



Appeal Decision

Site visit made on 5 March 2024

by Peter Willows BA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9th of May 2024

Appeal Ref: APP/K0235/C/21/3287903

4 Mill Hill, Keysoe, Bedford MK44 2HP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended).
 - The appeal is made by Mr Pieter Oberholster (Deceased) against an enforcement notice issued by Bedford Borough Council.
 - The notice was issued on 25 October 2021.
 - The breach of planning control as alleged in the notice is Without planning permission, the material change of use of land from a dwellinghouse to a mixed use as a dwellinghouse and for the keeping of pigeons and works associated with the use.
 - The requirements of the notice are:
 - i) Remove the structures exceeding 2m in height from the boundary with no. 5 Mill Hill; and
 - ii) Cease the use of the land for the keeping of pigeons
 - The periods for compliance with the requirements are:
Requirement i): 1 month
Requirement ii): 6 months
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (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.
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Decision

1. It is directed that the enforcement notice is corrected and varied by:
 - The deletion of the words 'works associated with the use' from section 3 of the notice (The matters which appear to constitute the breach of planning control) and their replacement with 'the erection of a hawk deterrent mirror complete with supporting trellis structure'.
 - The deletion of the words 'Remove the structures exceeding 2m in height from the boundary with no. 5 Mill Hill' from section 5 of the notice (What you are required to do) and their replacement with 'Remove the hawk deterrent mirror and the supporting trellis structure from the land'.
 - The deletion of the words 'Cease the use of the land for the keeping of pigeons' from section 5 of the notice and their replacement with 'Cease the use of the land for a mixed use as a dwellinghouse and for the keeping of pigeons'.
2. Subject to those changes, 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.

Preliminary Matter

3. Very sadly, Mr Oberholster died prior to the determination of the appeal. Nevertheless, the appeal is able to proceed in his name.

The Enforcement Notice

4. The courts have established that a planning enforcement notice must clearly tell the recipient what has been done wrong and what must be done to remedy the situation. On an appeal under section 174 of the Town and Country Planning Act 1990, the Secretary of State may correct any defect, error or misdescription in the enforcement notice if satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority (section 176 of the Act).
5. Here, the breach of planning control is, 'without planning permission, the material change of use of land from a dwellinghouse to a mixed use as a dwellinghouse and for the keeping of pigeons and works associated with the use'. The notice does not describe the specific works that are 'associated with the use'. This could cause uncertainty, particularly in respect of the pigeon loft on the site. I raised this matter with both parties following my site visit.
6. In response, the Council advised that there was no intention for the notice to target the pigeon loft, which it does not regard as harmful (as a structure). Rather, the only items the Council intended to target were a silver-coloured 'hawk deterrent mirror', together with the trellis support structure it was affixed to. These items were located on the property boundary but have now been removed. For the appellant, it is argued that the notice is unclear, incapable of correction and 'ultra vires'.
7. It seems to me that the notice would be clearer if it referred to the specific operational development the Council identifies, rather than 'works associated with the use'. There could be no injustice to the appellant if I were to correct the notice to do so, since it would limit the scope of the notice, and no injustice to the Council, which confirms that these were the only items targeted. The reasons for issuing the notice make it clear that the items the Council were concerned about included the hawk deterrent mirror (referred to as a 'silver disc') and trellis. Accordingly, I am able to correct the notice along these lines.
8. I also raised matters concerning the requirements of the notice, which are addressed as part of my consideration of the appeal on Ground (f).

Background

9. No 4 Mill Hill is a dwelling with gardens to the front and rear. The rear garden contains a large pigeon loft building. The building is comprised of 2 main elements. The part nearest to the house is finished in white shiplap boarding, with a tiled roof, projecting gables and domestic style bay windows. To the rear, this joins on to an older, brick-built structure. There are various appendages to the building, including a large water tank for roof drainage, canopies to the sides and a pen to the rear.
10. In 2013 the Council granted a certificate of lawful use or development (LDC) for 'Construction of pigeon loft in rear garden'. I do not have full details of the building covered by the LDC, but it appears that it was the shiplap structure only.

11. In October 2014 the Council issued a Planning Contravention Notice (PCN). The appellant's response indicated that the property was solely used as a residential dwelling and pigeons were kept only as a hobby. Up to 300 pigeons were said to be kept at the property.
12. In January 2021 the Council issued a further PCN. The appellant responded to this on 20 February 2021¹. The response indicated that pigeons had been kept on the land since 2002 (with a gap between 2006 and 2010). It indicated that the number of pigeons was between 150 and 250. Birds were exercised from the property twice daily in the summer and less often in the winter. About 4kg of waste was generated daily and subsequently removed from the site. About 6-10 pigeons were sold each year.

Ground (b)

13. The appeal on ground (b) is made on the basis that the material change of use alleged in the notice has not occurred. The burden of proof falls on the appellant and the standard of proof is the balance of probability.
14. It is said that the pigeons are kept on the site as a hobby and, as such, are incidental to the enjoyment of the dwellinghouse as such. Additionally, a certificate of lawful use or development (LDC) for a pigeon loft was issued in 2013. It is argued that the capacity of this building to accommodate pigeons has not changed at all. No part of the house itself has been used for the keeping of pigeons, so there has been no intensification of use in that regard.
15. It is important to distinguish here between the loft as a structure and its use. A pigeon loft is capable of being used for purposes incidental to the enjoyment of the dwellinghouse and, subject to certain limitations, benefitting from permitted development provisions. That does not, however, make such a building, or the plot within which it sits, immune from enforcement action if there should be a material change in its use. Thus, the way the appeal property, including the pigeon loft, has been used needs to be considered. The issuing of an LDC for the pigeon loft does not change that.
16. I have been referred to the case of *Wallington v SSW* [1991] JPL 542. That case involved the occupier of a dwelling keeping around 40 dogs. The Inspector found that the 'extraordinary' number of dogs at the property had brought about a material change of use, despite the fact that they were kept for the personal enjoyment of the occupier. The judge concluded:

In my judgment, the inspector was perfectly entitled to have regard to what people normally do in dwellinghouses to decide whether or not, as a matter of fact and degree, on the one hand (a) the keeping of the appellant's 40 or more dogs should reasonably be regarded as incidental to the enjoyment of her dwellinghouse as a dwellinghouse or, on the other hand, (b) the number of dogs kept by her exceeded what could reasonably be so regarded. On the evidence he decided in accordance with the latter alternative and, subject to what is said below, I can see no sufficient grounds for holding that he was wrong.
17. Thus, it is clear that the number of animals kept at a property can, in principle, bring about a material change of use by taking matters beyond that which is incidental to the enjoyment of the dwellinghouse as such.

¹ The response is incorrectly dated 20 February 2020.

18. In this case it is argued that the number of pigeons kept at the site has slightly reduced in recent years and that it is common for pigeon fanciers to keep over 200 pigeons for their hobby. In contrast to *Wallington*, no animals are kept in the house.
19. However, this is a fairly modest plot, the rear garden of which is dominated by the pigeon loft building. On the evidence before me, I regard 250 pigeons as well beyond what should reasonably be considered as incidental to the enjoyment of this dwellinghouse as a dwellinghouse. In my judgement, and having considered the views of neighbouring occupiers (as set out in more detail under ground (a)), it has caused a change in the character of the use of the property, due to matters such as the noise made by the pigeons, the potential for large numbers of birds in flight at and around the property, the potential for bird droppings and the structures and items of equipment associated with the use.
20. The Council has provided evidence to indicate that the sale of birds was greater than stated in the PCN response and generated significant sales returns. On this basis, it is argued that the keeping of pigeons was more than just a hobby. For the appellant, it is argued that the business activities were separate from the pigeons kept at the property, which were purely part of a hobby.
21. However, even if there were no commercial aspect to the pigeons kept at the site, 250 birds strikes me as an extraordinary number to be kept at a fairly modest domestic property. While the Council issued an LDC for a large pigeon loft, that cannot be seen as an endorsement that keeping such a large number of birds is only an incidental use, since use is also made of the pre-existing brick structure. In my judgement, the keeping of pigeons at the scale indicated is beyond something incidental to the enjoyment of the dwellinghouse as such and instead amounts to a primary use in its own right.
22. For these reasons, and on the balance of probability, I conclude that a material change of use occurred. Accordingly, the appeal on ground (b) fails.

Ground (c)

23. Ground (c) is concerned with whether or not there has been a breach of planning control. There is nothing before me to suggest that the corrected allegation – either the use or the operational development – alleged in the notice is lawful due to any existing planning permission or permitted development rights. Although the appellant cites the LDC for the pigeon loft, it is the use rather than the loft as a structure that is targeted by the notice. Accordingly, the appeal on ground (c) fails.

Ground (d)

24. The appeal on ground (d) is made on the basis that it was too late to take enforcement action when the notice was issued. The case made out relates to the use only and not the operational development. The burden of proof falls on the appellant and the standard of proof is the balance of probability.
25. The time periods for taking enforcement action are set out in s171B of the Act. The relevant time period in this case is that specified at s171B(3), which states 'In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach'. Thus, to be immune from enforcement action, the use would

have needed to be carried out continuously for a 10-year period prior to the service of the notice on 25 October 2021. This means that it would need to have commenced not later than 25 October 2011.

26. For the appellant it is argued that pigeons have been kept at the site since 2002. The 2014 PCN suggests that Mr Oberholster owned and occupied the property from 2003. I have no reason to doubt that pigeons were kept at the property from around that time.
27. However, for a material change of use to have occurred, the birds would have needed to be kept in sufficient numbers to bring about a change in the character of the use of the land. I have no evidence to show that this occurred from as early as 2002/3. Indeed, the earliest indication of a potential difficulty is the issuing of the first PCN, in October 2014.
28. Moreover, the number of birds kept at the site was probably limited by a lack of accommodation when the appellant first occupied the property. I do not know precisely when the current pigeon loft was built, but the LCD was not issued until 2013. Since the certificate was for a proposed (not existing) development under s192 of the Act, it appears that it must have been built after that date. I have noticed the suggestion that the loft was constructed 'around 2010', but the burden of proof falls on the appellant and there is no firm evidence to support this. The report relating to the pigeon loft indicates that it was considered to be permitted development on the basis that the pigeons were kept as a hobby. This is a clear indication that the Council had not detected anything to suggest a material change of use at that point in time.
29. Overall, the evidence indicates, on the balance of probability, that the mixed use alleged in the notice commenced less than 10 years before the notice was issued. Accordingly, the appeal on ground (d) fails.

Ground (a)

The development

30. The nature of the deemed planning application arising from the appeal on ground (a) is derived from the breach of planning control alleged in the notice. Here, I will correct the breach of planning control to read: 'the material change of use of land from a dwellinghouse to a mixed use as a dwellinghouse and for the keeping of pigeons and the erection of a hawk deterrent mirror complete with supporting trellis structure'. This, therefore, is what the deemed planning application seeks planning permission for.

Main issue

31. The main issue is the effect of the development on the living conditions of neighbouring occupiers.

Reasons

32. The appeal property is within a short row of dwellings within a wider rural setting. It is plainly desirable that these properties remain either in residential use or in a use compatible with such use so that the living conditions of neighbours are not compromised.
33. I accept that pigeons are relatively quiet animals and their impact on the area should not be overstated. However, kept in large numbers at a modest

domestic property, there is scope to have a significant and harmful effect on the living conditions of neighbours due to such matters as noise, smell, perching on neighbouring houses and bird droppings.

34. Here, it is common ground that the numbers have been as high as about 300 birds at times. In 2021 the numbers were stated to be 150-250. It seems to me that, with birds kept in such large numbers, it is likely that neighbours will be affected in the ways outlined above. Indeed, representations from neighbours suggest that this has been the case. I am told that smell and flies arising from the pigeons can be such as to deter one neighbour from sitting out in the garden. I am also told that the noise from pigeons perching on a neighbour's rooftop can awaken them in the morning. It is said that droppings from the pigeons and dust from the pigeon loft can dirty washing hanging on a line. It is said that the pigeons fly low over neighbouring property in large flocks.
35. All of these impacts are disputed, and there are not photographs or other evidence to categorically prove them. I am also mindful that different people will perceive impacts differently – what bothers one person might not trouble another. I have no reason to doubt that the pigeons have been properly looked after, following appropriate practices.
36. Nevertheless, given the number of pigeons, I consider that the kinds of impacts described by the neighbours are likely. The Council advises that, on visits to neighbouring properties, unusual amounts of bird droppings have been noted on the windows. While I understand the pigeon loft contains triple glazing, the pigeons do not spend all their time inside. Overall, I consider that the use of land for keeping pigeons on this scale is likely to have caused significant harm to the living conditions of neighbouring occupiers. This puts the use contrary to policies 32 and 47S of the Bedford Borough Local Plan 2030. Between them, these policies seek to avoid noise and other sources of disturbance likely to have a harmful impact on quality of life.
37. I accept that the level of harm could be mitigated by limiting the number of pigeons with a planning condition. However, the appellant's suggestion of 250 birds would still be at a level where harm would occur in my view, and imposing a figure low enough to address the harm would undermine the benefit of any planning permission. None of the other conditions suggested would adequately address my concerns. The fact that a statutory nuisance has not been declared does not alter my view that there has been harm to living conditions, having regard to the facts of this particular case. The case of *May and Rother DC [2014]*, referred to by both parties, draws a clear distinction between a statutory nuisance and an impact on amenity that may justify the refusal of planning permission.
38. The hawk deterrent mirror and supporting structure were not in place when I visited the site. It appears to me that harm from them was likely to be limited. However, they are part and parcel of the change of use alleged and no party has suggested that permission should be granted for those items on their own.
39. For these reasons, the appeal on ground (a) fails.

Ground (f)

40. Appeals on ground (f) are made on the basis that the requirements of the notice exceed what is necessary to remedy any breach of planning control or remedy any injury to amenity which has been caused by any such breach. In this case it is argued that the requirements of the notice are excessive as they would take away the rights confirmed by the LDC. Further, both parties have suggested that the notice could specify a specific number of pigeons that could be kept at the property. I will also deal with my own concerns relating to the requirements of the notice here.
41. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first (s173(4)(a)) is to remedy the breach of planning control which has occurred. The second (s173(4)(b)) is to remedy any injury to amenity which has been caused by the breach. The requirements of the notice are i) Remove the structures exceeding 2m in height from the boundary with no. 5 Mill Hill; and ii) Cease the use of the land for the keeping of pigeons. These requirements are consistent with remedying the breach of planning control in accordance with s173(4)(a), and that appears to me to be the purpose of the notice. Indeed, the Council is clear that it did not consider it appropriate to 'under enforce'. I deal with the 2 requirements of the notice in turn below.

Requirement i)

42. As I have already explained, I will correct the notice to clarify the very minor operational development it is targeting. It is necessary to amend the requirements of the notice to reflect this, by referring specifically to the hawk deterrent mirror and supporting trellis structure. This will further clarify that the notice does not seek the removal of the pigeon loft and, to that extent, should address one of the concerns raised on behalf of the appellant.

Requirement ii)

43. The intention of requirement ii) is no doubt to cause the unauthorised element of the mixed use to cease. Nevertheless, the wording used could be interpreted as ruling out the keeping of pigeons entirely, even that which is 'incidental to the enjoyment of the dwellinghouse as such'. Such activity would not amount to development. It is established law that the requirements of an enforcement notice must not purport to stop a person from doing something they are entitled to do without planning permission, including anything exempted from the definition of development under section 55(2)². Thus, it is desirable to improve the clarity of the notice in that regard.
44. The unlawful use alleged in the notice is a 'mixed use as a dwellinghouse and for the keeping of pigeons'. It seems to me that it would be best if the requirement were to cease that mixed use, rather than focusing on the pigeons alone and creating the uncertainty outlined above. I will therefore vary that requirement along those lines. There can be no injustice in doing so for either party, since the substance of what is required is unchanged.
45. For the avoidance of doubt, the change I shall make only requires the unauthorised mixed use to cease. It does not affect the resumption of the lawful use of the property as a dwellinghouse. Nor does it alter the fact that

² see *Mansi v Elstree RDC* [1964] 16 P&CR 153

uses incidental to the enjoyment of the dwellinghouse as such are lawful, in accordance with s55(2)(d) of the Act. As the Council clearly recognises, that includes the keeping of pigeons in reasonable numbers as a hobby. As I have indicated elsewhere, I agree with the Council that 250 or more pigeons is excessive and does not fall within that provision in this instance.

46. Both parties have suggested that the notice should specify the number of pigeons that can be kept at the property, along the lines of the *Wallington* case. The Council suggested a figure of 100 birds³. For the appellant, it is clear that a far higher figure would be sought, it having been argued that even 250 birds did not bring about a material change of use.
47. I appreciate that there are comparisons between this case and *Wallington*. However, there are differences. In particular, in that case the enforcement notice specified the number of dogs to be kept. In so doing it appears that its purpose was to remedy the harm to amenity arising from the breach of planning control.
48. Here the purpose of the notice is to remedy the breach of planning control. That purpose can only be achieved if the unauthorised use ceases. It is not open to me, as in *Wallington*, to specify an arbitrary number designed to address the harm and (perhaps) not the breach. I do not have sufficient information to determine a precise number of birds which would be the maximum which could be 'incidental to the enjoyment of the dwellinghouse as such'. Therefore, while I understand the desire for the certainty a specific figure would bring, I will not impose one as a requirement of the notice. Should the occupier of the property wish to determine whether any particular number of birds can be lawfully kept there, it is open to them to seek a determination on the matter by applying to the Council for a certificate of lawful use or development under s191/192 of the Act.

Conclusion – ground (f)

49. I will amend the notice to require the specific items of operational development to be removed and the mixed use to cease. To that extent only, the appeal on ground (f) succeeds.

Ground (g)

50. It is argued under ground (g) that additional time would be needed to allow the relocation of the pigeons. A 12-month period is sought. At the time of writing the appeal statement, restrictions on the movement of birds had been imposed due to an outbreak of bird flu.
51. However, I cannot see that 12 months is justified in current circumstances. While it is possible that restrictions could again be imposed if a further outbreak of bird flu were to occur, the Council has to the power under s173A(1)(b) to extend the period for compliance, should that prove necessary for some unforeseen reason. As things stand, I can see no reason to extend the period for compliance to 12 months. It is also desirable to ensure that the breach of planning control is addressed without undue delay.
52. For these reasons, the appeal on ground (g) fails.

³ The Council has suggested a figure of 100 both as a basis for a planning condition and also in respect of the requirements of the notice.

Conclusion

53. For the reasons given above, I shall uphold the enforcement notice with correction and variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act (as amended).

Peter Willows

INSPECTOR