The Planning Inspectorate

Appeal Decision

Hearing held and site visit made on 7 October 2014

by Alan Woolnough BA(Hons) DMS MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 17 November 2014

Appeal Ref: APP/Q1445/C/13/2208935
21 Rowan Avenue, Hove, East Sussex BN3 7JF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mrs Jessica Yates against an enforcement notice issued by Brighton and Hove City Council.
- The Council's reference is 2013/0422.
- The notice was issued on 11 October 2013.
- The breach of planning control as alleged in the notice is: 'Without planning permission to *[sic]* change of use from residential to a mixed use for residential and dog breeding'.
- The requirements of the notice are:
    1. Permanently reduce the number of dogs which are kept on the premises to no more than 3.
    2. Demolish the kennels and associated accommodation apart from the wire kennel which is situated nearest the host property.
    3. Remove all demolished materials and rubble from the site.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (d), (f) and (g) of the 1990 Act as amended.

Summary of Decision: The appeal is allowed on ground (d) and the enforcement notice is corrected and quashed.

Procedural matters

1. At the Hearing an application for costs was made by Mrs Jessica Yates against Brighton and Hove City Council. This application is the subject of a separate decision.

2. The Appellant specifically requested that, in the event that her appeal succeeded on grounds (c) or (d), I should grant a Certificate of Lawful Use or Development (LDC) pursuant to section 177(1)(c) of the 1990 Act as amended. However, no fees have been paid on the subject appeal and I am mindful that an application to the Council for a LDC would require a fee to be paid in accordance with the Fees Regulations[1].

3. Having said this, the Regulations are silent on the question of whether a LDC granted on a section 174 appeal carries a fee. The Appellant perceives this as a 'quirk in the law' which would allow me to grant a LDC in this case. Nonetheless, I note that Regulation 10(13) of the Fees Regulations provides that *save where the 177(1)(c) powers are exercised*, the fees in respect of a

[1] The Town and Country Planning (Fees For Applications, Deemed Applications, Requests And Site Visits) (England) Regulations 2012 as amended.

deemed planning application (DPA)[2] shall be refunded to the Appellant. This suggests to me that, although not expressly stated, there is an expectation that the fees payable for the DPA should be appropriated to the LDC instead of being refunded and, accordingly, that there is no expectation that a LDC should be issued in the absence of a fee. Additionally, it is pertinent that the exercise of section 177(1)(c) powers is entirely at the discretion of the Inspector.

4. In any event, I am mindful that the question of whether the 'dog breeding' component of the mixed use alleged in this case has intensified at some point so as to alter the balance of the mix so significantly that a material change of use was triggered within the relevant period by means of that intensification has not been explored in this case[3]. This being so, I am not in a position to declare the mixed use lawful on the date that the enforcement notice was issued, irrespective of the success of the appeal on ground (d). In such circumstances, it is not appropriate to issue a LDC, regardless of whether or not a fee is payable, and I decline to do so.

5. Several local residents have raised objections that go to the planning merits of the alleged mixed use, focussing on issues such as the adverse effect that noise caused by barking dogs has had on their living conditions. However, in the absence of an appeal (a) consideration of planning merits falls outside my remit. Such matters have therefore informed my determination of the appeal only insofar as they might be indicative of a material change of use of the property.

The notice

6. The Appellant's contention that the enforcement notice is so fundamentally flawed that it is beyond correction is unsubstantiated. Whether the Council has correctly applied the tests of incidental use arising from case law in framing the notice or identified a reasonable threshold at which a material change of use might be held to have taken place has no fundamental implications for the validity of the notice *per se*. Instead, such matters fall neatly within the parameters of the appeal on ground (c) and it would have been open to me to quash the notice on that ground had I found it appropriate to do so.

7. Moreover, there can be no question that requirement 1 of the notice makes clear to the Appellant what she is expected to do in order to comply. Whether it is unduly stringent in seeking a reduction in the number of dogs kept on the premises to no more that three or lacking in appropriate qualification would be a matter for me to address in determining the appeal on ground (f), had it been necessary for me to do so. Contrary to the Appellant's assertion, no injustice would arise from building caveats or qualification into the requirement along the lines discussed at the Hearing, as long as the result was not more onerous to the Appellant than the notice as issued[4].

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[2] An application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended in association with an appeal against an enforcement notice on ground (a).
[3] Where an enforcement notice relies on a material change of use by intensification it must say so (*RB Kensington & Chelsea v Mia Carla Ltd* [1981] JPL 50). The subject notice does not and, consequently, exploration of such a possibility falls outside my remit.
[4] Although the parties failed to provide me at the Hearing with a definition of an 'adult dog' which might be used for qualification purposes in distinguishing between adults and puppies, I am satisfied that the Appellant has provided sufficient written evidence for such purposes in her written submissions. The Appellant's assertion that numbers specified in a planning enforcement notice should include *all* dogs kept at the premises, whether adults or puppies, is drawn from non-planning legislation and is therefore ill-founded.

8. Nor does the Council's failure to discuss matters in the wake of the Appellant's response to its Planning Contravention Notice before issuing the enforcement notice invalidate the latter. Irrespective of whether such a step would constitute good practice, it is not a statutory requirement. I am therefore satisfied that the enforcement notice is not beyond correction and that, accordingly, the grounds of appeal pursuant to section 174 of the 1990 Act as amended remain before me to consider, insofar as it is necessary for me to do so.

9. Notwithstanding my decision to quash the enforcement notice, it is incumbent upon me to correct it as best I can before doing so, within the scope of the powers available to me under section 176(1) of the 1990 Act as amended. In this regard I have identified some correctable flaws which fall outside the parameters of the section 174 grounds of appeal.

10. The previous use of the appeal property and the residential component of the alleged mixed use would be more accurately described by the term 'dwellinghouse' in the alleged breach of planning control. Moreover, the allegation should more properly refer to a *material* change of use, that being the act of development as defined by statute. There is also a grammatical error within the allegation.

11. Accordingly, the notice will be corrected at section 3 to read: 'Without planning permission, a material change of use of the Property from use as a dwellinghouse to a mixed use comprising use as a dwellinghouse and use for dog breeding'. To facilitate this, the appeal site should be designated 'the Property' in section 2 of the notice rather than 'the Land'.

12. The word 'Permanently' at the beginning of requirement 1 in section 5 of the notice is superfluous in the light of the provisions of section 181 of the 1990 Act as amended and will therefore be deleted. The 'wire kennel' referred to in requirement 2 is more properly described as a 'wire cage'. Requirement 3 should include the words 'arising from compliance with requirements 1 and 2' and, for consistency with section 2 of the notice as amended, refer to 'the Property' rather than 'the site'. The notice will be corrected accordingly.

13. No injustice arises from any of the above corrections.

The appeal on ground (c)

14. In appealing against the enforcement notice on ground (c) the onus of proof is firmly on the Appellant to demonstrate on the balance of probabilities that, on the date that the notice was issued, the matter alleged in the notice did not constitute a breach of planning control. To this end, the Appellant contends that dog breeding was in fact incidental to the primary use of the appeal property as a dwellinghouse, rather than a distinct component of a mixed use that required express planning permission.

15. At the Hearing the Appellant confirmed that on the date that the notice was issued eight adult dogs, but no puppies, were being kept at the appeal property. All were German Shepherds used for breeding. Up to three of these dogs were also used in association with Mr Yates' security business. Six were accommodated in purpose-built kennels in the back garden and two in the house, but none was kept solely as a domestic pet. This is consistent with the

Appellant's written submissions and is not contradicted or rendered less than probable by any other evidence before me.

16. The Appellant contends that the keeping of dogs on this scale and for such purposes was incidental to a primary use of the property as a dwellinghouse, rather than a distinguishable component of a mixed use. Her argument in this regard stems from the judgment in *Main v SSETR & S Oxon DC* [1999] JPL 195, in which it was found that ancillary or incidental[5] uses are not distinguished by scale but, rather, by a functional relationship with the primary use. This finding is interpreted by the Appellant as an indicator that the scale of an activity cannot preclude a use from enjoying 'incidental' status as long as a functional relationship with the primary use is maintained.

17. The Council is thus accused of focussing erroneously on the number of dogs at the appeal property and failing to pay sufficient regard to the functional relationship between dog breeding and residential use, such that there is no legal authority for the construction of the enforcement notice. The Appellant suggests that only if a 'dog breeding' planning unit separate from the dwelinghouse could have been identified would it have been possible for the notice to stand.

18. There is no dispute between the parties that the appeal property as used on 11 October 2013 comprised a single planning unit and, applying the tests arising from the judgment in *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207, I concur. Nor do I disagree with the Appellant that there is a functional relationship between dog breeding and residential activity in this case, by simple reason of the fact the dogs are accommodated in part within the dwelling itself and are looked after by those that reside there.

19. Nonetheless, on my reading of the *Main* judgment I find nothing therein to support the manner in which the Appellant has attempted to apply it in this case. On the contrary, the Appellant has paid insufficient regard to the specific context in which the concepts of scale and functionality were being addressed in that particular judgment. *Main* concerned a scrap metal yard where, amongst other things, the site was also used in part as a haulage depot. The Inspector had concluded that as haulage activities were relatively small and low key, they were 'ancillary' to the scrap yard.

20. However, the Court found that the Inspector had misdirected himself in law as to the proper meaning of the term 'ancillary' by disregarding the fact that the haulage activities were not functionally related to the operation of the scrap yard. The point thus established was that, no matter how small-scale an activity is, there must be a functional relationship with a primary use for it to be ancillary to the latter rather than a distinct component of a mixed use (albeit that a mixed use may not exist if the activity is so low key as to be *de minimis*).

21. This is quite different to saying, as the Appellant seems to imply, that a functional relationship alone is sufficient to secure ancillary status irrespective of scale. This being so, the Appellant is wrong to suggest that *Main s*upersedes the Court's decision in *Wallington v SSW & Montgomeryshire DC* [1991] PL 942. Accordingly, I find no reason to question the soundness of my colleague's

[5] The terms 'incidental' and 'ancillary' are interchangeable for the purposes of this appeal.

conclusion on a similar appeal cited by the Council (APP/P4605/C/13/2197328 & 2197329), in which he followed the *Wallington* approach.

22. The Appellant also refers me to paragraph E.4 of Class E of Part 1 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 as amended (the GPDO). This stipulates that, for the purposes of that Class, the term 'purpose incidental to the enjoyment of the dwellinghouse as such' includes the keeping of pet animal or other livestock for the domestic needs or personal enjoyment of the occupants of the dwellinghouse without imposing a limit on the number of animals.

23. However, Class E is of limited relevance to this appeal, being strictly limited to defining permitted development rights for the erection of outbuildings and similar structures within the curtilages of dwellinghouses. This being so, it could only apply to the kennels in the rear garden of No 21 rather than the use of the planning unit as a whole. In any event, in the light of *Wallington* the mere absence from Class E of a numerical restriction cannot reasonably be interpreted as an endorsement that the keeping of a limitless number of animals in domestic kennels, irrespective of species, property size and other relevant considerations, would be lawful.

24. In *Wallington* it was held that activities such as the keeping of dogs in large numbers will amount to a material change of use if outside what could normally be expected to occur within a dwellinghouse and its curtilage. Scale is therefore an essential determinative of what might be held to be 'normal' and I do not find the Council to have disregarded functionality in this case by reason of its focus on numbers. Nonetheless, in *Wallington* the Inspector was not defining the level at which a material change of use would be involved but, in upholding a requirement in an enforcement notice that the number of dogs be reduced to no more than six, found simply that the six dog limit was not excessive in the circumstances of that particular case.

25. The number of dogs that might trigger a material change of use is a matter of fact and degree and will differ from case to case depending on, amongst other things, the type and size of the dwellinghouse and the curtilage concerned. Additional considerations, such as the size of the dogs and the effect of physical changes made to accommodate them on the character of the property may also need to be factored in when determining whether or not the circumstances in question could 'normally' be expected to occur within such a setting. Indeed, similar principles apply to the identification of any incidental use, as confirmed by the judgment in *Pêche d'Or Investments v SSE* [1996] JPL 311.

26. In this instance the Council had concluded that keeping three dogs at the appeal property, irrespective of size or purpose, represented the upper threshold of a use incidental to the dwellinghouse, as reflected by the stipulation to reduce numbers accordingly in requirement 1 of the enforcement notice. This stance was amended at the Hearing to three adult dogs plus an indeterminate number of puppies, albeit that a formal distinction between adult and puppy was not forthcoming. In marked contrast, the Appellant advanced the view that, should it be determined that numbers were relevant to incidental status, ten adult dogs plus puppies should be the appropriate threshold.

27. I will revisit this question when addressing the appeal on ground (d). However, for the purpose of ground (c) it is sufficient for me to focus on the situation

that existed on the date that the enforcement notice was issued and apply my own judgment to whether the keeping of eight adult dogs amounted to an incidental activity. In doing so, I am mindful that in *Wallington* it was found by the Court that the keeping of six dogs in a detached cottage in a relatively isolated village location, where the property was large enough to accommodate 16 dogs indoors and a further 25 outside, was seen by the Court as a 'generous' estimate of the number which might normally be kept in such a setting.

28. By contrast, the appeal property is a small mid-terraced house on an urban residential estate. Although the rear garden is sizeable for a dwelling of this nature, it accommodates a substantial kennels complex, capable of accommodating six dogs, which spans its full width and essentially divides it into two. The kennels alone were not capable of housing all the dogs present at the property in October 2013, some of which had to be kept indoors.

29. Applying my own judgment and experience, I consider it beyond question that the keeping of so many large dogs in such a confined and restricted setting cannot 'normally' be expected to occur within a dwellinghouse of this kind and its curtilage. Indeed, I will go so far as to say that the numbers of dogs alone was sufficient in this case to create a mixed use that required express planning permission, given the amount of noise they would be likely to cause and irrespective of any change in character brought about by the kennels themselves or comings and goings generated by any business-related aspect of the breeding activity.

30. Although no noise data has been provided by any party, it is a matter of common sense that several large dogs kept at a small residential property are more likely than not to generate noise significantly greater than would usually be associated with a dwellinghouse and thus change the character of the property, especially when accommodated outside. The numerous objections from neighbours point to this and I experienced it for myself when visiting No 21. The concept of a statutory nuisance pursuant to the Environmental Protection Act 1990 falls outside the remit of planning legislation and is not therefore an appropriate measure of character change in a planning context.

31. I give no credence to the Appellant's assertion, made in the context of requesting a LDC, that 10 dogs plus offspring should be regarded as an incidental use. This claim is unsubstantiated and entirely without foundation. On the contrary, I find that, at the time that the enforcement notice was issued, the lesser number of dogs then kept in association with breeding was such that the activity could not reasonably be held to be incidental to the enjoyment of a dwellinghouse as such. It was therefore a distinct component of a mixed use, as alleged in the notice, and did not fall outside the definition of 'development' by reason of section 55(2)(d) of the 1990 Act as amended.

32. The keeping of dogs, for whatever purpose, is not otherwise permitted development pursuant to the GPDO, nor does it fall within the parameters of any planning permission granted by the Council. I therefore conclude on the balance of probabilities that the matter stated in the enforcement notice amounted to a breach of planning control. Accordingly, the appeal on ground (c) fails.

The appeal on ground (d)

33. In appealing against the enforcement notice on ground (d) the onus of proof is firmly on the Appellant to demonstrate on the balance of probabilities that, at the date when the notice was issued, no enforcement action could be taken against the stated breach of planning control by reason of the passage of time. In this case, the Appellant must show that the material change of use from a dwellinghouse to the subject mixed use occurred more than ten years before the notice was issued (hereinafter referred to as 'the relevant period') and that the mixed use was continuous thereafter.

34. The material date is therefore 11 October 2003. It must also be borne in mind that the judgment in *Gabbitas v SSE & Newham LBC* [1985] JPL 630 makes it clear that if the local planning authority has no evidence of its own, or from others, to contradict or otherwise make the Appellant's version of events less than probable, there is no good reason to dismiss an appeal on ground (d), provided the Appellant's evidence alone is sufficiently precise and unambiguous.

35. In demonstrating her case, the Appellant relies primarily on a statutory declaration in which she sets out, in meticulous detail, the dates of tenure to the nearest month of every adult dog kept at the appeal property during her period of occupancy, which began in September 1998. Taking this evidence at face value, it appears that a maximum of 11 adult dogs have been kept at any one time during the relevant period (at several points going back as far as 2003) and a minimum of six (for a spell of three months from September to December 2004). All were German Shepherds or Rottweilers.

36. According to the Appellant, most of these dogs were registered with the Kennel Club. It is evident from the Kennel Club records before me, which I have no reason not to accept as authentic, that many more dogs than referred to in the declaration are listed as having been bred or owned by the Appellant over the years. At the Hearing it was confirmed that these were puppies born at the property, registered with the Club and sold on shortly afterwards.

37. I cannot fault the precision and unambiguousness of the Appellant's evidence and, this being so, turn to consider whether any other evidence before me contradicts her version of events or renders it less than probable. The Council and others present very little evidence which might conceivably do this. The former points out that the Kennel Club registration documentation before me is far from comprehensive. However, having regard to *Gabbitas*, corroboration in documentary form is not necessarily required to demonstrate the Appellant's case.

38. My attention is also drawn to the fact that evidence from the Appellant's accountant regarding tax liability dates back only to 2004. However, this in itself does not contradict the detailed claim made on oath that dogs were being bred at the property before that date, particularly when one bears in mind the Appellant's sworn statement that the activity is looked upon as a hobby rather than a commercial enterprise and that she often loses money when breeding a litter. In any event, business activity is but one potential determinant of when a material change of use from a dwellinghouse might have occurred. As *Wallington* demonstrates, numbers of dogs alone can be sufficient to trigger this.

39. This being so, I attach little credence to the view that a material change of use from a dwellinghouse (as distinct from one triggered by the intensification of the dog breeding component of a mixed use) occurred at some time between 2010 and 2012. The Council's conclusion to this effect is based on the fact that the Appellant did not join the Kennel Club's Assured Breeders Scheme until 2012 and that the neighbour complaints increased during that period. I appreciate that either might potentially mark a step change in dog breeding practice at the property. However, nothing before me suggests that was so significant as to trigger a departure from a low key, incidental activity.

40. Notably, there is no evidence of a significant change in the number of dogs during this two year spell. Moreover, whilst there may well have been a rise in the level of disturbance caused by dogs at the appeal property in recent years, to which several neighbours attest, this is unquantified and, if it has occurred, could be attributable to a variety of potential reasons. These might include an intensification of dog breeding activity (as distinct from a material change from a primary dwellinghouse use) or something as simple as a change in neighbour or the individual characters of the dogs themselves.

41. One neighbour who attended the Hearing reported observing only three dogs in the property's garden some years ago, but could not attribute his observation to a particular time within the relevant period. Nor was he in a position to confirm that those were the only dogs present within the property as a whole. There is general agreement between the parties that the existing kennels in the rear garden were constructed in 2006. However, no one disputes that they replaced original kennels erected in 2002 and utilised the same concrete base. Therefore, whilst the replacement development may be indicative of an intensification in dog-breeding activity in or around 2006, it was not necessarily the trigger for an initial material change of use from a dwellinghouse.

42. Slightly more tangible is an entry in the Council's records to the effect that, in or around February 2004, animal welfare officers reported to the environmental health section that three dogs were being kept in kennels in the garden of the appeal property and one indoors. However, this is nothing more than a two-line entry in the Council's documentation. The officers are not named, no written record of their findings or the nature/thoroughness of their investigation has been submitted and no Council officer with contemporary knowledge of the incident attended the Hearing. By contrast, the Appellant's statutory declaration records 10 adult dogs being kept at the premises at that time and names them all. By my reckoning, all but two appear in the submitted Kennel Club records.

43. I am mindful that the animal welfare officers may not have gained access to the whole of the property and that, at the time of their visit, dogs may have been sent elsewhere for breeding purposes or have been out with Mr Yates in connection with his security business. Mindful that the Appellant's evidence of dog breeding history is given on oath, is far more detailed than the Council's records and largely substantiated by documentation, I find on balance that it has greater substance and reliability than the Council's evidence to the contrary and that there is no good reason to question its accuracy. I therefore attribute substantial weight to it.

44. Accordingly I accept that, in all likelihood, at least six adult dogs were kept at the appeal property at all times during the relevant period and used in

association with breeding. I find that all six dogs that the Appellant claims were present from September to December 2004 are documented in the Kennel Club records before me and, moreover, that all were adults by that time. Having regard to *Wallington* I am mindful that, as I have already explained, the Inspector found simply that the keeping of six dogs was not excessive in the circumstances of that particular case rather than marking the threshold at which a material change of use took place. Moreover, that property was in all likelihood larger than 21 Rowan Avenue, yet six was still considered by the Court to be a generous measure of normality.

45. This being so, and again applying my own judgment to the particular circumstances of this case, I find the dwellinghouse to be of such limited size that the keeping of six adult German Shepherds or Rottweilers would have exceeded what would normally be expected to occur within its confines. Bearing in mind the level of noise likely to be caused by large dogs being kept outside and the effect of this on the character of the property it follows that, on the balance of probabilities, dog breeding activity was a distinct component of a mixed use requiring planning permission, rather than something incidental to the primary use of a dwellinghouse, continuously throughout the relevant period.

46. I cannot rule out the possibility that fluctuations in the level of dog breeding or other changes at the property may have, at some point, resulted in significant intensification of the dog breeding activity within the relevant period amounting to a further material change of use. However, no such possibility is alleged in the enforcement notice and, this being so and having regard to *Mia Carla*, it is not a matter for me.

47. I conclude that the Appellant has fulfilled the burden of proof in demonstrating that the material change of use from a dwellinghouse to the alleged mixed use took place prior to the beginning of the relevant period rather than during it and that a mixed residential/dog breeding use was continuous thereafter. It follows that no enforcement action could be taken against that change of use by the time that the notice was issued and, accordingly, the appeal on ground (d) succeeds.

Conclusion

48. For the reasons given above I conclude that the appeal should succeed on ground (d). Accordingly, the enforcement notice will be corrected and quashed. In these circumstances the appeals on grounds (f) and (g) do not need to be considered.

Formal decision

49. It is directed that the enforcement notice be corrected by:
    - (i) in section 2, the deletion of the word 'Land' and the substitution therefor of the word 'Property';
    - (ii) the deletion of the wording of section 3 in its entirety, with the exception of the heading, and the substitution therefor of the words 'Without planning permission, a material change of use of the Property from use as a dwellinghouse to a mixed use comprising use as a dwellinghouse and use for dog breeding.';
    - (iii) in requirement 1 in section 5, the deletion of the words 'Permanently reduce' and the substitution therefor of the word 'Reduce';

(iv) in requirement 2 in section 5, the deletion of the word ‘kennel’ and the substitution therefor of the word ‘cage’; and

(v) in requirement 3 in section 5, the deletion of the words ‘from the site’ and the substitution therefor of the words ‘arising from compliance with requirements 1 and 2 from the Property’.

50. Subject to these corrections, the appeal is allowed and the enforcement notice is quashed.

Alan Woolnough

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Simon Brett MRTPI	Managing Director, Brett Incorporated Ltd
Jessica Yates	Appellant
Anthony Yates	Appellant’s husband

FOR THE LOCAL PLANNING AUTHORITY:

Matthew Gest	Manager, Planning Investigations and Enforcement Team, Brighton and Hove City Council
Robin Hodgetts	Senior Planning Investigations Officer, Brighton and Hove City Council

INTERESTED PERSONS:

Fred Cooper	Local resident
Andrew Marcou	Local resident

DOCUMENT SUBMITTED AT THE HEARING

1 Letter to the Planning Inspectorate from Mr Brett, dated 7 April 2014, submitted by the Appellant

PLAN

A Plan attached to the enforcement notice