



Appeal Decisions

Site visit made on 18 August 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 14 September 2020

Appeal A: APP/J1860/C/20/3244119

Appeal B: APP/J1860/C/20/3244120

Land at 6 Cedar Cottages, Main Road, Hallow, WR2 6PW

- 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 Mrs Rachael Young (Appeal A) and Mr Gavin Young (Appeal B) against an enforcement notice issued by Malvern Hills District Council.
- The enforcement notice was issued on 29 November 2019.
- The breach of planning control as alleged in the notice is: -
Without planning permission, the unauthorised material change of use of the Land from use as a dwellinghouse and associated residential garden to a mixed use of dwellinghouse and associated garden and for the keeping and breeding of dogs for commercial sale and stud.
Without planning permission, the unauthorised erection of two outbuildings, shown approximately edged green on the attached plan, and identified as 'A' and 'B' on the attached photographs.
- The requirements of the notice are: -
5.1 To permanently cease the use of the Land and unauthorised outbuildings for the keeping and breeding of dogs for commercial sale and stud.
5.2 To remove the two unauthorised outbuildings, as approximately shown edged green on the attached plan, and identified as 'A' and 'B' on the attached plan and photographs.
5.3 To lawfully remove all resulting materials from the land edged red on the attached plan and restore the land to its condition before the breach took place.
- The period for compliance with the requirements is: -
3 calendar months.
- Appeals A and B are proceeding on the grounds set out in section 174(2)(c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended (the 1990 Act). Since the prescribed fees have not been paid within the specified period, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the 1990 Act have lapsed.

Summary Decision: The appeal succeeds in part and the enforcement notice is upheld as corrected and varied in the terms set out below in the Formal Decision.

The Notice

1. On an appeal any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the 1990 Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority.
2. There is no dispute that one of the outbuildings, identified as 'B' on the photographs and plan attached to the enforcement notice, is indicated to be in

the incorrect position on that plan. However, it is clear from the evidence before me that the appellants are aware which outbuildings are affected by the enforcement notice. Furthermore, the photographs attached to the enforcement notice illustrate which outbuildings are identified as 'A' and 'B'.

3. To ensure clarity I intend to delete the original plan and replace it with an amended version that has been submitted, at my request, by the Council. Taking into account all of the above, I consider I can make the necessary corrections to the notice without causing injustice to the appeal parties.

Procedural Matters

4. As set out above there are two appeals on this site. They relate to the same enforcement notice and the same grounds of appeal, therefore, to avoid duplication I have dealt with them together.
5. After assessing the appellants' evidence, I considered that some of that evidence could reasonably be construed to apply to a ground (c) appeal. The appellants were given the chance to clarify whether they wanted to appeal on ground (c) and to submit any additional evidence in support of that ground. The additional evidence submitted by the appellants on this matter was minimal. Nevertheless, as stated above some of the previously submitted evidence also related to a ground (c) appeal. Both main parties have had the chance to submit evidence and comments on this matter and therefore, no injustice would be caused to them. I have dealt with the appeals on this basis.
6. I note that the evidence before me cites The Old Forge, a grade II listed building, Hallow Conservation Area and refers to the planning merits of the development. Nevertheless, these factors are not relevant to the determination of these appeals as the ground (a) appeals and the deemed planning applications have lapsed. My decision rests on the facts of the case, on relevant planning law and judicial authority. The test of evidence is made on the balance of probability.

The ground (c) appeals

7. For the appeals on ground (c) to succeed the onus of proof is on the appellants to demonstrate that the matters alleged do not constitute a breach of planning control. The appellants contend that the existing outbuildings have only been replaced and that operating a business from their home is permitted as it does not constitute a material change of use.
8. In relation to the outbuildings the appellants' case is that outbuilding 'A' replaced an existing outbuilding that had been in the same location for many years, at least back to when the property was purchased in 2003. The appellants state that the replacement building was of the same footprint and utilised the existing foundations and hard surface. They have also stated that outbuilding 'B' replaced a cattery building that was removed and that it was half the size of that cattery building.
9. There may have been outbuildings in similar positions as outbuildings 'A' and 'B' for many years and they may have been unsafe and unsightly. However, this does not mean that replacement buildings can be erected without the need for planning permission. Section 55(1A) of the 1990 Act states that building operations include, amongst other things, the demolition of buildings and rebuilding. As such, the erection of the outbuildings falls within the definition

of development under section 55(1) of the 1990 Act for which, section 57 of that Act says, planning permission is required.

10. I note that there is disagreement as to whether the outbuildings have been erected for a purpose incidental to the enjoyment of the dwellinghouse and as a result whether they are permitted by Class E of Part 1, Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO). Even if, they have been erected for a purpose incidental to the enjoyment of the dwellinghouse there is no evidence before me to indicate that the outbuildings as erected meet the limitations of Class E as contained within paragraphs E.1. and E.3. of the GPDO. The appellants have not shown that the outbuildings either did not require, or indeed, had the benefit of planning permission (whether under an express permission or by way of permitted development rights under the GPDO).
11. In relation to the material change of use reference is made to the section on the Planning Portal in relation to working from home. Briefly, the advice is that *'You do not necessarily need planning permission to work from home. The key test is whether the overall character of the dwelling will change as a result of the business'*. Whether an activity or business amounts to a material change of use is a matter of fact and degree, amongst the considerations being whether there is a change in the character of the use of the land and whether there are off-site impacts. In addition, ancillary or incidental uses have been held to be those that are ordinarily associated with the primary use of the property.
12. In this case, Mrs Young stated within her response to the Planning Contravention Notice (PCN) that in 2018 16 dogs were kept at the property with one male used for stud, 5 being *'working'* dogs and the remainder pets. Nevertheless, the majority of the dogs kept as pets are also indicated to be used for breeding and the response also states that the *'working'* dogs have occasional litters. The appellants have also stated within their evidence that they no longer have the male dog that was used for stud, that the overall number of dogs has been reduced and that occasional litters were put on the PCN as the majority of the *'working'* dogs were young at that time.
13. The response to the PCN also states that in 2012 4 dogs were kept at the property with 3 of them being breeding females and 1 litter of 7 puppies being produced. The number of litters increases to 4 in 2017 and it would appear that there were also 4 litters of pups in 2018, based on email correspondence submitted by the appellants.
14. It would appear that the appellant has been granted a licence to breed and sell dogs at the property. I have not been provided with a copy of the licence. In my experience these licences relate to the welfare of the animals and I do not know whether the licence stipulates that the dogs/puppies are to be kept and bred in line with any set requirements.
15. The alleged change of use, described in the enforcement notice, relates to the whole of the land which appears to be associated with 6 Cedar Cottages (No 6). It does not allege that the material change of use has only occurred within the outbuildings ('A' and 'B'). In this case, the appellants have stated that some of the dogs are kept within the house, the *'working'* dogs within outbuilding 'A' and that some dogs have spent some time within outbuilding 'B'. Moreover, they state that the garden area has and is being used by the family for general

domestic activities and play and outbuilding 'B' is being used for storing items and as a gym.

16. Based on the evidence before me, it is reasonable to consider that as the land affected by the enforcement notice area is occupied by the appellants and their family and that functionally and physically interdependent activities are carried out on it that it is the appropriate area to assess whether a material change of use has occurred.
17. The amount of dogs that have been kept and bred at No 6 for commercial sale and stud, based on figures supplied within the PCN, is not so insignificant that they are '*de minimis*'; that is to say they could be disregarded altogether. I note that the appellants appear to have since reduced the number of dogs that are kept and bred at the property.
18. Nonetheless, it appears that based on the evidence before me that there have been around 16 dogs and several puppies kept at No 6 in the time leading up to the issuing of the enforcement notice. It is not uncommon for occupiers of dwellings to keep dogs as pets and some of those dogs could be '*working*' dogs and they may have puppies. I also recognise that dog owners may sell their dog's puppies privately from their dwellinghouses but in the main this is likely to be an infrequent occurrence.
19. However, in this case there were 3 or 4 litters of puppies each year between 2015 and 2018 with each litter consisting of between 6 and 11 puppies. It is not entirely clear from the evidence before me as to where all the dogs and puppies were kept at that time. Outbuilding 'A' appears to have been used mainly to house the '*working*' dogs, outbuilding 'B' appears to have, at times, been used to house dogs and puppies and dogs have been kept within the dwellinghouse. It was also not apparent as to how many dogs were at No 6 on the day of my visit.
20. Outbuilding 'A' is designed as a kennels with external runs/feeding bowls and separate access doors for animals and humans. Outbuilding 'B' is similar in design in that there are 2 small hatches/doors for animals as well as a main door. The metal runs shown on the photograph attached to the enforcement notice are not currently in place but the area to the front of building has a concrete surface with a central drainage gully. Outbuilding 'B' was being used for general storage and to house gym equipment on the day of my visit.
21. No 6's rear garden area is not generous in size and it extends across the rear of the adjoining dwelling. As such, part of the rear garden and outbuilding 'B' are close to the rear elevation of that adjoining dwelling. The garden area appears to be used for sitting out and for children to play in. However, it also appears to have been designed to facilitate the keeping and breeding of dogs.
22. I acknowledge that there is no evidence before me of any written complaints in relation to noise or traffic arising from the use of No 6. Nonetheless, the numbers of dogs/puppies that have been kept at the property at any one time is significantly more intensive than would ordinarily be associated with a dwellinghouse use. No 6 is close to a relatively busy road, Main Road, which appears to be one of the main routes through Hallow. I noted at the site visit that there is a moderate level of background noise when within the rear garden of No 6. Nevertheless, given the concentration of dogs at the appeal site, it is

more likely than not, that the noise generated by dogs barking would have made a noticeable contribution to ambient noise levels in the area.

23. Due to those numbers of dogs/puppies, it is reasonable to consider that there would have been regular visits of prospective buyers, outings to the vets and those associated with the male stud dog. Even though, the visits of prospective buyers would be by appointment only these would be in addition to family trips from a wholly residential household. Consequently, the number of trips generated by the use of No 6 would have been, more likely than not, appreciably greater than generated by a typical residential household.
24. As such, even though the number of dogs kept and bred for commercial sale and stud appears to have recently been reduced it is reasonable to consider that at the time the notice was issued that the level and character of activities that occurred at the site were materially different from those associated with a dwellinghouse.
25. Furthermore, the requirements of an enforcement notice do not preclude the appellants from carrying out what they are lawfully entitled to use the property for once the notice has been complied with. To that end it is open to the appellants to apply for a determination under sections 191/192 of the 1990 Act as to whether operating a specific level of business or working from the property is lawful.
26. The evidence before me indicates that other activities such as an antique business, workshop and cattery could have been undertaken on the appeal site before the appellants purchased it. However, there is no evidence before me to indicate that any of those activities have been granted planning permission or the specific details of when those activities were carried out or the overall character of those activities.
27. As a matter of fact and degree I consider that, based on the evidence before me, the alleged breach of planning control, in relation to the material change of use, goes beyond what can reasonably be regarded as incidental to a dwellinghouse use and it has significantly changed the character of the use of the appeal site. As such, on the balance of probabilities, express planning permission is required for the making of a material change in the use of the property from a dwellinghouse and associated residential garden to a mixed use of dwellinghouse and associated garden and for the keeping and breeding of dogs for commercial sale and stud. It has not been obtained.
28. Taking into account all of the above, I find that the matters alleged constitute breaches of planning control. Therefore, ground (c) fails.

The ground (d) appeals

29. To succeed on an appeal on this ground the appellants have to prove on a balance of probabilities that no enforcement action could be taken in respect of the breaches of planning control with regards to the time limits contained within section 171B of the 1990 Act.
30. The photographic evidence submitted appears to show that outbuildings have been on the appeal site for a number of years. Moreover, a number of letters from various people who either live close to the site or have visited the site indicate that there have been outbuildings on the site since at least 2003. However, the appellants have stated within their evidence that previous

outbuildings were removed from the site due to their condition and the existing outbuildings 'A' and 'B' were erected as replacements. I have found above that the erection of the replacement outbuildings falls within the definition of development under section 55(1) of the 1990 Act for which, section 57 of that Act says, planning permission is required.

31. I note that at least one of the dates, given by Mrs Young in the PCN, for the erection of the outbuildings appears to be incorrect as it is after the date on the photographs attached to the enforcement notice. However, the appellants have not provided any other evidence to indicate that outbuildings 'A' and 'B' were substantially completed on or before 29 November 2015, being 4 years before the enforcement date was issued.
32. In relation to the material change of use it is apparent that the appellants have had dogs whether as pets or '*working*' dogs on the appeal site for a number of years. The appellants have also stated that before 2012 when one of their dogs had puppies those puppies were given away rather than sold. Nevertheless, based on the appellants' figures, in the PCN, the number of dogs kept at the site and litters of puppies appreciably increased between 2012 and 2018. The appellants have stated that they could go into greater detail into the costs associated with raising and training the dogs and that they could submit tax returns.
33. Nevertheless, they have not produced any firm or compelling documentary evidence in support of their claim that it is too late to take enforcement action against the alleged material change of use. For example, they have not produced VAT or tax returns or certified accounts, nor have they provided invoices for items such as dog food, bedding, vets bills or customer invoices to indicate that the material change of use began 10 years before the enforcement notice was issued.
34. Consequently, the appellants have not produced sufficient evidence to indicate that, on the balance of probability, that at the date the notice was issued no enforcement action could be taken against the alleged breaches of planning control. The appeals on ground (d) fail.

The ground (f) appeals

35. That the steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections. Having regard to its requirements, the purpose of the enforcement notice is to remedy the breaches of planning control. As a result, and in the absence of appeals on ground (a) as set out in section 174(2) of the 1990 Act and deemed planning applications, the power available to me under section 176(1) of that Act only relates to whether the requirements exceed what is necessary to remedy the breaches and not the planning merits of the case.
36. The appellants have stated that they consider that the requirements of the notice are excessive as the outbuildings have been there for more than 10 years. However, this is an argument relating to the ground (d) appeals and I have found that those appeals have failed.
37. They also consider that the notice requires them to reinstate buildings that were falling down and dangerous. However, requirement 5.3 does not require the reinstatement of former buildings onto the site it requires the land to be

restored to its condition before the breach took place. As such, immediately prior to the breach occurring, i.e. the outbuildings being erected, the former buildings would have been removed. The requirements are not excessive in this respect.

38. The appellants have also stated that they have submitted a pre-application enquiry to the Council, sent emails and tried to compromise with the Council on alternative schemes. The suggested alternatives include erecting a screen in front of the outbuilding 'A' so that it has the appearance of a workshop, erecting acoustic fencing, reducing the number of dogs, retaining smaller outbuildings or retaining only one of the outbuildings. However, these suggested alternatives would require me to assess the planning merits of those alternatives. As stated above, there is no ground (a) appeal or deemed planning application in this case therefore I am not empowered to consider those planning merits.
39. Moreover, as stated within the ground (c) appeals, the requirements of an enforcement notice do not preclude the appellants from carrying out what they are lawfully entitled to use the property for once the notice has been complied with.
40. Given that the notice does no more than seek to achieve the purposes of section 173(4)(a) of the 1990 Act, it is not excessive. The appeals on ground (f) fail.

The ground (g) appeals

41. The ground of appeal is that the time given to comply with the requirements is too short. The appellants request that the 3-month compliance period be extended to 9 months. They consider that if they have to remove outbuilding 'A' and if one of the '*working*' dogs has just been mated, the pregnancy would last 9 weeks and a further 8-10 weeks would be needed before the dogs can legally leave for a new home. Therefore, they consider that the minimum time would be 19 weeks but that it would be morally wrong not to spay the '*working*' dog first, let her recover and then find a suitable home. They also state that if they were able to retain outbuilding 'A' then they could do the work a lot quicker. The Council has stated that given the appellants evidence in this respect that they have no objection to the time for compliance being extended to 6 months.
42. Given the above and the logistics of rehousing the dogs I consider that a period of 3 months is a relatively short period of time to comply with the requirements of the notice. Moreover, given the alternative schemes suggested by the appellants and the apparent reduction in the number of dogs at the site an extension to the time for compliance would also allow them the time to obtain help and support to submit to the Council an alternative scheme and/or to apply for a determination under sections 191/192 of the 1990 Act.
43. Nevertheless, in the public interest, the requirements of the enforcement notice should ensure compliance within a reasonable period to overcome the harm identified by the Council in its reasons for issuing the notice. In my view a period of 6 months would strike the appropriate balance between the conflicting interests. To this limited extent the appeal on ground (g) succeeds.

Other Matters

44. The appellants consider that if the enforcement notice is upheld that it would have a detrimental effect on the family's free right to continue an activity that they have done for many years and that it would cause distress to all involved. I have taken into consideration the Human Rights Act, 1998 which enshrines in UK law most of the fundamental rights and freedoms contained in the European Convention on Human Rights (ECHR). I recognise that dismissal of the appeals would interfere with the appellants' rights under Article 8 and Article 1 of the First Protocol. Article 1 concerns enjoyment of possessions; Article 8 states that everyone has a right to respect for his home and private life, his home and correspondence. These are qualified rights, whereby interference may be justified if it is in the public interest; the concept of proportionality is crucial.
45. Dismissing the appeals would interfere with the appellants' rights, but to a limited extent, since they would still have their home. The interference would be in accordance with the law and in pursuance of well-established and legitimate aims: protecting the living conditions of existing and future occupiers. Given the harm identified within the reasons for issuing the notice and taking into account the variation to the notice to increase the time for compliance, the action is in accordance with the law, pursues legitimate aims and is necessary and proportionate to the situation.
46. I have noted the points made by the appellants about the Council's handling of the matter, the issues raised regarding Hallow Parish Council and that other businesses are run from nearby homes. Furthermore, I appreciate that the appellant undertook the works in good faith and did not seek to flout the planning regulations. However, these points have not affected my decision, which rests on the facts of the case, on relevant planning law and judicial authority.

Conclusion

47. For the reasons given above, I conclude that a reasonable period for compliance would be 6 months, and I am varying the enforcement notice accordingly. The appeals under ground (g) succeed to that extent and the enforcement notice is upheld with corrections and variations.

Formal Decision

48. It is directed that the enforcement notice be corrected by:
- the substitution of the plan annexed to this decision for the plan attached to the enforcement notice;
- and varied by:
- the deletion of 3 months and the substitution of 6 months as the period for compliance.

Subject to these corrections and variations the appeals succeed in part and the enforcement notice is upheld.

D. Boffin

INSPECTOR



Plan

This is the plan referred to in my decision dated: 14 September 2020

by **D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC**

Land at: 6 Cedar Cottages, Main Road, Hallow, WR2 6PW

References: APP/J1860/C/20/3244119 & APP/J1860/C/20/3244120

Scale: Not to Scale

