



The Planning Inspectorate

An Executive Agency in the Department of the Environment and the Welsh Office

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E.621 Margaret Scott

D A Haigh MRTPI, MBIM
Highlands
Beechen Cliff Road
BATH
Avon
BA2 4QS

Your reference: 912/5

Council reference: AD/1548
E66

Our references :

- (A) T/APP/C/91/J3910/613970/P6
- (B) T/APP/C/91/J3910/614246/P6
- (C) T/APP/C/91/J3910/614247/P6
- (D) T/APP/C/91/J3910/614248/P6

Date 18 JUL 92

PLANNING DEPT	
13 JUL 1992	
PASSED TO	DATE REC.

Sir

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 174 AND SCHEDULE 6
PLANNING AND COMPENSATION ACT 1991

APPEALS BY MRS V FORTUNE (A), MR K FORTUNE (B), MR G FORTUNE (C),
MR V FORTUNE (D)

LAND AT LF REPLACEMENT WINDOWS, BUMPERS WAY, CHIPPENHAM, WILTS

1. I have been appointed by the Secretary of State for the Environment to determine your client's appeals against an enforcement notice issued by the North Wiltshire District Council concerning the above mentioned land. I held an inquiry into these appeals on 23 June 1992. Evidence was taken on oath. At the inquiry an application was made on behalf of the appellants for an award of costs against the District Council and this is the subject of a separate letter.

2. a. The notice was issued on 9 July 1991

b. The breach of control alleged in the notice is a failure to comply with condition 2, subject to which planning permission No N.85.0772.F was granted on 20 May 1985 for the erection of an industrial building, car parking and landscaping on land at Bumpers Way, Chippenham.

c. The condition in question is :

02. No raw materials, finished or unfinished products or parts, crates, materials, waste, refuse or any other item shall be stacked or stored outside any building on the site without the prior approval in writing of the local planning authority.

d. The notice alleges that the condition has not been complied with in that before 25 October 1990, old window frames and waste materials have been stored in skips placed on the area outside the building

e. The requirements of the notice are (i) to remove the old window frames, waste materials and skips from outside the building on the site;

(ii) to cease using the area outside the building for the storage of old window frames and waste materials

f. The period for compliance with the notice is 3 months

Grounds of appeal

3. Your clients' appeals are proceeding on grounds (a), (d), and (h) as set out in Section 174(2) of the 1990 Act prior to its amendment by the Act of 1991.

Site description

4. LF Replacement Windows occupy a modern industrial building, one of many on the Bumpers Way Industrial Estate on the western fringes of Chippenham. The company acquired the site in 1985 and commissioned the building which was first occupied in about January 1985. The building is set back behind a verge and car park with two vehicular accesses to Bumpers Way. The majority of the building is given over to the manufacture of wooden, alloy, and UPVC replacement windows. There is a small amount of office accommodation and a showroom at the front of the building. At the time of my visit two covered skips were situated on the car park, together with an open trailer of an agricultural character, containing discarded wooden window frames. A few small items were stacked in the small gaps along the sides of the building.

The appeal under ground (d)

5. The Council's enforcement notice alleges a breach of condition which relates to the use of the land outside the building. For the Council it was argued that the alleged use, which was not denied by your clients, could not benefit from the immunity from enforcement action conferred by Section 172(4)(b) because the condition related to a use of the land. However the notice, in para (1), alleges a breach of planning control within the period of 4 years before the date of issue of the notice. It was in response to that part of the notice that your clients appealed on ground (d), and later you provided evidence in written and photographic form to the effect that the open areas had been used for the storage of skips and waste since early 1986. The Council had been invited to withdraw the notice but had declined, and had not commented on the evidence provided.

6. At the inquiry it was submitted on behalf of the Council that para (1) of the notice was defective and a suggested revision was submitted (Document 4), together with an invitation that I might wish to correct the notice to that effect.

7. Before I heard the closing submissions I drew the attention of the inquiry to the judgement of the Court of Appeal in the case of Harvey v Secretary of State for Wales and Cardiff City Council (1989)(JPL 420/90), and I adjourned the inquiry in order for the parties to study the report of the case.

8. In the case referred to above the judgement makes clear that the broken condition or limitation does not itself have to involve some operational development in order to benefit from the so called '4 year rule'. The condition or limitation merely has to relate to some other operational development for which permission was granted subject to compliance with the condition or limitation, whatever it might be.

9. The Council's advocate, not wishing to contradict the judgement, submitted that the case now under consideration differed from the Harvey case in that the condition relating to this notice required that certain acts should never take place, whereas in Harvey, the condition had a positive requirement. You suggested that I must take account of the judgement, having regard to the nature of the alleged breach.

10. It is clear to me in this appeal that the judgement in Harvey has to be followed and that the condition, although amounting to a prohibition of certain uses of the land outside the building, is one to which Section 172(4)(b) relates. Hence it is my view that the notice can be defeated by showing that condition 2, referred to in the notice, has been breached for a period in excess of 4 years prior to the issue of the notice.

11. It follows that the Council's enforcement notice as served is accurate in its reference to a period of 4 years, and that no correction is needed.

12. Although the Planning and Compensation Act 1991 makes changes in relation to the immunity rules, Section 4(2) of the Act makes clear that in the case of any breach of planning control, where the time for issuing an enforcement notice has expired (by virtue of the provisions of Section 172(4)(b) of the 1990 Act) before the coming into force of Section 4 of the 1991 Act, nothing in Section 4 of the 1991 Act enables enforcement action to be taken in respect of the breach.

13. On behalf of your clients, written and photographic evidence was produced to show that waste materials and skips had been placed on the car park since early in 1986, and I heard evidence on oath from Mr Ashdown that his company had been contracted to provide skips and to dispose of waste from the factory since February 1987, over 4 years before the service of the notice. None of this evidence was disputed by the Council. However it was submitted that the periodic removal of skips for emptying meant that each week the use ceased, albeit for an hour or two, and then recommenced. I cannot accept that construction of the situation. On the evidence, it seems to me that since early 1986 there has been a breach of condition 2 of the original permission by virtue of the storage of waste in one way or another, in the open, in skips or in trailers, and that there was no intention to cease such use. In any event, on the balance of probabilities, I consider it most unlikely that at any time during the period in question the car park was devoid of stored waste, due to the manner in which skips are removed and the need to vary removal in tune with the output of the business.

14. I conclude, on the balance of probabilities, that condition 2 has been breached since early in 1986. Consequently the breach is immune from enforcement action and the appeals on ground (d) succeed. That being so I shall quash the notice and it is not necessary for me to consider the other grounds of appeal.

15. I have taken into account all of the other matters raised in these appeals but they have not been as important as those which have led to my conclusions.

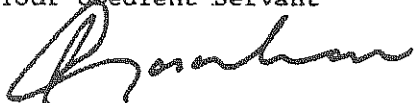
FORMAL DECISIONS

16. For the above reasons, and in exercise of the powers transferred to me, I hereby allow your clients' appeals, and direct that the enforcement notice be quashed.

RIGHT OF APPEAL AGAINST DECISION

17. This letter is issued as the determination of the appeals before me. Particulars of the rights of appeal to the High Court are enclosed for those concerned.

I am Sir
Your obedient Servant

A handwritten signature in cursive script, appearing to read 'P H GARNHAM', written in dark ink.

P H GARNHAM MA ARICS MRTPI
Inspector

Enc.

APPEARANCES

FOR THE APPELLANTS

Mr D A Haigh, MRTPI, MBIM

Chartered Town Planner

He called

Mr K S W Fortune

Company Secretary,
Swallow Falls
Rowden Lane
Chippenham
Wilts SN15 2NN

Mr T Ashdown

North Wilts Skip Hire

FOR THE PLANNING AUTHORITY

Mr J F McDonald

Principal Officer
District Secretary's Dept
North Wilts District Council

He called

Mr S Chambers BSc

Planning Officer
North Wilts District Council

DOCUMENTS

- Document 1 List of persons present at the inquiry
- " 2 Notification of inquiry and circulation list
- " 3 Copy of letter from Country Estates Ltd to DOE Inspectorate
- " 4 Council's suggested correction to enforcement notice

Appellant's documents

- " 5 Copy of page 1 of SSE's letter dated 20 May 1981 approving West Wilts Structure Plan
- " 6 Extract from Planning Policy Guidance Note No 4
- " 7 Definition of 'operation' from Oxford Dictionary
- " 8 Extract from Planning Policy Guidance Note No 18

PLANS

- Plan A Plan attached to the enforcement notice
- " B Plan indicating past and present waste disposal tips



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Date : 1.11.92

Sir

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 174 AND SCHEDULE 6
LOCAL GOVERNMENT ACT 1972, SECTION 250(5)
APPLICATION FOR COSTS BY MRS V FORTUNE (A), MR K FORTUNE (B), MR G FORTUNE
(C), MR V FORTUNE (D)

1. I refer to the application made on behalf of your clients for an award of costs against North Wilts District Council which was made at the inquiry held at Chippenham on 23 June 1992. The inquiry was in connection with 4 appeals against an enforcement notice alleging a breach of planning control, namely failure to comply with condition 2, subject to which planning permission No N.85.0772.F was granted on 20 May 1985 for the erection of an industrial building, car parking and landscaping on land at Bumpers Way, Chippenham. A copy of my appeal decision letter is attached.
2. In support of your application it was submitted that an inquiry into the appeals had been deemed necessary because of the need to take evidence on oath in respect of the appeals on ground (d). That ground of appeal had been stimulated by the inclusion, in para 1 of the notice, of the allegation that a breach had occurred within 4 years of the date of the service of the notice. In support of your clients' appeals you gathered evidence indicating that the alleged breach had occurred for a period longer than 4 years, and that evidence, in written and photographic form, was submitted to the Council on 25 November 1991. In your submission, some Councils would have withdrawn the notice at this point, however the Council did not, and the matter proceeded to inquiry. In your submission the Council behaved unreasonably in this respect thereby causing unnecessary expense in relation to the inquiry.
3. In response, reference was made to Circular 2/87 and to para 14 in particular. It was submitted that the critical question was not whether the Council's procedure had been correct, or their judgement sound, but whether their action had been reasonable. In pursuing enforcement proceedings in this case, the Council had behaved reasonably. Although the Inspectorate had asked whether the Council intended to withdraw the notice, following the submission of the details referred to in para 2 above, the Council could not have been persuaded to do so, for that would have denied the complaint itself, which was a reasonable one. The Council had conceded that para 1 of the notice was

defective, and had invited me to correct it. The Council were in no difficulty because of the defect, and had not behaved unreasonably. The application for an award of costs was therefore opposed.

4. The application for costs falls to be determined in accordance with the advice contained in Circular 2/87 and all the relevant circumstances of the appeal, irrespective of its outcome, and costs may only be awarded against a party who has acted unreasonably. Having regard to my decision in these appeals, I conclude that because of the wording of para 1 of the notice, the appellants were reasonable in producing evidence in support of their ground (d) appeal and in placing it before the Council well before the inquiry.

5. With hindsight, and having regard to the content of the evidence of Mr Chambers which suggested that as the alleged breach related to prohibition of a use of the land, the 'immunity period' in relation to enforcement action could not be 4 years, the Council sought at the inquiry to remedy the defect in para 1 by inviting me to correct that element of the notice. However I have seen no response to the appellants which would suggest that the Council realised either the inconsistency within the notice as served and as defended to inquiry, or suggesting that the evidence which you produced was, in their terms, irrelevant. Furthermore I consider that the Council ought to have been aware of the Court of Appeal judgement to which I have referred in my decision letter (Harvey v Secretary of State for Wales and Cardiff City Council 1989). The case has been reported fully in the Journal of Planning and Environment Law at 420/90, and there is reference to it in the Encyclopedia of Planning Law and Practice (P171B.09). In my judgement, had the Council considered the evidence produced by yourself in relation to the use alleged in the notice (evidence which was not contested at the inquiry), together with the judgement to which I have referred, the matter ought not to have been pursued to inquiry.

6. For all the above reasons, I conclude that the Council behaved unreasonably in pursuing the matter to inquiry and that an award of costs in respect of your clients' costs of the inquiry is justified.

FORMAL DECISION

7. Accordingly in exercise of my powers under Section 250(5) of the Local Government Act 1972 and paragraph 6(4) of Schedule 6 to the Town and Country Planning Act 1990, and all other enabling powers, I HEREBY ORDER that the North Wiltshire District Council shall pay to Mrs V M A Fortune, Mr K S W Fortune, Mr G K Fortune and Mr V G Fortune the costs of the proceedings of this inquiry, such costs to be taxed in default of agreement as to the amount thereof. The subject of the proceedings was an appeal under Section 174 of the Act of 1990 against an enforcement notice issued on 9 July 1991 alleging a breach of planning control within the period of 4 years before the date of issue of the notice, as follows :

the failure to comply with a condition on a planning permission by, since before 25 October 1990, storing old window frames and waste materials in skips placed on the area outside the building contrary to a condition of planning permission. The planning permission referred to above is :

N85.0772.F dated 20 May 1985 - construction of industrial building, car parking and landscaping, at Bumpers Way Chippenham. The condition referred to is :

2. No raw materials, finished or unfinished products or parts, crates, materials, waste, refuse or any other item shall be stacked or stored outside any building on the site without the prior approval in writing of the local planning authority.

8. You are now invited to submit to the North Wiltshire District Council, to whom a copy of this letter has been sent, details of those costs with a view to reaching agreement on the amount. A copy of the guidance note on taxation procedure, referred to in Circular 2/87, is enclosed.

I am Sir

Your obedient Servant



P H GARNHAM MA ARICS MRTPI
Inspector

Enc.