



Appeal Decisions

Site visit made on 19 September 2023

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 January 2024

Appeal A Ref: APP/U2235/C/21/3285565

Land at Plot A, Three Sons, Hampstead Lane, Nettlestead, Kent ME18 5HN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr M Brazil against an enforcement notice issued by Maidstone Borough Council.
 - The enforcement notice was issued on 13 September 2021.
 - The breach of planning control as alleged in the notice is, without planning permission, the construction of two outbuildings.
 - The requirements of the notice are:
 1. Demolish the two outbuilding, and
 2. Remove all debris.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) of the 1990 Act 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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Appeal Refs B to E: APP/U2235/C/21/3285542, 3285543, 3285544 and 3285545

Land at Three Sons, Hampstead Lane, Nettlestead, Kent ME18 5HN

- The appeals are made under section 174 of the 1990 Act as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Moses Brazil (Appeal B), Mr Anthony Cooper (Appeal C), Mr Alfie Doyle (Appeal D) and Mr John Harris (Appeal E) against an enforcement notice issued by Maidstone Borough Council.
 - The enforcement notice was issued on 13 September 2021.
 - The breach of planning control as alleged in the notice is, without planning permission, the laying of hardstanding and the construction of fences and gates in the area hatched on the attached plan.
 - The requirements of the notice are to remove from the hatched area at the Land all fences, gates and hardstanding.
 - The period for compliance with the requirements is six months.
 - The appeals are proceeding on the grounds set out in section 174(2) (a), (c) and (d) of the Town and Country Planning Act 1990 as amended. In respect of Appeal B only, since an appeal has been brought on ground (a) and the requisite fee has been paid, an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Summary Decisions

Appeal A is dismissed and the enforcement notice is upheld

Appeals B to E are dismissed and the enforcement notice is upheld

Procedural Matters

1. The Council confirms in the Appeal Questionnaire that the site is not subject to an Article 4 Direction. On that basis, the appellants for Appeals B to E point out that the erection of a wall, fence or means of enclosure of less than 2.0m in height would ordinarily constitute permitted development under Class A, Part 2, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) where not adjacent to a highway. Although not expressly stated as such, on my reading that constitutes an appeal under ground (c) as set out in section 174(2) of the 1990 Act: namely that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control. I have therefore treated it as such.
2. The appellants also contend that, if their primary position that the erection of the fences does not constitute a breach of planning control is not accepted, then the more reasonable remedy would be to require them to be reduced in height to conform with Class A, Part 2, Schedule 2 of the GPDO. On my reading, that constitutes an appeal on ground (f) as set out in section 174(2) of the 1990 Act: namely, that the requirements of the notice exceed what is necessary. I have therefore treated it as such.
3. Appeals B to E include an appeal made on ground (d) as set out in section 174(2) of the 1990 Act. The appellants' evidence in relation to that ground of appeal is entirely focused on the laying of hardstanding and the construction of fences and gates alleged in the enforcement notice. The appellants also contend that there is an issue with the scope of the notice and the plan which has been appended to it. It is further contended that with this evidence it is clear that the notice is not correct and should be amended. However, on my reading, the 'scope' of the notice referred to by the appellants actually forms the basis for their appeal under ground (d) rather than to the validity of the notice. I have therefore considered the point raised on that basis.

Background

4. On 1 June 2017, a temporary planning permission was granted on appeal (APP/U2235/C/15/3138039) for the change of use of the land from agriculture to a mixed-use comprising agriculture and the stationing of caravans in residential occupation and the carrying out of operational development¹. A condition imposed upon that permission (Condition 2) required that at the end of 5 years the use thereby permitted shall cease and all caravans, buildings, structures, materials and equipment brought on to the land, or works undertaken to it in connection with the use, shall be removed and the land restored to its condition before the development took place. That permission expired in June 2022 has not been renewed. Consequently, as it currently stands, the site is being occupied without the benefit of planning permission.
5. On 17 July 2017, on application by the Council, an Injunction was granted by the Court preventing, amongst other things, the bringing onto the land of further caravans and the undertaking of any further development, including works in preparation for use of stationing of caravans for residential use. Since that time, the Council has not accepted any further planning applications in

¹ Although that appeal was made in relation to all of the land the subject now subject to these appeals, this permission was only in relation to land now subject to Appeal A, the appeal otherwise being dismissed.

relation to this site. However, I am informed by the appellant (but not verified by the Council) that in the last couple months the Council has reconsidered the merits of submitting a fresh planning application for this site albeit, as I understand it, this only relates to the site subject to Appeal A. I understand that the appellant's agent is currently preparing a planning application to be submitted to the Council presumably, but not expressly stated as such, for the stationing of caravans on the site for residential occupation.

Appeal B to E: the appeals on ground (c)

6. An appeal on this ground is one of the 'legal' grounds of appeal, in which the burden of proof is on the appellant to show, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control.
7. The appellant's case on this ground of appeal is that the fences that have been erected do not exceed 2m in height and are therefore permitted by Class A, Part 2, Schedule 2 of the GPDO. However, the appellant has provided no evidence to support that contention. Under this ground of appeal, it is for the appellant to show that the erection of the fences does not constitute a breach of planning control: it matters not the Council has not specifically advanced that the fences exceed 2m metres in height. In any event, it was evident from my site visit that some of the fences (and the gate posts supporting them) either clearly exceed 2m in height or were very close to that height, such that it could not be ascertained without measurement that they did not exceed 2m in height. Those fences/gate post would therefore not have benefitted from any deemed planning permission granted under Part 2, Schedule 2 of the GPDO.
8. I am also mindful of the Injunction granted in July 2017 which, amongst other things, prevented works in preparation for use of stationing of caravans for residential use. Article 3(5) of the GPDO provides that the planning permission granted by the GPDO 2015 does not apply if, in the case of permission granted in connection with an existing use, that use is unlawful. The appellant has provided no convincing evidence as to when these fences were erected. I therefore cannot discount the possibility that the erection of these fences took place after the enforcement notice came into effect following the dismissal of the appeal in June 2017 (APP/U2235/C/15/3138039) insofar as it related to the wider site and/or was carried out after the Injunction came into effect, such that the erection of those fences was unlawful. In that scenario, by reason of Article 3(5) of the GPDO, any planning permission that may otherwise have been granted by the GPDO 2015 does not apply in this case.
9. Accordingly, on the balance of probability, the appeals on ground (c) fail.

Appeals B to E: the appeals on ground (d)

10. The appeal on this ground is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters. In order to succeed on this ground, the appellants must show that the development was substantially complete on the date four years before the notice was issued. The relevant date in this case is therefore 13 September 2017, that being the exact date four years before the notice was issued. The test in this regard is the balance of probability and the burden of proof is on the appellants.

11. An aerial photograph taken in 2017 shows that an area of hardstanding of some description was in place on the plot on the north-west corner of the site on that date. The photograph is dated July 2017, and therefore at around the time that the Injunction was issued on 17 July 2017. It is of course entirely possible that the hardstanding was substantially complete before that photograph was taken, but I have no further evidence from the appellant to demonstrate that. An aerial photograph taken in May the following year shows slight variations in the extent of the plot covered by hardstanding, which would tend to suggest that it was not substantially complete in July 2017. However, in the absence of any further evidence in that regard, particularly from ground level, I am unable to reach any firm conclusions on that point.
12. It is clear from both the photograph taken in July 2017 and that taken in May 2018, as well as a later photograph taken in 2020, that the plot in the north-eastern corner of the site was not laid to hardstanding on either of those dates. These photographs all show that this plot was largely covered by grass at all those times. No other areas of hardstanding are evident in the photograph taken in July 2017, and none are claimed by the appellants.
13. The aerial photographs taken in July 2017 and May 2018 shows that both the plot in north-east corner of the site and that in the north-west corner had some fencing around parts of the perimeter, notably the front boundary of the plot in the north-west corner and the rear of the plot in the north-east corner. However, neither photograph is of good clarity and it difficult to make out fencing on the other parts of the boundaries of those plots. At the most, any fencing that may be present appears to be low in height and is not a prominent feature in those photographs.
14. By contrast, the aerial photograph taken in May 2020 is of exceptional clarity. By that time, hardstanding had been laid on the adjoining plots and, with that, fencing had clearly been erected on the boundary with the plots on the north-east and north-west corners of the plot. The clarity of the 2020 photograph reveals that fencing has been erected on the other parts of the boundaries of those plots. However, notwithstanding the difference in clarity compared with the photographs taken in 2017 and 2018, I have great difficulty in reconciling the prominence of the fencing in the 2020 photograph with the indistinct line of fencing in the earlier photographs. It is therefore difficult to escape the conclusion that the fencing may not have been substantially complete in 2017 or 2018, or is only partially completed on those dates, and that it is the substantially complete fencing that is visible in the later photograph.
15. With an appeal on ground (d), the burden of proof is on the appellant. In this case, the appellants' case stands or falls on a single aerial photograph taken in July 2017, which is only a couple of months shy of the relevant date of 13 September 2017². The appellants have no other evidence to corroborate their version of events. Even though the Council has provided no evidence of its own to contradict that of the appellants or make their version of events less than probable, I find that the appellants' evidence is not sufficiently precise and unambiguous to show that, on the balance of probability, either the hardstanding or the fencing was substantially complete on the relevant date.
16. Accordingly, on the balance of probability, the appeals on ground (d) fail.

² The aerial photograph taken in May 2018 is less than four before the date on which the notice was issued, and therefore does not assist the appellants.

Appeal A: the appeal on ground (a) and the deemed planning application

17. The ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. The Council has stated three substantive reasons for issuing the enforcement notice, from which the following main issues are raised:

- whether the breach of planning control alleged in the notice is inappropriate development in the Green Belt for the purposes of the National Planning Policy Framework (Framework)
- the effect of the development on the character and appearance of the area
- whether the development increases the risk of flooding on the site and elsewhere, and
- if the breach of planning control alleged in the notice is inappropriate development in the Green Belt, 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 the breach of planning control alleged in the notice is inappropriate development in the Green Belt

18. Paragraph 149 of the Framework indicates that, with some exceptions, the construction of new buildings is inappropriate in the Green Belt. The appellant accepts that the construction of the two outbuildings does not fall within any of the exceptions set out in Paragraph 149 of the Framework and that the breach of planning control that has occurred amounts to inappropriate development in Green Belt. Paragraph 147 of the Framework confirms that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

Character and appearance

19. The appeal site falls within the Nettlestead Green Farmlands Character Area as defined in the Council's Landscape Character Assessment (2013) (LCA). The key characteristics of this Character Area include a reasonably flat and low-lying landscape, native hedgerows, traditional farmsteads and a small field pattern. It is an incoherent landscape. The Council's Landscape Capacity Study: Sensitivity Assessment (2015) (LCS) identifies that this landscape is in poor condition overall. The landscape sensitivity is deemed to be low. The guidelines and mitigation state that new development should respect the local character and improve the strength of character through promoting the use of local materials and style of development.

20. The appeal site and surroundings exhibit many of the key characteristics of the Nettlestead Green Farmlands Character Area, including native hedgerows and a small field pattern. Although perhaps not of the local vernacular, the design of the outbuildings and the materials from which they are constructed are in my view acceptable. However, the prominent siting of the outbuilding towards the site frontage results in it being visually intrusive in this flat landscape. The scale of the outbuilding toward the rear of the site is excessive. When

combined with the buildings already present on the site, the outbuildings form a conglomeration of buildings, the density and coverage of which is wholly out of keeping with the character of small fields and traditional farmsteads that are key characteristics of this Character Area. As such, as set out in the reasons for issuing the enforcement notice, the development harmfully consolidates sporadic and urbanising development in the countryside.

21. I recognise that the landscape in this Character Area is incoherent and is in poor condition. However, that only serves to make it more important that the character of this landscape is improved as envisioned in the LCS and is not further harmed and fragmented by the presence of these two outbuildings.
22. I conclude that the construction of the two outbuildings subject to the enforcement notice unacceptably harms the character and appearance of the area. I therefore conclude that the development is contrary to Policies SP17, DM15 and DM30 of Maidstone Borough Local Plan (Local Plan). These policies state, amongst other things, that development proposals in the countryside must be of a high quality of design in terms of siting, mass and scale and should maintain, or where possible, enhance local distinctiveness including landscape features. Development will not be permitted where it results in harm to the character and appearance of the area.

Flood Risk

23. The appeal site lies within Flood Zone 3, and so has a high probability of flooding under the Planning Practice Guidance: Flood Risk and Coastal Change and the technical guidance to the Framework on flood risk. As the Council points out, the residential use of the site is already established (albeit the site is currently being occupied without the benefit of planning permission) and, because the buildings are associated with an existing Traveller and Gypsy site, take the view that the Sequential Test is considered to be passed as there is no other reasonable location for the buildings.
24. I am not, however, convinced that is the correct approach. I take the view that, now that the planning permission for the use of the site for the stationing of caravans in residential occupation has expired, the suitability in flood risk terms of the two outbuildings should be properly assessed through the completion of a Sequential Test based on the latest information in relation to flood risk, as part of an up-to-date Flood Risk Assessment (FRA).
25. That is to some extent academic given that there is no FRA of any description before me. Consequently, for example, in terms of the Exception Test required by the Framework, there is nothing before me to show that the development would provide any wider sustainability benefits to the community that might outweigh the flood risk, such that part (a) of the Exception Test would be satisfied. In the absence of a robust and up-to-date FRA, I am unable to conclude that the construction of the two outbuildings would be acceptable in terms of flood risk.
26. In reaching that conclusion, I am mindful that the previous Inspector found that concerns about flood risk would be mollified by the imposition of a condition requiring raised floor levels (APP/U2235/C/15/3138039). However, that was in relation to a different development and was based on up-to-date advice from the Environment Agency confirmed at the Hearing held into that appeal. I do not have the benefit of that same information before me.

27. I conclude that it has not been demonstrated that the development would not increase the risk of flooding on the site and elsewhere. I therefore conclude that the development is contrary to Policy DM15 of the Local Plan. This policy requires, amongst other things, that the site is not located in an area at risk from flooding (zones 3a and 3b) based on the latest information from the Environment Agency or a specific Flood Risk Assessment which has been agreed by the Environment Agency.

Green Belt balancing exercise and conclusion on the ground (a) appeal

28. In accordance with paragraph 148 of the Framework, I attach substantial weight to the harm to the Green Belt by reason of the inappropriate nature of the development. I further conclude that the development subject to the enforcement notice would have an unacceptably harmful effect on the character and appearance of the area, a matter to which I attach significant weight. It has not been demonstrated that the development would not increase the risk of flooding on the site and elsewhere. Given that outbuildings are not intended for residential occupation, this is also a matter to which I attach significant weight³. These harms could not be overcome by the imposition of suitably worded conditions.
29. Against this, the appellant points out that the outbuildings are ancillary buildings to the established use of the site for the stationing of caravans in residential occupation. The appellant therefore considers that the retention of the outbuildings for that purpose needs to be balanced against the needs of preserving the openness of the Green Belt by ensuring their retention is tied to the occupation of the site.
30. I can see the merit of the appellant's argument *had there been a planning permission in place to which to tie the retention of the outbuildings*. That could then have been secured by the imposition of a suitably worded condition. However, that is not the position here, the temporary planning permission granted in 2017 for the use of the site for the stationing of caravans in residential occupation having already expired. The proposition advanced by the appellant is therefore not practical at this time.
31. I am informed by the appellant that a fresh planning application is to be submitted in relation to this site. It is essential that any decision that I make in relation to this appeal does not fetter the consideration of that application by the Council (assuming that an application is to be submitted and then that it is entertained by the Council). Granting a permanent planning permission for the two outbuildings (which is what has been applied for) might fetter, or at the very least influence, the Council's consideration of any application that is submitted. That would not be permissible.
32. I have considered whether (exceptionally in relation to operational development) a temporary planning permission for the retention of the outbuildings could be granted pending the submission of that application, but I have no details or guarantee as to when (or indeed if) an application might be submitted in relation to this site. I am therefore not able to word with sufficient precision a condition specifying the period for which any temporary permission might be granted. This is therefore also not practical at this time.

³ Had the outbuildings been intended for residential occupation, this would have been a matter to which I would have attached substantial weight.

33. For all these reasons, I attach only limited weight to the retention of the outbuildings on the basis that they are ancillary to (and could be tied to), the use of the site for the stationing of caravans in residential occupation.
34. Consequently, the harm by reason of inappropriateness and any other harm, is not clearly outweighed by other considerations, such that the very special circumstances necessary to justify the development do not exist.
35. For the reasons set out above, the breach of planning control alleged in the notice is also contrary to policies in the Local Plan. I have not been advised of any material considerations of sufficient weight, either taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan.
36. Accordingly, I conclude that planning permission ought not be granted for the matters stated in the notice and that the appeal on ground (a) should be dismissed.

Appeal B: the appeal on ground (a) and the deemed planning application

37. The Council has stated three substantive reasons for issuing the enforcement notice, from which the following main issues are raised:
- whether the breach of planning control alleged in the notice is inappropriate development in the Green Belt for the purposes of the Framework
 - the effect of the development on the character and appearance of the area
 - whether the development increases the risk of flooding on the site and elsewhere, and
 - if the breach of planning control alleged in the notice is inappropriate development in the Green Belt, 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 the breach of planning control alleged in the notice is inappropriate development in the Green Belt

38. The laying of hardstanding and the construction of fences and gates is inappropriate development in the Green Belt for the purposes of the Paragraph 149 of the Framework. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

Character and appearance

39. The key characteristics of the Nettlestead Green Farmlands Character Area include native hedgerows and a small field pattern. The laying of hardstanding and the construction of the close-boarded fences, gate posts and gates urbanizes the site and is at variance to those key characteristics. Accordingly, the development is not in accordance with the positive aspects of the Character Area in which the site is located, contrary to Policies SP17, DM15 and DM30 of the Local Plan. These policies require that development should maintain, or where possible, enhance local distinctiveness including landscape features.

Flood Risk

40. Irrespective of whether the hardstanding areas were all constructed of permeable material, the laying of that hardstanding is unlikely to impede the flow of floodwater to any significant extent. However, the same cannot be said of the erection of fences and gates. These are an obvious barrier and impediment to the flow of floodwater across the site and, whilst they would not prevent the passage of floodwater completely, they could potentially displace floodwater to other parts of the site or outside of the site. In the absence of a FRA, there is nothing before me to demonstrate that the development would not increase the risk of flooding on the site or elsewhere. I therefore conclude that the development is contrary to Policy DM15 of the Local Plan.

Green Belt balancing exercise and conclusion on the ground (a) appeal

41. For the remaining plots, it has been advanced by the appellant that these hardstanding areas are required by the occupants for the enjoyment of their land. The appellant points out that whilst the enforcement notice contends that the hardstanding facilitates the residential occupation of some of the plots, the residential use is not the subject of the enforcement notice and should therefore (in his view) be afforded limited weight.
42. The appellant's argument in that respect is wholly misconceived. The Council has provided a comprehensive planning history of the whole site. Apart from the temporary planning permission granted on appeal in 2017 (APP/U2235/C/15/3138039), and which itself has now expired, the planning history confirms that none of the other plots are occupied with the benefit of planning permission. Most, if not all, of the other plots also appear to be occupied in breach of the Injunction issued in July 2017.
43. The corollary is that whilst the areas of hardstanding do facilitate the residential occupation of some of the plots, they are facilitating a residential use of land which is not lawful in planning terms and which is possibly in breach of an Injunction issued by the courts. That is not a sound or justifiable reason for permitting inappropriate development in the Green Belt, and accordingly I attach very little weight to it.
44. I have considered whether the imposition of suitably worded conditions could overcome the harms that I have identified above and make the development acceptable in planning terms. However, in my view the harms identified are intrinsic to breach of planning control that has occurred and could not be overcome by the imposition of conditions.
45. Consequently, the harm by reason of inappropriateness and any other harm, is not clearly outweighed by other considerations, such that the very special circumstances necessary to justify the development do not exist.
46. For the reasons set out above, the breach of planning control alleged in the notice is also contrary to policies in the Local Plan. I have not been advised of any material considerations of sufficient weight, either taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan.
47. Accordingly, I conclude that planning permission ought not be granted for the matters stated in the notice and that the appeal on ground (a) should be dismissed.

Appeals B to E: the appeals on ground (f)

48. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the Town and Country Planning Act 1990 sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control 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. In this case, the requirements of notice are to remove from the Land all fences, gates and hardstanding. The purpose of the notice must therefore be to remedy the breach of planning control that has occurred.
49. The appellants' case on this ground of appeal is that a more reasonable remedy would be to require the fences to be reduced in height to indeed conform to Class A, Part 2, Schedule 2 of the GPDO. However, it is settled case law that permitted development rights under the GPDO cannot be obtained retrospectively. Consequently, whilst the height of the fences and gates could be reduced to a height equivalent to that permitted under Class A, Part 2, Schedule 2 of the GPDO, they would not then become development permitted by that provision in the GPDO. It follows that the breach of planning control would remain and not be remedied.
50. I have considered whether there are any other suitable alternatives to the removal from the Land all fences, gates and hardstanding which would overcome the planning difficulties with less cost or disruption to the appellants, but none are obvious to me.
51. Accordingly, the appeals on ground (f) fail.

Conclusion

52. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold both enforcement notices and refuse to grant planning permission on the applications deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decisions

Appeal A Ref: APP/U2235/C/21/3285565

53. The appeal is dismissed.

Appeal B Ref: APP/U2235/C/21/3285542

54. The appeal is dismissed.

Appeal C Ref: APP/U2235/C/21/3285543

55. The appeal is dismissed.

Appeal D Ref: APP/U2235/C/21/3285544

56. The appeal is dismissed.

Appeal E Ref: APP/U2235/C/21/3285545

57. The appeal is dismissed.

Paul Freer
INSPECTOR