by Elmbridge Borough Council.
 - The enforcement notice was issued on 13 September 2018 under ref. 180808/PL/ENF.
 - The breach of planning control as alleged in the notice is: *"Within the last 10 years and without planning permission, the change of use of the land from B2 (limited to maintenance, repair and storage of plant and machinery) of the former planning unit to the creation of a new planning unit with a Sui Generis (skip hire) use."*
 - The requirements of the notice are:
 - "1) To permanently cease the use of the Land for a skip hire business; and*
 - 2) To permanently cease the use of the cabin as an office for the skip hire business; and*
 - 3) To permanently remove all skips and resultant materials from the Land, once the above use has ceased."*
 - The period for compliance with these requirements is 3 calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decisions

Appeal A Ref: APP/K3605/C/18/3213746

1. It is directed that the enforcement notice be corrected by the insertion of the word "material" before the word "change" in paragraph 3 and varied, following the success of the appeal on ground (g), by altering the text "3 CALENDAR MONTHS" to "6 MONTHS" in paragraph 6 as the time for compliance. Subject to the correction and variation, the appeal is otherwise dismissed, 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.

Appeal B Ref: APP/K3605/C/18/3213751

2. It is directed that the enforcement notice be corrected by the insertion of the word "material" before the word "change" in paragraph 3 and varied, following the success of the appeal on ground (g), by altering the text "3 CALENDAR MONTHS" to "6 MONTHS" in paragraph 6 as the time for compliance. Subject to the correction and variation, the appeal is otherwise dismissed, 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.

Validity of the enforcement notices

3. The appellant is correct to point out that the enforcement notices are incorrect in that the breaches of planning control alleged do not mention that there has been a material change of use. It is open to me to correct the allegations to put the notices in order if this would not cause injustice to either party. I consider that this can be achieved as it is clear from the appellant's written submissions for each case that he has not been misled by the incorrect framing of the allegations. In particular, an appeal on ground (c) – that there has not been a breach of planning control – has been lodged in respect of Appeal A (storage) and is likely to have at least been considered for Appeal B (skip hire).
4. Regulation 4 of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 prescribes that an enforcement notice shall specify the reasons why the local planning authority considers it expedient to issue the notice and all policies and proposals in the development plan which are relevant to the decision to issue an enforcement notice.
5. Paragraph 4 in both enforcement notices sets out the reasons for their issue. I would admit that the paragraphs could have been written with greater clarity with regards to the specific circumstances of the developments and the alleged harm to the Green Belt, but minimal or incomplete reasons for issue would rarely justify a finding of nullity or invalidity. Here, the appellant was able to compile fully reasoned statements on ground (a) having deduced that the Council could only have meant that the developments were in conflict with the content of paragraph 4. The Council found no relevant development plan policies in relation to the Green Belt so no such policies could be included in the notices. Reliance on the National Planning Policy Framework (the Framework) was appropriate in the circumstances.
6. As it is, subject to a correction to each notice to address the matter outlined in paragraph 3 above, I find that the notices are valid.

The appeal sites and relevant planning history

7. The appeals concern a square-shaped yard to the north of and a larger rectangular-shaped yard to the east of a vehicle repair workshop currently occupied by JS Automotive. The workshop has an associated surfaced forecourt next to Turners Lane and other land to the south of that forecourt.
8. The smaller yard was used for storage (B8) by a scaffolding contractor between March 2016 and October 2018. At some point after October 2018, the yard was given over to use for the storage (B8) of concrete pumping vehicles and plant. There were 4 distinct, sizeable vehicles/plant in evidence on the day of my visit.
9. The larger yard has been used by a skip hire business (*sui generis* use) since about March 2016 until the present day. At the site visit, the parties present noted 26 skips, 2 skip lorries, a shipping container used for the storage of maintenance equipment, 2 dumper trucks, a "360" excavator, a timber cabin laid out as an office, a static caravan providing mess facilities and a private touring caravan.
10. The Council says that the appeal sites originally formed part of the "Wimbledon Stadium Kennel" complex. Much of the surrounding land is occupied by businesses with kennels. Wimbledon Greyhound Welfare (WGW), a registered charity devoted to the care and rehoming of retired racing greyhounds, occupies 4 Burhill Kennels close to the appeal site and at any one time can have up to 80 greyhounds in the kennels either awaiting rehoming or in permanent residence.
11. Full planning permission was granted in March 1995 under ref. 94/1474 for the "Use of site for maintenance, repair and storage of plant and machinery." Although I have not been supplied with any of the approved plans, it is my understanding that both appeal yards, the workshop building and its forecourt comprised the L-shaped site relating to that full planning permission. Condition 2 sought to restrict the use of the building to only the maintenance, repair and storage of plant and machinery. On a plain reading of condition 2, neither the site as a whole nor the forecourt is specifically mentioned in the condition itself.

Appeal A, the appeal on ground (c)

12. In an appeal on ground (c) the onus is on the appellant to show, on the balance of probabilities, that the matters stated in the enforcement notice do not constitute a breach of planning control.
13. In this case the appellant submits that the scaffolding enterprise or the current concrete pumping enterprise amounts to the storage of plant and machinery which is part of the use permitted under application ref. 94/1474. Whilst the subdivision of the wider (permitted) site and the use of the appeal site for such storage represented a change of use from the approved use, the appellant says that the alleged use and its planning consequences are sufficiently similar to the previous use of the site that there has not been a material change of use.
14. A material change of use is not defined in any statute or statutory instrument. It is a question of fact and degree in each case. For there to be a material change of use, there needs to be some significant difference in the character of the activities from what has gone on previously. When there are questions over whether there has been a material change of use amounting to development, it

is necessary to ascertain the correct planning unit and the present and previous primary uses of that unit. The leading case on the subject is *Burdle & Williams v SSE & New Forest RDC [1972] 1 WLR 1207* as quoted by the Council. The tests for determining the planning unit laid down in that case start with the unit of occupation and turn on the concept of physical and functional separation.

15. The parties appear to agree that the area covered by the relevant planning permission constituted the planning unit or unit of occupation with the building being towards the centre of the L-shaped site. Whether SR Newman (Plant) Ltd, the original applicant, ever operated from the site has not been made clear and the evidence provided by the main parties about the actual use of the overall site between 1995 and 2016 is rather scant.
16. The WGW states that since 1999 the appeal site has not been used for most of that time. Photographs from 2008, 2010 and 2012 provided by WGW show a largely empty site and an access drive through it to the land to the east, behind the workshop building. By February 2017, the appeal site had been enclosed by metal palisade fencing and gates, incorporated the former access drive and included substantial racks to store the scaffolding equipment. Comparing photograph 2 (August 2012) to photograph 4 (February 2017) a profound change in the visual character and appearance of the appeal site and the activities upon it can be readily detected.
17. There are now 3 separate areas across the permitted site that are occupied for different and unrelated purposes. Each one is physically and functionally separate and distinct. There is the skip hire site, the subject storage compound and the vehicle repair workshop (and forecourt) where machinery can be said to be maintained, repaired and stored in line with the relevant planning permission. Each area used for a different main purpose, together with any incidental activities, ought to be considered as a separate planning unit. The subject use (scaffolding or concrete pumping vehicle/plant storage) is a primary storage use (B8) within the purposely arranged compound area only. This has created a new planning unit, comprising only the compound area, with a new primary use.
18. A primary storage use was not part of the use permitted under ref. 94/1474 anywhere on that application site. Whether condition 2 applies to the appeal site or not is not particularly significant. Clearly, the planning permission would have allowed for some outdoor storage of plant and machinery (even though in practice the appeal site does not seem to have been required in this way historically), most obviously as an incidental consequence of machinery and plant awaiting maintenance and repair work or collection. Once that storage activity expanded to become the primary use on its own within a separate planning unit then it is the case that there has been a material change of use. The external effects – visual, noise and traffic impacts – of this primary storage use have been registered by third parties including the WGW. This confirms my own judgement that, as a matter of fact and degree, there has been a significant difference in the character of the activities from what has gone on previously.
19. There has therefore been a material change of use amounting to development. Planning permission was required and has not been obtained. Consequently, I conclude on the balance of probabilities that the matters stated in the enforcement notice the subject of Appeal A do constitute a breach of planning control. The appeal on ground (c) in Appeal A therefore fails.

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

20. This ground of appeal is that planning permission ought to be granted for what is alleged in the enforcement notices.
21. There is no dispute that the appeal sites are situated within the designated Green Belt. Guidance in the Framework sets out the government's policy on Green Belts. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. Substantial weight is to be given to any harm to the Green Belt. Very special circumstances to justify inappropriate development will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from a proposal, is clearly outweighed by other considerations.
22. The main issue is therefore whether the material changes of use constitute inappropriate development in the Green Belt and, if so, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations, so as to amount to the very special circumstances required to justify the developments.

Whether the developments amount to inappropriate development in the Green Belt

23. The appellant and the Council seem to think that since storage and sui generis skip hire uses are not any of the developments referred to in paragraphs 145 and 146 of the Framework, they are inappropriate in the Green Belt. However, the judgement to make is somewhat more complex than that.
24. Paragraph 146 e) of the Framework explains that material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds) are not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it.
25. The Framework explains that the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence. There is no definition of openness in the Framework but, in the Green Belt context, it is generally held to refer to freedom from, or the absence of, development. The openness of the Green Belt has a spatial aspect as well as a visual aspect.
26. From the photographs and from what I saw on my visit, both the storage use and the skip hire use generate intensive operations and activities across most of the yard areas. The vehicles, equipment, plant and other items which support the uses give the yards a cluttered appearance. This has quite a significant impact upon the openness of the Green Belt in terms of volume and physical presence. That impact is also manifest in a visual sense, the storage use being readily apparent from Turners Lane and the skip hire use being noticeable from the track which passes to the south of the site. The

photographs from WGW show that while the yards were previously developed, the actual development on the ground was limited and far less intensive.

27. Consequently, I consider that it is likely that the developments have materially reduced the openness of the Green Belt and no clear evidence has been presented to obviously suggest that a contrary view should be taken. Applying national policy, it follows that the material changes of use amount to inappropriate development in the Green Belt.

Harm

28. Inappropriate development is, by definition, harmful to the Green Belt and there is also actual harm to the Green Belt as identified above.
29. Whilst the Council submits that the only significant planning constraint is the Green Belt, I have had regard to the relevant observations of third parties. In particular, the WGW reports that the uses have caused a severe loss of amenity variously through noise and disturbance that frightens the dogs and the passage of heavy vehicles on narrow lanes causing significant hazards and inconvenience to dog walkers from the kennels. There has been the incineration of waste materials on the skip hire site. Given the proximity of the kennels operated by WGW to the appeal sites, these concerns about amenity are plausible and have not been directly countered by the appellant.

Other considerations

30. The appellant asserts that in respect of both yards/uses there is a realistic fallback centred on the planning permission granted under ref. 94/1474 for the use of the sites for maintenance, repair and storage of plant and machinery. Whilst condition 2 restricts the building specifically to this limited B2 use, I accept the Council's common-sense approach that unrestricted B2 use of the open ground or subject yards would be unlikely to suit any industrial processes of the type covered by Use Class B2. No specific practical examples on this point have been advanced by the appellant. The realistic fallback for the yards is therefore in relation to the maintenance, repair and storage of plant and machinery in association with the same use carried on in the workshop as one planning unit.
31. In this regard I accept that the appeal sites could be used in association with the vehicle repair business for storage and parking of cars, vans or lorries, or items of plant. However, historically this workshop seems to have operated satisfactorily without any need to use the 2 subject yards since it benefits from a sizeable forecourt and other land to the south. That situation persists today. In any event the use of those 2 yards in support of the workshop building would be unlikely to produce impacts comparable to those arising from the primary storage and skip hire uses the subject of the notices. No specific conditions have been set out that would render the impacts comparable.
32. I am aware that both appeal sites amount to previously developed land, are set within a wider commercial enclave dominated by kennels and have not

been fully open land for many years. Nonetheless, the photographs submitted by WGW showed a profound change in the character of the yards upon the commencement of the unauthorised uses. The fact that previous uses may have taken place on the appeal sites in the past does not dictate that different uses will be acceptable having regard to the constraint of the Green Belt.

33. That the developments make effective use of land and provide a degree of employment and economic activity count as positive factors in their favour. However, little information is before me regarding the economic and employment impacts of the developments. This limits the weight that I can attach to these matters.
34. The Council has not alleged any harm in relation to the character of the countryside, Strategic Views, mineral resources, highway safety or residential amenities. The absence of harm in these respects is essentially a neutral factor. The Council has not cited any conflict with development plan policies in these cases but the Framework is obviously a material consideration for the application of Green Belt policy that may point to a decision otherwise than in accordance with the development plan.

The balance of considerations and conclusion on ground (a)

35. In accordance with the Framework, I attach substantial weight to the harm to the Green Belt by reason of inappropriateness and loss of openness. Also to be weighed in the balance is the harm to the amenities of the WGW which attract moderate weight. I judge that the matters in favour of the developments do not clearly outweigh the totality of the harm that is caused and so the very special circumstances necessary to justify the developments do not exist. I find no material considerations of sufficient weight to justify a grant of planning permission for either of the uses. The objections to the developments could not be fully overcome by the imposition of planning conditions. I conclude that the appeal on ground (a) should fail in Appeals A and B and that the deemed planning applications should be refused.

Appeal B, the appeal on ground (f)

36. This ground of appeal is that the steps required by the notice to be taken exceed what is necessary. The gist of the appellant's case is that the placing of a skip or skips on the appeal site could be a legitimate and otherwise lawful part of the use of the site for the maintenance, repair and storage of plant and machinery allowed for under planning permission ref. 94/1474.
37. Since the notice seeks to discontinue the unauthorised use of the land, the key purpose of the notice is clearly to remedy the breach as set out in section 173(4) (a) of the Act. No lesser steps than the cessation of the skip hire use and the removal of all skips that might facilitate that use would achieve that purpose. The requirements of the notice cannot, therefore, be said to be excessive.
38. Should the operators of any future lawful use of the appeal site, either under planning permission ref. 94/1474 or indeed under any new planning

permission, require skips as ancillary or temporary features of the lawful use of the site then being carried on, then I do not consider that the enforcement notice would bite on such skips. The number of skips that might be required for such incidental purposes cannot be determined now in any event. What is important is that all skips which have facilitated the unlawful primary use of the appeal site for skip hire purposes are removed. Appeal B therefore fails on ground (f).

Appeals A and B, the appeals on ground (g)

39. This ground of appeal is that the time period given to comply with the requirements of the notices falls short of what should reasonably be allowed.
40. A period of 3 calendar months has been given by the notices and the appellant submits that a period of 6 months would be more appropriate. It is said that it could take the occupiers of the appeal sites some time to find suitable alternative sites, enter into tenancy agreements and then relocate to those premises without disruption to the businesses. Online searches have given an indication to the appellant that open storage sites of a suitable size and location are not readily available for rent. The Council points out that no permanent structures would need to be dismantled and that a period of 3 calendar months is sufficient for the appellant to seek alternative premises elsewhere to undertake the businesses in a lawful manner.
41. In line with the advice at paragraph 58 of the Framework, effective enforcement is important to maintain public confidence in the planning system. I do not consider that the appellant's request would serve to frustrate the planning system. Where business uses are involved, it is necessary to weigh the interests of the businesses against the harm caused by the uses the subject of the enforcement notices. On the one hand, the appellant has estimated that he would need 6 months to plan for and organise relocation without causing detriment to the businesses. On the other, there is harm being caused by the developments to the Green Belt which enjoys a high level of protection from inappropriate development. I consider that a period of more than 6 months would arguably be tantamount to the grant of temporary planning permissions. However, in all the circumstances of these cases I find that a compliance period of 6 months would give the appellant a reasonable period of time to comply with the notices and would strike the appropriate balance. The appeals on ground (g) succeed and the notices are varied accordingly.

Andrew Dale

INSPECTOR