



Appeal Decisions

Site visit made on 20 October 2022

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 January 2023

Appeal A: APP/J1535/C/21/3280588

Land at Yelverton, St Leonards Road, Nazeing, Waltham Abbey, Essex EN9 2HQ

- 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 Mr Ozbay Kent against an enforcement notice issued by Epping Forest District Council.
 - The enforcement notice was issued on 10 May 2021.
 - The breach of planning control as alleged in the notice is, Without planning permission: The importation of earth, vehicle tyres and wheels to raise the land levels.
 - The requirements of the notice are:
 - 1) Remove all the imported earth, wheels and vehicle tyres from the land hatched black on the attached plan.
 - 2) Return the land in the hatched area to the levels as shown in Planning Application EPF/2105/16, Topographical Site Plan, number 20160318 – PL01.
 - 3) Remove all resultant debris from the land.
 - The period for compliance with the requirements is 4 months after this notice takes effect.
 - The appeal is proceeding on the ground set out in section 174(2) (a) and (d) of the Town and Country Planning Act 1990 as amended.
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Appeal B: APP/J1535/C/21/3280595

Land at Yelverton, St Leonards Road, Nazeing, Waltham Abbey, Essex EN9 2HQ

- 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 Mr Ozbay Kent against an enforcement notice issued by Epping Forest District Council.
 - The enforcement notice was issued on 10 May 2021.
 - The breach of planning control as alleged in the notice is, Without planning permission: The erection of a building shown hatched in black on the attached plan.
 - The requirements of the notice are:
 - 1) Remove the building as shown on the attached plan.
 - 2) Remove all resulting debris from the land.
 - The period for compliance with the requirements is 4 months after this notice takes effect.
 - The appeal is proceeding on the ground set out in section 174(2) (a) and (d) of the Town and Country Planning Act 1990 as amended.
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Formal Decisions

Appeal A

1. The enforcement notice is corrected with the wording of the allegation changed to read:

‘Without planning permission, the raising of the land levels following the importation of earth, vehicle tyres, wheels and any other materials which have facilitated the works.’
2. Point 1 of the section ‘What you are required to do’ is reworded to read:

‘Remove from the land hatched black on the attached plan all the imported earth, vehicle tyres, wheels and any other materials used in the raising of the land levels.’
3. The reference to the drawing no. in point 2 of the above section is changed from 20160318 – PL01 to drawing no. 20160318 – PL07.
4. Subject to these corrections the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act, as amended.

Appeal B

5. The enforcement notice is quashed and planning permission is granted for 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 erection of an outbuilding in the south-west corner of land at Yelverton, St Leonards Road, Nazeing, Waltham Abbey, Essex EN9 2EB, subject to the following condition:
 - 1) The building hereby approved shall be used only for agricultural or horticultural purposes and incidental facilitative means for such.

Matters concerning the Enforcement Notice relating to Appeal A

6. The enforcement notice in its section ‘What you are required to do’ refers to the Topographical Site Plan as drawing no. 20160318 – PL01. This is incorrect and should instead read as drawing no 20160318 – PL07.
7. I also find the wording of the allegation as insufficient to describe the actual nature of the breach which has occurred. The contravention clearly did not stop at the importation of the materials specified, as the land levels were subsequently raised as a result.
8. Under the provisions of section 176(1) of the 1990 Act, as amended it is open to me to correct any defect, error or misdescription in the enforcement notice or to vary its terms provided I am satisfied that the correction or variation will not cause any injustice. It is considered that the Courts interpret the power to correct a notice very widely and that the powers in s176(1) can extend to making significant changes to the terms of the notice so as to put it on a proper footing.
9. In this particular instance, although the thrust of the breach is obvious to the naked eye, certain wording needs to be altered slightly both to fit with and target the identified breach of planning control. In essence, the breach

remains as unauthorised operational development but the requirement is amended to properly achieve the enforcement notice's purpose.

10. Accordingly, the altered wording, in requiring for the inclusion of the words "any other materials", which may have been deposited on the land to facilitate the identified breach, necessitates that this be included within point 1 of the section 'What you are required to do'.
11. The amendments have no implications for, as the matter is already covered by, the grounds of appeal put forward. Accordingly, neither party has been prejudiced by the revised wording which does no more than reflect the planning position.

Appeal A

The appeal on ground (d)

12. The appeal on ground (d) is that, at the date the enforcement notice was issued, it was too late for the Council to take formal action as the development which constituted the breach of control had already acquired immunity from such in planning terms.
13. Taking into account the date of issue of the notice and, depending on whether the identified breach comprises operational development or a material change in the use of the land, the material date will be either four or ten years immediately prior to this.
14. The onus is on the appellant to prove his case, with the burden of proof being on the balance of probabilities. Such cases cannot take into account planning merits or impact and, as such, my decision has to be based on evidential fact and, where applicable, case law.
15. In this particular instance, although I would likely consider that the importation of earth, tyres and wheels onto the land would involve a material change of use to the land due to the effective storage involved, the Council has instead targeted the '*raise in land levels*' which, as operational development, means that the material date is 10 May 2017. In this respect I can understand the Council's considered rationale as to the nature of the breach.
16. Records show that following a complaint received a Council enforcement officer visited the site on 27 June 2016. The Council's investigator, Mr Gordon, has provided a Written Statement to this effect and says that he walked over the whole site accompanied by the landowner (also now the appellant). The appellant's statutory declaration confirms this visit took place.
17. At this site visit Mr Gordon took photographs which have now been produced to assist the Council's case against the appeal. These show that a significant amount of earth had been brought onto the land which, at this time, was in the form of a number of mounds. The land, though, was still largely grassed and had yet to be levelled. The presence of the earth would be consistent with the relevant content of the statutory declaration produced by a representative of Haringey Borough FC and also that of the appellant which indicate that a substantial amount of earth was brought to the appeal site in May 2016 for the purposes of levelling it due to its sloping nature. This would have represented the first stage of the land being raised which the enforcement notice is concerned with.

18. The above accounts are, however, inconsistent with the contents of the individual statutory declarations from Mehmet Ali, Yuri Dimitrov, and Hurban Hristov, all of which say that they worked at the appeal site during May, June and July 2016 for the purposes of making a tyre wall. Further, I note the following statements made by the appellant in his statutory declaration:

"All of the earthworks and levelling of the garden were complete by the summer of 2016..." (paragraph 26)

"I met Mr Gordon on site. We walked through the old house, through the outbuildings towards the right hand side of the land where he saw for himself the tyre wall built and the way I had levelled the land." (paragraph 29)

19. Given that both the officer and the appellant indicate that a thorough inspection of the site took place on 27 June 2016 it is less than conceivable that if such a "wall" had existed at the time it would not have been witnessed and photographed. Yet Mr Gordon, in his Written Statement, says that he did not see any retaining wall made of wheels and tyres.
20. Mr Gordon's photographs and his recorded observations throw considerable doubt on the recollections of the above persons in terms of the dates stated.
21. In December 2016 planning permission (ref EPF/2105/16) was granted for the demolition of outbuildings on the land and the erection of a replacement outbuilding. The works also involved some land levelling and an extract from the Council's case report indicates that this was necessary to carry out the approved development. Accordingly, the Council decided to close the enforcement investigation.
22. However, the Council says that it then continued to receive complaints regarding the land levels being raised further. In response, another Council official, Mr Ayres, visited the site on 1 February 2018. By way of a Written Statement he claims not to have seen any tyres stored on the land or rather, as he terms it, no tyre wall or terrace. Although Mr Ayres took photographs little can be discerned from these due to the fact they were taken from an adjacent site. Clarity is, therefore, hindered due to the distances involved and, moreover, it is unclear as to where the photographs were taken from and towards where exactly. There is no accompanying plan to throw light on this.
23. Only one photograph gives an indication of the visual change that the land had undergone. That said, little, if anything, can be gleaned as to the change in land levels. Some tyres might have been present on the land at this time and, if so, would have been outside the visual points photographed.
24. This contrasts with Mr Gordon's previous site visit where, as confirmed by the appellant, a full inspection of the land undoubtedly took place.
25. An aerial photograph dated August 2017, provided by the appellant, suggests that the land had undergone considerable works but height levels cannot be ascertained from this photograph. The same is true of an aerial photograph taken in 2018, produced by the Council.
26. A neighbour, Mr Tsourou, who resides at a neighbouring property, has produced a Witness Statement which throws further light on the changes made to the land levels at this time. He states:

"Around the middle of 2018 I noticed that my neighbour at Yelverton had brought onto the land what appeared to be a large amount of vehicle tyres..."

27. He continues:

"I noticed the grounds were still being risen in areas in 2020 and I contacted the Council once again to find out how the Council's investigations where (sic) progressing from my concerns in 2016 and was then notified that my original complaint was closed."

28. The appellant disputes Mr Tsourou's evidence and considers that it is inconceivable that he did not take any photographs of the tyres and earth to support his case. I agree that this would have substantiated his Witness Statement. However, the converse is true in that I consider that the reason Mr Gordon's photographs of 27 June 2016 only show a number of mounds of earth strewn across what was then grassed land and the original outbuildings positioned towards the centre of the land, but no tyres in evidence. This is because the totality of evidence, when balanced out, strongly suggests that these items, as later witnessed, had still to be brought onto the land.
29. Mr Ayres revisited the site on both 28 October 2020 and 26 January 2021, again taking photographs which I have been supplied with. The October photographs were, he says, taken in the same place as those which he took when at his previous visit in February 2018. One of these clearly show a significantly large number of tyres stacked up to form a tall and lengthy wall-like structure, and additional photographs taken during the following visit illustrate this further. Here, although I have found the February 2018 photographs to be largely unclear, I consider it likely that if the same vantage point was used, as claimed, then the many tyres stacked to the height, as later witnessed in October 2020, would have been visible.
30. The change in land levels looking southwards is readily apparent and, from my site visit observations, the land levels have been raised highest to the area of land south of, and outside of, the hatched area of land shown on the plan attached to the enforcement notice. However, the so called tyre wall appears to fall within the hatched section.
31. In addition, whilst walking westwards along the land from the area to the rear of the house, I noted that the appeal site's land levels relative to Long Acre, the neighbouring property's rear curtilage, were considerably higher. There was no gradual transition, only a sharp stepped rise, and this is a clear indication of the land levels having been markedly raised and levelled. The number of tyres evident reinforces my view that these were brought on to the land, presumably, over a period of time. Even if, the "tyre wall", as described, had not been stacked up at the time of the site visit in June 2016 it is unrealistic to suggest that the tyres might have been covered in earth at this time. Instead, if tyres numbering those evident at the October 2020 site visit had been present on the land they would have represented a marked feature worthy of comment.
32. The appeal turns in this instance on, not when the land was first raised or levelled, as referred to in the case report for application ref. EPF/2105/16 but, instead, when the works being carried out to achieve the end result could have been termed as substantially complete.

33. Whilst the aerial photographs taken in 2017 and 2018 give a clear indication that the land has undergone significant alteration, with it apparently subject to ongoing change due the works undertaken, the change in the various land levels cannot be ascertained to a degree where firm conclusions could be drawn. Evidence, therefore, in the form of ground level photographs and personal recollections that might corroborate events is therefore of particular value in this case. Here, I give particular weight to Mr Tsourou's evidence where he refers to a large amount of tyres being delivered to the site around the middle of 2018.
34. The evidence, both photographic and personal, show that earth began arriving at the site in 2016, but the tyres – certainly to any significant quantity – are not evident and, instead, likely started arriving at a later date. All this strongly suggests that the raising of the land levels was a work in progress and I have seen no compelling evidence from the appellant to show, on the balance of probabilities, that either the raising and levelling works and importation of materials to facilitate this was substantially complete by 10 May 2017.
35. The appeal on ground (d) therefore fails.

The appeal on ground (a) – the deemed planning application (DPA)

Main Issues

36. The site lies within the Metropolitan Green Belt. As such, the main issues in this appeal are:
- 1) whether the development constitutes inappropriate development in the Green Belt and, if so, the effect on the Green Belt's openness; and
 - 2) if it is inappropriate development, whether the 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.

Whether inappropriate development, and the Green Belt's openness

37. The 2008 and 2013 aerial photographs flown and the photographs taken in June 2016 by Mr Gordon show that the land had a rural character which, due to the clearance of vegetation and the subsequent substantial earthworks carried out, has meant that its original character has now been lost. The effects of raising the land levels on the immediate landscape has been compounded by its now unkempt nature due to the importation of a multitude of materials which are now effectively stored openly on the land.
38. All development in the Green Belt, be it uses of land or operational development, is inappropriate for the purposes of the National Planning Policy Framework (the Framework) unless it accords with the exceptions listed in paragraphs 149 and 150 of the document. The development at issue does not fall within either of these. Further, Policy GB2A of the Epping Forest adopted Local Plan and Alterations (LP) serves to guard against inappropriate development within the Green Belt.
39. The Framework says that when considering any planning application substantial weight should be given to any harm to the Green Belt. Very special circumstances will not exist unless the potential harm to the Green Belt by

reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.

40. The Framework states that an essential characteristic of Green Belts is their openness and that the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land within them permanently open, and that development should not compromise the purposes of including land in the Green Belt.
41. The relationship between visual impact and openness is important here. In the judgement of *John Turner v Secretary of State for Communities and Local Government*, heard in the Court of Appeal, it was said that the word 'openness' is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. A more recent 2020 judgement (*Samuel Smith Old Brewery and others v North Yorkshire CC*) concluded that matters relevant to openness in any particular case are a matter of planning assessment.
42. The appellant indicates that the tyre wall was erected to provide support to the earth for levelling. However, realistically, this would not have represented the only option available for this purpose.
43. The site is on the cusp of the Green Belt, but the importation of earth, tyres and other materials has heightened the land significantly and this is readily visible from the rear windows of residential properties along this stretch of St Leonards Road. Although the Council has not mentioned this point in its 'Reasons for Issuing the Notice' this is both indicative and illustrative of the resultant deleterious impact on the Green Belt's openness.
44. I therefore conclude that this visually obtrusive development is in material conflict with the Framework's objectives and, in being contrary to the aims and objectives of LP policies GB2A, GB7A, CP2, LL1 and LL2, and policies SP7 and DM3 of the Council's Submitted Version Local Plan (SVLP), the development has seriously harmed the openness of the Green Belt.

Planning balance

45. I need not reiterate my findings on the first main issue. The Council, though, has also made reference to policies relating to land pollution and flood risk but, in the absence of relevant details to this effect, any technical evidence in this regard or compelling empirical evidence to confirm it I am unable to comment on any such resultant impact.
46. I have had regard to the appellant's comment that the land needed stabilising although, as I have mentioned, there is no evidence before me to show that other options, apart from the importation of a large number of rubber tyres and other materials for this purpose were considered and discounted. The claim that "*tens of thousands of pounds on trees, shrubs and materials as well as labour*" has not been substantiated but, even if this was the case, at my site visit I noted that it has done little to mitigate the impact of the development given the land's somewhat stark appearance and its visual prominence.
47. In the circumstances I have seen no evidence of very special circumstances existing which might be sufficient to outweigh and set aside the inappropriateness of the development carried out.

48. Accordingly, I find the development to be unacceptable in its contextual setting, and in significant material conflict with the Framework and also the policies I have referenced from the Council's development plan documents.
49. Reinstating the land levels to accord with the topographical survey undertaken to accompany the 2016 planning application should serve to largely remedy the harm. However, were it to prove necessary, once the required remedial works have been carried out, to spread some additional topsoil to make good the land's surface – obviously within reason – then this would be a matter for negotiation at that stage between the appellant and the Council.

Conclusion

50. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Appeal B

The appeal on ground (d)

51. Appeal B relates to an outbuilding situated in the south-western corner of the site. Up until 2017, with reference to the aerial photograph produced from that year, the building was not previously evident. However, having had regard to the statutory declarations which indicate that some structure existed in that location for many years, and the indication that the land was cleared of a fair amount of vegetation including the cutting back of a number of trees around this particular location, it is likely that a structure did exist.
52. As mentioned for Appeal A any appeal on ground (d) is that, at the date the enforcement notice was issued, it was too late for the Council to take formal action as the development which constituted the breach of control had already acquired immunity from such in planning terms. The onus of proof in such cases is on the appellant and is assessed on the balance of probabilities.
53. Again, as the alleged breach relates to operational development the material date is 10 May 2017. The appellant, in his statutory declaration, refers to a tired, old outbuilding which was partially within an overgrown area, and indicates, that once accessible, it was utilised for the storage of tools and machinery.
54. If it did exist then it is fair to assume that it would have been hidden from view and it is understandable that Mr Gordon might have not been aware of its presence when he undertook his site visit in June 2016. I note that the said structure is omitted from the site plan submitted to accompany the 2016 planning application but, again, this may have been that the trees had not been sufficiently cut back at the time that the topographical survey was carried out. Alternatively, if the structure was visible at the time of the survey, its relative remoteness from the area of the land the subject of the planning application, would not necessarily mean that it being represented on the site plan was required.
55. The first photograph in which the outbuilding is shown is one taken by Mr Ayres during his site visit in October 2020. Open-ended at both the front and the one

- side visible, it gives the appearance of a timber-built, physically un-sound structure. However, in the time between this site visit and the following one in January 2021, it appears that the structure underwent some repair and refurbishment. Photographs taken on the latter site visit show, instead, a close-boarded timber building with a series of upper floor windows and a balcony with balustrading attached to its flank. The building's height appears to have increased slightly, but this is more to do with an internal mezzanine arrangement. From my site visit observations it was not clear to me whether the footprint had been enlarged.
56. Accordingly, in the three months that had elapsed between Mr Ayres' site visits the building had undergone significant material alterations, and had taken on a different visual appearance.
 57. Section 55(1) of the 1990 Act defines development as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land." S.55(2) goes on to itemise a number of operations, and uses of land, which shall not be taken to involve development. These include "the carrying out for the maintenance, improvement or other alteration of any building of works which do not materially affect the external appearance of the building".
 58. Section 336 provides that for the purposes of the 1990 Act, the term "building" includes any structure or erection, and any part of a building as so defined.
 59. The dividing line between works which can be considered as alteration or repair, and works which constitute rebuilding, is not always readily apparent. The former may be extensive but effecting a change to the appearance of the building is not in itself sufficient to take such works outside the scope of the exemption from development.
 60. In interpreting s55(2) the purpose of the section must be borne in mind. Attempting to limit its scope by arguing that it can only relate to small scale works, "routine" matters, etc. goes directly opposite to that purpose. The limiting factor is not the scale or nature of the works but the requirement that they should not be to such an extent as to materially affect the external appearance of the building.
 61. In the judgement of *Street v Essex CC* [1965] it was held, that the question whether or not constructional works amounted to "maintenance" or "rebuilding" must be a question of fact and degree. In this particular instance I consider that the works undertaken are of sufficiently materiality to have brought about a substantial and material change to the external appearance of the structure which had existed previously.
 62. I find that the building works undertaken have gone beyond those which can reasonably be considered to fall within s55(2)(a) of the 1990 Act. Accordingly, development had therefore taken place without planning permission in late 2020/early 2021 and, as such, any immunity from enforcement action, by the time the notice was issued in May 2021, had been lost.
 63. The appeal on ground (d) therefore fails.

The appeal on ground (a) – the deemed planning application (DPA)

64. The main issues are identical to that for Appeal A.

65. It is unclear what point the appellant is trying to make in paragraph 5.18 of his Written Statement. Here, in the case report for the 2016 planning application, the Council is clearly referring to a proposed replacement outbuilding on a different part of the site. This has nothing to do with the building at issue in the current appeal. Moreover, the building at appeal hadn't even been identified on the application's site plan submitted.
66. Nonetheless, given the appellant's stated intention, albeit at the time he purchased the land, to "*cultivate a self-sufficient lifestyle to live off the proposed vegetation*", and the fact that he has not objected to the Council's suggestion that the building, if permitted, should be subject to a condition restricting its use for agricultural/horticultural purposes I am satisfied that the intention is to use the building for related means. Given this, I am guided by the advice in paragraph 149 of the Framework.
67. This says that the construction of new buildings in the Green Belt constitute inappropriate development within, except for certain exceptions. One of these is buildings for agriculture. With the close connection between agriculture and horticulture I can understand the reason for the Council's suggested condition.
68. Even if I were to consider that the agriculture/horticulture crossover somewhat clouds the issue I have had regard to the fact that a building was in situ – albeit a rather dilapidated structure which has since been substantially altered – in this rather unobtrusive location.
69. If not inappropriate development then the effect on the Green Belt's openness need not be considered and besides, in this respect, given the location and the recent removal of other outbuildings which were previously sited on the land, I am satisfied that the existing building's retention would not unduly compromise the openness.
70. The sole reason why the enforcement notice relating to the building was issued relates to the effect on the Green Belt, and the Council has decided that no other issues have arisen from the development. I agree with this approach.
71. Nonetheless, I find that the said building, in this particular instance, is not in material conflict with the Framework, nor the relevant policies in the development plan documents; namely LP policies GB2A, GB7A, CP2, LL1 and LL2, and also SVLP policies SP7 and DM3. The other policies cited by the Council, as I have explained in my conclusions on Appeal A, are of lesser importance given the limitations of the evidence before me.
72. In the circumstances I have come to the conclusion that planning permission should be granted for the building subject to a condition restricting its future use. Accordingly, should the building be put to a use/s beyond this restriction, it would likely constitute a material change in planning terms for which the benefit of planning permission would be required.

Conclusion

73. For the reasons given above I conclude that the appeal should succeed on ground (a) and planning permission will be granted.

Timothy C King

INSPECTOR