The Planning Inspectorate

Appeal Decision

Site visit made on 5 March 2024

by H Davies MSc MRTPI

an Inspector appointed by the Secretary of

State Decision date: 14 March 2024

Appeal Ref: APP/Q3630/C/23/3317861
Part of Land at Thynne Lodge, Green Lane, Staines-Upon-Thames TW18 3LX

- 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 William John and Mrs Genty Smith against an enforcement notice issued by Runnymede Borough Council.
- The notice was issued on 30 January 2023.
- The breach of planning control as alleged in the notice is without planning permission:
  1) The material change of use of the land from agricultural to a dog day care business (sui generis) and;
  2) The erection of a building (hatched blue on the plan attached).
- The requirements of the notice are to:
  5.1 Cease using the Land for the running of a dog day care business;
  5.2 Remove all items and paraphernalia relating to the dog day care business from the Land;
  5.3 Demolish the building (hatched blue on the attached Plan);
  5.4 Remove all resultant waste and other materials form the Land;
  5.5 Return the Land to agricultural use.
- The period for compliance with the requirements is six (6) months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Act. 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.

Decision

1. It is directed that the enforcement notice is corrected by removing requirement 5.5, "Return the Land to agricultural use", in its entirety. It is further directed that the enforcement notice is varied in section 6, 'Time for compliance', by deleting the words "six (6)" and replacing them with the words "twelve (12)".

2. Subject to this correction and variation the appeal is dismissed, 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.

The notice

3. I have a duty to get the notice in order and s176(1) of the Act grants powers to (a) correct any defect, error or misdescription in the enforcement notice, and/or (b) vary the terms of the notice, provided it would not result in injustice to the appellant or the Council. Requirement 5.5, states "return the Land to agricultural use". However, settled case law[1] has established that an

[1] Lipson & Lipson v SSE & Salford MBC [1976] 33 P&CR 95; [1977] JPL 33

enforcement notice cannot require a former use to be resumed. Cessation of the unauthorised use is achieved by requirement 5.1 and requirement 5.5 is not necessary to achieve the aims of the notice. I will therefore correct the notice by removing requirement 5.5. I am satisfied that I can correct the notice accordingly without causing injustice.

Preliminary matters

4. The Runnymede Borough Council 2030 Local Plan (Adopted July 2020) (LP) states that the Council will exercise strict control over development within the Green Belt in accordance with national guidance. National planning policy regarding the Green Belt is set out in the National Planning Policy Framework (the Framework) and Green Belt policies within the LP are broadly consistent with the Framework. The Framework was updated in late 2023. Green Belt and flood risk policy within it did not change, other than paragraph reference numbers.

5. An application (reference RU.21/0338) was submitted, seeking planning permission for 'Retrospective Change of use of land to the rear of Thynne Lodge from Agricultural to Sui Generis and erection of 1 no. replacement timber framed outbuilding for use as a Dog Day Care Business.' This was refused in April 2021.

The appeal on ground (a) and the deemed planning application

6. An appeal on ground (a) 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 terms of the deemed planning application are derived from the allegation. Hence, the development for which planning permission is sought is the material change of use of the land from agricultural to a dog day care business and the erection of a building.

7. The site to which the deemed planning application relates is within the Green Belt. This is not in dispute. The Framework specifies that development within the Green Belt is inappropriate, with certain specified exceptions, and that inappropriate development is, by definition, harmful to the Green Belt and should not be approved, except in very special circumstances.

Main Issues

8. The main issues are:

   - Whether the development is inappropriate development in the Green Belt, having regard to the Framework and any relevant Local Plan policies;
   - Whether the site is an appropriate location for the development with regards to flood risk;
   - The effect of the development on the living conditions of occupants of neighbouring dwellings; and
   - If the development is found to be 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.

Reasons

Whether the development is inappropriate development in the Green Belt

9. Framework paragraph 154 sets out exceptions, whereby new buildings in the Green Belt would not be inappropriate. Paragraph 154d allows for the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces. This exception is reflected in Policy EE14 of the LP, which also sets out that development should maintain the openness of the Green Belt and clarifies that it is the lawful use of the building which will be taken into account.

10. The Council state that the last lawful use of the land and its buildings was agricultural. The appellant does not contest this but states that the site and the previous main building had been used for the dog business, prior to the building being removed. No evidence has been provided to substantiate this and even if the previous building was used for the dog business prior to its removal, it would not have been its lawful use. Therefore, the new building is not in the same use as the previous.

11. Evidence provided by both parties shows that there was previously a long main building plus 2 small buildings on the site. The main previous building was dilapidated. Its rear half was constructed in blockwork, to a modest height, with a simple pitched sheet roof and frequent openings along its length. The front half, along most of its length, consisted of open sections with no roof, bounded only by low blockwork walls. The appellant comparison drawings seem to suggest that the 2 smaller buildings have been removed entirely, and the replacement building covers only the footprint of the main previous building.

12. However, aerial images and photographs provided by the Council indicate that the replacement building extends across what would have been the main original building as well as at least part of the footprint of one of the smaller buildings. This brings into question the footprint and hence the volume calculations comparing the original to the replacement building. On balance, based on the evidence available to me, I am unable to conclude with any certainty that the replacement building is not materially larger than the buildings it replaced.

13. The appellant concedes that the replacement building is modestly higher than the maximum height of the previous buildings. From my site visit it was evident that the replacement building is fully enclosed, is full height to the front and back, and covered by a shallow pitched roof across the whole of its footprint. Consequently, the design and visual bulk of the appeal building has a greater impact on openness than the mostly half covered and quite open buildings it replaced.

14. On the basis of the above, the replacement building is not in the same use as the previous lawful use and does not maintain the openness of the Green Belt. Therefore, the exception at Framework paragraph 154d does not apply and the building fails to comply with Policy EE14 of the LP. In addition, I cannot be certain the building is not materially larger than the building it replaced, which also fails to meet the requirements of the exception.

15. I have also considered the exception at Framework paragraph 154g, which allows for limited infilling or the partial or complete redevelopment of previously developed land, subject to the impact on openness. This exception is reflected in Policy EE17 of the LP. However, the Framework explicitly excludes land that was last occupied by agricultural buildings (which is the last lawful use of the site) from the definition of previously developed land. Therefore, the site is not classed as previously developed land, so the exception at paragraph 154g does not apply and the building fails to comply with Policy EE17 of the LP.

16. Framework paragraph 155e sets out that material changes in the use of land are not inappropriate in the Green Belt, provided they preserve openness and do not conflict with the purposes of including land within it. This exception is reflected in Policy EE19 of the LP. The use of the site for the dog business has included the addition of substantial areas of artificial grass and fencing with an urban appearance. There are a range of vehicles associated with the use parked on site during operating hours and additional vehicle movements to and from the site. Together, these elements mean the character and appearance of the site is much more urban than it would have been for its lawful agricultural use. Therefore, the unauthorised use fails to safeguard the countryside from encroachment, which is one of the purposes of the Green Belt.

17. Overall, the building and the use are do not meet any of the exceptions set out in the Framework and fail to comply with relevant Green Belt policies of the LP. Therefore, the building and the use constitute inappropriate development in the Green Belt and are, by definition, harmful to the Green Belt.

Flood risk

18. It is common ground that the site is located within Flood Zone 3b and that both the previous and current use of the site class as less vulnerable forms of development. Flood Zone 3b is the functional floodplain, where water has to flow or be stored in times of flood. It is land at the highest risk of flooding. The Planning Practice Guidance[2] (PPG) sets out that development classed as less vulnerable should not be permitted in zone 3b.

19. The Environment Agency were consulted on application reference RU.21/0338 which sought permission to retain the development. They noted the flood risk assessment but concluded the development was contrary to the Framework and the PPG and objected to the development in principle. Their only comment on how to overcome the objection was to demonstrate that the development was not located within Flood Zone 3b.

20. The definition of Flood Zone 3b in the Runnymede 2030 Strategic Flood Risk Assessment, sets out that in developed areas, existing building footprints, where it can be demonstrated that they exclude floodwater, will not be defined as functional floodplain and the planning requirements associated with Flood Zone 3B will not apply. From the provided photographs, it is evident that the previous buildings, which have been removed and replaced, would not have excluded floodwater, so would have been defined as part of the functional floodplain. The replacement building is not on a like for like basis. I therefore consider the building to be bound by the requirements of Flood Zone 3b.

[2] Paragraph: 079 Reference ID: 7-079-20220825

21. In Flood Zones 2 and 3, both the Framework and Policy EE13 of the LP require the use of a sequential test, whereby a sequential, risk based approach to the location of development is applied, with development not being permitted if there are reasonably available sites, appropriate for the proposed development, in areas with a lower risk of flooding. The sequential test may not need to be applied to the change of use, as both the previous and current use are in the less vulnerable classification. However, as set out above, the replacement building which supports and enable the use is subject to the Flood Zone 3b requirements, so the sequential test needs to be applied.

22. On the information made available to me with this appeal, I have insufficient evidence to allow me to conclude that reasonably available sites, appropriate for the development, in areas with a lower risk of flooding, have been investigated and ruled out. Therefore, it has not been demonstrated that the development cannot be directed towards land at lower risk of flooding. Consequently, the development fails the sequential test.

23. The Framework sets out that if it is not possible for development to be located in areas with a lower risk of flooding, the exception test may have to be applied. The exception test is therefore to be applied only if the sequential test has been passed, which is not the case here. Notwithstanding this, even if the exception test were to be applied, to pass it the Framework requires the development to provide benefits to the community which outweigh the flood risk, and, for the development to be safe for its lifetime. The dog business provides some employment and a service to people in the area who own dogs. The scale of these benefits is modest and not sufficient to outweigh the significant flood risk to which I must attach substantial weight. I have been presented with no details to allow me to conclude the building would be safe from flooding for its lifetime or that it would not increase flood risk elsewhere. Therefore, I am unable to conclude that the development would pass the exception test, even if it were to be applied.

24. I note that no people or animals would be on site overnight and that a flood risk management plan could be produced. These factors do not overcome the failure to pass the sequential test or the exception test and this cannot be overcome by imposing conditions.

25. It has not been demonstrated that the site is an appropriate location for the development with regards to flood risk. It therefore does not comply with Policy EE13 of the LP or Paragraphs 165 to 169 of the Framework, which seek to direct development away from areas at highest risk of flooding.

Living conditions of occupants of neighbouring dwellings

26. Dogs are transported to the site by staff, not individual owners, and the number of movements across a day is modest. On this basis, the impact on neighbour amenity from vehicles is unlikely to have a detrimental impact. The number of vehicle movements could be controlled via a planning condition.

27. A noise impact assessment[3] has been submitted, which concludes that the impact on neighbouring occupants of noise from the business would be at a 'low observed adverse effect level'. The PPG noise exposure hierarchy indicates this effect level should be mitigated and reduced to a minimum.

[3] HA Acoustics – 2 May 2023

28. The noise impact assessment recommends that a specific noise management plan be produced. Given the information provided, it seems likely that an appropriate plan would be able to reduce the noise impact to an acceptable level. This could be secured via a suitable planning condition.

29. I conclude that, subject to the imposition of suitably worded planning conditions, the development would not cause unacceptable harm to the living conditions of occupants of neighbouring dwellings. Consequently, I find no specific conflict with Policies EE1 and EE2 of the LP. Together, amongst other things, these seek to ensure that development does not have an adverse impact on the amenities of occupiers of neighbouring properties and that noise impacts are appropriately mitigated.

Whether very special circumstances exist

30. The development is inappropriate development in the Green Belt, which by definition, is harmful. Very special circumstances will not exist unless the harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

31. The development is not excessive in scale and is not visible from public vantage points. Consequently, I consider the degree of harm to openness and the purposes of including land in the Green Belt caused by the development to be modest. Notwithstanding this, in accordance with the Framework, I must attach substantial weight to any harm to the Green Belt. In addition, I have identified harm in terms of flood risk, which would be long lasting, so I attach substantial weight to this harm. I have not identified harm to the living conditions of neighbours so this is a neutral factor.

32. I am informed that the business employs 11 people. It also provides a service to local dog owners. However, the scale of these benefits is small and private, rather than public, so I can afford them only limited weight in favour of the development.

33. Planning permission for a change of use could have been applied for prior to removing the previous building, but it was not. I have no evidence to suggest that had an application been made, it would have been granted. Therefore, I do not consider this to be a valid fallback position and ascribe it no weight in favour of the development.

34. Therefore, these other considerations, taken together, do not clearly outweigh the harm to the Green Belt, and the other harm to flood risk. Consequently, the very special circumstances required to justify a grant of planning permission do not exist and the development conflicts with the Framework and the Local Plan.

Conclusion on ground (a) and the deemed planning application

35. I conclude that the development is inappropriate development in the Green Belt and very special circumstances do not exist, meaning the development conflicts with the Framework. The development also conflicts with Policies EE13, EE14, EE17 and EE19 of the LP and there are no material considerations which indicate that the decision should be taken other than in accordance with the development plan. Therefore, the appeal on ground (a) fails and planning permission is refused.

The appeal on ground (f)

36. An appeal on ground (f) is that the steps required by the notice to be taken, 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. The notice requirements in this case seek to remedy the breach of planning control. As set out above, I find both the building and the use to be unacceptable. Therefore, allowing either the building or the use to remain would fail to remedy the breach.

37. While there was some form of building on site previously, it was dilapidated and has been demolished and replaced. Consequently, planning permission would be required to construct a building, even if it was the same as the building which was there previously. No proposed scheme has been presented under this appeal.

38. As established by case law[4], a notice 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, so that the Land is restored to its condition before the change of use took place. This is even if such works on their own might not constitute development, or they would be permitted development, or immune from enforcement action. This means that the notice can require the removal of fencing and surfacing and other paraphernalia relating to the dog business.

39. The notice requires the 'building' to be demolished and removed. In so far as the base of the building is the same as the base of the previous building, the notice does not require the removal of the base.

40. Given the above, the required steps are not unreasonable. Anything short of these steps would not remedy the breach of planning control that the notice was issued to resolve. As such, the requirements are not excessive and the appeal on ground (f) fails.

The appeal on ground (g)

41. An appeal on ground (g) is that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed. The notice specifies a time for compliance of 6 months after the notice takes effect.

42. The appellant has requested more time, to allow them to find and prepare an alternative site. Their request for 2 years is excessive, bearing in mind the harm I have identified which needs to be addressed without undue delay. However, sufficient time is needed so that the business is not unduly disrupted. In balancing the harm resulting from the breach of planning control against the needs of the appellant, their staff and customers, I consider it reasonable and proportionate to extend the compliance period to 12 months.

43. For the reasons given above, I conclude that the period for compliance with the notice falls short of what is reasonable. It would be reasonable to extend the compliance period to 12 months and the appeal on ground (g) succeeds.

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

Conclusion

44. I conclude that the appeal on ground (a) should not succeed. I shall uphold the enforcement notice, with correction, and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended. The appeal on ground (f) also fails. However, I conclude that the period for compliance with the notice falls short of what is reasonable. Therefore, I shall vary the period for compliance in the enforcement notice prior to upholding it. The appeal on ground (g) succeeds to that extent.

H Davies

INSPECTOR