Appeal Decision

Inquiry held on 4 October 2005
Site visit made on 4 October 2005

by Antony Fussey JP BSc(Hons) Dip TP MRTPI

an Inspector appointed by the First Secretary of State

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Date
0 4 NOV 2005

Appeal Ref: APP/J3910/C/05/2002064
Land to the north-east of Hickstead, Lower Seagry, Chippenham, Wilts, SN15 5EW

- 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 Mathew James Hicks against an enforcement notice issued by North Wiltshire District Council.
- The Council's references are 02.00197.ENF and AD2806.
- The notice was issued on 21 March 2005.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the land from agricultural to a mixed use for agriculture and industrial, including the breaking, repair, storage and modification of machinery, including motor vehicles.
- The requirements of the notice are
  1. cease the use of the land for industrial use, including the breaking, repair and storage and modification of machinery, including motor vehicles
  2. remove all materials associated with the unauthorised use from the site including all vehicles, parts, tools and other equipment.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the ground set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended does not fall to be considered.

Summary of Decision: The appeal is dismissed and the enforcement notice upheld.

Procedural Matters

1. All evidence at the Inquiry was given on oath.

2. At the Inquiry an application for costs was made by Mr Mathew James Hicks against North Wiltshire District Council. This application is the subject of a separate Decision.

Site Description

3. The appeal relates to a modern metal-clad and concrete-floored agricultural building, measuring about 15m x 8m x 4m to the eaves. It is on the northern side of a lane leading to Lower Seagry and to the east of the appellant's house. An access off the lane runs between them and then divides, with a separate leg going on to serve each; the eastern terminates in a hardcored forecourt outside the appeal building. A tall doorway and a pedestrian door open off the forecourt into the building. A little way inside the smaller doorway, and next to the building's northern wall, is a small flat-roofed structure, measuring some 2m wide x 3m long x 2m high, which is used as an office and storeroom.

4. In the main part of the building I saw a wide variety of equipment, including a vehicle lift, welding gear, a hydraulic press, a quad bike and a standby generator. There were

workbenches next to the building's southern wall, and various spares, tyres, tools and other items on different parts of the floor. There was a large tractor inside the main doors, which I was told belonged to a local farmer and was being repaired. There was also a motor cycle under repair. The building and forecourt are largely surrounded by mounding, some 1.5 to 2m tall. Between it and the building's northern wall I saw a trailer and a car, which appeared to be derelict, and there was a large trailer and a bailer on the forecourt.

5. The appeal site extends beyond the mounds to include the nearest part of a large field. I saw a trailer, a tractor, other items of agricultural machinery, together with a horse box and a horse trailer, on the southern part of the field, parked in a row next to the access to the appellant's house. To the south-west of the house is an outbuilding which I was told was the remaining part of a block of stables. Further west, and in another ownership, is an older house, known as The Old School House.

Planning History

6. In 2001 the appellant applied for a lawful development certificate (LDC) in respect of the use of the former stables building as a dwelling. An LDC was granted; the building was then largely demolished and the appellant's current house was built.

7. In 2004, following a visit from the Council's enforcement officer, he applied for planning permission to continuing using the workshop to repair agricultural equipment. The Council would have approved the application subject to a Section 106 Agreement but after he was informed that the submitted application did not relate to non-agricultural vehicles the appellant withdrew the application. At the Inquiry he said that the Agreement would have tied the occupation of the workshop to his house and that conditions on any permission would have controlled working hours and the nature of the use.

The Evidence Presented

8. The appellant is the sole proprietor of Auto and Trailer Services, which operates from the appeal site. Until 1994 he was a partner in a small family business near Malmesbury which was mainly involved in the manufacture, sale and servicing of trailers; the family also undertook agricultural contracting. He was mainly concerned in the manufacture, servicing and adaptation of the trailers, which from 1993 took place solely on the appeal site; at the Inquiry he agreed that a previous reference to 1990 was incorrect. He also repaired and serviced farm equipment, private motor vehicles and commercial vehicles. The land outside the workshop was used to park vehicles, etc in connection with the use, whose nature has not materially changed up to the present. From 16 October 1994 he operated the business in his own right, still from the workshop. There was always an element of agricultural use relating to the adjacent land, and this continues.

9. From October 1994 he and his mother stayed with his sister and brother-in-law, who at that time lived at the Old School House. He used their agricultural workshop for the business; in 1995 he was given the building and adjoining land. He decided in that December to sleep in the workshop but to use the cooking, washing and bathing facilities in the house; he also kept his clothes there. The building was not physically altered but he placed a camp bed in the office/store room, between the desk and the door, for sleeping. The room continued to be used to store parts and equipment and as an office; the bed was folded up during the day. He did not regard the workshop as his home but did not really sleep anywhere else during this period.

10. He moved into the stables in summer or autumn 1996 (the details he gave varied). He then in 2001 sought an LDC in relation to the use of the stables as a dwelling. His application was supported by a statutory declaration dated 22 May 2001 which said that at Christmas 1995 he decided to live in the appeal building. He shared bathroom, cooking and laundry facilities with the Old School House until the summer of 1996, when he converted the old stable building into a self-contained dwelling. He had lived in the former stables since autumn 1996.

11. He argued that throughout the period from 1994 until the present he has used the workshop to repair and service a range of vehicles. He said that the split between agricultural and private vehicles varied but that private vehicles currently represent some 30% of the business' turnover, less than before. He provided 9 statutory declarations, dated September 2005, from customers and suppliers which refer to the existence of a mixed agricultural and industrial use for more than 10 years. All refer to vehicles including private motor cars, land rovers, light commercial vehicles and horse boxes parked at, and being worked on within, the workshop.

12. The Council said that, despite repeated requests, he did not provide evidence to support the claims he is making in this appeal. However it cited his statutory declaration supporting the LDC application, and also two of July 2001 from his sister and a friend, which confirmed the information he gave about a residential use. The Council argued that the business activities have been mixed in varying degrees with agricultural and residential uses. Although accepting that no dwelling was created, it argued that the various changes have been material. Accordingly it believed that the business use has been a constituent part of different mixed uses over the 10 year period, with the current uses being materially different from others during that period.

Inspector's Appraisal

13. The material date is 21 March 1995. The parties agreed that at that date the building was in mixed use for agriculture and vehicle repairs, although without planning permission, and that this activity has continued to the present. It seems to me that this also relates to the land immediately around the workshop, and both parties appear to agree that the workshop and this land constitute a planning unit, separate from the appellant's house. It is also not disputed that between December 1995 and May 1996 the store room / office area within the building was also used for residential purposes in that the appellant slept there. In the context of this appeal, the onus is on him to demonstrate that on the balance of probabilities this residential use was not material.

14. I agree that neither the office area nor the building as a whole constituted a dwelling, as eating and washing facilities were elsewhere. However this is not what is alleged. Part of the building was used for sleeping every night over this period and I accept that this constituted a residential use. Indeed I agree with the Council that sleeping is a principal element of a residential use.

15. The area involved was relatively small but for a substantial part of the 24 hour day residential was the only active use of the building and the planning unit. This was so even though the building had not been physically adapted to facilitate it and there appears to have been no change to the intensity of the other uses taking place. It may be that sleeping in the building for only a few nights could have been de minimis, and I am not persuaded by the

Council's arguments otherwise. However the use operated consistently every night for around 5 or 6 months. I do not consider that such a regular use over such a period was de minimis and the appellant conceded that it was not ancillary to the primary use. Accordingly I find as a matter of fact and degree that the nature and scale of the residential component means that during this period the building had a mixed use of agriculture, vehicle repairs and residential.

16. I find the change in the mixed use by the addition of the residential component to be material and that the appellant has not discharged the burden on him to demonstrate otherwise. *Lynch v SSE QBD [1999] JPL 354* indicates that the addition of a material element to an existing mixed use produces a new material change of use, and that the 10 year period for immunity from enforcement begins at that point.

17. The parties accept that the industrial component was added to the lawful agricultural use more than 10 years before the enforcement notice was served and has continued to operate since then. However, the intervening material change of use within the same planning unit means that the period now under consideration began with the commencement of the new mixed use of agriculture and industry, with the residential element, in December 1995. Accordingly the 10 year period required to secure immunity from enforcement action has not yet elapsed. The only lawful use of the appeal site is therefore for agriculture. Moreover, although not determinative in this appeal, I consider that when the ancillary office/storage use physically and exclusively re-occupied the space used by the residential element in about May 1996, a further new chapter in the use of the building opened. In any event the enforcement notice was served within the 10 year period from December 1995, and the appeal must therefore fail.

Conclusions

18. For the reasons given above and having regard to all other matters raised, I consider that the appeal should not succeed.

Formal Decision

19. I dismiss the appeal and uphold the enforcement notice.

A. Fussey

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr D R Pearce BSc(Est Man) FRICS	Director, Land Development and Planning Consultants Ltd, Lavender Cottage, Nettleton, Chippenham, Wilts, SN14 7NS
He gave evidence and also called	
Mr M J Hicks	The appellant, of Hickstead, Lower Seagry, Chippenham, Wilts, SN15 5EW

FOR THE LOCAL PLANNING AUTHORITY:

Mr N Wicks BTP Dip Law MRTPI	Chartered town planner, of Enforcement Services Ltd, 7 Station Road, Winslow, Bucks, MK18 3DZ

DOCUMENTS

Document	1	List of persons present at the inquiry
Document	2	Council's letter of notification and list of persons notified
Document	3	Statement of Common Ground
Document	4	Appendices I and II to Mr Hicks' proof
Document	5	Appendix to Mr Wicks' proof
Document	6	Correspondence between Mr Wicks and Mr Pearce

PLANS

Plan A Plan attached to the enforcement notice

Costs Decision

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Costs application in relation to Appeal Ref: APP/J3910/C/05/2002064
Land to the north-east of Hickstead, Lower Seagry, Chippenham, Wilts, SN15 5EW

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr Mathew James Hicks for an award of costs against North Wiltshire District Council.
- The inquiry was in connection with an appeal against an enforcement notice alleging the material change of use of the land from agricultural to a mixed use for agriculture and industrial, including the breaking, repair, storage and modification of machinery, including motor vehicles.

Summary of Decision: The application fails and no award of costs is made.

The Submissions for Mr Hicks

1. The Council acted unreasonably in terms of paragraphs 23 and 24 of Annex 3 to Circular 8/93 in that it had no reasonable grounds to conclude that there had been a breach of planning control and that its stated reasons for the expediency of taking enforcement action were inadequate.

2. There was no evidence of any investigations to justify the statement that the unauthorised development took place within the previous 10 years. The parties agreed that the use which is the subject of the notice had existed for more than 10 years and it was only after the notice was served that it became clear that the Council's conclusion was based on the residential use between December 1995 and May 1996. The first he knew of this point was in the Council's letter of 18 May 2005; he had not been invited to address this issue before.

3. Well before proofs had to be prepared he proposed that the notice be withdrawn to give the opportunity for the evidence available to both parties to be produced and considered. The Council rejected this proposal and gave him no opportunity to explain the nature and extent of the residential use, nor did it explain that this was the sole ground for arguing that the commercial use had not had 10 years uninterrupted existence.

4. The notice alleges that a commercial use is inappropriate in this location, but before it issued the notice the Council had confirmed its willingness to grant permission for one, but which excluded the repair of private motor vehicles. It did not explain why this element of the use is unacceptable or why it was expedient to issue the notice in this case. It is unreasonable to take enforcement action to remedy the absence of a planning permission.

5. The Council had not carried out initial investigations as advised in paragraphs 14 to 17 of PPG18. Had it done so it would have been aware of the nature and scale of the business, and the importance of car repairs to it. No account was taken of the financial implications of complying with the notice and, had there been proper investigation, these could have been considered along with the planning options. Had the Council complied with the advice, the pressure on a small business caused by the need to appeal would not have arisen and the costs would not have been incurred. However the Council's unreasonable actions have caused unnecessary expenditure.

The Response by North Wiltshire District Council

6. The parties did not dispute that there has been a breach of planning control, but differ over when it occurred. The appellant's first criticism is therefore unfounded. When the notice was issued, there was clear evidence of a breach; the appellant said that this happened more than 10 years ago, but this assertion was unsupported by evidence. The Council gave more weight to his statutory declaration, which contradicted the assertion. The Council was consistent in its requests for evidence, but none was forthcoming until the appellant's proof was received in September. By then it was too late to avoid most of the costs, which had already been incurred. The Council has not acted unreasonably; the appellant had provided no evidence to demonstrate that there had been no breach of control.

7. The Council provided very little evidence of harm from the development or conflict with policy as these matters are irrelevant to the inquiry because there is no ground (a) appeal or deemed planning application. The Council cannot be criticised for not addressing a matter which is not the subject of the appeal; if this point had not arisen only after the appellant's case had been concluded, the Council could have provided evidence on expediency.

8. The Council has not behaved unreasonably. Any unnecessary expense for the appellant arose from his own omission or inaction; costs could have been reduced had he brought the evidence which had been previously requested.

Conclusions

9. I have considered this application for costs in the light of Circular 8/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.

10. The Council had clear evidence, volunteered by the appellant in his statutory declaration, of a residential use in the building and this caused it to believe that the commercial use was unauthorised, as having been part of an interrupted mixed use. In view of the details he gave, I see no reason why the Council should have sought further information from him or needed to investigate this point further. It did, however, consistently ask for evidence from him to support his view that the breach of planning control had been occurring for more than 10 years.

11. I see no reason why the notice should have been withdrawn to give him an opportunity to bring forward other evidence to in effect counter what he had previously said. It may have been that the importance of the period of residential use may not have been obvious to him at first, but he still proceeded with the appeal when he knew the specific point being made by the Council.

12. The parties agreed that the materiality of the residential component of the mixed use was a matter of fact and degree and I do not consider that the Council was unreasonable in considering it material when the appellant did not. I am satisfied that it had reasonable grounds to conclude that there had been a breach of planning control.

13. The enforcement notice set out the reasons for service by clear references to planning policies. These were not challenged in a ground (a) appeal and it would be inappropriate to closely examine the reasons without one, or indeed to consider the Council's position on the appellant's planning application as any form of precedent. On the face of it the Council's

reasons do not appear to me to demonstrate inadequate justification for enforcement action or to support the contention that the action was taken to remedy the absence of a planning permission. I am not persuaded that it was inexpedient or unreasonable to take the action.

14. PPG18 advises that the impact on a small business be examined before enforcement action is taken. I agree that the Council does not appear to have done this explicitly in relation to the notice, but I note that it had very recently being considering the appellant's application and was in negotiation with him. I therefore find it unlikely that the Council would have been unaware of the details of the business or that any further investigations would have removed the need for the appeal. Indeed it appears to me that the Council's apparent stance that the business could continue in some less intense form accorded with advice in paragraph 15 of PPG18. Nor did enforcement action come as a "bolt from the blue" as described in paragraph 16. In these circumstances I do not consider that the Council behaved unreasonably in terms of PPG18.

15. I consider that unreasonable behaviour resulting in unnecessary expense, as described in paragraphs 23 and 24 of Annex 3 to Circular 8/93, has not been demonstrated and I therefore conclude that an award of costs is not justified.

Formal Decision

16. I refuse the application for an award of costs.

A. Tuney

INSPECTOR