



Appeal Decisions

Site visit made on 30 August 2022

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

an Inspector appointed by the Secretary of State

Decision date: 3rd October 2022

Appeal A Ref: APP/M0655/C/22/3292387

Appeal B Ref: APP/M0655/C/22/3292388

2 Brookvale Close, Burtonwood and Westbrook, Warrington, WA5 4LP

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended (the 1990 Act). The appeals are made by Ms. Phaedra Wilkinson (Appeal A) and Mr. Thomas Rayment (Appeal B) against an enforcement notice issued by Warrington Borough Council.
- The notice was issued on 15 December 2021.
- The breach of planning control as alleged in the notice is:
Without planning permission, the material change of use of the dwelling to include dog keeping and breeding.
- The requirements of the notice are to:
Reduce the number of dogs which are kept on the property to a maximum of 4 dogs at any one time, with no more than 1 litter of puppies at a time.
- The period for compliance with the requirements is: one calendar month.
- The appeals are proceeding on the grounds set out in section 174(2)(b), (c), (f) and (g) of the 1990 Act.

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.

Applications for costs

1. An application for costs was made by Ms. Phaedra Wilkinson and Mr. Thomas Rayment against Warrington Borough Council. An application for costs has also been made by Warrington Borough Council against Ms. Phaedra Wilkinson and Mr. Thomas Rayment. These applications are the subject of separate decisions.

Preliminary Matters

2. As set out above there are two appeals on this site. They relate to the same enforcement notice. To avoid duplication I have dealt with them together, except where otherwise indicated.
3. The site visit was arranged to be undertaken on the basis of access being provided to it by the appellants or their representatives. However, the appellants nor their representatives attended the site at the time of the visit. As such, I carried out an unaccompanied site visit, from the public highway, and I am satisfied I saw everything I needed to determine the appeal and I have proceeded on this basis.
4. The evidence before me cites the impact of the development on the living conditions of neighbouring occupiers and the character and appearance of the area. However, an appeal on ground (a) has not been made. Therefore, the planning merits of the case before me are not relevant to my decision as my

decision rests on the facts of the case, on relevant planning law and judicial authority. Furthermore, I am not empowered to consider whether or not planning permission should be granted for the development.

The Notice

5. 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.
6. The description of the alleged breach relates to '*...the material change of use of the dwelling to include dog keeping and breeding*'. However, Class C3 of the Town and Country Planning (Use Classes) Order 1987 as amended (UCO) relates to a use as a dwellinghouse as set out in the Schedule to the UCO. It is apparent from the evidence before me that the Council alleges that the use of the property had materially changed to that of a dwellinghouse and for dog keeping and breeding. Established case law has found that where an occupier carries on a variety of activities within the entire unit of occupation, and it is not possible to say that one is incidental or ancillary to another and that those uses are not confined within distinct and separate parts of the site, that its use can reasonably be treated as a composite or mixed use.
7. Moreover, it is clear that the appellants understand that the allegation is a material change of use to a mixed use as a dwellinghouse and dog keeping and breeding. Therefore to ensure that the description of the alleged breach reflects the UCO and to ensure clarity within it I intend to delete the wording '*of the dwelling to include*' and substitute it with '*to a mixed use as a dwellinghouse and*'. Those corrections do not affect the nature of the arguments made in relation to the appeal and neither party will be prejudiced by my decision to correct the description of the breach.

The ground (b) appeals

8. An appeal on ground (b) is made on the basis that the matters alleged in the notice have not occurred. The onus rests on an appellant to demonstrate their case and I must assess whether the breach has occurred in light of the evidence presented, on the balance of probability.
9. The appellants maintain that they have never sought to utilise the property for the breeding of dogs and that their conduct of merely keeping dogs at it does not constitute a development under the definition in section 55(1) of the 1990 Act. Arguments to the effect that any change of use is not material more properly falls to be considered under ground (c) below. They have also stated that they have lived at the property since 2018 and during this time they have purchased 10 dogs, valued at between £20,000 and £50,000 each, to be kept as pets for their display at the American Bully Kennel Club – of which they are keen attendees. Their evidence also indicates that the dogs are kept in structures in the rear garden of the property. Therefore, there is no dispute that dogs have been kept at the property.
10. The Council's evidence includes redacted copies of a defence statement made to the Police in May 2020 in which one of the appellants states '*I am a dog breeder, I breed American Bullies they sell for considerable amounts of money*'. Within a redacted copy of a defence statement made by the same appellant to

Liverpool Crown Court it is stated that *'the accused and his partner operated a legitimate, successful business breeding and selling expensive pedigree American Bulldog puppies as well as supplying semen to other breeders for artificial insemination'*. Police exhibit photographs of dogs within the structures at the bottom of the garden of the property, puppies within a building and other dogs within a fenced area within the garden are also included within its evidence.

11. The Council has also provided snapshots from social media accounts and a website. The appellants have not disputed that the social media accounts/website shown in those snapshots are associated with one or both of them. In those snapshots various dogs are shown, and it is stated that those dogs have been produced, sold, puppies are expected and the price to choose/purchase one of those puppies by/from the appellants. Even if the puppies/dogs were not sold for commercial reasons the evidence indicates that the appellants are involved in breeding dogs.
12. The evidence is also supported by letters from local residents who describe that: a run of kennels was erected after the appellants moved into the property; the front entrance to the garage was bricked up using the side entrance for access to what is believed to be a heated nursery for puppies; various individuals bringing their pets to the property for presumably mating/breeding purposes; a lady attending the property regularly to clean the kennels and the noise generated by the dogs.
13. The appellants have stated that they have kept dogs at the address and one of the appellants has completed defence statements stating that he breeds 'American Bullies'. There is no dispute that the dogs kept at the address are 'American Bullies' and there is no evidence before me to indicate that the breeding of those dogs was undertaken at another address. Overall, on the balance of probability, the evidence strongly indicates that the dwelling, 2 Brookvale Close (No 2), and its grounds was being used for the keeping and breeding of dogs at the time the enforcement notice was served therefore the breach of control identified has occurred. Consequently, the appeal on ground (b) fails.

The ground (c) appeals

14. 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.
15. 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) of the 1990 Act 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.
16. In *Wallington v SSW* [1991] JPL 942 (*Wallington*), the Court of Appeal upheld the issuing of an enforcement notice requiring the reduction in the number of dogs kept at a private dwellinghouse from 44 to 6. This judgment confirms that there are two questions to be asked. First, was there a material change of use, and secondly, if so was that use incidental to the enjoyment of the

dwellinghouse as such. Whether an activity 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. Not every change in use is material. A change is not material if it is too small to be meaningful or taken into consideration.

17. Whether section 55(2)d of the 1990 Act applies is not down to how many dogs the appellants as occupiers choose to keep in their enjoyment of the dwelling. Rather, for a use to be considered incidental to the enjoyment of a dwellinghouse and exempted from development under that section of the 1990 Act, it must be of a scale and nature that is incidental to the reasonable enjoyment of the normal residential use of the buildings and land which comprise the dwellinghouse and its curtilage.
18. 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. The *Wallington* judgment stated that in that case the Inspector took a perfectly proper course in considering the number of dogs that can normally be kept in domestic circumstances because he did not want to shut out the prospect of any dogs whatever being kept in the dwellinghouse. However, this judgment did not establish a 6-dog rule. Nonetheless, the Court gave examples of the type of matters to have regard to 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.
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 2 and its grounds, as identified on the enforcement notice plan. The dwelling is a modern detached property occupying a plot near to the junction of Colne Road and Brookvale Close. Due to the orientation of the dwelling to Brookvale Close the one side boundary of the rear garden runs adjacent to the highway. Brookvale Close is a no through road within an area of other residential properties. The rear garden is enclosed with fencing and the walls of the detached outbuilding that appears to have originally been a garage. The rear garden is relatively modest in size and it is bounded by neighbouring gardens on 2 sides. The properties to the rear in Colne Road are bungalows and their gardens are relatively modest in size.
20. Next to the rear boundary there are the structures cited above that the appellants state the dogs are housed in. The evidence before me indicates that the remainder of the rear garden was largely hard landscaped and had been divided up with fencing. It was not apparent at the time of my visit how many dogs, if any, were present on the site.
21. As stated previously the appellants have lived at the property since 2018 and during this time they have purchased 10 dogs. I note that the dogs were purchased and kept to be shown at the American Bully Kennel Club and not for commercial gain. The police exhibit photographs show a number of dogs in the structures, 8 puppies in a pen within a building and 4 dogs in a fenced area. The Council have stated that in September 2021 11 dogs were present during a visit to the property by them.
22. The neighbours have described the disturbance caused by the noise generated by the dogs barking. They have stated that the noise from the dogs has been continuous throughout the day and night and that the location of the property

means that when vehicles and pedestrians pass it the dogs bark. They have also referred to the smell, in the summer months, emanating from the rear garden. No 2 only has one off-road parking space and those neighbours have stated that the grass verges along Brookvale Close, close to No 2, have at times been churned up due to vehicles parking on them. They have stated that the vehicles were associated with visitors to No 2. It is also stated that a person came to the site most days to clean the kennels and feed the dogs.

23. It is reasonable to consider that 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. The presence of 10 or so dogs with the associated structures and fencing appears to have changed the character of the modest rear garden of the dwellinghouse. Furthermore, there will inevitably have been some off-site impacts from the presence of that number of dogs which are bound to bark. Dogs are pack animals and when one barks others may follow and there is an increased likelihood of frequent dog barking given the numbers involved. The proximity of Brookvale Close would also exacerbate the potential for the dogs to be disturbed by passing pedestrians and vehicles.
24. I noted at the site visit that there is a modest level of background noise when adjacent to the rear garden of No 2. I acknowledge that the site visit is only a snapshot in time. Nevertheless, given the concentration of dogs that have been at the appeal site, its location and the proximity of the neighbouring dwellings and gardens, it is more likely than not, that the noise generated by dogs barking would have made a noticeable and disturbing contribution to ambient noise levels in the area. This is borne out by the representations of neighbouring occupiers.
25. Due to those numbers of dogs/puppies, it is also reasonable to consider that there would have been regular visits of prospective buyers and owners of prospective breeding dogs, outings to the vets and the person/s cleaning the kennels and feeding the dogs. The evidence of the neighbours in relation to the number of vehicles visiting No 2 and the damage to the grass verges indicates that the number of visits drew their attention and was noticeable. Consequently, the number of trips generated by the use of No 2 would have been, more likely than not, appreciably greater than generated by a typical residential household and that of No 2 prior to its use for the keeping and breeding of dogs.
26. As a matter of fact and degree I consider that the alleged breach of planning control has significantly changed the character of the use of the appeal site and goes beyond what can reasonably be regarded as incidental to a dwellinghouse use. As such, on the balance of probabilities, express planning permission is required for the making of a material change of use to a mixed use as a dwellinghouse and dog keeping and breeding. That mixed use is not excepted from the meaning of development within section 55(2)(d) of the 1990 Act. Since planning permission has not been granted for the development there has been a breach of planning control.
27. I conclude that the matters alleged in the notice constitute a breach of planning control. The appeal on ground (c) fails.

The ground (f) appeals

28. The ground of appeal is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
29. Section 173 of the 1990 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 requirements in an enforcement notice may, and often will, serve both the purpose of remedying a breach of planning control and the purpose of remedying any injury to amenity.
30. The notice does not specify which of the two purposes it seeks to achieve. The notice only requires a reduction and limitation of the number of dogs/puppies kept on the site at any one time. The Council has stated that it considers *'four adult dogs plus a litter of puppies is the upper limit of what could reasonably be considered to be incidental to the use of this particular dwelling'*. In other words, to a level that would not constitute 'development' under section 55(2)(d) of the 1990 Act. Thus, the purpose of the notice is not limited to addressing injury to amenity but also seeks to remedy the breach. The appellants submit that reducing the number of dogs to such an extent far exceeds that which is reasonable to remedy any injury to amenity of neighbouring properties. They have not suggested an alternative to that requirement. Consequently, it is not clear precisely how they envisage that the notice should be varied.
31. The breach of planning control would not be remedied without any reduction in the number of dogs/puppies kept at the property. As stated in the *Wallington* judgement any number is arbitrary as there is no clear dividing line as to when a material change of use can occur. The Council has stated that *'even at this level of intensity there is likely to be noise and disturbance generated for neighbouring residents, albeit to a degree that is more tolerable and comparable to a more generic dwelling house with the genuine incidental keeping of dogs as pets. This number of dogs would also still allow for the keeping of dogs as a hobby.'* Therefore, it seems to me that the Council have taken the view that based on the evidence available that the numbers stated in the requirement would remedy any injury to amenity which has been caused by the breach. From my observations and the evidence before me I have no reason to disagree with those findings. Moreover, as there is no ground (a) appeal and deemed planning application I cannot deal with general planning considerations through a ground (f) appeal.
32. In the absence of any obvious alternative, the requirements are not excessive and do not go beyond what is necessary to remedy the breach of control or to remedy any injury to amenity which has been caused by any such breach. Therefore, the appeal on ground (f) fails.

The ground (g) appeals

33. The ground of appeal is that the time given to comply with the requirements is too short. The appellants request that the one calendar month compliance

period be extended to 6 months. They consider that the removal of the dogs would either involve several sales or locating an alternative site to house them. They maintain that finding several buyers to purchase the dogs given their monetary value or finding an alternative site to house the dogs in such a short time period is unreasonable. The Council states that there are a number of kennel facilities located within the Warrington area where the dogs could be temporarily housed at short notice if needed.

34. Given the monetary value of the dogs and the logistics of selling/rehousing them I consider that a period of one month is a relatively short period of time to comply with the requirements of the notice. 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 3 calendar months would strike the appropriate balance between the conflicting interests. To this limited extent the appeal on ground (g) succeeds.

Conclusion

35. For the reasons given above, I conclude that a reasonable period for compliance would be 3 calendar 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

36. It is directed that the enforcement notice be corrected by:

- deleting the wording '*of the dwelling to include*' and substituting it with '*to a mixed use as a dwellinghouse and*' within the description of the alleged breach of planning control;

and varied by:

- the deletion of one calendar month and the substitution of 3 calendar 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

Appendix 1

List of those who have appealed

Reference	Case Reference	Appellant
Appeal A	APP/M0655/C/22/3292387	Ms. Phaedra Wilkinson
Appeal B	APP/M0655/C/22/3292388	Mr. Thomas Rayment