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# Appeal Decision

Site visit made on 1 September 2015

**by A U Ghafoor BSc (Hons) MA MRTPI**

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

Decision date: 5 October 2015

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**Appeal Ref: APP/Z4718/C/15/3006740**

**Lower Ground Floor, Birkby Bargain & Home Improvement Centre, Bay Hall Works, Miln Road, Birkby, Huddersfield HD1 5EJ**

- 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 Mr Javid Akhtar against an enforcement notice issued by Kirklees Metropolitan Borough Council.
- The notice was issued on 6 February 2015.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use from industry to retail.
- The requirements of the notice are to cease the retail use and remove from the building all articles displayed and stored for sale.
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2) (b), (c) and (g) of the Town and Country Planning Act 1990 as amended.

**Summary of Decision: The appeal succeeds in part in relation to the period of compliance but otherwise the enforcement notice is upheld as corrected and varied in the terms set out below in the Formal Decision.**

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## Procedural Matters

1. Some of the representations focus, in part, on the planning merits of the alleged development. Reference is made to, amongst other things, the effect on local amenities, parking conditions and highway safety. However such considerations inform only whether planning permission should be granted, rather than whether planning permission was required for the matter stated in the Notice when it was issued. My decision is concerned only with the latter and, accordingly, I have not had regard to the former in determining this appeal.

## The Enforcement Notice

2. Paragraph 2 of the issued Notice describes the land affected as the '*lower ground floor*', which, for ease, I shall abbreviate as '*the LGF*'. The area is physically separate from the floors above which are occupied by Deluxe Beds Limited who, in around 2011, let out the LGF to the Appellant. It appears the toilet and canteen facilities were not included in the tenancy. The site plan attached to the Notice covers the whole of the LGF area and is, technically, incorrect. Nevertheless, from the written representations, it seems to me that this deficiency has not caused any confusion. The Appellant has submitted<sup>1</sup> a revised site plan identifying the occupied area. For greater clarity, I shall substitute the plan attached to the issued Notice with this new site plan.

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<sup>1</sup> By letter dated 22 September 2015.

3. It is apparent the allegation is better described as follows: *'Without planning permission, the material change of use of the lower ground floor from industry to its use for retail purposes'*. Greater precision follows when the requirements are phrased to require the cessation of the LGF for retail purposes. The intended corrections are minor and do not fundamentally alter the nature of the alleged development originally enforced against. The appeal parties understood the Notice's intent, because of the way and manner in which the grounds of appeal have been selected and presented. I am satisfied that no injustice to any party arises from any of the above corrections.
4. A planning contravention notice had been issued but the Council say it was unreturned. Enquiries have been made with HM Land Registry and documents show the subject land is owned by the Council. There are various 999 year leases registered. Interested parties include Mr Abdul-Razak Gulab Din and Mr Matloob Hussain as well as the HSBC Bank, and all individuals and organisations have been served with a copy of the Notice. It is unclear whether Deluxe Beds Ltd have been served with a copy of the Notice, however, I am satisfied the interests of the owner and occupiers have been satisfactorily protected because a timely appeal has been made.

### **Ground (b)**

5. In legal grounds of appeal, the burden of proof rests with the Appellant with the standard of proof being the balance of probabilities. A change of use of land or buildings requires planning permission if it constitutes a material change of use. There is no statutory definition of material change of use; however, it is linked to the significance of a change and the resulting impact on the use of land and buildings. Whether a material change of use has taken place is a matter of fact and degree and this will be determined on the individual merits of a case.
6. The LGF can lawfully be used for general industrial purposes, which is classified as Class B2 of the Use Classes Order<sup>2</sup>. The Appellant does not argue that the LGF was used for an industrial purpose when the Notice was actually issued. He vehemently denies that the LGF is used for the retail sale of cookers and refrigerators. He claims that domestic appliances are sold online through the company's own website, on internet sites such as Ebay and Gumtree, and on Preloved which had 1068 live adverts on 14 July 2015<sup>3</sup>. He maintains that white goods are serviced and despatched from the LGF, and that no retail sales take place onsite, though there is no evidence to show that there is a specific restriction on visiting members of the public to the site.
7. The Council's evidence is particularly instructive of the use of the LGF for the display of over 100 domestic appliances during the period leading up to the issuing of the Notice. My own observations confirmed the Council's evidence that significant amount of domestic appliances are stacked, arranged and laid out in rows. Walkways have been created and virtually all of the appliances have price tags on them, which suggests that the public can inspect displayed goods at leisure before purchase. There is a large counter area located in a prominent part of the LGF. The magnitude of the operations suggests the LGF is used for the display and retail sale of portable appliances.

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<sup>2</sup> Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended.

<sup>3</sup> Information taken from the Appellant's final comments.

8. In addition to all of that advertisements have been erected on the external elevations of the building, which are visible to the passing public, and show the availability of branded domestic appliances. The images show refrigerators and washing machines as well as other domestic white goods available in the premises. The front yard is used for open air display of white goods. To my mind the layout of the site together with the advertisements indicate that the LGF is open to visiting members of the public who can acquire domestic appliances for delivery or collection.
9. The Council's assertion is that the LGF is also used for the sale of Asian clothes on the internet. Its evidence includes images from a website, *PoshakCollection*, and photographs of garments on display in the LGF during the period leading up to the issuing of the Notice. I observed that part of the LGF is used for the display of Asian garments. The clothes include variety of designs with elaborate embroidery, which allows potential customers to view the type of fashion available. There are manikins presumably used to display garments. Given the considerable amount of clothes on display and the scale of the activity, it is plausible that the LGF is also used for the display and retail sale of clothes to visiting members of the public.
10. The evidence presented shows that there is no restriction on visiting members of the public who can view white goods and clothes before purchase. The arrangement and layout of the LGF together with the type of advertisements on the external elevations indicate that the site is used for the display of goods for sale to visiting members of the public. The character of the use of the LGF has significantly changed to a retail use given the nature and scale of the activities. The LGF is primarily used for retail purposes, which falls within the ambit of Class A1 of the Schedule to the Use Classes Order. I find that a physically and functionally separate retail planning unit has been created.
11. In addition to local planning policy objections to the use of the LGF for retail purposes, as identified in the reasons for the issuing of the Notice, interested parties have concerns about the effect of the change of use on amenities and traffic. There is evidence of increased comings and goings associated with the retail activity. I consider that the LGF's change of use from general industrial to retail is likely to have both on and offsite planning consequences.
12. As a matter of fact and degree, the particular facts show a material change of use of the LGF has occurred as a matter of fact. The description of the corrected allegation is correct. Therefore ground (b) must fail.

### **Ground (c)**

13. The Appellant provides no evidence to show that the change of use of the LGF from general industrial to retail benefits from a deemed planning permission. There are no specific permitted development rights set out in the Town and Country Planning (General Permitted Development) Order 1995 as amended<sup>4</sup> for the change of use of the LGF from its lawful industrial use to its use for retail purposes. Express planning permission is required and it has not been obtained. The corrected matters constitute a breach of planning control. Ground (c) must also fail.

### **Ground (g)**

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<sup>4</sup> Amended by statutory instrument 2015 no. 596, the Town and Country Planning (General Permitted Development) (England) Order 2015, which came into force on 15 April 2015.

14. It is necessary to consider whether the compliance period specified in the notice is reasonable. The Council's main argument is that two months is sufficient to comply with the terms of the Notice. It considers that most sales are done over the internet and the relocation of domestic appliances to an alternative storage unit should be straightforward.
15. However, firstly, I consider that the requirement to cease the use of the LGF for retail purposes is likely to cause some disruption to the business, the Appellant and employees; extending the compliance period has the potential to minimise disruption. Secondly, suitable alternative accommodation would be required to relocate significant amount of bulky products and stock. Arrangements for appropriate transport would need to be made, which could take some time. Thirdly, an extended period would not place a disproportionate burden upon the Appellant and his business. Therefore, six months would be reasonable and as I am varying the period of compliance, ground (g) succeeds to this limited extent only.

### **Overall conclusions**

16. For the reasons given above and having considered all other matters, I conclude that the appeal on grounds (b) and (c) fail. Ground (g) succeeds because a reasonable period of compliance is six months and I shall vary the Notice. Subject to the corrections and a variation, the appeal is dismissed and the Notice is upheld.

### **Formal Decision**

17. It is directed that the enforcement notice be corrected by:
- (A) The deletion of all of the text in paragraph (3), the breach of planning control alleged, and the substitution therefor of the following text: *'Without planning permission, the material change of use of the lower ground floor from industry to its use for retail purposes'*
  - (B) The deletion of all of the text in paragraph (5), what you are required to do, and the substitution therefor of the following text: *'Cease the retail use of the lower ground floor and remove from the lower ground floor all articles displayed and stored for sale'*
  - (C) The site plan attached to the Notice is deleted and substituted with the plan annexed to this decision.
18. It is directed the enforcement notice be varied by the insertion of the following words beneath the corrected requirement: *'Time for compliance with the enforcement notice is six months'*.
19. Subject to the corrections and variation, the appeal is dismissed and the enforcement notice is upheld.

*A U Ghafoor*

Inspector

# Plan

This is the plan referred to in my decision dated: 05.10.2015

by **A U Ghafoor BSc (Hons) MA MRTPI**

**Land at Lower Ground Floor, Birkby Bargain & Home Improvement Centre, Bay Hall Works, Miln Road, Birkby, Huddersfield HD1 5EJ**

**Reference: APP/Z4718/C/15/3006740**

Scale: Not to scale



## Appeal Decision

Site visit made on 24 February 2015

**by Michael Moffoot DipTP MRTPI DipMgt MCMI**

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

**Decision date: 09 November 2015**

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**Appeal Ref: APP/Z4718/A/14/2220140**

**Field House Farm, Wholestone Moor, Outlane, Huddersfield HD3 3FQ**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Mr Matthew Tidmarsh (DC21) against the decision of Kirklees Metropolitan Council.
  - The application Ref: 2012/62/91594/W, dated 14 May 2012, was refused by notice dated 10 January 2014.
  - The development proposed is installation of 1 Endurance 50kW wind turbine 34.2m in overall height (ie to blade tip).
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### Decision

1. The appeal is allowed and planning permission is granted for installation of 1 Endurance 50kW wind turbine 34.2m in overall height (ie to blade tip) at Field House Farm, Wholestone Moor, Outlane, Huddersfield HD3 3FQ in accordance with the terms of the application Ref: 2012/62/91594/W dated 14 May 2012, and subject to the conditions in the attached Schedule.

### Procedural Matter

2. The Secretary of State for Communities and Local Government issued a Written Ministerial Statement (WMS) on 18 June 2015 setting out considerations to be applied to proposed wind energy development. I have taken into account the changes to policy arising from the WMS and associated amendments to the *Planning Practice Guidance* together with the views of the main parties on the matter.

### Main Issues

3. The main issues in this case are:
  - (i) whether the proposal would be inappropriate development in the Green Belt;
  - (ii) the effect of the development on the openness of the Green Belt and the purposes of including land in it;
  - (iii) the effect on the character and appearance of the area, including the cumulative impact;
  - (iv) the effect on the significance of designated heritage assets; and
  - (v) if it is inappropriate development, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations, including the provision of renewable energy, so as to

amount to the very special circumstances necessary to justify the development.

## **Reasons**

### *Inappropriate development*

4. Paragraph 89 of the *National Planning Policy Framework* ('the Framework') sets out the types of new buildings that are not considered inappropriate in the Green Belt. It does not include wind turbines; indeed, paragraph 91 states that elements of many renewable energy projects in the Green Belt will comprise inappropriate development.
5. The appeal proposal would therefore be inappropriate development which the Framework advises is, by definition, harmful to the Green Belt and such harm should be accorded substantial weight.

### *Openness and purposes*

6. With a hub height of some 24m and a blade tip height of about 34m the proposed turbine would have some presence within its local setting and as a man-made feature in the Green Belt, together with the associated control cabinet, would result in some loss of openness. However, given the slender form of the turbine and modest size of the cabinet the reduction in openness would be moderate in this case.
7. Having regard to the scale and form of the turbine and the nature of the development, the proposal would also result in some encroachment into the countryside in conflict with one of the five purposes of the Green Belt as described in paragraph 80 of the Framework. Together with the moderate loss of openness, this militates against the proposed development.

### *Character and appearance*

8. Amongst other things, saved Policy EP8 of the *Kirklees Unitary Development Plan* (UDP) permits wind turbines and associated infrastructure provided the development will not cause serious harm to the character, recreational value and visual amenity of the Green Belt or landscape. These objectives are broadly consistent with the provision for acceptable forms of wind energy development in the Framework.
9. The landscape in the vicinity of the appeal site carries no formal designation. The proposed turbine would be sited to the west of Scapegoat Hill on an elevated moorland plateau in open countryside where rough, largely treeless grazing land is enclosed by dry-stone walls and fencing. The character of the surrounding area derives in large part from its exposed upland location with extensive views to the north and south over lower lying landscapes of the Southern Pennines and steep-sided valleys leading to scattered settlements and expansive urban areas in the valley floors. The site is within the 'Rural Fringes' Landscape Character Type in the *Landscape Capacity Study for Wind Energy Developments in the South Pennines* (2010) with an overall landscape sensitivity of 'moderate', where the key constraints are its relatively small scale and extent, the intimacy and complexity of its land cover and its densely settled character which makes it highly sensitive in visual and recreational amenity terms. I agree with this assessment. Reference has also been made to Supplementary Planning Guidance: *Wind Energy* which includes details of

the matters which will be taken into account in assessing proposals for turbines.

10. There are a number of vertical features in the vicinity of the site. They include a medium-scale wind turbine to the immediate east and two smaller twin-bladed turbines adjacent to the track to the south that forms part of the Kirklees Way. There are three lattice telecommunications masts at the radio station to the south of the site, another at the reservoir to the east and one to the rear of properties fronting Halifax Road to the south-east. A pair of tall monopole masts is visible some distance to the south-west of the site towards the aptly named Pole Moor and various overhead lines are evident in the local area. From the elevated appeal site and its environs I also noted a wind farm and individual turbines in the wider landscape, including a number close to the busy M62 to the west and other randomly sited installations to the north. The landscape also features prominent lines of pylons, overhead telegraph poles, street lights and lighting columns along the motorway corridor.
11. This is not therefore an environment that is devoid of turbines and other vertical infrastructure development; indeed, it could be argued that they are a defining feature and established characteristic of the area consistent with the moderate sensitivity of the landscape. In this context therefore, the introduction of an additional wind turbine of the scale proposed would have a limited impact and would not be the strident feature that the Council contends. Its effect would be most pronounced from local viewpoints, including the public right of way to the east of the site and another to the south/south-west. It would also be seen from the section of Kirklees Way between Halifax Road and the radio station and from Scapegoat Hill. For receptors using these routes the turbine would be noticeable but would be observed in conjunction with the numerous infrastructure items in the vicinity so that its visual impact would be limited.
12. From other viewpoints, including the more outlying ones identified in the appellant's photomontages and from other roads and public rights of way in the wider area, the impact would be less pronounced due to distance and intervening topography, vegetation and built development. As a consequence the magnitude of visual impact would be changeable, from insignificant at a distance to moderate at close quarters. As to cumulative impact, the proposal would not generally be observed in the context of other turbines in the wider landscape. However, it would be viewed more locally in conjunction with the turbines and telecommunications masts in the vicinity of the site, resulting in a moderate cumulative impact.
13. Drawing these findings together, I conclude that whilst there would be some visual impact arising from the proposal the overall impact of the development would be of a low to moderate magnitude, and as such would not result in material harm to the character and visual amenity of the landscape that Policy EP8 of the UDP seeks to protect.

#### *Heritage assets*

14. UDP Policy EP8 also includes provision for wind turbines where they will not cause serious harm to the character, appearance or setting of a listed building. One of the core principles of the Framework is to conserve heritage assets in a manner appropriate to their significance, so that they can be enjoyed for the



contribution to the quality of life of this and future generations. Paragraph 132 states that great weight should be given to the asset's conservation when considering the impact of a proposed development on the significance of a designated heritage asset. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that in considering whether to grant planning permission for development which affects a listed building or its setting, the decision maker shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

15. The Council submits that the individual and group setting of various Grade II listed buildings in the vicinity of the site would be adversely affected by the proposed development. The nearest properties are at Harts Hole and Rochdale Road and includes early to mid-19<sup>th</sup> century detached and terraced stone cottages and a barn with stone slate roofs and multi-light mullioned windows typical of traditional weavers' dwellings that are found throughout the area. However, these buildings are a significant distance from the appeal site and their setting would not be compromised by the proposed development due to the intervening landform of Wholestone Moor.
16. Listed properties on High Street, School Road and Chapel Street at Scapegoat Hill are further still from the appeal site and their setting is informed in large part by the tight-knit arrangement of built development within and on the edge of the village. In this context and given the separation distances involved the setting of these properties would not be affected by the proposed development.
17. The Scapegoat Hill Baptist Church on School Road is a substantial two-storey building of dressed stone under a pitched blue slate roof. It is an imposing example of Victorian religious solemnity with a considerable presence on the western edge of the village. Although the building's exposed upland location makes a significant contribution to its setting within the local landscape it would be more than 600m from the appeal site, and would not therefore be affected by the development. The setting of the standing stone/milestone at the junction of Nettleton Hill Road, School Lane and Round Ings Road has been greatly compromised by the clutter of road signage that surrounds it to the extent that its significance as a heritage asset has been significantly diluted. The appeal proposal would not result in further harm to its setting.
18. Reference has also been made to listed buildings at New Hey Road near Outlane on the north side of the M62, which are also a considerable distance from the appeal site and do not rely on it to define their setting. The listed buildings at Round Ings Road are well below the site and their setting relies on the grouping of the buildings and their architectural and historic significance rather than the wider surroundings.
19. Considerable importance and weight should be given to the protection of designated heritage assets. However, in the case of the examples cited by the Council I am satisfied that the turbine would not materially harm the significance of these heritage assets or their setting. As such, there would be no conflict with Policy EP8 of the UDP.

#### *Other considerations*

20. The Framework advises that where renewable energy projects comprise inappropriate development, developers will need to demonstrate very special

circumstances if projects are to succeed. Such very special circumstances may include the wider environmental benefits associated with increased production of energy from renewable sources.

21. The appellant advises that the proposed turbine would generate an estimated 250,000kWh annually - sufficient to power about 55 dwellings - and would reduce carbon emissions by some 140 tonnes per annum. Although these are relatively modest amounts, the Framework makes it clear that even small-scale projects can provide a valuable contribution to cutting greenhouse gas emissions and assist in ensuring future energy security. I attach significant weight to the benefits that the appeal proposal would bring about in these respects.
22. I also acknowledge that small-scale projects such as this can bring about economic benefits and job opportunities which can make a modest contribution to the local and wider economy. This attracts moderate weight in favour of the development.

### **The balancing exercise**

23. The turbine represents inappropriate development in the Green Belt which is, by definition, harmful, and this harm must be afforded substantial weight according to the Framework. There would also be some loss of openness and a degree of encroachment. I attach no material weight to the impact of the proposal on the character and appearance of the area or the effect on the significance of heritage assets.
24. On the other side of the coin the provision of renewable energy, the resultant reduction in CO<sub>2</sub> emissions and security of supply attract substantial weight, and such wider environmental benefits arising from the generation of energy from renewable sources may contribute to very special circumstances according to the Framework. When weighed against one another, the other considerations in this case clearly outweigh the harm to the Green Belt by reason of inappropriateness and the other moderate harm to the Green Belt I have identified. I therefore conclude that the very special circumstances necessary to justify the grant of permission exist in this case.
25. However, with reference to the transitional provisions set out in the WMS I note that the site is not in an area identified as suitable for wind energy development in a Local or Neighbourhood Plan. In these circumstances, the WMS states that local planning authorities can find the proposal acceptable if, following consultation, they are satisfied it has addressed the planning impacts identified by the affected local communities and therefore has their backing. In this case there were no objections from the affected local community and as such the proposal would meet the transitional arrangements contained in the WMS. Significant weight can be accorded to this.

### **Conditions**

26. The Council has provided suggested conditions in the event that the appeal succeeds. Where appropriate, I have amended the suggested conditions to accord with guidance in the *Planning Practice Guidance*.
27. In addition to the usual conditions regarding the commencement of development and compliance with approved plans, conditions to address the

requirements of the Ministry of Defence and Highway Authority are appropriate. In the interests of public safety. To safeguard visual amenity I shall require approval of the colour finish to the turbine and control cabinet.

28. Given the mechanical limitations of the wind turbine it is necessary and reasonable to impose a temporary permission for 25 years and require removal of the entire installation at the end of the period or if it ceases to operate within the 25 year period.

### **Conclusions**

29. For the reasons set out above, I conclude that the proposal is acceptable and the appeal should succeed.

*Michael Moffoot*

Inspector

### **Schedule of Conditions**

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: (i) site location plan drawing no 02; (ii) elevation drawing no 05; and (iii) foundation/cabinet detail drawing no 06.
- 3) No development shall commence until written notification of the following details has been submitted to the Local Planning Authority for the information of the Ministry of Defence:
  - (i) the date for the erection of the wind turbine;
  - (ii) the maximum height of the construction equipment; and
  - (iii) the latitude and longitude of the wind turbine.
- 4) No development shall commence until a scheme has been submitted to and approved in writing by the Local Planning Authority which provides the following details:
  - (i) measures for the protection of public safety on definitive footpath no. Col/41/10 during the construction period;
  - (ii) the access route to transport materials and equipment to the site;
  - (iii) temporary warning and direction signs on approaches to the site;
  - (iv) the location of materials storage and car parking areas for construction workers during the construction period.

The approved scheme shall be implemented and maintained throughout the construction period.

- 5) No development shall commence until details of the colour(s) and finish of the wind turbine and control cabinet have been submitted to and approved in writing by the Local Planning Authority. Development shall be carried out in accordance with the approved details.
- 6) The planning permission hereby granted shall be for a period not exceeding 25 years from the date electricity is first exported to the National Grid. The date on which electricity is first exported to the National Grid shall be notified in writing to the Local Planning Authority within 28 days of that event.
- 7) At the end of the 25 year period referred to in condition 6, the wind turbine shall be decommissioned. Within 3 months of the decommissioning, the wind turbine and any associated equipment shall be removed from the site and the site shall be restored in accordance with a scheme which shall previously been submitted to and approved in writing by the Local Planning Authority.
- 8) If the wind turbine hereby permitted ceases to operate for a continuous period of 6 months, a scheme for the decommissioning and removal of the wind turbine and any other ancillary equipment and structures relating solely to the wind turbine shall be submitted to and approved in writing by the Local Planning Authority within 3 months of the end of the cessation period. The scheme shall include details for the restoration of the site. The scheme shall be implemented within 3 months of the date of its written approval by the Local Planning Authority.