

# Appeal Decision

Inquiry held on 30 January 2007

Site visit made on 30 January 2007

**by Colin A Thompson** Dipl Arch DipTP Reg Arch  
RIBA MRTPI IHBC

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

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Date

20 Feb 2007

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**Appeal Ref: APP/J3910/C/06/2017715**

**The Old Inn, Upper Minety, Malmesbury, Wiltshire SN16 9PT**

- The appeal is under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act).
- The appeal is by Mrs A Bailey against an enforcement notice (the notice) issued by North Wiltshire District Council.
- The Council's reference is AD2957.
- The notice was issued on 8 May 2006.
- The breach of planning control as alleged in the notice is the material change of use of the land from a mixed use for residential purposes and as a public house to use as a dwelling house.
- The requirements of the notice are:
  - a) cease using the part of the land that was formally used for the purposes of a public house solely for residential purposes;
  - b) restore the land to a condition suitable for the reinstatement of the commercial public house use.
- The period for compliance with the requirements is one month from the date the notice takes effect.
- 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 allowed and the enforcement notice is quashed**

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## Procedural Matters

1. At the Inquiry an application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.
2. Because matters of fact were in dispute all evidence at the inquiry was taken under oath.

## The Notice

3. Careful reading of requirement a) has highlighted a possible typing mistake. If *formally* is changed to *formerly* the requirement makes more sense. This is a minor matter which could be corrected without causing injustice if I am minded to uphold the notice.

## Ground (d) Appeal

4. This ground is that at the time the notice was issued it was too late to take enforcement action.
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Limitations of this Appeal

5. This is one of those unfortunate cases where the closure of a public house has split the local community. There is support for the appellant's wish to continue to live, in an unrestricted manner, in what has been her home for some 38 years, whilst others want to see the public house use retained and the pub eventually re-opened.
6. I must stress that the matter before me for decision is a very narrow, legal, one. It does not involve the planning merits of the case. I simply have to determine whether what might have been an unlawful use has been in existence for long enough for it to become lawful. If, on the balance of probabilities, and as a matter of fact and degree, the answer is *yes* then that is the end of the matter and the appeal must be allowed.
7. Another point which needs clarification is that whatever is my conclusion on this case, it is not within my remit, or that of planning law, to force an owner of a property to use it for a particular purpose. So the reopening of the public house could not be required. All that could be done would be to compel any unlawful use to cease. Supporters of the campaign to save the public house may find this unsatisfactory, but nevertheless these are the limitations of my decision.

Background Information

8. There seems to be no disagreement that the previous lawful use was a mixed, or composite, one for residential purposes and as a public house. The alleged contravention is a change from the mixed use to just a single one as dwelling house.
9. When the public house was trading the appellant and her family used the first floor as residential accommodation (sitting room, 3 bedrooms and a bathroom) with the public house use being confined to the ground floor (cellar, stores, serveries, bars and toilets).
10. It is a matter of agreement that the rooms shown on the floor plans submitted with the appellant's evidence are identified as follows, Bar 1 (former Lounge Bar), Bar 2 (former Public Bar) and Bar 3 (former Snug). There is probably only one planning unit in that the ground floor includes some areas where the public house, and residential, uses overlapped. Clear examples of this are the kitchen and utility room, there is only one of each, which were used to store food and /or produce meals both for the family (the residential use) and pub customers (public house use). The limited nature of the first floor residential accommodation, and the lack of any central heating when the pub was trading, probably means that the appellant's claim that the family dined on the large table in the Public Bar and that the children did their homework downstairs, where there was space as well as lit fires and warmth in cold weather, is probably correct.
11. The Council agree that the appeal building now has just a single residential use. From the submitted 13 April 2006 photographs, and what I saw at the accompanied site visit, I would agree with this assessment. The bar counters, and some of the original shelves, remain but they are adorned with domestic items and domestic furniture is present throughout the whole ground floor. Of the original pub furniture it is likely that only the large table, mentioned in the preceding paragraph and shown right/centre on photograph A, in what was the Public Bar, and possibly the chairs around it, remains.

12. I saw that a separate building, which was previously a skittle alley, has had its wooden alley removed and was being used for domestic storage purposes. It seems to be a matter of agreement that this was last used for the public playing of skittles in the early 1990s. I have no evidence as to the function of the public house's second floor loft, which was probably also used for domestic storage. Both areas can be discounted for the purposes of determining this appeal.

#### My Assessment

13. Section 171B(2) of the Act states that where there has been a breach of planning control consisting in the change of use of any building, to use as a single dwelling house, no enforcement action may be taken after the end of 4 years beginning with the date of the breach. It follows that because the notice was issued on the 8 May 2006 the key date in this appeal is 8 May 2002.
14. Pinpointing the date of any breach can be problematical. The only effective test is to compare the present use with the previous use, or the use in the base year (in this case 4 years prior to taking enforcement action) and assess whether there has been any material change. In addition to acquiring immunity, the combined effect of section 171B, and section 191(2) and (3), of the Act, is that after the relevant time limit has expired any uses or operations become lawful. But the rationale of immunity is that throughout the relevant period of unlawful use, the local planning authority, although having the opportunity to take enforcement proceedings, failed to take any action. These are the tests advocated in *Thurrock Borough Council v Secretary of State for the Environment, Transport and the Regions*, and *Terry Holding* [2001] EWHC Admin 128 Case N°: CO/1200/2000 and [2002] JPL 1278.
15. Mrs Bailey in her sworn written, and oral, evidence states she and her husband closed the public house for business on 30 September 2001. Mr Bailey had become ill, with a serious lung disease in 1998, which combined with his heart problems prevented him from properly running the pub. The appellant was not able to cope with the business on her own. At this point Mrs Bailey says that the public house use was *abandoned* and shortly thereafter the business element of the mixed use became part of an entirely residential one. It is a matter of simple logic that part of a mixed use cannot remain *dormant* once it has all been actively subsumed into the sole surviving remaining use.
16. There is little doubt that Mr and Mrs Bailey meant to stop the public house use, with no intention of resuming it, when they ceased trading. Mr Bailey's planning application to change the use of the public house solely to a residential one, dated 28 August 2001, and possibly the earlier application to develop an adjoining field for 7 houses, left few doubts in this regard. But I will set aside any further consideration of the notion of *abandonment* because, on reflection, I do not believe that it is a central issue in this case where a material change of use is claimed for the whole planning unit.
17. After the pub ceased trading Mrs Bailey says that the beer engines, and all the unused stock, were returned to the brewery. Some Wadworth delivery notes support the assertion that stock was indeed returned. In the next few weeks, after closure, all the bar furniture, the chairs and small tables, was sold along with the commercial cooking equipment which was used to produce bar meals. In this same period Mrs Bailey says that she brought stored domestic furniture down into what were the former bar areas and used them (the bars)

entirely for living accommodation, effectively changing the use of the whole ground floor (including the ladies toilet). The reason for this change was because at this time, Mr Bailey was significantly restricted in his ability to get around and was very depressed. He tended to stay in his bedroom and family life was moved downstairs so as not to disturb him. It follows, Mrs Bailey says, that by the end of 2001, and thereafter, the pub was used as a single dwelling house.

18. Although it is up to the appellant to prove her case, in *F W Gabbitts v SSE & Newham LBC [1985] JPL 630* it was held that the appellant's sworn evidence in a particular case, if sufficiently precise and unambiguous, does not need corroboration by independent evidence in order to be accepted. In this case, not only is Mrs Bailey's evidence precise and unambiguous it is corroborated by the sworn testimony of her son and has additional support from numerous letters from friends and acquaintances that visited the former pub and saw how the ground floor was used during the relevant period. In the absence of convincing counter evidence, and as a matter of fact and degree on the balance of probabilities, therefore, I find that a material change of use took place before 8 May 2002. Because the breach has subsisted for more than 4 years the residential use of the whole planning unit has become immune from enforcement.
19. Regarding the limited evidence to challenge the appellant's version of events. The Council presented no witnesses of its own to the Inquiry, who had knowledge of the appeal premises over the relevant period, to give sworn evidence. Instead, it relied on passing references to *an attractive public house* in the then Inspector's 17 May 2002 decision, on an earlier planning appeal, and a planning officer's *impression* remembered from some 4½ years previously. Neither is very convincing evidence because from a superficial appearance point of view, particularly when the bar counters are retained as continues to be the case here, there can often be not much difference between the look of a functioning public house and that of domestic living accommodation.
20. There was a visit by a Council officer in 2005, although it is not known who this person was and no contemporaneous notes or photographs of what the officer saw are presented. The only significant reference which I have of this visit (other than what the appellant says about it) is recorded in a Council letter to Mr Stooke dated 11/8/2005. In this it is commented that *...the bar and infrastructure associated with the pub use remained in position. Provided this remains the case, the Council would argue that a change of use had not taken place...* It is not clear to me what *bar and infrastructure associated with the pub use* is being referred to in this letter. As previously noted the bar counters do still remain, but they have not prevented the Council accepting that a change of use to a wholly residential one has by now taken place. Alternatively it is probable that the beer engines, pub stock and furniture, were all removed by the end of 2001.
21. The appellant acknowledges that she was aware that she should not be using the whole of the ground floor for residential purposes. So she attempted to disguise appearances a little, when the 2005 Council visit took place. She achieved this by redecorating the ground floor so that household nick-knacks could be removed and domestic furniture could be covered with dust sheets. Such a relatively minor deception on Mrs Bailey's part is understandable and should not have deceived an experienced planning officer who should have been prompted to look under the covers, and /or made a note to come back on another day. It

therefore seems to me that the Council had the opportunity to take enforcement action, throughout the relevant 4 year period, but chose not to do so.

22. Mr Stooke told the inquiry that he had not been inside the public house since the summer of 2001 when he was asked to leave after his disagreement with the Baileys over the impending pub closure. Although not spying on the appellant this witness said that since the pub's closure he had seen little evidence, particularly at night, that the ground floor was in regular use. But the building is set some way back from the road and it was accepted that the ground floor front windows had shutters. I also saw that the most comfortable sitting room, where the appellant had her TV and music centre, and where Mrs Bailey said she spent most of her evenings, is in the former Snug which is located towards the rear of the building. In view of the appellant's acknowledgement that she knew that she should not be using the ground floor in sole residential use I would expect Mrs Bailey to be careful not to advertise her presence there.
23. Mr Bailey's letter to the Council dated 1 August 2002, just some 16 months before he died, was written at a time he was depressed. This appears to me to be the airing of what Mr Bailey considered was a continuing grievance, that he thought he had with the local planning authority, rather than providing any reliable evidence that the former public house was not by then being used solely as a residence, albeit unlawfully.
24. I have taken into account one of my earlier decisions, reference APP/P1615/C/05/2002632 regarding the Horseshoe Inn, Brooms Green, referred to by the Council. But the circumstances of this case are very different from that in the Brooms Green appeal where the appellant there, was effectively claiming, that a change of use to residential that required planning permission had *not* taken place.
25. None of the contrary evidence, to the Baileys' sworn testimony, seems to me to be sufficiently compelling to alter my conclusion that a material change of use to a single dwelling house took place more than 4 years before the key date.

### **Conclusion**

26. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should succeed on ground (d). Accordingly the enforcement notice will be quashed.

### **Formal Decision**

27. I allow the appeal and direct that the enforcement notice be quashed.

*Colin A Thompson*

Inspector

## APPEARANCES

### FOR THE APPELLANT:

Mr S Chambers BSc(Hons) MA	Agent and advocate
MRTPI	
Mrs A Bailey	Appellant
Mr S Bailey	Appellant's son

### FOR THE LOCAL PLANNING AUTHORITY:

Mr N Wicks BTP DipLaw MRTPI	Advocate and planning witness, Enforcement Services Ltd, 7 Station Road, Winslow, Buckinghamshire MK18 3DZ. Email <a href="mailto:enforcementservices@btinternet.com">enforcementservices@btinternet.com</a>
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### INTERESTED PERSONS:

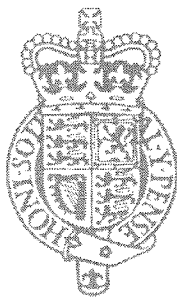
Mr J Stooke	Representative of STOP, Robinswood House, Upper Minety, Wiltshire SN16 9PT
Mr Cole	Common Farm Dairy, Minety, Wiltshire SN16 9RH

## DOCUMENTS

Document 1	List of persons present at the inquiry
Document 2	Letter of notification of the inquiry
Document 3	Agreed schedule of accommodation
Document 4	Letter from Mr C Bailey (put in by the LPA)
Document 5	Judgement <i>Hughes and SSTR and South Holland DC OBCOF 1999/0471/C</i>
Document 5	Folder supporting the evidence of Mr Stooke

## PHOTOGRAPHS

Photo A-G Photographs put in by Mrs Bailey dated 13 April 2006



## Costs Decision

Inquiry held on 30 January 2007

Site visit made on 30 January 2007

by **Colin A Thompson** Dipl Arch DipTP Reg Arch

RIBA MRTPI IHBC

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Date

20 Feb 2007

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### Costs application in relation to Appeal Ref: APP/J3910/C/06/2017715

#### Old Inn, Upper Minety, Malmesbury SN16 9PT

- The application is 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 by Mrs A Bailey for a full 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 a mixed use, for residential purposes and as a public house, to use as a dwelling house.

#### Summary of Decision: a full award of costs is made

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#### The Gist of the Submissions for Mrs Bailey

1. It is in the face of sworn evidence, and a substantial weight of local correspondence, that the local planning authority proceeded to issue an enforcement notice. But the Council has no substantial evidence to support its assertion that any breach of planning control took place within 4 years of the key date and no witnesses, with a direct knowledge of the case over this relevant period, were produced.
2. Such unreasonable grounds for issuing an enforcement notice runs contrary to paragraph 24, of Annex 3, to Circular 8/93 *Award of Costs in Planning and Other (Including Compulsory Purchase Order) Proceedings* and is a clear case of unreasonable behaviour as described by the Circular.

#### The Response by the Council

3. In an ideal world relevant site visit notes should have been produced. But this is not an ideal world. The local planning authority has to be pragmatic, taking what action it considers expedient using the evidence it has.
  4. In this instance the appellant openly admitted that she sought to mislead the local planning authority during the key 4 year period. In that context alone it is not unreasonable for the Council to at least question Mrs Bailey's assertions.
  5. Nothing is wrong with how the local planning authority has conducted its case. Mrs Bailey sought a residential planning permission through an application for a Lawful Development Certificate. In refusing this application the Council had no option but to take enforcement action, anything less would be tantamount to accepting the residential use of the whole property. No unreasonable behaviour of the type defined by Circular 8/93 has taken place.
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### **My Conclusions**

6. 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.
7. As noted in my enforcement decision the Council presented no witnesses to the Inquiry who had any direct knowledge of the public house over the relevant 4 year period. The only evidence which it could rely upon was part of some generalised descriptive paragraphs in an earlier appeal decision, a named officer's unsupported 4½ year old recollections and the second hand report of an unnamed officer's later site visit. None of this evidence had any supporting notes, contemporaneous or otherwise, and no photographs were taken.
8. I do not find that the appellant's little deception, where she attempted to disguise her use of the ground floor of the pub, by redecorating the area and covering the furniture with dust sheets at the time of the 2005 Council visit, should have misled an experienced planning or enforcement officer. That vigilance was needed by the local planning authority should have been apparent following Mr Stooke's correspondence where he reminded the Council, on several occasions, of the need to keep a close eye on the use of the premises.
9. To my mind this is a clear example of the kind of unreasonable behaviour set out in paragraph 24, of Annex 3, to Circular 8/93 whereby the local planning authority was not able to show that it had reasonable grounds for concluding it was expedient to issue an enforcement notice. Because unreasonable behaviour, resulting in unnecessary expense, as described in Circular 8/93, has been demonstrated a full award of costs is justified. The application is allowed in the terms set out below in the Formal Decision and Costs Order

### **Formal Decision and Costs Order**

10. In exercise of my powers under section 250(5) of the Local Government Act 1972 and Schedule 6 to the Town and Country Planning Act 1990 as amended, and all other powers enabling me in that behalf, I HEREBY ORDER that North Wiltshire District Council will pay to Mrs Bailey, the full costs of the appeal proceedings, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal under section 174 of the Town and Country Planning Act 1990 as amended against an enforcement notice issued by North Wiltshire District Council alleging the material change of use of the land, from a mixed use, for residential purposes and as a public house, to use as a dwelling house at the Old Inn, Upper Minety, Malmesbury SN16 9PT.
11. The applicant is now invited to submit to North Wiltshire District Council, the Agent of which has been sent a copy of this decision, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Supreme Court Costs Office is enclosed.

*Colin A Thompson*

Inspector