



Appeal Decisions

Site visit made on 29 July 2024

by Hilary Orr MSc, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9th October 2024

Land Opposite Junction of Glen Lea and Nutcombe Lane, Hindhead, Surrey, GU26 6BP

Appeal A Ref: APP/R3650/X/24/3343155

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mrs Angela Jenkins against the decision of Waverley Borough Council.
- The application ref WA/2024/00398, dated 13 February 2024, was refused by notice dated 15 April 2024.
- The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is the siting of a shipping container for use ancillary to agriculture and equestrian use.

Appeal B Ref: APP/R3650/W/23/3332813

Land at the junction opposite Glen Lea and Nutcombe Lane, Hindhead, Surrey, GU26 6BP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a failure to give notice within the prescribed period of a decision on an application for planning permission.
- The appeal is made by Ms Angela Jenkins against Waverley Borough Council.
- The application Ref is WA/2023/02353.
- The development proposed is the erection of a stable block (revision of WA/2023/00838).

Appeal C Ref: APP/R3650/W/23/3330264

LAND OPPOSITE JUNCTION OF GLEN LEA AND NUTCOMBE LANE, HINDHEAD, GU26 6PB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
- The appeal is made by Ms Angela Jenkins against the decision of Waverley Borough Council.
- The application Ref is WA/2023/00838.
- The development proposed is the erection of a stable block.

Applications for costs

1. Applications for an award of costs for these appeals have been made by Ms Angela Jenkins against Waverley Borough Council. These applications are the subject of a separate Decision.

Decisions

Appeal A

2. The appeal is dismissed.

Appeal B and Appeal C

3. The appeals are dismissed.

Background and preliminary matters

4. There are three appeals. Appeal A relates to a refusal for a Certificate of Lawful Development (CLD) for the siting of a shipping container for use ancillary to agriculture and equestrian use.
5. Appeal B and Appeal C both relate to the erection of a stable block on the appeal site. Appeal B concerns the non-determination of an application for planning permission Ref WA/2023/02353. This application was a revision to application Ref WA/2023/00838 which was refused by the Council (Appeal C). From the evidence, it is not suggested that there are any material differences between the two schemes. The Council have confirmed that had it been within their power to determine WA/2023/02353 (Appeal B), they would have refused it for the same reasons as Appeal C. I shall therefore consider the appeals together.
6. My attention has also been drawn to several other sites, including WA/2024/00634, where the Council have since issued an LDC for a shipping container. The appellant has suggested that this site should also be visited. However, I have been provided with a copy of the officer report for that application and find it to be comprehensive and have nothing to suggest that it is factually incorrect. LDC's are fact driven and therefore must be determined on the particular facts. Accordingly, I am satisfied that I can determine this appeal without the need to carry out a detailed site visit to this other site.
7. The site is located adjacent to, and to the east of Nutcombe Lane. It comprises an irregular piece of land with a small parking area and gated field access, opposite the junction with Glenlea. The land has the appearance of a small valley, sloping down from east and west to a small water course that runs along the valley floor. At the time of my visit the land was being grazed by a number of horses and there was a small timber stable with a tack or storage room, sited on a levelled and hard surfaced area close to Nutcombe Lane.

Reasons

Appeal A

8. Firstly, I should explain that the planning merits of the development are not relevant to this appeal, which relates to an application for an LDC. The main issue for determining this appeal is whether the Council's decision to refuse the LDC application was well founded, with particular regard to whether the proposed development would comprise development requiring planning permission, based on the available evidence.
9. In an LDC appeal the onus of proof is on the appellant to show that, on the balance of probability, the development would have been lawful, at the time of the application.

The case for the appellant

10. The appellant's first ground set out on their appeal form is that the Council failed to give notice of their decision, as the decision they issued was not accompanied by a plan. This is not expanded upon in her statement of case.
11. The appellant further argues that the siting of the shipping container on the appeal site, for a purpose ancillary to the permitted use of the land, does not constitute development requiring planning permission. A legal opinion relating to another appeal (APP/R3650/X/23/3333287) and a newspaper article have been submitted in support of her case.

The case for the Council

12. The Council firstly submits that their decision was made in accordance with established procedure and that the application site was clearly identified.
13. Secondly, it is their case that the siting of the shipping container on this particular site, would constitute operational development, due to its degree of fixing to the ground and its permanence.

Assessment

14. Article 39(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (DMPO) sets out requirements for LDC applications, while Article 39(14) provides that any certificate issued under s191 or s192 must be substantially in the form prescribed in Schedule 8 of the DMPO. If an LDC is not in such form, it will be invalid. In this instance the submitted application was refused.
15. To my mind the land is clearly identified on the decision through its address. Moreover, I have not been directed to any legislation, or regulation that prescribes that a plan must accompany the decision to refuse the application. For these reasons I find that the appeal fails on this point.
16. Turning to the second point, Section 57 of the Town and Country Planning Act 1990 sets out that planning permission is required for the carrying out of any development of land. Section 55 expands this by setting out the meaning of development. This comprises two limbs: the carrying out of building, engineering, mining or other operations in, on, over or under land; or the making of any material change in the use of any buildings or other land. The question of whether a structure is a building, or a use of land, is not that straightforward and is a matter of judgement and must be considered, as a matter of fact and degree, on the particular circumstances of the site, with the onus of proof on the appellant.
17. It is generally accepted that 'operational development' comprises activities which result in some physical alteration to the land that have a degree of permanence to the land itself, whereas a 'use' does not interfere with the actual physical characteristics of the land.
18. It is necessary to apply the tests set out in case law, *Cardiff Rating Authority v Guest Keen Baldwin's Iron & Steel Co Ltd* [1949] 1QB 385 (endorsed by the Court of Appeal in *Skerrits of Nottingham Ltd v SSETR (No 2)* [2000] 2 PLR 102). Three primary factors have been identified as decisive of what was a building:

- (a) Size – how was the structure brought to site, or did it have to be constructed on site;
 - (b) Permanence - is the structure capable of and intended to be moved and how long would it be in one position, and, if so, how would it be moved; and
 - (c) Physical attachment – how is it fixed to the ground, or will it rest by its own weight.
19. All three tests must be considered, although none are necessarily determinative.
20. Size; The proposal is for a substantial shipping container, which from the evidence measures some 12.75m in length, 3m wide and 3.1m high. It is not disputed that it would be constructed of permanent materials and brought to site ready assembled, rather than constructed on the site.
21. Permanence; The proposal does not identify any particular location for the container. From my site visit it was clear that there are parts of the site where siting a shipping container would be difficult, without significant advance preparation. How the container will be used is unclear from the evidence and there is no evidence to confirm whether, once sited, there would be an intention, or even the need to move it around within the site and if so, how this would be achieved.
22. Due to its scale and significant weight, it is likely that specialist apparatus would need to be brought to site for that purpose, particularly given the sloping nature of much of the site. There was no evidence of any suitable equipment or machinery at my site visit, but I acknowledge that, whilst the access is very restricted, suitable equipment could potentially gain entry after significant manoeuvring.
23. Physical attachment; There is nothing in the evidence to suggest that it would be sited on a prepared base, or connected to any services. Nonetheless, to my mind, its weight alone is enough to stabilise the container and affix it to the ground, thereby providing the qualities of attachment commensurate with a building.
24. Overall, the utilitarian nature of the shipping container and its significant size, would result in a significant physical change to the site. There is no information on how long the container might remain in one location and even if it was moved from one part of the site to another, it would not remove the significance of its presence in planning terms. Accordingly, the physical change to the land, as a whole, is likely to be permanent.
25. This factor in itself is not decisive, but when weighed with the other factors, I find that, as a matter of fact and degree, the size, permanence and physical attachment to the ground all point to the container being a building as defined in s336 of the Act.
26. I acknowledge that there may be circumstances where the siting of a shipping container, could be considered to be ancillary to the lawful use of the land and thus not require planning permission. The lawful use of the appeal site is understood to be for equestrian and agricultural purposes. However, I have not been provided with any information to demonstrate how the container would be

used in connection with the lawful use. Consequently, this does not alter my decision.

27. Similarly, my attention has been drawn to examples where it has been determined that a shipping container does not constitute development. However as set out above, these decisions will be fact sensitive and whilst some parallels can be drawn, for example the size of the container, there are also clear siting differences. The Officer report for the application at Lower Punchbowl Farm Hyde (WA/2024/00634) makes clear that the container would be moved around the site to facilitate various agricultural activities such as hay making. Moreover, the site has existing suitably surfaced tracks, giving access to other parts of the site, together with existing vehicles available, suitable for lifting or towing the container. This reduces its degree of permanence and is in stark contrast with the appeal site. No evidence has been provided to demonstrate that once sited, there would be any intention, or need to move it within this largely sloping and undeveloped site.
28. A second example provided to me is WA/2024/01129. In this instance the facts again differ with the container having been designed or adapted for human habitation, being in accordance with a previously approved CLD.
29. I acknowledge that planning permission already exists for the siting of a caravan on the appeal site (WA/2022/02043). It has been suggested that this shipping container could be adapted for residential occupation and sited on the land in accordance with that permission.
30. A later CLD application on the appeal site (WA/2024/01480), for 'the siting of a caravan compliant container, designed or adapted, for human habitation for use ancillary to the existing mixed agriculture/equestrian use of the land was submitted. This has been approved since my site visit, concluding that it would be covered by Certificate WA/2022/02043. However, this was not the proposal before the Council at the time of their decision thus falling outside the scope of Appeal A and does not affect my findings.
31. I have taken into account all of the above factors and have had regard to all of the evidence before me. Overall, on the very particular circumstances of this case and as a matter of fact and degree, I find that on the balance of probability, the appellant has failed to provide sufficient, clear and precise evidence to demonstrate that the shipping container, as proposed, would not require planning permission. The decision of the Council was therefore well founded.

Appeals B and C

32. As set out above Appeals B and C relate to the erection of a stable block.
33. Whilst the Council's officer report for the associated planning applications refers to the proximity of the site to the Wealden Heath II Special Protection Area (SPA), they have since confirmed that as the site is over 1km away and not likely to result in additional residential use, the proposed development would be unlikely to have a significant effect on the integrity of the SPA. I have no reason to come to a different view. Thus, the main issue for determining these appeals is the effect of the proposed development on a Principal Habitat.
34. The crux of the appellant's case is that the Council could have granted conditional planning permission for the development, rather than refusing it.

They submit that conditions could have been imposed to require biodiversity/ecology assessments to be submitted with an obligation to enter into a legal agreement to mitigate any negative impact of the development, if that was required.

35. From the evidence, the development is to be sited within woodland that has been identified as a Habitat of Principal Importance for the purposes of the conservation of biodiversity in England. Therefore, The Natural Environment and Rural Communities Act 2006 (NERC) duty applies. While I acknowledge that the appeal site is not a designated site, it is still reasonably likely to provide habitat for protected and conservation priority species of principal importance. Moreover, it may well have additional value in terms of its habitat value for flora. Paragraph 185 of The National Planning Policy Framework (the Framework) primarily refers to plans, but it nevertheless emphasizes the importance of priority habitats and species and the need to promote their conservation, restoration and enhancement.
36. Natural England's standing advice for protected species sets out where protected species may be expected, for example where woodland is on or next to the site, these may include bats, breeding birds, badgers, dormice, invertebrates, great crested newts, reptiles and protected plants. The Framework at Paragraph 180 advises that planning decisions should minimise impacts on and provide net gains for biodiversity.
37. In the absence of an appropriate survey, carried out by a competent and appropriately accredited individual, it is not possible to establish a baseline against which the effect of the proposal can be judged. Since the effect of the proposal cannot be assessed with any degree of certainty, it is not possible to engage with the mitigation hierarchy to firstly avoid, minimise, mitigate or compensate for any resultant adverse impact.
38. Planning conditions that ask for such surveys are not normally appropriate, because the full impact of the proposal on protected species must be considered before planning permission is granted. Accordingly, without appropriate evidence that sets out the presence, or absence, of protected and priority species and habitats, in accordance with the mitigation hierarchy, I am not satisfied that I can assess whether any mitigation is required, or how any necessary mitigation can be provided on site. Alternatively, if that is not possible, how and where off-site mitigation will be delivered, or if none of these options can be achieved, what financial contribution would be required and whether it is affordable.
39. For the above reasons and on the information before me, I find that the proposed development causes unacceptable harm to the habitat of Principal Importance, contrary to Policy NE1 of the Waverley Borough Local Plan Part 1: Strategic Policies and Sites (2018) and Policy DM1 of the Waverley Borough Local Plan Part 2: Site Allocations and Development Management Policies (2023). These policies seek to conserve and enhance biodiversity ensuring that any adverse effects are avoided or appropriately mitigated. Appeals B and C therefore fail.

Conclusions

Appeal A

40. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of 'the siting of a shipping container for use ancillary to agriculture and equestrian use' was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Appeals B and C

41. I conclude that the appeals should be dismissed.

Hilary Orr

INSPECTOR

