



Appeal Decisions

Site visit made on 3 October 2023

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 January 2024

Appeal A Ref: APP/A0665/C/23/3318777

Land at Marsh Lane, Dutton, Northwich, Cheshire WA4 4EY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Secure Dog Exercise Areas Ltd against an enforcement notice issued by Cheshire West and Chester Council.
- The notice was issued on 17 February 2023.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land from agricultural to a dog exercise area with associated fencing, gates and hardstanding ("the unauthorised development").
- The requirements of the notice are to:
 - (i) Cease the use of the Land as a dog exercise area
 - (ii) Remove the hardstanding, fencing, gates, jumps, benches and other paraphernalia associated with the use of the land as a dog exercise area from the Land.
 - (iii) Reinstate the land to its condition prior to the breach taking place.
- The period for compliance with the requirements is: 3 calendar months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Appeal B Ref: APP/A0665/W/23/3319849

Land off Marsh Lane, Dutton, Northwich WA4 4EY

- 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 Secure Dog Exercise Areas Ltd against the decision of Cheshire West and Chester Council.
- The application Ref 22/04104/FUL, dated 2 November 2022, was refused by notice dated 16 February 2023.
- The development proposed is change the use of an agricultural field to a dog exercise area.

Decisions:

Appeal A

1. It is directed that the enforcement notice is varied by:
 - At section 5(ii) of the notice, the deletion of the words 'fencing, gates,' so that it reads '(ii) Remove the hardstanding, jumps, benches and other paraphernalia associated with the use of the land as a dog exercise area from the Land.'
 - The deletion of requirement (iii).
 - At section 6, the deletion of '(ii) and (iii)' and '3' and the insertion of 'and (ii)' and '12' so that it reads '(i) and (ii) above within 12 calendar months from the date this notice takes effect'.
2. Subject to the variations above, the appeal is dismissed and the enforcement notice is upheld.

Appeal B

3. The appeal is allowed and planning permission is granted for change the use of an agricultural field to a dog exercise area at Land at Marsh Lane, Dutton, Northwich WA4 4EY in accordance with the terms of the application, Ref 22/04104/FUL, dated 2 November 2022, and the plans submitted with it, subject to the conditions set out in Appendix 1 below.

Preliminary Matters

4. Since the appeal was made, a revised National Planning Policy Framework (the Framework)(December 2023) has been published. Although paragraph numbers with respect to the Green Belt have changed, the document has not raised any new matters which are determinative to this appeal.

Appeal B: S78 Appeal

Main Issues

5. The main issues of the appeal are:
 - Whether the appeal scheme is inappropriate development in the Green Belt having regard to the National Planning Policy Framework (December 2023)(the Framework) and relevant development plan policies;
 - The effect of the appeal scheme on the openness of the Green Belt;
 - The effect of the appeal scheme on the character and appearance of the area; and
 - 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 required to justify the appeal scheme.

Reasons

Whether inappropriate development in the Green Belt

6. The main parties do not dispute that the appeal site lies within the Green Belt. Policy STRAT 9 of the Cheshire West and Chester Council Local Plan (Part One) Strategic Policies (2015)('the LP1') seeks to protect Green Belt in line with the National Planning Policy Framework. The National Planning Policy Framework (the 'Framework')(December 2023) identifies that the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open. It goes on to state that inappropriate development is harmful to the Green Belt and should not be approved except in very special circumstances.
7. The construction of new buildings should be regarded as inappropriate in the Green Belt subject to a number of exceptions as set out in paragraph 154, including b) the provision of appropriate facilities (in connection with the existing use of land or a change of use) for... outdoor recreation...; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it.
8. Paragraph 155 advises that certain other forms of development are also not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it. These are: b) engineering

operations; and e) material changes in the use of land (such as changes of use for outdoor sport or recreation...).

9. The appellant suggests that the use of the land as a dog exercise area would fall to be considered as 'outdoor recreation', a matter which is not disputed by the Council. Although the facility would be used to train dogs, this would typically be done by owners in their spare time for fun and so I would agree that the activities which take place within the appeal site should be considered to be 'outdoor recreation' and that it falls to be considered under paragraph 155e) of the Framework. Since the erection of the enclosures are necessary for the use, I consider they should be considered under paragraph 154b)¹.
10. Paragraphs 154b) and 155 of the Framework, contain a specific test about whether openness is preserved, in determining whether the proposal should be categorised as inappropriate development. The correct approach is to consider the impact or harm, if any, wrought by the change. The openness of the Green Belt has a spatial aspect as well as a visual aspect. How to take account of the visual effects is a matter of planning judgement rather than one of legal principle.
11. The appeal site comprises a substantial area which is located off Marsh Lane. Gates have been erected between the area of hardstanding and the exercise area and fencing delineates the exercise area from the remainder of the field. Within the exercise area, equipment is placed. A substantial area of hardstanding has been installed by the entrance of the facility, which is visible from Marsh Lane.
12. The appellant proposes to replace the hardstanding area with an eco-grid, which would allow grass to grow through it. While I have no substantive details as to the system that would be used, in my experience, it is likely to be possible to design a scheme which limits the visual effect of the parking area. The highways officer has recommended a condition to secure the formation and grading of the access. This is likely to include hardstanding of some sort rather than an eco-grid. Nevertheless, I consider the area of hardstanding which is likely to be required would be limited in area and so it would not adversely impact on openness.
13. Although vehicles parked within the site would have a spatial effect, since it would be possible to limit use of the appeal site to one booking at a time and no more than 6 dogs at a time, the total number of vehicles which would be parked in the site at any one time would be limited and so the resultant spatial effect would be limited. Moreover, vehicles are unlikely to be parked within the site when the exercise area is not in use. Limiting the hours that the exercise area can be used would also limit its spatial effect.
14. I saw that there is limited paraphernalia associated with the dog exercise use within the site. The equipment is modest in size and is located on one side of the site in a linear fashion, with seating. Views into the site are limited from Marsh Lane by virtue of a mature hedgerow. Although the fencing is visible from outside of the site, the appellant has used post and wire fencing, which allows views through it and limits its visual impact. As a consequence, the majority of the appeal site appears open and so the appeal scheme has not resulted in encroachment into the countryside.

¹ In line with the findings of the Inspector in APP/M1005/W/21/3281517.

15. For the reasons given above, I find that the appeal scheme preserves the openness of the Green Belt and does not conflict with the purposes of including land within it. Consequently, the appeal scheme is not inappropriate in the Green Belt and there is no conflict with policy STRAT9 of the LP1 in this regard.

Character and appearance

16. Policy STRAT9 of the LP1 seeks to protect the intrinsic character and beauty of the Cheshire countryside by restricting development to that which requires a countryside location and cannot be accommodated within identified settlements, including small scale and low impact rural diversification schemes appropriate to the site, location and setting of the area.
17. The business is intended to provide a private space, within which dogs can be exercised without potential triggers which may be found when walking in urban areas. A countryside location is therefore required so that dogs can be exercised away from other stimuli and with sufficient space so that they can be let off the lead, if necessary.
18. Policy ENV6 of the LP1 seeks development which respects local character, amongst other things and policy DM3 of the Local Plan (Part Two) Land Allocations and Detailed Policies (2019)(the LP2) seeks a high standard of design that respects the character and protects the visual amenity of the local area. While the fencing is taller than may typically be used in agriculture, they are not solid features and, as a result of their design, do not appear out of keeping in a rural setting.
19. Although the construction of an access into the site has the potential to have an urbanising effect, as set out above, the replacement of much of the hardstanding with an eco-grid will limit its visual impact. Furthermore, the retention of mature hedgerows helps retain the rural character of the wider area and additional planting around the site will help further minimise the visual effect of paraphernalia located within the site. Planting proposed by the appellant can be secured by condition.
20. The provision of artificial lighting within the site, whether fixed or mobile, has the potential to have an urbanising effect on the area. However, limiting the hours of use of the site would limit the need for artificial lighting, and could be controlled by condition. Furthermore, where artificial lighting is required, its design and use can also be controlled by condition.
21. Thus, I conclude that there is no significant harm to the character and appearance of the area and no conflict with policies STRAT9 and ENV 6 of the LP1 and policy DM3 of the LP2, the requirements of which are set out above.

Other Matters

22. Concern has been raised by interested parties regarding the effect of the appeal scheme on the living conditions of nearby residents, with regard to noise and disturbance. The appellant has submitted a Noise Impact Assessment in support of the appeal scheme, which concludes that noise arising from the use is very unlikely to cause disturbance to nearby residents during the daytime. The Council advises that conditions controlling hours of operation, as well as limiting the number of dogs and prohibiting simultaneous use by multiple users would ensure the use does not lead to significant adverse

impacts in relation to residential amenity and minimise the likelihood of dogs fighting.

23. I note concerns regarding the effect of the use of the land on livestock and other animals. However, the site would be bound by fencing. Planting around the site would provide a visual barrier between users of the adjacent fields. Furthermore, it is not uncommon for dog walkers to use roads and lanes which abut fields containing livestock, or indeed for dog walkers to use public rights of way which pass through or by fields containing other animals.
24. Concern has been raised regarding the increase in the number of vehicles using Marsh Lane and users of the site parking on grass verges. I note the Highways Officer advises that the low intensity nature of the use would not result in unacceptable pressure on the operation of the local highway network or highway safety. The provision of parking within the site and the inclusion of a condition limiting the use to one customer at a time will limit the number of vehicles parking within the site at any one time and should ensure that vehicles do not need to park on grass verges.
25. It is suggested that there may be restrictive covenants on the land which would prevent, amongst other things, the keeping of more than 2 dogs on the land. However, such matters are outside the scope of this appeal.
26. It is suggested that allowing the appeal would open the flood gates to other commercial opportunities in a Green Belt and the surrounding countryside. However, I see no reason why allowing the appeal scheme would result in other commercial development being approved, since each proposal would need to be assessed on its own merits.

Conditions

27. Although the appeal scheme is partly retrospective, there are some proposed elements which have not been implemented, such as the eco-grid system. For the avoidance of doubt, I consider the inclusion of a plans condition is therefore necessary in this case. I shall also include a condition requiring the implementation of the proposed planting scheme, in the interests of protecting the character and appearance of the area.
28. The Highways Officer requests the inclusion of conditions to secure the satisfactory formation of the access and the provision of a turning and parking area for cars. I agree such matters are necessary to address the points I have raised above regarding the effect of the appeal scheme on the Green Belt and the character and appearance of the area and to ensure there is no harm to highway safety.
29. I shall impose conditions 2 and 3 to ensure that details of the access and parking area are submitted, approved and implemented, so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and so it is not possible to use a negatively worded condition to secure the approval and implementation of the access and parking area before the development takes place. The conditions will ensure that the development can be enforced against if the requirements are not met.
30. The Environmental Health Officer has recommended that a condition limiting hours of use, limiting the number of dogs allowed on site at any one time and

prohibiting simultaneous hire by multiple users would address the potential for harm from noise. I consider it reasonable to limit the use of the site in this way, since dogs who are not familiar with each other are more likely to generate noise.

31. The appellant proposed opening times of 8am to 7pm Monday to Friday during the summer and 8am to 5pm Monday to Friday during the winter, and 8am to 1pm weekends and Bank Holidays. The Council suggests slightly more restrictive hours of operation during weekdays and no operations on Sundays or Bank Holidays. Occupants of nearby properties would reasonably expect peace and quiet in the evenings and over much of the weekend and on Bank Holidays. As such, I consider the hours suggested by the Council to be more appropriate in this case.
32. Given the use of the site, the collection of dog waste from within the site is necessary. Since the provision of bins has the potential to affect openness of the Green Belt and the character and appearance of the area, I shall include a condition to secure the provision of details to ensure this is adequately controlled. As with conditions 2 and 3, there is a strict timetable for compliance because permission is being granted retrospectively.
33. I have considered whether a condition limiting the use of external lighting is necessary. Limiting the hours that the facility can be used so that they fall within daylight hours will significantly limit the need for external lighting to be used. However, some lighting may be needed for maintenance, which is likely to be limited in extent and duration. I shall therefore include a condition.

S78 Conclusion

34. For the reasons given above, I conclude that the appeal scheme is not inappropriate development in the Green Belt and would not harm the character and appearance of the area and accords with the development plan as a whole. Consequently, Appeal B should be allowed subject to the conditions set out above.

Appeal A: S174 Appeal

Ground (b)

35. An appeal under ground (b) is made on the basis that the matters stated in the notice as constituting the breach of planning control, have not occurred. The onus of proof is firmly on the appellant to show that some or all of the alleged matters had not in fact occurred by the time the notice was issued, on the balance of probabilities.
36. The main thrust of the appellant's case under this ground is that the canine exercise equipment are chattels which are outside the definition of development. These appear to be arguments that the matters stated in the notice do not constitute a breach of planning control, which should be considered under ground (c).

Ground (c)

37. An appeal under ground (c) is made on the basis that the matters stated in the notice (if they occurred) do not constitute a breach of planning control. It is for the appellant to make their case on the balance of probabilities. Section 191(2)

of the Act sets out that uses and operations are lawful at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason).

38. The appellant suggests that the fencing is permitted by The Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)('the GPDO'). Part 2, Class A of Schedule 2 permits the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.
39. The appellant states that the dog exercise area opened in October 2021 under Class BA, Part 4, Schedule 2 of the Town and Country Planning (Permitted Development and Miscellaneous Amendments)(England)(Coronavirus) Regulations 2020. While a temporary material change of use of the land would have been permitted by the GPDO, the erection of permanent features, such as fencing, hardstanding and gates would not have been permitted.
40. Although the fencing and gates were erected on site prior to the application for planning permission, from the evidence before me, it seems likely that the fencing and gates that has been erected to form the enclosures within the site, facilitate the unauthorised use and can be required to be removed to remedy the breach. In addition, the items placed within the site, such as benches, jumps and so on, while not necessarily development in their own right², also facilitate the unauthorised use.
41. An enforcement notice concerned with a material change of use, by virtue of section 173(4)(a) of the Act, may require the removal of works which would otherwise be immune, including the removal of those which might not constitute development, or which might have been permitted development if they had not been constructed to facilitate the alleged use.
42. Thus, for the reasons given above, the matters stated in the notice constitute a breach of planning control and the appeal under ground (c) must fail.
43. Within their case under ground (c), the appellant appears to have conflated grounds (c) and (f). Arguments regarding the removal of the fencing are not relevant to an appeal under ground (c) and shall be considered under ground (f) below.

Ground (f)

44. An appeal under ground (f) is made on the basis 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.
45. Section 173(4) of the Act sets out the purposes of a notice are (a) remedying the breach by making any development comply with the terms... of any planning permission..., by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or (b) remedying any injury to amenity which has been caused by the breach.

² Having regard to *Cardiff Rating Authority v Guest Keens* [1949] 1 KB 385.

46. The notice requires the use to cease and the hardstanding, fencing, gates, jumps, benches and other paraphernalia associated with the use of the land as a dog exercise area to be removed from the land and the land to be reinstated to its condition prior to the breach. It is therefore clear that the purpose of the notice is to remedy the breach.
47. The main thrust of the appellant's case under ground (f) is that gates and fencing had already been erected on the site under Class A of Part 2 of Schedule 2 of the GPDO and that these structures can be lawfully sited and used for agricultural purposes.
48. The appellant has drawn my attention to *Caldwell & Anor v Secretary of State for Levelling-Up, Housing and Communities* [2023] EWHC 2053 (Admin), which considered the scope of the power to require the removal of operational development pursuant to the power in section 173(4)(a) of the Act. In this case, the appellant had erected a building more than 4 years prior to the issue of the notice, which was occupied as a dwelling.
49. The enforcement notice required, amongst other things, demolition of that building on the basis that an enforcement notice directed at a breach of planning control by the making of an unauthorised material change of use may lawfully require the land or building in question to be restored to its condition before that change of use took place, by the removal of associated works as well as the cessation of the use itself.
50. In this case, the judge recognised that while *Murfitt*³ clearly establishes the power to require restoration can include the removal of operational development, which could not be enforced against on its own, because of section 171B, that principle is subject to limitations and cannot override or extend the statutory scheme.
51. In the case of *Murfitt*, and *Kestrel Hydro*⁴ to which *Caldwell* refers, the works have been secondary, ancillary or associated with the case of use. They have not been fundamental or causative of the change of use. Whether that limitation is reached was held to be a matter of fact and degree. In the case of *Caldwell*, the judge took the view that to require the removal of the dwelling house went beyond the statutory power. However, in this case, as a matter of fact and degree, I consider the fencing, gates and hardstanding are ancillary and have not been causative of the change of use. Consequently, the enforcement notice can include their removal.
52. Nevertheless, once the enforcement notice has been complied with, the appellant would benefit from permitted development rights. While the GPDO does not grant retrospective planning permission, requiring removal of the fencing and gates is unlikely to achieve anything and is therefore excessive, because the grant of planning permission under the GPDO represents a realistic fallback position and is an obvious alternative that could be achieved with less cost and disruption.
53. I shall therefore vary the notice at requirement 5(ii), so that it does not require the removal of the gates and fencing and shall delete requirement 5(iii) in its entirety. The appeal under ground (f) succeeds to that extent.

³ *Murfitt v Secretary of State for the Environment* [1980] 40 P&CR 254

⁴ *Kestrel Hydro v SoSCLG* [2016] EWCA Civ 784

Ground (g)

54. An appeal under ground (g) is made on the basis that any period specified in the notice...falls short of what should reasonably be allowed. The appellant requests that the time limit for compliance be extended to 12 months to allow them to find another additional income to replace the loss of this business.
55. It is asserted that the business is not having any 'physical harm'. However, where there is no appeal under ground (a), it is not possible to take planning merits into account. Nevertheless, I am granting planning permission for the use of the land under appeal reference APP/A0665/W/23/3319849 and am attaching conditions which require the submission and approval of details for the access and installation of an eco-grid surface, amongst other things.
56. Section 180 of the Act provides that where, after the service of a copy of an enforcement notice...planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission.
57. I consider it is reasonable in this case to extend the compliance period to 12 months, to give the appellant sufficient time to secure the necessary approvals required by condition and carry out the required works. Thus, the appeal under ground (g) succeeds.

S174 Conclusion

58. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control and the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeal on grounds (f) and (g) succeed to that extent.

M Savage

INSPECTOR

Appendix 1: Conditions

1. The development hereby permitted shall be carried out in accordance with the following approved plans: 132034-01 Rev D – Location plan and 132034-02 Rev D – Proposed site plan.
2. The use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 90 days of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i. Within 3 months of the date of this decision a scheme for the formation and grading of the access shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
 - ii. If within 11 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii. If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
 - iv. The approved scheme shall have been carried out and completed in accordance with the approved timetable.
- b. Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be maintained.
- c. In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.
3. The use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 90 days of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i. Within 3 months of the date of this decision a scheme for the replacement of hardstanding with an eco-grid surface, as indicated on drawing reference 132032-02 Rev D, shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
 - ii. If within 11 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii. If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
 - iv. The approved scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be maintained and remain available for the use hereby permitted.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

4. The use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 90 days of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i) Within 1 month of the date of this decision a scheme for the containment and storage of dog faeces and its disposal shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
 - ii) If within 9 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
 - iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved scheme specified in this condition, the storage and disposal of dog faeces shall be undertaken in accordance with the approved scheme.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

5. Within the first planting season following the grant of permission, the hedgerow and tree planting as shown on the Proposed Site Plan, drawing number 132034-02 Rev D shall be fully implemented. If within a period of 5 years from the date of initial planting, any trees or shrubs planted in accordance with the approved landscaping works are removed, die or become diseased or seriously damaged then replacement trees or shrubs shall be planted in accordance with the approved landscaping works in the next available planting season unless agreed otherwise in writing by the local planning authority.
6. Prior to the installation of external lighting, a scheme detailing the lighting equipment to be installed shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall include full details of the hours of operation, location, size, design of luminaries and fittings, type/output of light sources with lux levels. The lighting equipment shall be installed and used in accordance with the approved details.

7. Dogs shall not be permitted within the site except during the following periods:

- i) Between 1 April and 30 September:
 - 0800 to 1800 Monday to Friday
 - 0800 to 1300 Saturday
- ii) Between 1 October and 31 March:
 - 0800 to 1600 Monday to Friday
 - 0800 to 1300 Saturday

The site shall not be used for any purpose at any time on Sundays and Bank Holidays.

8. Use of the dog exercise area shall be limited to one customer at a time and no more than 6 dogs at a time.