



Appeal Decisions

Inquiry Opened on 11 May 2021

Site visit made on 18 May 2021

by Paul Dignan MSc PhD

an Inspector appointed by the Secretary of State

Decision date: 18 June 2021

Appeal A: APP/N1920/C/19/3235723

Appeal B: APP/N1920/C/19/3235724

Land adjacent to 8 St Giles Avenue, South Mimms, Hertfordshire, EN6 3PZ.

- 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 Jane Fowler (A) and Mr Andrew John Fowler (B) against an enforcement notice issued by Hertsmere Borough Council.
 1. The enforcement notice, numbered 17/0264/UCU, was issued on 24 July 2019.
 2. The breach of planning control as alleged in the notice is Without planning permission, the material change of use of land from agricultural to Sui Generis (No Use Class) businesses (incorporating commercial, light industrial and open air storage).
 3. The requirements of the notice are: Permanently cease use of the land for commercial purposes (including the chauffeur rental business, glass van hire business, chicken sitting business and storage of non-functional motor vehicles); Permanently cease all light industrial activities on the land (including the tree felling business and associated log burning); Reinststate the topsoil and vegetative cover of the land where these have been removed; Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the land and its environs.
 4. The period for compliance with the requirements is 4 months.
 5. Appeal A is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.
 6. Appeal B is proceeding on the grounds set out in section 174(2)(b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Decisions

Appeal A

1. It is directed that the enforcement notice be corrected by the deletion, in Section 3, of the description in its entirety and its replacement with "Without planning permission the material change of use of the land to a mixed use comprising residential use associated with 8 St Giles Avenue, chauffeur hire, chauffeur rental and chicken boarding." and by the substitution of the plan annexed to this decision for the plan attached to the enforcement notice. Subject to these corrections the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the use for residential use associated with 8 St Giles Avenue, chauffeur hire, chauffeur rental and chicken boarding at Land adjacent to 8 St Giles Avenue, South Mimms, Hertfordshire, EN6 3PZ subject to the following conditions:

- 1) Chauffeur hire or rental vehicles shall not be picked up or dropped off at the site except between 0800 hours and 1900 hours Monday to Saturday, and not at any time on Sundays or on Bank or Public Holidays.
- 2) The chauffeur hire and rental uses hereby permitted shall be carried on only by Location Chauffeurs Limited.

Appeal B

2. Since the notice is quashed, no further action is taken.

Application for costs

3. At the Inquiry an application for costs was made by Mr and Mrs Fowler against Hertsmere Borough Council. This application is the subject of a separate Decision.

Ground (b) and the notice

4. An appeal on ground (b) is that the matters alleged have not occurred. Often it is used to attack the precision of the description of the alleged breach of planning control. What is alleged here is a mixed use. The concept of a mixed use is one of two or more primary uses existing within the same planning unit, where one is not ancillary to the other, although there may be ancillary uses associated with each primary use. In mixed use cases, the allegation should refer to all the components of the mixed use. This ground is, in effect, concerned with characterising that use, and that also requires identification of the appropriate planning unit.
5. St Giles Avenue is a short residential cul-de-sac served by an unadopted road. No 8 is the end house on the northern side. The property comprises the dwelling and gardens and a rectangular piece of land to the east, separated from the side garden by a hedge with pedestrian access through it, and with direct access from St Giles Avenue via a wide gate. This rectangular piece of land is the appeal site outlined on the plan attached to the notice. It is apparently under a separate title. When the appellants purchased the property, that is the house and the appeal site, which were in the same ownership and sold together, in 2006 the appeal site had on it 2 garage buildings with associated hardstanding and a greenhouse at the southern end by the gated access, and 2 timber sheds beside the garden hedge at the north-west corner. The previous owner, Mr Mills, who gave evidence at the Inquiry, erected the greenhouse and laid hardstanding by the garages. He also had a Koi carp pond there and stored logs for his domestic wood burning stove. He had a landscaping business and used the area, including the garages, sheds and hardstanding, for parking and storage as need be, some connected to his business and some personal.
6. The Fowlers bought the property in part because it had parking for their chauffeur business. Mr Fowler also collected 4-wheel drives, mainly Landrovers and Rangerovers, and these were also moved to the appeal site. In about 2007-08 Mrs Fowler started keeping hens, initially rescuing ex-battery hens, and later added a chicken boarding business. Over time the chauffeur business expanded, notably so following the introduction of licensing, which enabled the Fowlers to establish a chauffeur car rental business. Other uses on the site up to now included a glass-van hire business and as a base for a tree surgeon business started by the Fowler's son, though neither operates from the site

now. The administration and day to day running of the chauffeur hire and rental business uses a summerhouse in the main garden of No 8. On my site visit I saw that one of the original garages by the entrance gate was being used for storage of tools and sports paraphernalia, including scuba diving suits, tanks and related equipment, and the other was being used to restore a Rangerover. The former is clearly domestic in character, and I return to the latter below. I should note also that the log store was almost empty, the vacant space being used for garden equipment and sundry storage, including some Landrover panels.

7. Where there is a dispute as to whether a material change of use has occurred, it is first necessary to ascertain the correct planning unit. The leading case on the subject is *Burdle*¹, which established tests for determining the most appropriate area. The starting point is the unit of occupation. In this case that comprises both the house and gardens at No 8, and the adjoining land the subject of the notice (save for a minor error which I shall correct by attaching an amended plan). By way of background, the adjoining parcels appear to have been in single ownership for many years. The first *Burdle* test is that "within" common ownership, it is only possible to identify a separate planning unit where there is a functional or physical separation of activity. The judgment goes on to state that "it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit".
8. It was argued by the appellant that the running of the chauffeur business from the summerhouse within what is indisputably the garden means that there is not functional separation between the appeal site and the remainder of the property. That is not decisive in my view since administration of the business is not intimately attached to its physical presence. However, while the uses identified on the appeal site are physically confined to that area, there appears to me to be significant use of the appeal site for domestic purposes, that is for purposes directly related to the enjoyment of the dwellinghouse at No 8 as such. This includes the use of the garages for storage of domestic items, and indeed there are elements of domestic storage in many parts of the appeal site. There is also children's play equipment. This is apparently for the Fowler's grandchildren and is more recent, but a trampoline is evident in 2010, so the use for children's play is not entirely new. I consider the keeping of hens, separately from the chicken boarding business, also to be akin to a hobby use, incidental to the residential use of No 8.
9. Looking at the other uses of the appeal site, I am also of the view that the use for keeping and restoring old 4-wheel drive vehicles is a hobby use, again incidental to the use of the dwellinghouse as such. While the number of vehicles kept has apparently increased over time, there are now about 16, about 4 of which are roadworthy, it is clearly Mr Fowler's hobby. In addition to preparing some for personal long distance travel, both his son and daughter have also used some for competing in off-road rallies, it is a family interest, and the Rangerover being restored in the garage is intended for a long trip by Mr and Mrs Fowler to Spain. Although Mr Fowler has occasionally sold a vehicle, that seems to be because they were not exactly what he wanted rather than

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

any attempt to profit from his hobby. While the number of vehicles kept is somewhat excessive, I am satisfied that it remains within the bounds of an incidental use rather than a primary use.

10. While the garden hedge, notwithstanding the opening to provide access between the two, provides a degree of physical separation between the appeal site and the more obviously domestic character of the house and its gardens, it seems quite clear that the Fowlers, and indeed the previous owner, use and have used the appeal site for purposes incidental or ancillary to the dwellinghouse use in addition to the other uses unrelated to residential use, and do so and have done so to a significant degree. The functional relationship remains even though there might be a degree of physical separation between the uses. Hence in considering the Burdle tests I find that it is not possible to identify, within the unit of occupation comprising all of the land owned by the Fowlers, any physically separate and distinct area that is occupied for substantially different and unrelated purposes, together with its incidental and ancillary activities, to the rest of the land. I consider therefore that the appropriate planning unit comprises all of the land at St Giles' Avenue owned by the Fowlers. Hence the mix of uses of the planning unit includes use for residential purposes.
11. Turning then to the description of the use in the notice, although preferable in many cases, it is not necessary in an enforcement notice aimed at a material change of use to state the previous lawful use, or indeed the last use before the use enforced against, whether lawful or not. In cases like this where some uses have come and gone, and there is considerable doubt about when the land was last used for agriculture, or indeed whether that was the last lawful use, I think it is better just to delete reference to agriculture.
12. Leaving aside the 4-wheel drive use then, the businesses that have operated from the site in the Fowler's ownership are chauffeur hire, chauffeur rental, glass van hire, chicken boarding and tree surgeon. For clarity, where a mixed use is alleged it is better to specify the actual component uses rather than grouping them under generic terms such as commercial, light industrial or storage.
13. It is not disputed that all of these uses have occurred, and indeed appear to have been occurring at the same time, comprising a single mixed use. However, only the chicken boarding and chauffeur hire and rental businesses remain. The Council are of the view that the tree surgeon use retains a manifestation on the site, that is the log storage, but in fact most has now been used domestically at No 8 and what remains is, in my view, merely domestic storage ancillary to the dwellinghouse use. While the glass van hire and tree surgeon uses remain pertinent to ground (d) at least, the Court of Appeal judgement in *Thurrock*² suggests that it is not appropriate to serve an enforcement notice in respect of a use which had commenced as a result of a material change of use in breach of planning control but which had ceased to be an active use before any accrued planning right had arisen. Ground (b) is worded in the past tense, so even if component of a mixed use has ceased, the breach, if correctly specified, will have occurred as a matter of fact. However, I have a duty to get the notice in order where possible, and in the light of *Thurrock* I consider it appropriate to correct the allegation to exclude the two

² *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226

uses which have ceased. In coming to this view I accept that when the Council visited prior to issuing the notice the log store was fairly full, but since the tree surgeon business had relocated in 2018, I make the assumption that the logs were left for Charles' parents use and so were not a presence on the land of his business.

14. In view of the foregoing, I shall correct the allegation in the notice to "Without planning permission the material change of use of the land to a mixed use comprising residential use associated with 8 St Giles Avenue, chauffeur hire, chauffeur rental and chicken boarding." This does not cause injustice to the parties and in fact reflects the appellant's position on the deemed planning application to be considered under ground (a). Subject to that correction then, the appeals on ground (b) are dismissed.

Ground (c)

15. This ground is that the matters alleged in the notice, as corrected, do not constitute a breach of planning control. The first argument concerns chicken boarding, which it is suggested might be agriculture, and hence is excluded from the definition of development³. Leaving aside the mixed nature of the use, which is a single use whose component elements may not be decoupled, so far as is relevant here the definition of agriculture⁴ for the purposes of the 1990 Act is limited to the keeping of livestock for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land. There is not evidence before me to show that the chickens being boarded are being kept for any of those purposes, and keeping hens as a hobby is not agriculture. To the extent that the boarding business itself may be seen as a hobby, and therefore incidental to the residential use, subject to materiality, it does not have the hallmarks of a hobby. It is advertised and provides a paid-for service, with contractual obligations and investment requirements, and with off-site impacts such as the coming and going of clients. Whether profitable or not, it is a business that occupies a significant proportion of the land. While I accept that it grew from Mrs Fowlers chicken rescue activity, which is in my judgement to be regarded as a hobby, both in scale and purpose, and incidental to residential use, I consider that the chicken boarding business now comprises a primary and separate use of the land.
16. The second argument raised under this ground concerns the materiality of the chauffeur related businesses. When the Fowlers moved to No 8 they had an established business of relatively limited scale involving some 4 employees that appears to have been able to operate from the site without any planning consequences such as notably increased activity or disturbance. Some works took place in 2008, a car port extension to one of the garages and the construction/extension of hardstanding in front to the existing garages with a valeting/washing facility. All of this remains consistent with operating a business from home which did not involve, as a matter of fact and degree, a material change of use of the planning unit, notwithstanding some impact on Green Belt openness from unauthorised operational development.
17. There appears to have been a change in scale from about 2009 with the introduction of licencing for chauffeur hire cars. The chauffeur fleet expanded to some 20 vehicles by 2012, in part due to demand during the Olympics.

³ Section 55(2)(e) of the 1990 Act

⁴ Section 336 of the 1990 Act

Although chauffeurs would tend to keep the cars at home when in use, there does appear to have been more vehicles kept on the site, as they would be when between jobs, and there is likely to have been substantially more comings and goings. More valeting on site is also likely, and neighbours noticed the increase in activity from about the time that the business was expanding. Increased numbers of vehicles also required more physical infrastructure, hardstanding and car ports. I am satisfied that somewhere between 2009 and 2012 the scale of the chauffeur hire and rental business had gone well beyond what might be considered as incidental to a residential use of the land, as a matter of fact and degree. It had become a separate primary use.

18. The matter of intensification of the chauffeur hire and rental business has been raised, but mainly in the sense of a material change of use of a primary use to a different primary use through intensification. I consider that there has been intensification of the use, but to the extent that what had been an incidental use became a primary use rather than anything more
19. Ultimately though, this ground is concerned with the single mixed use, however it came about. This is a material change of use of the land which is development for the purposes of section 55(1) of the 1990 Act. In the absence of planning permission the appeals on this ground cannot succeed.

Ground (d)

20. This ground is that it is too late to take enforcement action. I will deal with this briefly. Whatever was occurring in 2009 in terms of materiality/primary uses, it is not disputed that there has been at least one other primary use in the interim, that is the tree surgeon use. The glass van hire business is said by Mrs Fowler to have operated under the chauffeur rental business, and in many ways it does appear sufficiently similar to be considered as part of that use, so I will deal no further with it. So far as there may be individual components of any mixed use that may have subsisted for more than 10 years through different mixed uses, it is well established that if a single or mixed use has not subsisted for the requisite 10 year period before being superseded by another, a component of the first use could not depend on the duration of the first use for the purposes of establishing its lawfulness.
21. The tree surgeon business operated from the site from about 2012 to 2018. It was started by Charles Fowler after training as an arboriculturist and, presumably, gaining some experience. Evidently it has been successful, expanding over time to the point where it operated 2 chipper trucks with associated vehicles. Workers would arrive early in the morning, the vehicles would leave and return, vehicles would be kept on the land overnight, and some processing of logs was carried out on the site, chainsaw use being evident to neighbours. Quite a large quantity of processed firewood was in storage/seasoning, apparently for sale to local pubs and restaurants. It has not been argued that it was not a primary use in itself for planning purposes, and it is quite clear to me that it was a separate primary use of the land, as a matter of fact.
22. The introduction of the tree surgeon use materially changed the use of the planning unit to a new mixed use, and the effect of that is to reset the clock for enforcement purposes. The clock would have been reset again when the mixed use materially changed to a different mixed use with the cessation of the tree surgeon use. Since 10 years had not elapsed by the time the notice was issued,

immunity from enforcement could not have been achieved for the mixed use enforced against, as corrected, and the appeals on this ground could not succeed.

Appeal A - ground (a) and the deemed planning application

23. This ground is that planning permission should be granted for the matters alleged to comprise a breach of planning control.
24. The appeal site is located within the Shenley, Ridge and South Mimms section of the Metropolitan Green Belt, hence, having regard to the reasons for issuing the notice and matters raised in the Inquiry, the main issues are as follows;
- Whether the use amounts to inappropriate development in the Green Belt,
 - The effect of the proposal on the character and appearance of the area;
 - The effect on the living conditions of neighbours in terms of noise and disturbance;
 - and if the use is inappropriate development, whether the harm by reason of inappropriateness, and any other harm, would be clearly outweighed by other considerations so as to amount to the very special circumstances required to justify the proposal.
25. On the first question, the most up-to-date position on development in the Green Belt is that set out in the National Planning Policy Framework (NPPF), which provides that material changes in the use of land are not inappropriate provided that they preserve its openness and do not conflict with the purposes of including land in it. Looking first at openness, I consider the baseline position to be that following compliance with the notice⁵. Although the requirements of the notice appears to require removal of some of the hardstanding put down to facilitate the mixed use, the car ports and garages would remain, as would the hardstanding and washing/valeting facilities at the southern end, which I am satisfied have been in place since 2008. There would remain then covered parking for some 12 cars, such that the chauffeur hire and rental uses would not be likely to significantly affect Green Belt openness.
26. The chicken boarding operation uses 'heras' fencing and small poultry arks, which have a very limited effect on openness, lacking permanency among other things. I take a similar view of Mrs Fowler's own chicken coops. The log storage structure is rudimentary, but need not be removed, so cannot be said to reduce openness. The main impact on openness would come from the residential use, and chiefly the 4-wheel drives stored or kept at the northern end of the site. Some no doubt could be moved to the curtilage of No 8, but probably not all, so some limited reduction of openness would result, albeit probably temporary. Being very well screened from public views, the site is effectively enclosed by hedgerows, there is no real visual dimension to the openness impact.
27. Of the purposes of Green Belts, only that of assisting in safeguarding the countryside from encroachment is engaged. The countryside surrounding the appeal site is arable land in large fields and contrasts markedly with the appeal site which is in effect enclosed with the residential cul-de-sac and has long contained garages, so that its character is far more closely related to the

⁵ Section 173(11) of the 1990 Act

established residential neighbourhood than to the surrounding countryside. Having regard to what would or could remain on site following compliance with the notice, I consider that the change of use would not conflict with the Green Belt purpose of assisting in safeguarding the countryside from encroachment.

28. Overall however, I consider that the change of use would not preserve Green Belt openness, hence the change of use would be inappropriate development in the Green Belt.
29. In terms of character and appearance however I consider that the use has not had an unduly urbanising effect. The chicken structures and their presence, the log store, and even the 4-wheel drive collection, which is only noticeable at close quarters, actually give the site quite a semi-rural character. Urbanising influences would be the extent of hardstanding and the presence of the carports and garages, but save for some hardstanding alongside the internal hedge, which cannot be seen from outside, all would remain following compliance with the notice. It is also relevant that with the garage buildings at the most visible part of the site, and I have no doubt that they can lawfully be used as garages, that is for car parking or domestic storage or even hobby use, the site would always have a somewhat domestic character.
30. Turning to the effect on the living conditions of neighbours, there have evidently been complaints of noise and disturbance over the years, but on the evidence I heard much of that was due to the tree surgeon business. The extent of comings and goings related to the chicken boarding and chauffeur related uses appear to me to be relatively low and certainly well within what would normally be considered acceptable in a residential area.
31. In planning policy terms I find no conflict with Policy CS12 of the Hertsmere Core Strategy 2013 (CS) which is concerned with environmental protection, or with Policies SADM11 and SADM26 of the Hertsmere Site Allocations and Development Management Policies Plan 2016, which respectively seek to conserve landscape character and ensure good standards of development in the Green Belt. However, by virtue of inappropriateness, there is conflict with CS Policy CS13 unless there are other considerations to clearly outweigh the harm due to inappropriateness, such that very special circumstances exist.
32. One other consideration to which I attribute substantial weight is that the main contribution to reduced openness, and hence inappropriateness, is due to the residential component of the use. While agriculture is the default use of the site, that is mainly because it is not development. A residential use has not been affirmatively established, but there is ample evidence that the site has been used in association with No 8 as a dwelling for many years, and the presence of the garages indicates that at least part of the site can lawfully be used for domestic purposes. That the site has been used for many years for the chauffeur hire and rental businesses without significant detriment to the character and amenity of the area, and indeed the same can be said of the chicken boarding business, is also a matter to which I attribute significant weight, particularly as working hours can be controlled. While I note the Council's view that the hire/rental business could operate from elsewhere, I consider nonetheless that some further weight should be attributed to the economic contribution it makes in its current form, providing employment for the Fowlers and for others in the wider area.

33. Substantial weight must be attached to any harm to the Green Belt, but in the circumstances I consider that the other considerations combine to clearly outweigh the harm, such that very special circumstances exist. I find accordingly that the development complies with CS Policy CS13 and with the development plan read as a whole. I am satisfied that it is sustainable development as required by CS Policy SP1, and the appeal on this ground succeeds. I shall therefore grant planning permission on the deemed planning application, subject to a condition limiting the chauffeur related use to the Fowler's companies, in view of the weight given to their economic circumstances, and restricting the time when users of the chauffeur businesses can pick up or drop off vehicles, in the interests of local amenity.
34. The grant of planning permission means that the notice will be quashed, so I do not need to consider grounds (f) and (g) on Appeals A or B.

Paul Dignan

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Kate Olley Of Counsel

She called

Anthony Borden	Neighbour
Paul Mills	Previous owner
Jane Fowler	Appellant
Andrew Fowler	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mark Howells Of Counsel

He called

David Ashdown	Neighbour
Victor Unuiqbe	Planning Enforcement Officer

DOCUMENTS SUBMITTED AT THE INQUIRY

- 1 Council's opening submissions
2 Appellant's opening submissions
3 Council's closing submissions
4 Appellant's closing submissions
5 Appellant's costs application

Plan

This is the plan referred to in my decision dated: 18 June 2021

by Paul Dignan MSc PhD

Land at: Land adjacent to 8 St Giles Avenue, South Mimms, Hertfordshire, EN6 3PZ

Reference: APP/N1920/C/19/3235723 & 3235724

Scale: not to scale

