
Appeal Decisions

Site visit made on 26 August 2021

by S Hunt BA (Hons) MA MRTPI

Inspector appointed by the Secretary of State

Decision date: 6 October 2021

Appeal A Ref: APP/J1535/W/21/3268098

Aver House, Nursery Road, Nazeing, Waltham Abbey EN9 2JE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant prior approval required under Schedule 2, Part 20, Class ZA of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
 - The appeal is made by Mr Kevin Ellerbeck of Aver House Developments Ltd against the decision of Epping Forest District Council.
 - The application Ref EPF/2711/20, dated 20 November 2020, was refused by notice dated 11 December 2020.
 - The development proposed is prior approval for the demolition of existing building and construction of one new dwelling in its place.
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Appeal B Ref: APP/J1535/W/21/3267568

Aver House, Nursery Road, Nazeing, Waltham Abbey EN9 2JE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Kevin Ellerbeck of Aver House Developments Ltd against the decision of Epping Forest District Council.
 - The application Ref EPF/0858/20, dated 27 April 2020, was refused by notice dated 16 September 2020.
 - The development proposed is for the demolition of a commercial building and replacement with a single dwelling.
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Decision

1. Appeal A is dismissed.
2. Appeal B is dismissed.

Application for costs

3. An application for costs was made by Mr Kevin Ellerbeck of Aver House Developments Ltd against Epping Forest District Council in relation to both appeals. These applications are the subject of separate Decisions.

Procedural Matters

4. There are two appeals made by the same appellant on the same site. Although Appeal A relating to prior approval was submitted after Appeal B, I have dealt with it first so that any potential fallback position can be considered in the determination of Appeal B.

5. The description of development used in the banner heading above for Appeal A is as set out on the Council's decision notice. The decision notice states that the works as described are 'not lawful', but it does not explicitly state that prior approval is refused. Looking at the notice as a whole I am satisfied that the decision notice can be read as a refusal of prior approval.
6. The Development Plan for the area comprises the saved policies of the Epping Forest District Local Plan (1998) Alterations 2006 (the Local Plan). The Council also refers to Policy DM4 of the submission version of the emerging Epping Forest Local Plan (LPSV) in the reason for refusal for Appeal B. The emerging plan is at an advanced stage towards adoption following its examination in public and recent consultation on main modifications. I consider weight to be given to the emerging policy in the main issues.
7. A revised version of the National Planning Policy Framework (the Framework) was published in July. The parties were given an opportunity to comment and I have referred to the revised version in this decision where necessary.

Main Issues

Appeal A:

8. Part 20 of Schedule 2 to the GPDO¹ was amended on 31 August 2020 by the Town and Country Planning (General Permitted Development) (England) Order (Amendment) (No.3) Order 2020. Class ZA permits 'Demolition of buildings and construction of new dwellinghouses in their place' subject to a range of limitations and conditions.
9. The issue of whether the proposal is permitted development is in dispute, in relation to the use of the existing building which would be demolished. The requirement for prior approval is worded as a condition attached to the grant of permission by Article 3(1) of the GPDO, and so prior approval only becomes relevant if the proposed development falls within the permitted development right. Article 3(5) of the GPDO specifies that the permission granted by Schedule 2 does not apply if (b) in the case of permission granted in connection with an existing use, that use is unlawful.
10. The main issue in relation to Appeal A is whether the proposal satisfies the requirements of the GPDO in being permitted development under the provisions of Schedule 2, Part 20, Class ZA, with particular regard to the use of the existing building.

Appeal B:

11. The main issues in relation to Appeal B are:

- Whether the proposed development would represent inappropriate development in the Green Belt;
- The effect of the proposed development on the openness of the Green Belt; and
- Whether any harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development.

¹ Town and Country Planning (General Permitted Development) (England) Order 2015

Reasons

Appeal A

12. The main parties have supplied conflicting evidence relating to the lawful use of the existing building, a simply designed single storey structure with a garage door type opening to the front. The Council argues that the building's current lawful use is B8 storage use whereas the appellant considers it to be a B1 office use. For the reasons given below, I do not agree with the appellant.
13. Class ZA (paragraph ZA(1)) requires the single detached building to comprise premises established for (i) office use falling within Class B1(a) of the Schedule to the 1987 Order² (or any combination of other B1 uses) existing on 12 March 2020. The wording '*established*' indicates to me that this use should have been in existence for a reasonable period of time prior to that date.
14. I note that part 6a of the prior approval application form, dated 20 November 2020, states that the existing building is '*commercial office*' and has been empty for six months. Part 6c states the property has been used as an '*art studio and office*' since 21 May 2019.
15. However, this information on the use of the building appears to contradict with Part 6 of the planning application form for Appeal B, dated 27 April 2020, which states that the current use of the site is '*Commercial B8*'. A more recent planning application on the same site by the same appellant, dated 25 September 2020³ also refers to the existing use of the site as '*Commercial B8*'. A prior approval application for a change of use from storage unit (Class B8) to a dwelling was granted on 1 August 2018⁴. This includes statutory declarations and a range of invoices which satisfied the Council that the use of the building between 2012 and 2018 was B8 storage.
16. The appellant has provided a statement dated 18 November 2020. The accompanying Land Registry document confirms the ownership but not the use of the building at the date of the sale on 21 May 2019. The statement indicates that the appellant used the premises as an office from the date of purchase until 30 April 2020, that it is currently vacant, and that it has never been used by his company for B8 storage use. It is notable that the statement is from the appellant himself, and is not signed by a witness to give it legal status as a statutory declaration.
17. The appellant's explanation that the previous planning applications referred to B8 storage use in error, and that this does not confer a planning status on it, is conflicting evidence. It gives me no reason to find that the building's lawful established use is anything other than for B8 storage. Furthermore, there is no other evidence before me from any third party with a direct or personal knowledge of the building and its use.
18. The building was granted change of use to offices some 16 years ago⁵, however there have been numerous more recent planning applications relating to the site and surrounding land which refer to a B8 storage use instead. Consequently I am not satisfied that any of the evidence before me indicates

² The Town and Country Planning (Use Classes) Order 1987

³ EPF/2162/20

⁴ EPF/1582/18

⁵ EPF/0580/95

that any change of use to B1 offices has been lawfully implemented. The appellant has failed to discharge the burden of proof that is upon him to provide evidence of any previous or existing use, including any period of vacancy. That which is before me is contradictory, but on the balance of probabilities it points towards the use of the building around and preceding 12 March 2020 being B8 storage and not class B1 as required by part 1(b) of Class ZA.

19. No case has been put to me by the Council to demonstrate that the other necessary requirements of Class ZA have been met. In particular, there is inadequate evidence before me relating to its period of vacancy as required by ZA1(e) prior to the date of the application for prior approval.
20. I was unable to view the interior of the building on my site visit, nonetheless this would not necessarily be representative of its use in March 2020 nor its latter vacancy period.
21. On the basis of the evidence before me, the lawful use of the building is B8 storage and in order for the Class ZA provisions to apply, a B1 use must be lawful. The development is not permitted under Article 3(5) of the GPDO which specifies that the permission granted by Schedule 2 does not apply if (b) in the case of permission granted in connection with an existing use, that use is unlawful. Consequently, prior approval cannot be granted.

Appeal B

22. The appeal site is situated within the Metropolitan Green Belt. It comprises previously developed land, containing a single storey commercial building (as set out above for Appeal A) together with areas of hardstanding. Nursery Road is a narrow lane with a 'ribbon' development of detached dwellings to the west side only. Beyond the rear of the site is a grassed paddock, and beyond vegetation to the north is open land associated with the Lee Valley Regional Park.

Whether Inappropriate Development

23. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances, and substantial weight should be given to that harm. Such very special circumstances will not exist unless such harm is clearly outweighed by other considerations. Firstly it should be established whether the proposed development falls under any of the exceptions set out in paragraph 149 of the Framework. Exceptions e) and g) are of relevance to this appeal.
24. It is a matter of disagreement between the parties whether the proposed development would amount to '*limited infilling in a village*' as set out in part e) of paragraph 149. Nursery Road is clearly detached from the main built-up area of Nazeing as shown on the Local Plan proposals map, and washed over by Green Belt, but this does not necessarily mean it is not part of the 'village'. I saw on my site visit that Nazeing is spread quite extensively along the streets which lead into and out of the main body of the settlement. This is particularly the case along Nazeing Road where there are a number of pockets of ribbon residential development, together with an industrial area in close proximity to the site and a range of glasshouses and horticultural uses nearby.

25. Whether the proposal comprises limited infilling is a question of fact and planning judgement for the decision-maker having regard to a number of matters. These include the nature and size of the proposal, the site's location and its relationship to existing development adjacent to it.
26. I found on my site visit that the end of the ribbon development along Nursery Road is clearly marked by dense vegetation and the remaining length of Nursery Road is gated off. This, in my view, forms a discernible boundary to land associated with the Lee Valley Regional Park beyond. There are no other buildings beyond the appeal site for some distance. Indeed, I am satisfied that the appeal building itself signals the end of the existing ribbon of development. I am also mindful that the evidence indicates that the presence of the building formed part of the justification for the approval of the four new dwellings adjacent to the site⁶.
27. I accept that the development is limited in terms of the area of its plot, which is similar to its neighbours, and it would be for a single dwelling only. However the proposed dwelling is not limited in terms of its scale. It would be significantly larger in size than the commercial building which it would replace, both in height and footprint.
28. In view of the above, whilst the appeal site is located on the outer limits of a settlement and forms the end of an existing ribbon of development, I am not satisfied that the proposed development would represent limited infilling as required by paragraph 149 e) of the Framework. This leads me to the same conclusion in respect of paragraph 149 g), notwithstanding that the proposal involves the redevelopment of previously developed land. I therefore conclude that the proposed development is inappropriate by definition. I attach considerable weight to the harm by definition.

Harm to openness of the Green Belt

29. The existing building is small both in its footprint and height. It includes a reasonable amount of space around it to the front, rear, and to the side where the site adjoins the adjacent new dwelling. Visually, views of the building are restricted until one reaches the end of the lane, and it is relatively well screened by the surrounding vegetation and its neighbour. The site is self-contained and its visual effects are limited to the immediate area around it.
30. I find that the proposed development would have a much greater impact on the openness of the Green Belt than the existing building. Spatially, there would be no greater spread into the countryside or encroachment beyond the vegetated boundary and I find limited harm in this respect. However visually, the construction of a substantial detached dwelling would result in greater harm over and above the effects of the existing building on the site.
31. I acknowledge that it would be similar in scale to its neighbours. However there is limited spacing between the dwellings resulting in a cramped appearance which would be amplified by the proposed development. I find there would be moderate harm to openness, and I also give this harm substantial weight in accordance with paragraph 148 of the Framework.

⁶ EPF/1956/17

Other Considerations

32. The appellant has put forward several other considerations in favour of the proposal. The Council cannot currently demonstrate a five year supply of housing land, and as such the appeal scheme would make a positive, albeit small, contribution to the supply of housing to which I give moderate weight. The site lies in an accessible location which is within reasonable reach of local services including public transport provision and as such its location does not weigh against the development.
33. The proposed dwelling would be of a design similar to its recently constructed neighbours. The Council raises no objection to the design and I have no reason to conclude otherwise. I acknowledge that the appearance of the site is currently untidy. However I give this limited weight in my considerations as the open storage appears to be connected with the recent construction of the neighbouring dwellings and is therefore temporary.
34. There is insufficient evidence before me to suggest that the existing commercial use is a cause for complaint in the area. Given the small scale of the existing building it is unlikely that any polluting processes could be carried out, or that there would be heavy traffic movements to the detriment of the amenities of the adjacent residential dwellings. Consequently, its proposed demolition carries little weight as a benefit.
35. The fallback position is unrealistic given my conclusions on Appeal A. Furthermore, there is no evidence before me that the previous prior approval consent for change of use⁷ has a real prospect of being implemented. Even so, as a conversion it would have no greater impact on openness of the Green Belt than the existing building. The lack of garden space for the conversion also has limited bearing on my findings, as it is commensurate with the size of the existing building. If the building is ultimately converted by way of prior approval, additional garden space could be sought separately.
36. The case law which has been put to me⁸ has limited relevance, given that Appeal A relates to works that do not fall within the scope of permitted development. There is no evidence before me that a certificate of lawfulness for the use of the existing building has been applied for. The appellant's claim that the Council did not make a decision within the statutory time period relates to a separate, more recent, prior approval application⁹ which is not before me and therefore it is not of relevance to my conclusions.
37. There are few details of the other appeal decisions and applications referred to before me, as such I am unable to draw upon any direct comparisons with the appeal site. In any event, I have found that the proposals are unacceptable in their own right.

Very Special Circumstances

38. Substantial weight arises against the proposal as a result of it being inappropriate development in the Green Belt, causing moderate harm to openness. I do not find that the other considerations advanced by the appellant, as set out above, amount to the very special circumstances

⁷ EPF/1582/18

⁸ Keenan v Woking Borough Council [2017] EWCA Civ 438 and Murrell v SSCLG [2010] EWCA Civ 1367

⁹ EPF/1200/21

necessary for the proposed development to outweigh the harm from inappropriateness and to the openness of the Green Belt.

39. The proposed development would conflict with Local Plan policies GB2A and GB7A which aim to protect the Green Belt from inappropriate development. The policies when read as a whole are in general accordance with the Framework. It is also contrary to emerging LPSV policy DM4. The emerging plan is at an advanced stage following recent consultation on main modifications. I have not been informed of any significant modification to Policy DM4 and give it moderate weight in my decision.

Other Matters

40. The site lies within the zone of influence for the Epping Forest Special Area of Conservation (EFSAC). Regulation 75 of the Habitats Regulations¹⁰ sets a condition for development which is likely to have a significant effect on a European site (either alone or in combination), and is not directly connected with or necessary to the management of the European site. Development must not begin until the developer has received written notification of the approval of the local planning authority under Regulation 77, who may approve the development only after having ascertained that it will not adversely affect the integrity of the site. Furthermore, Regulation 76 requires an application to be made in writing to the appropriate nature conservation body for its opinion on whether the development is likely to have a relevant effect.
41. There is no evidence before me to indicate that this exercise has been carried out for the previous prior approval¹¹ for conversion to a dwelling. Consequently, this further reduces the weight I give to that fallback position.
42. The Council accepts that both Appeal A and B would not result in a net increase in traffic using roads through the EFSAC, and has concluded that a single dwelling would not result in a likely significant effect on the integrity of the EFSAC in relation to atmospheric pollution. This is subject to the requirements of the Council's Interim Air Pollution Mitigation Strategy, adopted in February 2021. The document has been agreed with Natural England and results in the requirement for a financial contribution towards the continued monitoring of effects on air quality within the EFSAC, together with provision of an EV charging point and digital communications infrastructure to support home working.
43. The evidence before me does not lead me to a different conclusion to the Council regarding likely significant effects in my role as competent authority. Nonetheless, whilst the provision of an EV charging point and digital communications infrastructure could be secured by conditions, for Appeal B there is no completed planning obligation before me which is necessary to secure the financial contribution towards air quality mitigation. As I have dismissed the appeals for other reasons, I make no further deliberations on this issue.
44. Any complaints to the Epping Forest District Council's monitoring officer regarding conduct are not a matter for this appeal. The costs applications deal with matters relevant to the appeal.

¹⁰ Conservation of Habitats and Species Regulations 2017

¹¹ EPF/1582/18

Conclusions

45. For Appeal A and on the evidence before me, I am not satisfied that the appeal building can be lawfully said to comprise premises established for office use falling within Class B1(a) of the Schedule to the 1987 Order on 12 March 2020 required by the provisions of paragraph ZA(1)(b). There is also insufficient evidence of its vacancy for a period of at least 6 months immediately prior to the date of the application for prior approval as required by paragraph ZA1(e).
46. For these reasons, I conclude that the proposal is not permitted development, and that Appeal A should be dismissed.
47. For Appeal B, I find that the proposal would amount to inappropriate development that would cause harm to the openness of the Green Belt and there are no other considerations capable of amounting to the very special circumstances necessary to outweigh the harm caused by inappropriateness. The development is contrary to the relevant policies of the development plan when read as a whole and there are no material considerations to indicate that a decision should be taken other than in accordance with that plan.
48. For the above reasons, Appeal B is also dismissed.

Susan Hunt

INSPECTOR