



Appeal Decisions

Hearing held on 6 December 2022

Site visit made on 7 December 2022

by Zoë Franks Solicitor

an Inspector appointed by the Secretary of State

Decision date: 17 January 2023

Appeal A Ref: APP/Z2505/W/22/3296930

Panache Station Road, Old Leake, BOSTON, PE22 9QQ

- 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 Matthew Fletcher against the decision of Boston Borough Council.
- The application Ref B/21/0461, dated 18 October 2021, was refused by notice dated 14 February 2022.
- The development proposed is COU to garden and keeping and breeding of dogs including construction of kennels (retrospective).

Appeal B Ref: APP/Z2505/C/22/3296958

Panache Station Road, Old Leake, BOSTON, PE22 9QQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Matthew Fletcher against an enforcement notice issued by Boston Borough Council.
 - The notice, numbered PENF00001/21, was issued on 17 March 2022.
 - The breach of planning control as alleged in the notice is: 1. Without planning permission, the material change of use of land for keeping and breeding of dogs, and for use of land as a residential garden by the occupiers of the dwelling called 'Panache'. 2. Without planning permission, development which facilitates the material change of use as specified in 1. above, which is the erection of a kennel building and a concrete base to site the kennel building on, the erection of fencing and gates, the laying of hard surfacing to create a roadway to the kennel building, and creation of an earth bund.
 - The requirements of the notice are: i. Cease the use of the land for the keeping and breeding of dogs ii. Cease the use of the land as residential garden. iii. Remove the kennel building in its entirety from the land iv Remove all of the concrete base that the kennel building is erected on from the land. v. Remove the chalk/hardsurfacing from the land that is being used as the roadway. vi Remove the earth bund in its entirety from the land. vii Remove all fencing and gates from the land.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c), (d), (e), (f), (g) of the Town and Country Planning Act 1990 as amended.
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Decisions

Appeal A

1. The appeal is dismissed.

Appeal B

2. It is directed that the enforcement notice is corrected by: the deletion of 3 months and the substitution of 6 months and the time for compliance; and the substitution of the plan annexed to this decision for the plan attached to the enforcement notice.
3. Subject to the corrections, the appeal is dismissed and the enforcement notice is upheld.

Appeal A

4. The main issues are:

- Whether the development is in the countryside, and whether it can be demonstrated that it meets the sustainable development needs of the area in terms of economic, community or environmental benefits;
- The effect of the development on the character and appearance of the area;
- The effect of the development on the living conditions of the occupiers of neighbouring properties; and
- Whether the development would comply with local and national policy which seeks to ensure that inappropriate development in areas of flooding should be avoided.

Countryside and sustainability

5. The appeal site is in the Countryside as defined in the South East Lincolnshire Local Plan (2011 – 2036) ('the SELLP') as it is outside the defined settlement boundaries. Policy 1, the Spatial Strategy, states that in the Countryside development will be permitted that is necessary to such a location and/or where it can be demonstrated that it meets the sustainable development needs of the area in terms of economic, community or environmental benefits. There is nothing before me to indicate that this development is necessary in a countryside location or that it meets any wider sustainability needs.
6. Policy 7 provides that the acceptability of new businesses on non-allocated sites which have not been previously developed will be assessed according to listed criteria. The appeal development is not in accordance with this policy in that: it conflicts with neighbouring land uses; there is a significant adverse impact upon the character and appearance of the area; the design is not responsive to the local context; it does not maximise opportunities for modal shift away from the private car are demonstrated; and there is not an identified need for the business location outside of identified employment areas on the Policies Map.
7. The appellant argues that the development supports his commercial needs, which as he is a resident of the area therefore equate to business needs, and that it is sustainable to locate his business next to his dwelling. He also states that as the kennels are constantly supervised the development also provides employment which is a benefit. However, these considerations do not outweigh the conflict to Policies 1 and 7 identified above, and the associated planning harm.

Character and appearance

8. The development is located on the edge of a residential area, at the rear of a row of houses which back onto open countryside. The buildings are constructed predominantly from timber cladding with white UPVC windows and concrete roof, and do not match or complement either the residential houses or agricultural buildings in the area. The fencing is also obtrusive and does not blend in with the existing built environment or open aspect of the countryside beyond. There are unobstructed views of the development from many points

within the vicinity which are harmful. It would not therefore be acceptable for the built elements of the fencing, hardsurfacing, bund and concrete slab to remain if the use were to cease as they are incongruous and jarring in the surrounding landscape, and therefore cause material harm.

9. The actual use, i.e. the keeping and breeding of dogs, is also at odds with the residential and rural character of the area. It causes increased noise and activity from both the dogs and operations undertaken to care for and house them, and there are some additional comings and goings associated with the business.
10. The development therefore causes material harm to the character and appearance of the area, through both its visual effects and impacts caused by the use, and this is in conflict with Policies 2 and 3 of the SELLP which aims to secure good design which is appropriate to the local area.

Living conditions

11. The development is at the rear of houses and the number of dogs kept is substantially greater than would normally be expected in a residential area. Many representations were received through the course of the planning application and appeal from local residents objecting to the use because of the impact of the development on their living conditions. These objections were supported by the observations of the Council's very experienced environmental health officer who had visited the locality twice to assess the noise, notwithstanding the acoustic evidence submitted by the Appellant. The acoustic evidence was unclear about whether the assessment reflected times when the dogs were inside or outside of the kennels, and included average measured noise levels which clearly has the effect of smoothing out the levels overall and does not fully reflect the loudest noises. The acoustic evidence assumed that only 2 or 4 dogs would be exercised at any one time but it is not possible to ensure that would always be the case (a condition in this regard would be unenforceable), and the application was for the keeping of up to 20 dogs. The appellant's second report states that low level barking is audible at times in the adjacent dwellings.
12. I therefore accept the environmental health officer's evidence that sporadic barking would be audible in the gardens of neighbouring properties and that this could be very annoying to the occupiers (even if the overall noise level may not be very high). This indeed reflects the evidence that has been received from interested parties.
13. The impacts caused by the development, by way of the noise from the dogs but also disturbance from the cleaning and management of the site, causes material harm to the living conditions of the occupiers of neighbouring properties. This is in conflict with Policy 2 of the SELLP which, amongst other things, seeks to meet sustainable development considerations in relation to impact on neighbouring land uses.
14. The appellant suggests that the bund could be increased in height to 2.5m as shown on the submitted plan. This may have a positive impact in terms of the reduction in noise coming from the site, although the Council's evidence was that it would be of marginal benefit. The increase in the height of the bund would only exacerbate further the concerns regarding the appearance of the development, and would therefore not be a reasonable or appropriate

mitigation. A condition limiting the permitted noise levels at the site boundaries would also not adequately mitigate the adverse effects because noise from dogs is not at a constant level and such a condition would not regulate the noisier spikes in volume caused by sporadic barking. It would also be unreasonable to impose the enforcement of such a condition on the Council as it involves ongoing measurements and it is not possible to access the site boundaries from public land.

Flood risk

15. The development site is in Flood Zone 3 and consists of the change of use and the operational development of the kennels buildings and fencing, hardstanding, bund and enclosures
16. Policy 4 of the SELLP sets out the Council's approach to flood risk and is broadly consistent with the National Planning Policy Framework 2021 ('the Framework'), which itself is a material planning consideration. The Framework advises that "Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas of highest risk (whether existing or future)."¹
17. As the development consists of both the change of use and the operational elements, a site-specific flood risk assessment and evidence that the site meets the sequential and, if needed, the exception tests are required by Policy 4 and the Framework. In addition Policy 4 requires that development will need to demonstrate that surface water from the development can be managed and will not increase the risk of flooding to third parties. Planning Practice Guidance explains that a flood risk assessment should establish the risk of flooding from all sources, the potential of the development to increase flooding elsewhere, what measures will be taken to deal with these effects and risks, and that the information provided needs to be credible and fit for purpose. As none of this information has been provided in sufficient detail to support the application it fails to meet these policy requirements. It is not possible to make a proper assessment regarding how flood risk will be managed now and over the development's lifetime.
18. The appellant states that the development is inherently flood resilient but has not provided any details regarding the construction techniques to support this assertion. The development will increase the number of people on the appeal site, and the presence of the dogs mean that it is likely that there would be attempts to remove them should flooding occur. This use therefore requires a more detailed assessment than that provided and this could not be properly secured by the use of a condition as it is fundamental to whether the development should be granted permission.
19. The Environment Agency were consulted about this application and the parties agree that the response that the development could be considered in Flood Risk Standing Advice Cell D7 was incorrect. However, this does not change my findings in relation to the development plan and Framework as set out above.

¹ Paragraph 159

Other matters

20. Concerns were raised regarding the effect of the development on highway safety in the area. However, no objections were received from the Highways Authority in this regard and I accept that any increases in the comings and goings would be fairly limited and could be safely accommodated.
21. I was referred to the boarding kennels at Janarth Cottage (permission reference B/05/0036, granted 11 March 2005). Whilst this development uses materials similar in colour to those in the appeal and is also for an animal use, it was granted permission before the adoption of the SELPP, and the publication of the Framework. Each development must be decided in accordance with the development plan at the date on which it is determined, and will be specific to its own site specific considerations. A particular site specific difference is that Janarth Cottage is located further away from other properties which reduces the potential for conflict in terms of the impact on the occupiers of neighbouring sites. I have taken the development at Janarth Cottage into account but it does not alter the findings of harm caused by the development as set out above.

Other conditions

22. I have considered the conditions put before me by the parties, and made reference to some of these conditions earlier in the decision. Whilst I accept that schemes to regulate the external materials, lighting, landscaping and pollution could be secured through the imposition of conditions this would not address the harm that I have identified above. A condition limiting the number of dogs to be permitted on the appeal site would be very hard to enforce but would also not prevent the harm associated with the use of the land for the keeping and breeding of dogs, in particular the noise disturbance. A condition removing permitted development rights from the site would only prevent future development and would not make the current development acceptable.
23. I do not therefore find that the use of conditions can mitigate the adverse effects of the development sufficiently to enable it to proceed.

Conclusion on Appeal A

24. The development is in conflict with Policies 1, 2, 3, 4 and 7 of the SELLP, and the Framework. There are no other considerations of sufficient weight to overcome this harm and permission should not therefore be granted and the appeal fails.

Appeal B

The Notice

25. The plan attached to the notice does not accurately reflect the extent of land in the ownership and use of the appellant, and includes an area along the western boundary which is in a separate ownership. Section 173 of the 1990 Act sets out the elements that must be included in an enforcement notice and omission of one of these will mean that it is defective on its face and render it a nullity, however none of these elements are missing in this case. A notice can also be invalid if it is flawed in some way, but not so defective as to be a nullity. Section 176 of the Act provides that an invalid notice can be corrected provided that doing so will not cause injustice to the appellant or the Council.

26. The notice in this case tells the appellant fairly what he has done wrong and what he must do to remedy it, and is therefore not a nullity. The plan attached to the notice covers all of the land which is being used as alleged in the notice but includes an adjoining element which is part of a separate planning unit and in different ownership. The error regarding the inclusion of the additional adjoining land should be corrected so that the plan accurately reflects the land being used by the appellant as alleged in the notice, and this can be done without causing injustice to either main party. There will be no injustice caused to the owner of the adjoining land as it will no longer remain subject to the notice and the failure to serve the notice pursuant to section 172 is also no longer relevant.
27. I therefore direct that the notice should be corrected by the removal of the plan which identifies the land shown edged red and replacement with the plan provided by the Council during the hearing (and which the appellant agrees accurately reflects the land in their ownership).
28. The appellant also argues that the requirements are imprecise but I do not find this to be the case and I am satisfied the notice clearly sets out what is required.

Appeal B, Ground (e)

29. The appeal under this ground relates to failure to serve the notice on the owner of the adjoining part of the land which is not in the appellants control or ownership. This ground of appeal has therefore been addressed in the preceding paragraphs dealing with the correction to the Notice and does not fall to be considered further.

Appeal B, Ground (c)

30. An appeal on this ground is on the basis that the matters stated in the notice do not constitute a breach of planning control. The appellant argues that the Council accepted that the whole of the land shown within the red line on the enforcement notice was already in use as a garden, and this is shown by the decision notice issued by the Council in Appeal A which describes the existing use as garden. The Council accepts that the description on this decision notice was poorly worded, but not that it was ever their position that the whole of the area to the rear of the house had always been garden. This is evidenced by the officer's report which describes the land as 'a rear garden with a large paddock beyond', and the application is also described in that report as 'change of use of the land to form an extension to the garden and for the keeping and breeding of dogs'. In addition the application, as submitted by the appellant, was also described as for a proposed change of use to extension to the garden and for the keeping and breeding of dogs. I therefore do not find that it was ever either parties' case that the whole of the rear area had a lawful use as a garden prior to the service of the notice, or that either party has been unclear about their respective positions.
31. The appeal on this ground does not therefore succeed.

Appeal B, Ground (d)

32. To succeed on this ground the appellant must show on the balance of probabilities that, at the date when the notice was issued, no enforcement

action could be taken in respect of any breach of planning control constituted by the matters stated in the notice. The appellant acquired the land in 2020 but has not provided any direct evidence regarding its use prior to that date. In the absence of precise and unambiguous evidence regarding the actual use of the land prior to 2020 the appellant has not proven on the balance of probabilities that it was used as a garden for the necessary period of 10 years prior to the issue of the notice.

33. The appeal on ground (d) therefore fails.

Appeal B, Ground (f)

34. An appeal on ground (f) is on the basis that the steps required by the notice to be taken, or the activities required by it to cease exceed what is necessary to remedy the breach of planning control, or as the case may be, to remedy any injury to amenity which has been caused by any such breach. The purpose of the notice in this case is to remedy the breach of planning control and as such it is not unreasonable to require that the unauthorised uses cease and that the land be put back into its previous condition, which is in effect what the requirements of this notice are seeking to achieve. This includes requiring that works which facilitate the change of use, such as the fencing and gates in this case, are removed (irrespective of whether they may usually benefit from permitted development rights).

35. The appellant argues that some elements of the development could remain as they are not intrusive and could be used for another purpose. However, this is an argument that concerns the planning merits of the development and cannot be considered as part of the appeal brought under section 174 because ground (a) and the deemed application for permission was not pleaded in this case . This issue is addressed fully as part of Appeal A.

36. The appeal on ground (f) does not succeed.

Appeal B, Ground (g)

37. The appellant seeks an extension of the time period for compliance to 12 months on the basis that this would be a reasonable time in which to identify and locate alternative premises in which to relocate the business. The Council accepts that an extension to 6 months would be reasonable as it is likely that planning permission would also need to be obtained for a similar use in any alternative premises.

38. There has been a breach of planning control, and for the reasons set out below in relation to Appeal A, I have found that planning harm is caused by the development, including to the living conditions of neighbouring occupiers. Taking all of the considerations into account, including the welfare of the dogs, 6 months is a proportionate period which will allow for alternative arrangements to be made, either on a temporary or permanent basis if a replacement site has been identified.

Zoë Franks

INSPECTOR

Appendix 1

List of those who have appealed

Reference	Case Reference	Appellant
Appeal A	APP/Z2505/W/22/3296930	Mr Matthew Fletcher
Appeal B	APP/Z2505/C/22/3296958	Mr Matthew Fletcher

APPEARANCES

FOR THE APPELLANT:

Keith Baker, Design and Management

FOR THE LOCAL PLANNING AUTHORITY:

Piers Riley-Smith, Counsel

Ian Carrington, Senior Planning Officer

Alan Watts, Senior Planning Enforcement Officer

Nick Davies, Principal Environmental Health Officer

Martha Rees, Senior Lawyer, Planning

Abbie Marwood, Deputy Development Manager

DOCUMENTS

Attendance List

Leake Commonsides Inset Map 53

PLANS

Amended enforcement notice location plan

B.04.0736 Block Plan (17.09.2004)

Plan

Land at: Panache Station Road, Old Leake, Boston PE22 9QQ

Reference: APP/Z2505/W/22/3296930 and APP/Z2505/C/223296958

Scale: Not to Scale

