



Appeal Decision

Site visit made on 25 January 2023

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 February 2023

Appeal Ref: APP/D3640/C/22/3294991

Land at Miles Green Farm, 35 Queens Road, Bisley, Surrey GU24 9AR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act). The appeal is made by Mr Adrian Keeling against an enforcement notice issued by Surrey Heath Borough Council.
 - The notice was issued on 9 February 2022.
 - The breach of planning control as alleged in the notice is: without planning permission, the material change of use of the lawful equestrian use to a mixed education and leisure facility with associated buildings and car parking area.
 - The requirements of the notice are to:
 1. Cease the use of the land as a mixed education and leisure use outlined in red on the attached site location plan;
 2. Demolish the yurt building hatched in red on the attached site location plan;
 3. Demolish the tent building hatched in blue on the attached site location plan;
 4. Demolish the toilet block with wooden framing containing 2 WCs building hatched in green on the attached site location plan;
 5. Remove the hardstanding area in its entirety hatched in black on the attached site location plan;
 6. Remove all resulting materials and debris from the land as a result of taking step 2 to 5;
 7. Reinstate the land back to the approved use and make good any damage caused in complying with steps (2), (3), (4), (5) and (6).
 - The period for compliance with the requirements is: 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. The enforcement notice is quashed.

The Enforcement Notice

Mixed use and planning unit

2. The notice alleges a mixed use for education and a leisure facility. The concept of a mixed use is where two or more primary (or main) uses existing within the same planning unit. One is not incidental to the other, although there may be incidental uses associated with each primary use. A mixed use is a specific use in itself. My starting point when considering the allegation on the notice in this case before I visited the site, was that within the appropriate 'planning unit' (I return to that below), or at least within the red-line on the notice plan, there would be 2 main activities, those being education and a leisure. When I visited it did not appear as straightforward.

3. A red line on a plan included within an enforcement notice does not necessarily have to define the whole planning unit. However, in order to assess the materiality of a change of use it is first necessary to ascertain the correct planning unit, and the present and previous primary (as opposed to incidental) uses of that unit. It has been held that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes. The concept of physical and functional separation is key.
4. The red line on the plan that accompanied the notice covers a very broad area which when I visited the appeal site, clearly included fields that are still used for purposes related to equestrian activities. I saw horses within the fields and there are also buildings within the site including a large stable with horse-stalls as well as an uncovered sand-school near to it. The mixed use as alleged does not include equestrian activities and from my understanding of the evidence, the alleged leisure use does not seem to include that equestrian activity.
5. Outside of the red line on the plan, there are other primary uses, those being the dwelling at No 35 Queens Road and also the building containing the nursery school. There are also some other outbuildings including those used in connection with the equestrian use. It is unclear from the evidence that has been submitted, the degree to which the residential use is self-contained within the dwelling and land immediately around it or whether it should be a primary use within the mix of uses. It may be that the nursery school is part of the education element of the mixed use although the main nursery building is next to the dwelling with a shared driveway and parking area. I can see from the planning history included with the Council's officer report which resulted in the refusal of the related planning application (Ref 19/2293/FFU) that the use for the nursery involved the change of use of part of the dwelling. I cannot know whether there is any complete physical and functional separation between the dwelling and nursery school or from the other activities within the land occupied by the appellant and their various activities.
6. The car park which is specified in the allegation on the notice (also referred to within the requirements as the hardstanding area) is claimed by the appellant to be used by staff of the nursery. It seems logical though that parking across the site which does not seem to be specifically allocated, may be used flexibly by various users. Some parking appears from the aerial image from 2021 to also occur within the field to the north-west of the yurt.
7. The Council's officer report also sought authority to take enforcement action. This refers to the creation of a "new planning unit" but also to a functional link between "the house and the site in terms of the Montessori nursery school, which is based in the house but uses the yurt for certain classes and activities." This lends weight to my concerns about the use as alleged involving a broader mix of primary activities than has been alleged.

Injustice

8. I have a duty to try and get a notice in order where I can. I have broad powers to correct or vary the notice under s176(1)(a) and (b) but this can only be undertaken where it would not cause injustice to the appellant or to the Council.

9. If I were to reduce the scope of the notice to define a smaller area for the mixed use as already alleged, that would not seem to accurately reflect the nature of the use that has occurred. In addition, the evidence has been submitted on the basis that the mixed use covers a broader area. Some of the evidence has been targeted at the existing red line on the notice plan. If I were to reduce the area it could affect the appellant's case on ground (d) in particular which could have implications if I were to uphold the notice.
10. I have also considered whether I could broaden the scope of the notice to describe more accurately the mixed use. However, neither of the main parties has submitted representations and evidence in relation to what would be a significantly different notice. Even if the described use was broadened but the requirements were not (with the undisputedly lawful primary uses being allowed to remain) the case would be further complicated in ways not expected by either main party. For instance, the implications of 'under-enforcement' by reason of s173(11) of the Act can produce consequences unintended by any party. Upon compliance with the requirements, a new planning permission would be granted for the elements of the mixed use that are not required to cease. That would supersede any other planning permission and any conditions attached to them. The parties have not had to address those possibilities given how the alleged unauthorised use is currently described.

Conclusions

11. I therefore have concerns about the way in which the notice has been drafted. I am also concerned that if I were to use my powers under s176(1)(a) and (b) of the Act, it could cause injustice to both the Council and the appellant. If the notice is quashed on this basis, it does not affect the ability of the Council to reconsider the matter.
12. For the reasons given above I conclude that the enforcement notice does not specify all of the elements of what may be a broader mix of uses within the planning unit. It is not open to me to correct the errors or vary the notice in accordance with my powers under section 176(1)(a) and (b) of the Act, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances the appeals under grounds (a), (c), (d) and (f) as set out in section 174(2) of the 1990 Act as amended do not fall to be considered.

Andy Harwood

INSPECTOR