



Appeal Decisions

Hearing Held on 1 October 2019

Site visit made on 1 October 2019

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 December 2019

Appeal A, Ref: APP/P1560/C/18/3214046

Appeal B, Ref: APP/P1560/C/18/3214047

St John's Nursery or Nurseries (also known as "St John's Plant Centre" and/or "Winter Wonderland") Earls Hall Drive, Clacton-on-Sea, Essex CO16 8PB

- 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 St John's Nursery (Appeal A) and Park View (Enfield) Ltd (in liquidation) (Appeal B) against an enforcement notice issued by Tendring District Council.
- The enforcement notice was issued on 14 September 2018.
- The breach of planning control as alleged in the notice is
 - a. Without the benefit of planning permission, an unauthorised material change of use of the Land to a mixed use of a garden centre (either sui generis use or within Class A1 of the Town and Country Planning (Use Classes) Order 1987) and also retail sales within Class A1 of the Town and Country Planning (Use Classes) Order 1987, as amended, together with associated customer parking. This mixed use is combined with the lawful activity of the Land which is in operation as a wholesale nursery operated for horticultural and thus agricultural purposes and;
 - b. Without the benefit of planning permission, an unauthorised material change of use of the Land to a mixed use for use as a "Winter Wonderland" and as a sui generis use comprising retail sales akin to the holding of the market but also for use within Use Class A1 of the Town and Country Planning (Use Classes) Order 1987, as amended, combined with sales of plants, trees and shrubs together also with amusement rides, animatronic displays and visitor attractions (including a Santa Claus grotto) and a cafe within Use Class A3 of the Town and Country Planning (Use Classes) Order 1987, as amended. This mixed use is combined with the lawful activity of the Land being in operation as a wholesale nursery operated for horticultural and thus agricultural purposes plus associated customer parking.
- The requirements of the notice are
 - A Cease the unauthorised material uses of the land for
 1. A mixed use of a garden centre (either sui generis use or within Class A1 of the Town and Country Planning (Use Classes) Order 1987) and also retail sales within Class A1 of the Town and Country Planning (Use Classes) Order 1987, as amended, together with associated customer parking. This mixed use is combined with the lawful activity of the Land, which is in operation as a wholesale nursery operated for horticultural and thus agricultural purposes and;
 2. A mixed use for use as a "Winter Wonderland" as a sui generis use comprising retail sales akin to the holding of the market but also for use within Use Class A1 of the Town and Country Planning (Use Classes) Order 1987, as amended, combined with sales of plants, trees and shrubs together also with amusement rides , animatronic displays and visitor attractions, including a Santa Claus grotto and a cafe within Use Class A3 of the

Town and Country Planning (Use Classes) Order 1987, as amended. This mixed use combined with the lawful activity of the Land being in operation as a wholesale nursery operated for horticultural and thus agricultural purposes plus associated customer parking.

B Cease any other material change of use of the Land within Use Class A1 of the Town and Country Planning (Use Classes) Order 1987, as amended.

C Cease the use of the Land for customer parking in connection with the uses set out in A-B.

D Remove from the Land all goods for sale, stock and items sold on the Land in conjunction with the unauthorised uses.

E Cease the use of all animatronic displays, miniature railways, rides and roundabouts used in conjunction with the unauthorised uses.

F Cease the use as a Santa's Grotto or any other Santa Claus visitor attraction used in conjunction with the unauthorised uses.

G Cease all sales of fireworks on the Land and remove any trailer or container used for such sales in conjunction with the cessation of the unauthorised uses in A-B

H Cease any use of any part of the Land as a cafe or restaurant or other catering facility used in connection with the use is in A-B, whether used for use within Class A3 of the Town and Country Planning (Use Classes) Order 1987, as amended, or as an ancillary use to the unauthorised uses set out in this notice and referred to in the steps A-B.

I Remove from the Land all materials resulting from steps A-H of these requirements.

- The period for compliance with the requirements is six weeks.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Appeal B is proceeding on the grounds set out in section 174(2)(b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal C, Ref: APP/P1560/W/18/3202282

St John's Plant Centre, Earls Hall Drive, St Osyth, Essex CO16 8PB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Park View Nursery (in liquidation) against Tendring District Council.
 - The application, Ref 17/01935/FUL, is dated 7 November 2017.
 - The development proposed is described as improvements to Earls Hall Drive.
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Decisions

Appeals A and B

1. It is directed that the enforcement notice be corrected by the deletion of "or Nurseries (also known as "St John's Plant Centre" and/or "Winter Wonderland") from the address of the site and by the deletion of the wording of the allegations and the substitution with the words "the material change of use of the site to a mixed use, comprising horticulture, retail, leisure uses and a cafe use". It is also directed that the enforcement notice be varied by the
 - deletion of "six weeks" and the substitution with "six months" in paragraph 6 of the notice;
 - deletion of the wording in paragraphs 5.A.- I. and the substitution of the words "Cease the mixed use of the site, comprising horticulture, retail, leisure uses and a cafe use and remove from the land all items, fixtures and fittings that facilitate the mixed use". Subject to these corrections and variations the appeals are 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.

Appeal C

2. The appeal is allowed and planning permission is granted for improvements to Earls Hall Drive at St John's Nursery, Earls Hall Drive, St Osyth, Essex CO16 8PB in accordance with the terms of the application Ref 17/01935/FUL, dated 7 November 2017 subject to the following conditions:
 - 1) The development hereby permitted shall begin not later than 3 years from the date of this decision.
 - 2) The development hereby permitted shall be carried out in accordance with the following approved plans: dwg No 1789-01 dated 07/17, 1789-02 dated 07/17 and a Block plan showing the site outlined in red.
 - 3) No development shall commence until details of the materials to be used in the construction of the surfaces of the widened access road hereby permitted have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.

Procedural Matters

3. The Hearing opened on 1 October 2019 and was closed in writing on 13 November 2019. It was adjourned at the end of business on 1 October for conditions to be drafted, for the submission of copies of case law referred to during the Hearing and closing comments from the parties.
4. The enforcement notice appeal form states that the first appellant is St John's Nursery and the second appellant is Park View Nursery (Enfield) Ltd. The appellant in relation to Appeal C is stated as being 'Park View Nursery'. As the notice was served on several persons it was necessary to understand everyone's interests in the land.
5. It was clarified that the freeholder of the site is Kelsworth Limited; Moondrop Limited lease the site from the freeholder and St John's Nursery lease the site from the leaseholder. St John's Clacton Ltd and Growing Plants 4U carry out the use of the site. The Park View Nursery (Enfield) Ltd business went into liquidation after the appeals were lodged. However, as I am not aware that the company has been formally dissolved, their appeals may continue.
6. At the time when the notice was issued the National Planning Policy Framework (the Framework) in place was that published in 2012. This was replaced by the Framework published in July 2018. Minor clarifications were published to this document in February 2019.

The Notice

7. A notice must enable every person who receives a copy to know exactly what, in the Council's view, constitutes the breach of planning control and what he must do to put it right. It is not clear in this instance as two allegations relating to a material change of use of the site are made in respect of, what the parties agreed, is one planning unit. It is necessary to correct the allegation to clarify the terms of the deemed planning application under section 177(5) of

the 1990 Act, as amended and to vary the terms of the notice, which currently require the uses to cease, to reflect the changes.

8. While some elements of the material change of use to a mixed use are seasonal, they can also be expressed in the one allegation, which the parties agreed was the material change of use of the site to a mixed use, comprising horticulture, retail, leisure¹ uses and a cafe use. It follows that the requirement of the notice will therefore be varied to cease this use. There will be no injustice caused to either party in correcting and varying the notice as all of these uses are referred to in the notice. I will therefore deal with the appeal on the basis of the corrected allegation and the varied requirements.
9. The notice states the address of the site is "St John's Nursery or Nurseries (also known as 'St John's Plant Centre' and or 'Winter Wonderland')". At the Hearing it was clarified that the address of the site is St John's Nursery and I will proceed on that basis.

Appeal C

Main Issue

10. The main issue is whether the development represents an acceptable form of development having regard to highway safety. The Council were minded to approve the application prior to the submission of the appeal.

Reasons

11. The appeal site lies midway along St John's Road, the main road separating the settlements of Clacton-on-Sea and St Osyth. There is some residential development along the north side of St John's Road but generally land to the north of the houses and land to the south of the road is in agricultural use. Earls Hall Drive is a single-track access road which is situated between Nos 762 and 782² St John's Road. It is the only access to St John's Nursery and it is also used by a number of households at Earls Hall Farm, several businesses who occupy some of the farm buildings as well as traffic associated with the farm. In addition, it is the route of a public right of way that leads to the farm.
12. The appellant proposes to widen Earls Hall Drive by demolishing an outbuilding in the garden of No 762 and making use of a strip of garden land within that property to create a carriageway width of 5.5m. There would also be a 2.1m wide and a 2m wide footpath either side of the carriageway from St John's Road to the entrance into the nursery. At the junction of Earls Hall Drive with St John's Road, kerb radii of 10.5m would be provided in the bell mouth area and the new footpaths would link into those on St John's Road. The development would necessitate the removal of one tree, the reinstatement of boundary fencing to the garden of No 762 and the re-positioning of the access gates into the nursery car park so that they are 6m back from Earls Hall Drive.
13. This stretch of Earls Hall Drive is hard surfaced and is described by the owners (who occupy Earls Hall Farm) as having a narrow grass verge on one side and

¹ The leisure use comprises what is referred to as the "Winter Wonderland" activity that operates approximately between October and January. During this period the appellant makes use of part of the nursery to run an electric train through a Christmas wonderland to Santa's Grotto, installs animatronic Christmas displays, brings in fairground rides and opens up a pretend "Dickens" shopping street about 100m long. Behind the false shop frontages there are shelves displaying Christmas goods for sale. There is also a café serving hot and cold meals.

² There is a gap in the street numbering, these properties are only separated by the access way to the farm.

an earth verge on the other. Regardless of the current mixed use at St John's nursery, it is considered that the proposed alterations to the width and the provision of pavements would result in a significant improvement to highway safety. The development would allow two vehicles to pass where at present it is single track and would provide a separate passageway for pedestrians. To that end I note The Ramblers Association support the proposal and that the Framework requires that planning decisions should protect and enhance public rights of way. The HA also advise that the improvements would benefit heavy goods vehicles using Earls Hall Drive due to the changes in the kerb radii.

14. Policy EN1 of the Tendring District Local Plan, adopted 2007 (the LP) seeks to protect the traditional character of public footpaths and rural lanes. In this instance there is little rural character or appearance in this stretch of Earls Hall Drive. It is largely bounded by garden fencing and is used by a variety of vehicles carrying out deliveries and collections to the nursery as well as vehicles emanating from the businesses and residents on the farm. The improvements to Earls Hall Drive, to what are referred to as 'adoption' standards by the appellant, would change this character but to my mind there would be little or no harm caused to the rural character. As such, the Council's requirement for a landscaping strip would not be necessary.
15. I therefore find the development would be acceptable having regard to highway safety and as such, it would accord with Policies EN1, TR1A and TR3A of the LP. Policies TR1a and TR3a seek to reduce and prevent hazards and inconvenience to traffic and improve links to and between pedestrian routes.

Conditions

16. I have considered the conditions suggested by the Council against the requirements of the Planning Practice Guidance (PPG). In addition to the standard time limits and the requirement to carry out the development in accordance with the approved plans, it is also necessary and reasonable to impose a further condition. This would require the submission and approval of surfacing details prior to the commencement of the development. The Council include a number of informative notes in their suggested conditions but I have not imposed them as they do not carry any legal weight. Furthermore, a condition requiring that Earls Hall Drive shall remain open and free for use in perpetuity is unenforceable given it is privately owned.

Appeals A and B, ground (b)

17. Under a ground (b) appeal, the onus of proof falls upon the appellants to show that the alleged breach of planning control has not occurred, as a matter of fact. The appellants submit that as the notice was issued on the 14 September 2018, the Christmas retail, leisure and cafe uses were not taking place at that time and that a notice cannot be directed at a potential future use. The Council submit an element of the notice attacks a seasonal use. Although the retail element of the mixed use happens all year, it is the space it occupies and the goods for sale that vary, with the floor space being increased over the Christmas period in order to sell a wide range of Christmas goods. The appellants accept the notice can attack a seasonal use but seem to be under the impression that the notice must be issued at the time the seasonal use is occurring.

18. It is considered that this is not the case though as ground (b) is that the matters have *not occurred* (my emphasis) not that the matters are *not occurring*. The appellants explain that the Christmas retail, leisure and cafe use had occurred during the 2014 season on a much smaller scale. They then became a much bigger operation in 2015, 2016 and 2017. In the absence of any other submissions or material from the appellants, I conclude they have not been able to demonstrate that the alleged breach of planning control has not occurred, as a matter of fact. The appeals on ground (b) therefore fail.

Appeals A and B, ground (c)

19. This ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control. This appeal is limited to the retail use (the garden centre use) that takes place other than at Christmas time. The appellants accept that retail use at Christmas time amounts to development requiring planning permission, due to the range of goods being sold. Under a ground (c) appeal, the onus of proof is on the appellants to show that there has not been a breach of planning control.
20. The appellants submit that the sale of plants 'grown on' at the nursery to the general public and associated sundry items such as compost, fertiliser and plant pots is a use that does not amount to development. It is ancillary to the use of the site as a horticultural nursery. This is because of the scale of the activity, both in terms of the amount of space it occupies, and as a percentage of the business turnover.
21. The appeal site extends to approximately 6.5 ha and is primarily covered in glass with a total area of buildings extending to 53 100 sqm. The permanent sales area occupies approximately 4 366 sqm and at the Hearing the appellants stated that the turnover of the entire premises is approximately £2.5 million pa, of which £125 000 is sundries. They also stated that of the plants 'grown on' at the site, approximately 70% are sold to the public and 30% are sold to major supermarkets or garden centres. The income from the latter, each year, varies between £0.5 million and £1.2 million. Furthermore, case law has established that sales, for example of sundries, up to 10% of the business, can be regarded as an ancillary activity which does not amount to development requiring planning permission.
22. The concept of 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 users of the site. The leading case on the subject is *Burdle*³. 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.
23. The parties agree that the whole of the site is one planning unit and that the primary use of the site is that of horticulture. Where the parties disagree is over the type of retail use. The appellants acquired the site in 2012. At that time, it is stated it was derelict and had not been used for horticulture for over

³ *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207

10 years. The appellants state that they began using it for horticulture with ancillary plant sales and have continued to do so. They rely on case law (*Emma Hotels*⁴ and *Allen*⁵) to support their position that the floor space occupied by the sale of plants 'grown on' at the nursery to the public with associated sundry items, together with the income this produces as a percentage of business turnover, means that the retail activity can be considered to be an ancillary use.

24. The Council submit that initially the sale of plants grown on the site took place in a small area. This then became a larger area where the retail activity is not just limited to plants grown on the site. There is also the sale of, for example, furniture, fireworks (from a booth within the car park) and pet sundries, none of which are incidental or ancillary to a horticultural use. These are part of a new composite use which has developed since 2013. The Council also submitted a case to support their position, namely *Williams*⁶ as well as an extract from the Encyclopedia of Planning Law and Practice (EPL), which discusses the meaning of development.
25. The cases are helpful when dealing with the relationship of an ancillary use to the primary use and ascertaining the correct approach should that change. In *Emma Hotels*, a hotel bar drew 70% to 80% of its customers from outside but it was held that notwithstanding this, the provision and use of a bar in a hotel was incidental to the main hotel use. In that case the courts found it would be surprising if a hotel did not operate in that way as unless the hotel had a large number of bedrooms, there would not be sufficient residents to warrant a bar.
26. In *Allen*, it was held that the retail sale of plants and shrubs grown from seeds and cuttings on a site in a mixed use for agriculture and residential, was regarded as being incidental or ancillary to the use of the land. It was also held that the Inspector was entitled to conclude that a 10% proportion of sales derived from imported goods took the retail use outside the ancillary category.
27. In *Williams*, which was earlier than *Allen*, there was a similar finding. In that case the owner of a nursery sold what was grown on site from a building within the grounds. He then began to import and sell fruit in addition to his own produce and the courts held that this resulted in a change in the character of the use, which resulted in a material change of use amounting to development.
28. All three cases point to a need to consider the functional relationship between a primary use and an ancillary use, and whether this results in a change in the character of the use, rather than its scale and extent, as emphasised by the appellants. The focus by the appellants on the percentage sale of sundries being less than 10% to support their position that a material change of use has not occurred is incorrect. There have been other cases that have referred to different percentages but the level of overall sales and the proportion that are sales of imported goods must be looked at in each case. The two main tests for the materiality of a change of use are a change in the character of the use itself and the effect of that change upon neighbouring uses and the surrounding area.

⁴ *Emma Hotels Ltd v SSE and Southend on Sea BC* [1980] 41 P and C. R. 255

⁵ *Allen v Secretary of State and Reigate and Banstead BC* [1990] JPL 340.

⁶ *Williams v Minister of Housing and Local Government and Another* [1967] 18 P. & C.R. 514

29. From the evidence it seems to me that the type of imported goods has changed over time to the point where there has now been a change in the character of the use. The extent of the retail sales at the appeal site appears to comprise a wide variety of products in addition to plants grown on at the site. Some are seasonal, such as the sale of garden and conservatory furniture as well as fireworks, some are described by the appellants as being sundries, such as plant pots, compost, seeds, fertiliser and gardening tools but not lawn mowers. However, at the site visit I saw that the appellants' sundries also extend to and include various hard surfacing materials and 'wood burning' logs. The appellants also stated in their Planning Contravention Notice (PCN) response that household furniture was sold from the site but this ceased in 2016 and that they sold barbeques and garden heaters. In addition, the Council describe other goods they have seen for sale such as pet related products and grave memorials but these are disputed by the appellants.
30. As well as enlarging the sales area, the appellants created a public parking area in 2015 adjacent to the entrance. This area was doubled in size in 2017 so that the total number of car parking spaces became around 250. The appellants also installed lighting columns⁷ in 2015 and 2017. Planning permission was subsequently obtained for the car park extension in October 2017. The first complaints made to the Council following the acquisition of the site by the appellants were in 2012 and centred on the harm caused by additional traffic movements at the junction of Earls Hall Drive and St John's Road. These complaints have continued over the years and at one point led to the issue of an enforcement notice in 2013 alleging a material change of use but this was subsequently withdrawn due to an incorrect plan. The Council state that there have been claims of up to a 1000 vehicle movements a day during trading one spring bank holiday weekend but I have not been provided with any details of that complaint. The St Osyth Parish Council (SOPC) point out that there are always traffic difficulties, with cars queuing along St John's Road whenever the nursery has a sale, such as during May and August.
31. Having regard to these submissions and my conclusion on the change in the character of the use, it is my view that what may have begun as an ancillary use, the retail sale of plants 'grown on' at the site, has now morphed into a garden centre use. This is a new primary use that operates alongside the existing primary horticultural use of the site and results in a mixed use taking place on the site. No planning permission exists for this use. There has therefore been a breach of planning control and the appeal on ground (c) fails.

Appeal A, ground (a)

Main Issue

32. The main issue is whether the use of the site is acceptable, having regard to highway safety and the level of traffic generation.

Reasons

Highway safety and traffic generation

33. The appeal site occupies a substantial area to the north of the houses on St John's Road. Whilst the development is for a mixed use, it contains a significant area of retail floor space (4 366sqm) that is substantially increased

⁷ Witness statement of C Stathers to the High Court

(by approximately 2 472sqm⁸) during the “Winter Wonderland” operation. The appeal site car parking area lies to the south and west of the glass houses. Although it has a hard surface, it is not formally laid out with parking bays painted on the ground, although these were shown on the 2017 planning permission. It was stated that this could accommodate 300 cars if formal bays were marked out and the Council did not disagree with this figure.

34. The appellant submits that the operation of the “Winter Wonderland” provides a ‘fantastic’ facility for the town and district as evidenced by the considerable number of postings on social media. The use is a fundamentally conjoined retail and leisure package. Over the Christmas period, the business employs an extra 20 staff and the operation of the “Winter Wonderland” enables the retention of 70 of the nursery staff from the end of the summer till February. In addition, the extended car park accommodates all of the visitors.
35. The appellant’s submissions focus on the “Winter Wonderland” use element of the deemed planning application. However, given my findings on the ground (c) appeal, the development for the ground (a) planning application includes the operation of a retail (garden centre) use for most of the year. Planning law⁹ requires that all applications for planning permission be determined in accordance with the development plan. This therefore includes the garden centre use as well as the “Winter Wonderland” operation.
36. The operation of the mixed use has resulted in an increased number of vehicles entering and exiting the site. This has caused several difficulties described by the Highway Authority (HA) as being largely due to the inadequate width of Earls Hall Drive. Drivers are prevented from leaving the site by drivers turning into Earls Hall Drive from St John’s Road. Queues consequently form in the car park. Drivers seeking to turn into Earls Hall Drive from St John’s Road are prevented by drivers exiting the site. Consequently, cars form queues in both directions along the main road, classified as the B1027, a main distributor road. The increased number of visitors coming to/going from the site also increases the potential for conflict with other users of Earls Hall Drive such as large farm vehicles and users of the public right of way.
37. The SOPC and third parties who live near the site have described in detail the effects of the mixed use on living conditions. They take issue with the appellant’s figure of 10 visitors an hour which they say is more in the summer. During the “Winter Wonderland” event, it can take up to 3/4 of an hour to get home by car due to the volume of local traffic, when ordinarily from the town it would take far less. There are often tailbacks over a mile long in each direction from the junction of Earls Hall Drive with St John’s Road and congestion for many hours. In these conditions many visitors park their cars across numerous driveways preventing residents from leaving or entering their homes. Cars are also parked along the road and grass verges.
38. The mixed use also affects the households and businesses who rely on Earls Hall Drive to access/vacate their properties. In particular, one householder is a midwife who is often called to leave her property at short notice. In addition,

⁸ Part of the 2 472sqm floor area (Block 3 shown on the plan accompanying the response to the PCN) is used for the café area. At the Hearing it was not clear whether this area is used just during the “Winter Wonderland” or throughout the year. However, given it is fitted with ventilation and extraction equipment and third parties describe ‘Sunday dinner’ being on the menu, it would appear to be open most of the year.

⁹ Section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990

- when the arable farm is quiet over the winter, the farmer raises 1000 turkeys which are collected by customers just before Christmas. The operation of the "Winter Wonderland" event unduly conflicts with this enterprise as well as other businesses who operate in the farm buildings throughout the year.
39. The side garden fences of Nos 762 and 782 form the boundaries of Earls Hall Drive though where it emerges into St John's Road there is a bell mouth area that is part of the adopted highway. This is because there are wide grass verges running alongside St John's Road in the vicinity of the access that facilitate a bell mouth shape.
40. The distance between St John's Road and the appeal site entrance on the eastern side of Earls Hall Drive is about 85m¹⁰. Two pairs of double gates mark the ingress and egress. At this point Earls Hall Drive widens slightly for the first time to allow for two vehicles to pass. North of the public access into the appeal site there are a few more passing bays along Earls Hall Drive and another access point into the appeal site for delivery vehicles.
41. I am told that the former horticultural business that previously operated on the appeal site was given an access deed by the owners permitting use of Earls Hall Drive for service runs and vehicular access into the site for the horticultural business. The appellant and the owners of Earls Hall Drive are currently in dispute about this but that is a matter that is not before me and I have not been provided with a copy of the deed.
42. The appellant does not deny that the use of the site has been successful and results in traffic generation. In particular, he accepts that difficulties occur during the operation of the "Winter Wonderland" and employs traffic marshalls to prevent this happening. Three are on duty in the car park to assist drivers to find a parking space, one is on duty at the entrance to the car park who liaises with one on duty at the junction with St John's Road. Together they liaise to prevent congestion along Earls Hall Drive. However, congestion occurs at other times of the year, such as during the Easter and summer sales, and it is not clear whether traffic marshalls are employed on other occasions. The Council submit that marshalls have to be trained and accredited to operate on the public highway but the appellant stated his staff do not stand on the public highway and therefore do not need to be trained and accredited.
43. The HA receive reports from the police on traffic accidents. Between the 1 July 2016 - 13 June 2019 there have been three accidents in the vicinity of the appeal site described as 'slight collisions'. The exact details are not passed onto the HA but the only event that occurred during "Winter Wonderland" involved two cars and one casualty. The appellant explained this was caused as the HA had removed their roadside sign. New signage has subsequently been approved and installed. Nevertheless, the congestion caused by the mixed use can be considerable. Added to that, when the car park is full, drivers park along St John's Road, where there is a 40mph speed limit, or on the grass verges.
44. Policies TR1, TR1A and TR2 from the LP require the submission of a transport assessment for all new developments and a travel plan. New development will be assessed in relation to its effect on the transport system and its capacity to accommodate the traffic generated. In addition, Policies ER7, ER11 and QL10

¹⁰ There is also a reference to this being 67m.

from the LP require new business uses to have satisfactory vehicular access and adequate car parking as well as taking into account the acceptability of the level of traffic generated. Policy QL2 also promotes transport choice and Policy ER38 requires that farm shops will only be permitted where they do not cause traffic hazards.

45. The appellant has not submitted a formal transport assessment or a travel plan. At the Hearing he relied on the response made to the PCN given in August 2018 in which it is stated that outside of the "Winter Wonderland" event, there are approximately 10 visitors an hour. He also explained that the car park was extended in 2017 to meet the needs of visitors and there has been no objection from the HA on this point. In addition, he referred to the planning application made to widen Earls Hall Drive. He believes there is no need for a transport assessment as the HA did not seek one when he applied for temporary planning permission for the "Winter Wonderland" in 2017. He also states that it is open to the police and the Council to ban parking on the verge.
46. It appears to me that the appellant has failed to take full account of the Council's policy requirements and those set out in the Framework. In particular, no survey work has been carried out to ascertain visitor trip levels throughout the year, the frequency of visits and the direction of travel. There has also been no assessment of nearby junctions, given the importance of St John's Road as a main distributor road. In the main, there seems to be an over reliance on the anticipated success of Appeal C and the benefits that would bring. I have found this scheme would result in significant improvements to managing the flow of traffic in and out of the site, and goes some way towards resolving the queueing issue. However, widening Earls Hall Drive only deals with one aspect of the traffic consequences from the mixed use, albeit a substantial aspect. It does not resolve the whole issue of traffic creation and congestion.
47. This is because without any prior assessment work carried out, it is not clear whether the levels of parking provision are appropriate and that the use of a widened Earls Hall Drive would improve the situation further afield in terms of highway safety. Furthermore, if most of the traffic comes from Clacton-on-Sea, not an unlikely theory as the main 'A' classified road serving the area runs into the town, then the ability of cars to pass each other along Earls Hall Drive would not address queueing traffic waiting to turn right from St John's Road.
48. In addition, even though I allow Appeal C, it is not clear whether that planning permission could be implemented. This is because the appellant does not own Earls Hall Drive and a member of the family who does own it stated at the Hearing (and in writing in response to the application the subject of Appeal C) that no consent would be given to carry out any work to it.
49. The appellant explained though that he has bought Nos 762 and 782 St John's Road in order to carry out the works to widen Earls Hall Drive. This however is not the case. Land Registry extracts submitted at the Hearing by the Council show that the dwelling and surrounding land at No 762 is owned by Dumfries Developments Limited and only the front garden of No 782 is owned by Dumfries Developments Limited, not the side garden. In response, the appellant advised that the director(s) of Kelsworth Limited are director(s) of Dumfries Developments Limited, implying that there is sufficient control over

the land to implement any planning permission¹¹. Notwithstanding the fact that each company is a separate legal entity and noting the comments from the owners of Earls Hall Drive, there is nothing before me to demonstrate that this would be the case.

50. From all I have read and heard, the operation of the mixed use results in unacceptable harm to the living conditions of local residents and businesses. The levels of traffic congestion are substantial and have resulted in numerous complaints to the Council and the HA dating back to 2012, resuming in 2015 and continuing in 2016 and 2017. There is no doubt that the most severe congestion occurs during the operation of the "Winter Wonderland" event when visitors are attracted from not only across Essex but further afield.
51. Traffic conditions during this period are described as 'chaos' by the PC and local residents and were the main reason the Council sought an injunction against the operation of the use, in the interests of highway safety. However, congestion occurs at other times of the year and although the appellant states his summer sale only lasts two weeks, the evidence from neighbours is that this sale, and others held in the year also result in intolerable conditions.
52. Notwithstanding that in the operation of his business, the appellant can hold a sale at any time of his choosing, Policy QL11 of the LP requires new development to minimise any adverse environmental effects. Development will only be permitted if any additional road traffic arising will not have a materially damaging impact on amenity. The objective of the policy is to ensure that land uses are suitably located and controlled and that they are compatible with neighbouring uses.
53. Whilst I have no doubt that levels of business will fluctuate throughout the year, this is no mitigation for tolerating the effects of the use when business activities increase. This brings me to whether the use of the site is acceptable. However, at this point, in terms of traffic generation, I find that the development causes harm and as such does not accord with either LP or ELP policies as discussed, or indeed the requirements of the Framework.

Appropriateness of development

54. The appeal site is currently outside the Clacton-on-Sea settlement boundary in a rural location, as defined in the LP and the spatial strategy for the area, (Policy QL1) requires new development to be located in the towns. The emerging local plan¹² (the ELP) proposes that the site would be included in the settlement boundary and allocated for housing development.
55. The LP sets out that retail, leisure, entertainment facilities and tourism, amongst other uses, are regarded as town centre uses in the preamble to Policy ER31. This policy defines Clacton-on-Sea as a major town centre and requires all options in town centres to be thoroughly assessed before edge of centre locations or out of centre sites are considered. Policy ER32 requires proposals for town centre uses outside existing towns to be considered against a sequential site approach and need assessment whilst Policy ER32a requires proposals for development in use classes A1-A5 to be directed towards the primary shopping area.

¹¹ It was also stated that they are directors of Galliard Homes Limited, who have submitted a planning application to redevelop the appeal site with housing but it was unclear why this reference was made.

¹² Tendring District Local Plan 2013-2033 and Beyond – Publication Draft June 2017

56. Policy QL8 cited in the notice is not relevant as this relates to mixed use development within a settlement boundary and the appeal site lies within the rural area of the district.
57. The relevant policies from the ELP¹³ repeat the approach to sustainable development in the Framework and carry forward LP requirements and objectives to protect the town centre of Clacton-on-Sea. The ELP was submitted to the Secretary of State in October 2017. The Examination in Public (EIP) in respect of section one of the plan dealt with the overall strategy for growth, including housing and employment targets. This took place in January and May 2018.
58. Where there is an ELP, the Framework sets out that weight may be given to relevant policies according to the stage of preparation of the local plan, the extent to which there is an unresolved objection to relevant policies and the degree of consistency of the relevant emerging policies with the Framework. I find, based on the submissions from the parties, that whilst the ELP is at an advanced stage of preparation and the Council submit that the emerging policies are consistent with the Framework, the EIP process is not complete. The ELP therefore only attracts limited weight.
59. The Framework supports both the role that town centres play at the heart of local communities as well as the diversification of rural businesses. It states that decisions should ensure that developments will function well not just for the short term but over the lifetime of the development. The glossary also defines retail and leisure uses as being town centre uses.
60. The appellant submits the use of the site as a "Winter Wonderland" for a short seasonal period is neither a town centre use nor a major retail activity that can be considered in relation to LP Policies ER31, ER32 and ER32a. Although the site has no specific designation in the LP, the area in the vicinity of the appeal site is changing. Planning permission has been given and implemented for retail parks outside the town centre of Clacton-on-Sea and for housing development on the south side of St John's Road.
61. The requirements of the LP, the ELP and the Framework all refer to the need to carry out an impact assessment. They make no distinction in respect of seasonal developments. However, this has not been done as the appellant claims he was not asked to do it and, as they sell a specialist range of items not found in the town centre, no comparison would be possible. He also states that there are no suitable alternative sites and refers to the development of Brook Retail Parks east and west, which have been built in the last few years.
62. However, these comments do not equate to any sort of impact assessment though the observation regarding the specialist range of goods being sold could have formed part of the assessment to demonstrate the suitability of the appeal site. He stresses the importance of maintaining jobs, which is a material consideration but ignores another requirement of the Framework. This is that when considering out of centre proposals, preference should be given to accessible sites which are well connected to the town centre. At my site visit I saw that the recent retail park developments, unlike the appeal site, are accessed from the main 'A' road into the town via properly serviced highways.

¹³ SP1, PP1, PP2 and PP4

63. In addition, the retail/leisure package that comprises “Winter Wonderland” is not unique, as claimed by the appellant. I am aware that the owners of many large department stores, shopping centres, stately homes and even some Councils allow their parks to be used for various Christmas displays/markets. In my experience they include a whole host of events and attractions of varying sizes for children and adults. The appellant claims that anyone visiting the appeal site may visit the pier and the town centre and thus the use has wider economic benefits but there was no substantiated evidence submitted to support this claim. In conclusion, I therefore find that the development does not accord with either LP Policies ER31, ER32 and ER32a, ELP Policies SP1, PP1, PP2 and PP4 or indeed the requirements of the Framework.

Other Matters

64. The Council are also concerned that the levels of congestion diminish air quality, which affects local residents. The appellant makes no comment on this matter. I find that no substantive evidence is submitted by either party in relation to this issue and as such I am not able to pursue it. This is because I am unable to determine the extent of any potential harm arising and whether this would be of such significance for this appeal.

Planning balance

65. I have found that the mixed use of the site is not acceptable, having regard to highway safety and the level of traffic generated. It results in unacceptable harm to the living conditions of local residents and businesses due to traffic congestion. This conflicts with development plan policies. In addition, it has not been demonstrated that the location of the mixed use accords with the Council’s approach to sustainable development envisaged by the LP. Furthermore, there are no substantive material other considerations that demonstrate the operation of the business can only be at the appeal site. I give all of these matters substantial weight.

66. I turn now to factors which could possibly outweigh these findings. Conditions have been suggested as a way forward to enable the development to proceed where it would otherwise be necessary to refuse planning permission in the first instance. It is suggested that the “Winter Wonderland” seasonal event should cease unless Earls Hall Drive is widened, a right-hand turning lane is created on St John's Road and a scheme for the use of traffic marshalls is submitted to and approved by the Council. They would operate at weekends, in the seven days prior to Christmas and during sales events.

67. The PPG states that conditions requiring works on land that is not controlled by the applicant often fail the test of reasonableness and enforceability. The use of a Grampian condition is often suggested but at the Hearing two matters were brought to my attention. Firstly, the family who own Earls Hall Drive do not consent to work on their land, and secondly, the appellants do not own the land needed to widen the road. There is no documentation before me to show that Dumfries Developments Limited have given their consent to use their land notwithstanding the apparent relationship between the freeholders of the appeal site and Dumfries Developments Limited. For these reasons it is considered that there is no realistic prospect Earls Hall Drive could be widened. The Council suggested a section 106 agreement or a unilateral undertaking is the way forward but neither are before me.

68. The Council also cast doubt on the feasibility of a right-hand turning lane and point out that there is no guarantee such a facility would assist in the absence of a transport assessment. There is also an application for new housing on the south side of St John's Road before the Council which includes the provision of a new footpath on the south side of St John's Road, where none exists at present, and which could negate the provision of a right-hand turning lane from happening.
69. Whilst the use of traffic marshalls in theory should be welcome, this condition is really seeking to manage a situation that should not occur in the first place and points to the need for a transport assessment. Even if the condition was redrafted to require the submission of a transport assessment, none of the other suggested conditions deal with the location of the use and the prior need to carry out a sequential assessment. Making a sequential assessment the subject of a condition demonstrates that in this case conditions are not appropriate when the principle of the development may not be acceptable at the appeal site. As such, I make no further comments on the remaining suggested conditions.
70. It is open to me to grant planning permission for part of the development which could be a mixed use for horticulture, retail (namely a garden centre) and cafe. However, given what appears to be a significant amount of traffic generated when the "Winter Wonderland" is not in operation, particularly at sale times, and my findings on the suggested road improvements, it is likely that conditions would not overcome the harm that is caused by that use. Taking all of these factors into account, I consider that in the overall planning balance the other considerations do not clearly outweigh the harm I have found and for these reasons the appeal on ground (a) fails.

Appeals A and B, ground (f)

71. The appeal on ground (f) is that the requirements of the notice exceed what is necessary to achieve the purpose of the notice. The purposes of a notice are set out in section 173 of the 1990 Act and are to remedy the breach of planning control (S173(4)(a)) or to remedy injury to amenity (S173(4)(b)). In this case the notice requires the cessation of the mixed use and that various items that facilitate the use should be removed. The purpose of the notice as confirmed at the Hearing is therefore to remedy the breach of planning control.
72. The appellants raise several concerns including that the requirement to cease retail sales is excessive. However, the requirement, as varied, is to cease a mixed use where the retail element is a primary use in the mixed use. This is reasonable and does not prevent the appellants from using the site for horticultural purposes and the ancillary sale of produce 'grown on' at the site.
73. The appellants also refer to the requirement to remove materials; if this relates to the removal of the "Dickens" style street then they say this is unreasonable. This is because it is formed within the building and planning permission was not required for it. However, the courts have held that a notice can require the removal of fixtures/fittings which are not in themselves development but because they facilitate a material change of use. This requirement is therefore reasonable.
74. The notice also requires the use of the customer car park to cease in connection with the material change of use. However, this is not reasonable.

Notwithstanding that planning permission exists for the car park, as I explained previously, the cessation of the mixed use would not prevent the appellant from using the site for horticultural purposes with ancillary sales of produce. The appeal on ground (f) therefore succeeds in part and I will also vary the requirements so that they are more precise.

The ground (g) appeal

75. This ground is that the time given to comply with the requirements of the notice is too short. The appellants request that this be extended to a year to avoid making any staff redundant and to enable the business to move elsewhere in the district.
76. In cases involving business uses, it is necessary to weigh the interests of the business against the harm caused by the development the subject of the notice. On the one hand, the appellants have calculated that they would need a year to plan for and organise their relocation without detriment to the business. On the other, the notice includes a number of reasons setting out the harm caused by the development. These include, amongst other matters, severe traffic congestion. It was primarily for this reason that the Council stipulated six weeks in an effort to avoid a 'Winter Wonderland' in 2018.
77. I consider a year would be tantamount to a grant of temporary planning permission. Furthermore, the time period in a notice is given to bring about the cessation of a use or the removal of operational development, not to find, and move to, an alternative site. Leaving the time period unaltered would not bring to an end the 2019 'Winter Wonderland', which I saw at the site visit was being prepared. However, a three month period would ensure that it did not reoccur, would be a reasonable time to enable the appellants to comply with the requirements of the notice and would strike the appropriate balance. To this limited extent the appeal on ground (g) succeeds.

Conclusions

Appeals A and B

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

Appeal C

79. For the reasons given above I conclude that the appeal should be allowed.

D Fleming

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

P Le Grys	Agent, Stanfords
T Bowden	Manager

FOR THE LOCAL PLANNING AUTHORITY:

W Beglan	Of Counsel
C Stathers	Enforcement Team Leader
K Hutchinson	Hutchinson Planning and Development Consultants
C Stoneham	Strategic Development Engineer, Essex County Council Highway Authority

INTERESTED PERSONS:

S Grantham	Chair St Osyth Parish Council
R Crosier	Local Resident
M Isom	Local Resident
P Bond	Local Resident
D Lord	Local Resident

Documents

- 1 Copy of plan from 17/01775/FUL
- 2 Copy of email to C Stathers dated 26 November 2017
- 3 Agreed Statement of Common Ground
- 4 Planning Statement for application 17/01935/FUL (Appeal C)
- 5 Copy of representations to application 17/01935/FUL
- 6 Copies of ELP policies omitted from appeal questionnaire
- 7 Copies of LP policies omitted from appeal questionnaire
- 8 Copy of letters of notification
- 9 Copy of planning application form and decision notice for 17/01770/FUL
- 10 Copy of officer report for 17/01770/FUL
- 11 Copies of Land Registry extracts for Nos 762 and 782 St John's Road
- 12 Extract from Encyclopedia of Planning Law and Practice, Vol 2 Part 2B, Part III Control over development
- 13 Williams v Minister of Housing and Local Government and Another [1967] 18 P. & C.R. 514
- 14 The Council's comments on the appellant's suggested conditions
- 15 The Council's closing submissions
- 16 Appellants' letter dated 11 October 2019 enclosing a copy of Allen v Secretary of State for the Environment and Reigate and Banstead Council [1990] JPL 340, an extract from the Inspector Training Manual-Enforcement Case Law 2019 page 27 and suggested conditions
- 17 The appellants' closing submissions

