



Appeal Decision

Site visit made on 10 July 2023

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 August 2023

Appeal Ref: APP/M1710/C/21/3281833

Land at Tall Trees, Kiln Way, Grayshott, Hindhead GU26 6JF

- 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 Ms Juliet Auburn against an enforcement notice issued by East Hampshire District Council.
 - The enforcement notice was issued on 14 July 2021.
 - The breach of planning control as alleged in the notice is: Without planning permission and within the last 10 years, a material change of use of land to mixed use of residential and fox/animal sanctuary, with the erection of structures/enclosures to facilitate the use.
 - The requirements of the notice are: 1. Cease the use of the Land as a fox/animal sanctuary. 2. Remove from the Land all structures and enclosures associated with the use as a fox/animal sanctuary. 3. To restore the Land to its previous condition before the planning breach set out took place.
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (e), (f) and (g) 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.
-

Summary of Decision

1. The appeal is dismissed and the enforcement notice upheld subject to a variation.

The ground (e) appeal

2. This ground of appeal concerns whether the enforcement notice was properly served on everyone with an interest in the land.
3. The appellant contends there is a mortgagee that was not served with a copy of the notice. This would appear to be the case based on the evidence before me. However, I have powers under S176(5) of the Act to disregard non-service provided that neither an appellant nor other relevant persons had been substantially prejudiced by the failure to serve.
4. Accordingly, given the appellant has then exercised all the available grounds of appeal, it cannot be said that there has been substantial prejudice to a relevant person. Indeed, there is then very little evidence before me that this is the case, and the absence of representations from the mortgagee does not persuade me otherwise.
5. The appeal on ground (e) therefore fails.

The ground (b) and (c) appeals

6. For the ground (b) appeal to succeed the onus is on the appellant to demonstrate, on the balance of probabilities, that the alleged breach of planning control, namely the mixed use as a fox/animal sanctuary, has not occurred as a matter of fact. For the appeal to succeed on ground (c) the onus is on the appellant to demonstrate, on the balance of probabilities, that there has not been a breach of planning control. This could be because the matters alleged do not constitute development, planning permission has already been granted for the matters alleged in the enforcement notice or they are permitted development.
7. The term sanctuary does not imply that it comprises an independent entity operating on a significant scale separately from the use of the dwelling, with permanent staff. Indeed, a mixed use has been alleged, which is not misleading. There is then no dispute between the parties that this is not taking place other than within the curtilage of the dwelling, or that this is not the planning unit.
8. I appreciate that the rehabilitation and release of foxes is seen by the appellant as a hobby. There is accordingly no staff or office, and the rescue service is not advertised or open to the public. The activity is undertaken without payment.
9. Whilst having an animal, or the keeping of a certain number of animals, would clearly not require planning permission, as a matter of fact and degree, there is a point at which the keeping of animals can amount to a material change of use of a residential property. This is because the character of the use or activity could no longer reasonably be described as merely incidental to the enjoyment of the dwellinghouse. This depends on the individual circumstances of the case.
10. The wider area is rural in character, but the appeal site forms one of a number of residential properties. The size of the site is reasonably large. I could however see during my site visit that whilst there is no physical separation between the domestic and other activities at the site, the principal enclosure is of a significant scale, comprising at least 4 parts, with various structures, to facilitate the different stages of rehabilitation. The sheer scale of the principal enclosure is also highlighted by the plan provided by the appellant, and which dwarfs the footprint of the dwellinghouse.
11. I also do not accept that the activity relates to a small number of foxes. It was also not necessary for the Council to confirm the precise number of foxes when it issued the enforcement notice. In any event, the evidence before me is that the number fluctuates, with up to 24 foxes having been kept at the site. It is then contended that there were 16 foxes when the notice was issued, and I was advised of the same figure on the day I undertook my site visit.
12. Even using the figure of 16 foxes, it is a significant number. They are not usually domesticated animals, and indeed this does not appear to be the intention of the appellant. Moreover, there is considerable evidence before me from interested parties of significant issues arising from odour, which would not ordinarily be expected to arise from an incidental residential use.
13. In considering the evidence in the round, as a matter of fact and degree, the character of the use cannot be reasonably described as merely incidental to the enjoyment of the dwellinghouse. Whilst it might be regarded by the appellant

as a hobby which may primarily be for her to determine as incidental, on the balance of probabilities the activity is actually one that goes beyond the mere personal enjoyment of the occupants of the dwellinghouse and what could normally be expected to occur within a curtilage. Accordingly, the activity does amount to development for the purposes of s55 of the Act and a mixed use has arisen. It is then not for me to speculate as to the precise number of foxes that would trigger this mixed use.

14. In light of my findings, it follows that the structures/enclosures cannot benefit from permitted development rights, as they are not for purposes incidental to the enjoyment of the dwellinghouse as required by the Order¹. Moreover, the Council has taken enforcement action against a mixed use, and so even if parts of the structure such as fencing do not exceed 2m in height, works integral to the unauthorised use can be required to be removed, even if they amounted to permitted development, which is entirely consistent with case law². I am however also not persuaded the principal structure would have been permitted development in any event, because I could see during my site visit that parts of the building operations exceeded 2m in height.
15. No planning permission has then been brought to my attention for what has been alleged in the enforcement notice.
16. Accordingly, the appeals on grounds (b) and (c) therefore fail.

The ground (d) appeal

17. For the ground (d) appeal to succeed the onus is on the appellant to demonstrate, on the balance of probabilities, that at the time the enforcement notice was issued it was too late to take enforcement action against the matters stated in the notice.
18. The appellant restricts this ground of appeal to the principal enclosure, which I accept constitutes a form of operational development. It is contended that it was constructed in February 2016 and April 2017 and is therefore immune from enforcement action on the 4-year rule, emanating from s171B(1) of the Act.
19. However, the Council has not taken enforcement action against the operational development of the principal enclosure. Rather, it has taken enforcement action against an unauthorised mixed use and along with-it the operational development that has facilitated the use. The enforcement notice is clear on its face that it has been issued pursuant to the 10-year rule, which emanates from s171B(3) of the Act.
20. Thus, an enforcement notice that is directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might be immune from enforcement action, so that the land is restored to its condition before the unauthorised change of use took place. This is again entirely consistent with the aforementioned case law.

¹ Class E of Part 1 to Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015

² *Murfitt v SSE* [1980] JPL 598, *Somak Travel v SSE* [1987] JPL 630, *Kestrel Hydro v SSCLG & Spelthorne BC* [2016] EWCA Civ 784

21. It is therefore not open to the appellant to disaggregate the principal enclosure for the purposes of a ground (d) appeal, as the notice has been issued pursuant to s171B(3) of the Act and therefore on the 10-year rule.
22. Given evidence pertaining to a 10-year period is not before me, the appeal on ground (d) therefore fails.

The ground (a) appeal

Main Issue

23. The main issue is the effect on the living conditions of neighbouring occupiers arising from the mixed use of the site as a fox/animal sanctuary, having particular regard to odour.

Reasons

24. As I have already noted, the wider area is rural in character, but the appeal site forms one of a number of residential properties. The size of the site is then reasonably large. The development before me relates to the mixed use of the site to include a fox/animal sanctuary, with the erection of structures and enclosures which facilitate this use.
25. The fox sanctuary may not be on a large scale if it were at a commercial or specialist facility, but in a residential context, it comprises a significant enclosure with associated structures with evidence it has consequently accommodated up to 24 foxes.
26. Even if I restrict my assessment to 16 foxes, which is a figure advanced by the appellant, it still results in the same significant enclosure and a considerable number of non-domesticated animals being taken through the stages of rehabilitation, to eventual release.
27. Given the number and content of interested party representations concerning the issue of odour, I do not find these to be mere unsubstantiated assertions. Accordingly, significant community dissatisfaction has resulted from a mixed use that has seriously affected the amenity of the area and general wellbeing of residents.
28. The appellant disputes these representations and states there is no means of verifying whether they are correct. However, I am persuaded that the keeping of this many foxes is likely to raise the odour concerns that have been expressed. The appellant could have provided evidence in the form of professional monitoring reports to dispute this, but has not done so, which I consider to be telling. The development has therefore failed to consider localised impacts and means to ameliorate those. It is the responsibility of the appellant to consider these. Even though such matters may equally apply to the Council's Environmental Health department, it does not provide grounds to grant planning permission for development that has otherwise given rise to a living conditions harm in planning terms.
29. The appellant has then requested that I grant planning permission subject to a condition restricting the number of foxes kept at the site. No suggested figure has been provided, and in light of the harm I have identified, and which has arisen with fluctuating numbers at the site, any figure that I arrive at would be an entirely arbitrary one. It would therefore need to be supported by evidence

and corresponding measures for odour control that are not before me and which to leave as conditional matters would result in an unacceptably high level of uncertainty. Moreover, it would also be necessary to seek a corresponding reduction in the size of the enclosures and structures, and there are no details before me concerning such matters.

30. I therefore conclude the development is harmful to the living conditions of neighbouring occupiers having particular regard to odour in contravention of Policy CP27 of the East Hampshire District Local Plan: Joint Core Strategy, adopted 2014 (the LP). This policy, amongst other things, requires development to not result in pollution which prejudices the health and safety of communities and their environments. For the same reasons the development conflicts with the living conditions objectives of the National Planning Policy Framework. I however do not find direct conflict with Policy CP1 of the LP, which relates to the presumption in favour of sustainable development.
31. There is some suggestion by the Council that the development harms the character and appearance of the area, but the notice was not issued for this reason and there is little evidence to otherwise persuade me this is the case.

The ground (f) appeal

32. The purpose of the enforcement notice is clearly to remedy the breach of planning control and it does not seek to under-enforce. Therefore, for an appeal on ground (f) to succeed it would be necessary for the appellant to explain why the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control and propose lesser alternatives steps.
33. I have already considered whether there has been a breach of planning control. It is not for me to speculate what number of animals then triggers that breach. In the absence of a planning permission or certificate of lawfulness, no fallback position reasonably exists.
34. The requirements of the notice do not stipulate that no animals should be kept at the site. I have then also considered the planning merits of retaining the use and commented on the prospect of keeping a lesser number of foxes.
35. The requirements of the notice therefore go no further than remedying the breach of planning control and do not abrogate pre-existing rights. The appellant is best placed to know which structures and enclosures then need to be removed to comply with the notice, in order that the land is restored to its previous condition. Accordingly, and in the absence of actual proposed lesser steps, the appeal on ground (f) therefore fails.

The ground (g) appeal

36. The appellant contends that the time given to comply with the requirements of the enforcement notice are too short and unless suitable alternative locations could be found, the animals would have to be put down.
37. There is then only limited evidence before me regarding the lack of suitable alternative locations or why 6 months would be required to find these. I do however recognise that a period of 2 months, given the need to also remove the structures and enclosures, would be too short, and so a period of 4 months

would therefore strike the appropriate balance and not unduly perpetuate the breach of planning control.

38. The appeal on ground (g) therefore succeeds to this extent.

Overall Conclusion

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

Formal Decision

40. It is directed that the enforcement notice be varied by:

- substituting '4 *months*' as the time for compliance within section 6 of the notice.

41. Subject to this variation the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Paul T Hocking

INSPECTOR