



Appeal Decision

Site visit made on 9 November 2021

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 03 December 2021

Appeal Ref: APP/V2635/C/21/3271654

20 The Avenue, Brookville, Norfolk

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Miss Cheri Moore against an enforcement notice issued by King's Lynn and West Norfolk Borough Council.
- The enforcement notice was issued on 17 February 2021.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the Land from use as a dwelling house with associated land to a mixed use of a dwelling house with associated land and a use for the keeping of dogs and the breeding of dogs for a commercial purpose.
- The requirements of the notice are:-
 1. Reduce the number of adult dogs kept on the land to no more than 14.
 2. Cease the use of the Land for the breeding of dogs for commercial purposes.
- The period for compliance with the requirements is 6 calendar months.
- The appeal is proceeding on the grounds set out in section 174(2)(b),(c),(d),(e),(f) & (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice upheld as corrected and varied as set out in the Formal Decision.

Preliminary Matters

1. There is no appeal on ground (a) with payment of the requisite fee for me to consider the grant of planning permission. That being so, I cannot consider the planning merits of the alleged development. Moreover, whilst there are numerous supporters testifying to the credentials of the appellant as a well-respected Kennel Club assured breeder, these are not matters that can be taken into account on the grounds of appeal before me.
2. Grounds (b),(c),(d) and (e) are known as legal grounds of appeal. On these grounds, the burden of proof rests with the appellant and the test of the evidence is the balance of probabilities.
3. My remit for this appeal relates solely to the enforcement notice and the pleaded grounds of appeal. Therefore, I am unable to address issues raised by the appellant concerning inconsistent treatment by the Council. Those arguments would need to be taken up with the Council directly. I should also make clear that dog licensing is a separate regime from planning control.

The appeal on ground (e)

4. Under ground (e), the appellant refers to the successful appeals¹ against a

¹ Appeal refs: APP/V2635/C/20/3250794 & 3250420 dated 30 October 2020

previous enforcement notice which was similarly directed at the material change of use of the land arising from the keeping of dogs and breeding of dogs for commercial purposes. The appellant considers it unfair to be served with 'the same thing'.

5. The earlier enforcement notice was issued on 2 March 2020. It was found to be a nullity by the previous Inspector and no further action was taken. This was because the notice failed to specify with sufficient clarity what steps must be taken to remedy the alleged breach of planning control. For that reason, the notice did not comply with the requirements of section 173 of the 1990 Act.
6. Where an enforcement notice is found to be a nullity, it is as though the notice never existed. It does not prevent the re-issue of another notice tackling the same alleged breach of planning control.
7. Ground (e) concerns whether a copy of the enforcement notice was properly served as required by section 172 of the 1990 Act. Section 172(2) provides that a copy of an enforcement notice shall be served- (a) on the owner and on the occupier of the land to which it relates; and (b) on any other person with an interest in the land.
8. The enforcement notice identifies all those who have been served with a copy. The list includes the appellant who is an occupier of the land. The appellant has clearly received the notice in order to make the appeal. There is no suggestion of other occupiers or persons with an interest in land who have not been served with a copy of the notice as required.
9. The appeal on ground (e) fails.

The appeal on ground (b)

10. This ground of appeal is that those matters alleged in the notice have not occurred.
11. The appellant states that the fundamental use of the home and garden has not changed. After 14 years of living at the address with a large number of animals, it is still a home and it is still a garden. However, the notice is not directed at the lawful residential use of the property. Arguments to the effect that any change is not material more properly falls to be considered under ground (c).
12. In order to succeed on ground (b), it would need to be demonstrated that the keeping of dogs and breeding of dogs for commercial purposes was not taking place on the land, as a matter of fact, when the enforcement notice was issued.
13. The keeping of dogs is undisputed by the appellant who confirms "*we have lived here for 15 years in august, with large breed dogs the whole time*". The appellant goes on to say she is licensed by the Council for dog breeding at home. The appellant argues that the dogs are not bred for commercial gain because she does not take profit with the money being used on vet bills and supplies.
14. The Council has not defined what is meant by 'a commercial purpose' but it is a commonplace term. In this context, I would take it to ordinarily mean that dog breeding is taking place for profit or gain. As dogs are being bred and puppies sold on a regular basis, this is a commercial activity howsoever the appellant chooses to expend the income generated.

15. As a matter of fact, a use for the keeping of dogs and the breeding of dogs for a commercial purpose has occurred. The appeal on ground (b) fails.

The appeal on ground (c)

16. The appeal on ground (c) is that those matters alleged do not constitute a breach of planning control. A breach of planning control comprises the carrying out of development without the required planning permission.
17. The meaning of development is set out in section 55(1) of the 1990 Act. It includes the making of any material change in the use of land. Certain uses of land shall not be taken for the purposes of the 1990 Act to involve development of land. They include a specific exception at section 55(2)(d) for the use of any buildings or other land within the curtilage of the dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such. Case law confirms that there are two questions to be asked. First, has there been a material change of use? Second, if so, was it for a purpose incidental to the use of the dwellinghouse as a dwellinghouse?
18. Thus, the first issue to be established is whether there is a 'material change of use'. The term is not defined by statute but certain means of analysis have emerged through decisions of the courts. Basically, for a material change of use to have occurred, there must be some significant difference in planning terms in the character of the activities undertaken compared to what went on previously and/or has been permitted. The fact the appellant has been licensed for up to 30 dogs under a separate regime has no bearing on the question of materiality in planning law terms.
19. The planning unit is the physical area against which the materiality of change is assessed. In this case, the planning unit is the dwelling at No 20 and its grounds, as identified on the enforcement notice plan.
20. The dwelling is a large, detached chalet style property occupying a very sizeable plot. It is located along a narrow lane among a row of other residential properties. The rear garden is enclosed with dense and tall planting. For the most part it is laid to grass. Next to one side boundary there are an assortment of small enclosures, sheds, other outbuildings, and timber kennels with pens. To keep the dogs apart, more kennels are positioned to the opposite side boundary leaving a large expanse of grass in between, and beyond, stretching to the rear boundary. A post and rail fence sub-divides the grassed land widthways, but it does not provide strict demarcation in where the dogs are kept. I observed puppies in an enclosure near to the house and an 'isolation kennel' within this same garden area.
21. There is no statutory limit on the number of dogs that can be kept at a dwelling before a material change of use takes place. In *Wallington v SSW* [1991] JPL 942, the Court of Appeal upheld the issue of an enforcement notice requiring the reduction in the number of dogs kept at a private dwellinghouse from 44 to 6 on the basis that a material change of use had occurred. However, this judgment did not establish a six dog rule. Whether a material change of use has taken place is a matter of fact and degree, determined on the individual merits of a case. Not every change in use is material. A change is not material if it is *de minimis* i.e., too small to be meaningful or taken into consideration.
22. The keeping of dogs in large numbers will amount to a material change of use if

the scale of the use falls outside what could normally be expected to occur within a dwellinghouse and its curtilage. In this case, the Council's Planning Enforcement Officer wrote to the appellant on 10 October 2012 following a site visit to state "*the current levels of dog breeding and the number of dogs kept as family pets do not constitute a material change of use of your dwelling house and curtilage*". The letter does not specify how many dogs were present at that time but the Council has stated during this appeal that its records show the number to be 14. The number had risen to 17 dogs in June 2015 but the Council still did not act.

23. A further planning enforcement investigation was undertaken in 2019 following the appellant's application to the Council for an Animal Welfare Licence for the home breeding of dogs which referred to 35 dogs. According to the Council, a site inspection in April 2019 established the presence of 28 'working' dogs which prompted the first enforcement notice. In her final comments, the appellant stated that she does not have 28 dogs but 21 currently, 18 of which are for breeding.
24. By the time of my site visit, I gather there was a total of 20 adult St Bernard's. Most of the dogs were in outside pens/kennels with some others in the dwelling. Where the dogs are kept is apparently rotated depending on their age and circumstances. For instance, elderly dogs, or a mother with new-born litter are kept indoors.
25. The dogs would not be confined to kennels at all times and indeed supporters refer to being impressed by the open runs for the dogs to exercise.
26. Despite the expanse of the site, a relatively large area of land is dedicated to the care of the dogs. Moreover, the presence of 20 or so dogs with associated kennelling and other paraphernalia has clearly changed the character of the property from its previous residential use. It exceeds the number of dogs which might reasonably be expected at this residential property. In addition, as the breeding programme has increased so will the potential number of visitors viewing the puppies.
27. In considering whether there is a material change of use, off-site impacts can be a consideration. By the same token, a material change of use can occur without giving rise to any off-site impacts.
28. Whilst the appellant takes issue with the Council describing the use as 'un-neighbourly' there will inevitably be some off-site impacts from the presence of such a large number of dogs which are bound to bark. Dogs are pack animals and when one barks others may follow. Irrespective of whether there have been complaints about noise, there is increased likelihood of frequent dog barking given the numbers involved.
29. The appellant pointed out that a neighbouring bungalow and garden is within her ownership thereby suggesting that disturbance was not in issue. Even if that is so, there are other dwellings nearby where occupiers could be disturbed by barking. I note that deliveries and visits in connection with the use may be occasional only. Nonetheless, none of this alters the fact that there is a significant difference in how the land is used and the character of the activities from what has gone on previously. Whilst I consider it probable that 20 or more dogs at these premises would cause some off-site impacts, the keeping and breeding of dogs is on such a large scale to have a significant impact in itself on

how the dwelling and grounds are used. Such a change in use is more than *de minimis*.

30. As a matter of fact and degree, I find that there is a material change in the definable character of the use of the land.
31. The issue turns to a consideration of the exception at section 55(2)(d) and whether there is a use of the dwelling and other land within its curtilage for a purpose incidental to the enjoyment of the dwellinghouse as such. Whether this section applies is not down to how many dogs the appellant as occupier chooses to keep in her enjoyment of the dwelling. Rather, an incidental use may be taken to mean a use which is subordinate in land use terms to the enjoyment of the dwelling as a dwellinghouse.
32. In *Wallington*, the Court gave examples of the type of matters to have regard in establishing whether, as a question of fact and degree, a use is for incidental purposes. These included the location and size of the dwelling, the nature and scale of the activity along with the disposition and character of the occupier.
33. Unlike *Wallington*, where the dogs were kept entirely as a hobby, there is a commercial element in this case. Some of the dogs are kept solely as pets but most are used for breeding. At the time of my visit there were at least two litters of puppies in pens outside. A further litter was inside the dwelling. The appellant is a licensed breeder. Indeed, from what the appellant says as few as three of the dogs are kept solely as pets.
34. The commercial activity does not automatically mean that the use cannot be for incidental purposes. Again, it is a matter of fact and degree. In this instance I have found that the scale of dog keeping and breeding has grown to such a level to amount to a material change of use. It follows in all the circumstances of this case that by virtue of the scale of activity, including the commercial element, the use goes well beyond what can reasonably be regarded as a purpose incidental to the enjoyment of the dwellinghouse as such.
35. To sum up, in terms of fact and degree, I consider there is a mixed use as described in the allegation which is significantly different to the previous use so as to amount to a material change of use as defined in section 55(1) of the Act. Such use is not excepted from the meaning of development within section 55(2)(d). Since planning permission has not been granted for the development there has been a breach of planning control.
36. I conclude that the matters alleged in the notice constitute a breach of planning control. The appeal on ground (c) fails.

The appeal on ground (d)

37. The ground of appeal is that at the time the notice was issued it was too late to take enforcement action.
38. To succeed on this ground the appellant must demonstrate that the material change of use involving the keeping of dogs and the breeding of dogs for a commercial purpose occurred at least 10 years prior to the date of the issue of the enforcement notice on 17 February 2021 and continued without material interruption for a period of 10 years after the date of such change.
39. The 10 year period need not be that immediately preceding the issue of the

enforcement notice so long as the breach was continuous throughout the relevant period without reversion to the original use or another change of use in the intervening period.

40. The appellant moved to the property in 2007 and says that she has been breeding and keeping large dogs since 2008. Various screenshots are produced including those with Kennel Club details for St Bernard's dating back to 2007. There are also several letters of support from purchasers of puppies from the appellant. None of this demonstrates how many dogs were kept and bred at the premises. Moreover, the point in issue is not how long the appellant has kept and bred dogs at the property, but how long she has done so in breach of planning control. Clearly, the keeping of dogs is common as it is for litters to be sold. As already discussed, dogs could be kept and bred commercially without necessarily requiring planning permission depending on all the circumstances.
41. The key point is whether the appellant can demonstrate that the use occurred and continued in breach of planning control for a period in excess of 10 years by the time the enforcement notice was issued. This does not mean the appellant must show that there were 28 dogs kept on the land throughout as long as there was a continuous breach which is now immune from enforcement action.
42. The question arises as to what point in time the breach occurred. The appellant states that when the Council visited in 2012, she had 17 (or 18) adult dogs on site. This is contradicted by the Council which maintains that its records show that there were 14 dogs in 2012 rising to 17 in 2015. On neither occasion did the Council take enforcement action.
43. If the Council is correct and a material change of use had not taken place when 14 dogs were kept at the property in October 2012, then the breach of planning control cannot have continued uninterrupted over a 10 year period.
44. Fourteen is an arbitrary number. Identifying when the keeping and breeding of dogs reached a point where it ceased to be incidental to the use of a dwellinghouse as such, and a material change of use occurred, will be a matter of planning judgement depending on the individual facts. In issuing the notice it is evident from the requirement to reduce the number of adult dogs to 14 that the Council must now take that as the point before the character of the land was materially changed. I have some difficulty reconciling that view with the Council's decision not to take enforcement action when the number of dogs rose to 17. Nevertheless, that is not pivotal to the ground (d) argument.
45. Quite when a material change of use occurred and there was no longer a use incidental to the enjoyment of the dwellinghouse is hard to identify on the limited information available. According to the appellant, the Council 'allowed me to build up to the number they provided of 30 since 2014'. I gather this was the year in which the appellant was first licensed by the Council for dog breeding with a limit of 30 dogs. Clearly dog breeding had already begun by 2014 as the Council's letter to the appellant of 10 October 2012 refers to both "levels of dog breeding and the number of dogs kept as family pets". I take it from this that a commercial dog breeding use probably existed in 2012 but not at a level to concern the Council in its capacity as local planning authority.
46. Based on the appellant's own evidence there has been an escalation in numbers and change in activity since around 2014 corresponding with the issue of the licence. If that was the trigger, there is still not 10 years uninterrupted use. The

earliest that immunity could be gained is 2017/2018. Yet, the appellant has not produced any detailed evidence of dog numbers and levels of commercial breeding over any given period.

47. Ultimately, the appellant's evidence lacks clarity and detail. It is not sufficiently precise to glean when the breach first occurred or that it continued uninterrupted for a period exceeding 10 years so as to be immune from enforcement action.

48. The ground (d) appeal fails.

The appeal on ground (f)

49. The ground of appeal is that the steps required by the notice to be taken are excessive. The arguments raised under this ground concern the compliance period which will be considered under ground (g). Nevertheless, the appellant raises arguments which are pertinent to ground (f) in terms of the fairness of the notice to require any less than 25 dogs which "will cripple my breeding plans". Issues are thus raised over the effect of the notice on the numbers of dogs being kept and bred. I shall deal firstly with the appellant's arguments on the number of dogs before addressing how the requirements are framed.

50. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. These are either to remedy the breach of planning control which has occurred (section 173(4)(a)), or to remedy any injury to amenity that has been caused by the breach (section 173(4)(b)). The purpose of the requirements constrains the way ground (f) can be argued, particularly where the planning merits are not being considered. Therefore, it is necessary to establish the purpose of the notice.

51. The notice requires a reduction in the number of dogs kept on the site. The limit of 14 dogs seeks to reduce the number to a level the Council considers to be incidental to the enjoyment of the dwellinghouse. In other words, to a level that would not constitute 'development' under section 55(2)(d) once the mixed use had ceased. Thus, the purpose of the notice is not limited to addressing injury to amenity but also seeks to remedy the breach. I am fortified in that view by the second requirement to cease all dog breeding for commercial purposes.

52. The Courts have been clear that where there is an appeal on ground (f) but, as in this case, no ground (a) appeal and the purpose of the notice is to remedy the breach, the power in section 176(1)(b) of the Act to vary the notice to under-enforce is limited and general planning considerations cannot be entertained.

53. The breach of planning control would not be remedied without any reduction in the number of dogs nor by limiting the number to 25.

54. The view was taken by the Council in October 2012 that 14 dogs did not constitute development in this particular case. It was made plain that such decision was taken on the evidence available and that the matter may be re-assessed if further evidence came to light. When the Council's planning enforcement officer returned to the site in June 2015, the number of dogs had risen to 17. The Council still took no action and closed its investigation. Had the keeping of 17 dogs constituted a breach of planning control then it must be anticipated that the Council would have acted instead of closing the file.

55. The Council's response at this time would clearly have signified to the appellant that the number was acceptable. Any number will be arbitrary as there is no clear dividing line. However, it seems to me that to require a reduction below the number of dogs that the Council had effectively condoned in 2015 would be excessive. It is the escalation in numbers and breeding since that time which triggered enforcement action.
56. The second requirement of the notice is to cease the use of the land for the breeding of dogs for commercial purposes. This has not been specifically challenged by the appellant. Nonetheless, I have considered whether any changes are necessary to ensure that the notice is in order.
57. Where there is a mixed use of land there is a single use made up of all the primary uses. In this case, the Council has sought to 'de-couple' the mixed use by requiring each unauthorised component to cease separately. This requires correction. As drafted, it would preclude any dog breeding for commercial purposes even if it were ordinarily incidental to the primary residential use. Whereas the notice should require the cessation of the mixed use for the keeping of dogs and the breeding of dogs for a commercial purpose. This can be done without injustice to either party. In view of the dispute between the parties as to the number of dogs that could be kept, it would appear prudent to include a saving provision with the number which I have found should be 17.
58. The Council considers that the commercial dog breeding must be required to cease otherwise it would continue and result in loss of amenity to neighbours due to increased noise. Given the financial incentives, the Council fears there is potential for a large number of puppies on the site at any one time. I acknowledge that this could happen in continuation of the breach of planning control. I am also mindful of the implications of section 173(11) of the 1990 Act by granting unconditional planning permission for the mixed use upon compliance with the notice if the requirement was removed or varied.
59. As corrected, the notice would simply require the cessation of the unlawful components of the mixed use. The requirements cannot purport to stop the appellant carrying out a use for purposes incidental to the primary residential use. There is no need to identify and protect any lawful incidental commercial purposes as the notice shall be construed accordingly.
60. The appeal on ground (f) succeeds to the limited extent described.

The appeal on ground (g)

61. The ground of appeal is that the time given to comply with the requirements of the notice falls short of what should reasonably be allowed.
62. The effect of the appeal is to stop the clock. The notice only takes effect on the date of this appeal decision when the compliance period starts. Instead of 6 calendar months, the appellant seeks a period of 3 years to allow the number of dogs be reduced naturally. She considers it unfair and inhumane to impose a period of 6 months.
63. I do not question that the appellant cares deeply for all her dogs which she regards as part of her family. This is reinforced by the observations of those in support who have purchased puppies from the appellant.
64. Some months have elapsed since the issue of the enforcement notice in

February 2021 and the indication is that numbers have already reduced to 20 adult dogs. In light of my finding on ground (f) the number of adult dogs must be reduced to no more than 17. I recognise that some time is needed for the appellant to reduce numbers further and appreciate that it will be a difficult decision for the appellant on how this is achieved.

65. On the other hand, and in line with the advice at paragraph 59 of the national Planning Policy Framework, effective enforcement is important to maintain public confidence in the planning system.

66. I consider that 9 months would strike an appropriate balance and enable the appellant to take necessary steps to reduce the number of adult dogs at the property.

67. I shall extend the period of compliance. To this limited extent the ground (g) appeal succeeds.

Formal Decision

68. It is directed that the enforcement notice be corrected and varied by:

- deleting the text in paragraphs 5.1 and 5.2 and substituting the words "Cease the mixed use of the Land by reducing the number of adult dogs kept on the Land to no more than 17 and ceasing the use of the Land for the breeding of dogs for a commercial purpose."
- substituting 9 months as the period for compliance.

69. Subject to those corrections and variations, the appeal is dismissed and the enforcement notice is upheld.

KR Seward

INSPECTOR