The Planning Inspectorate

Appeal Decision

Inquiry held and site visit made on 12 October 2010

by Alan Woolnough BA(Hons) DMS MRTPI

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

Decision date: 4 November 2010

Appeal Ref: APP/W0530/C/10/2124575
Land at Hill Trees, Babraham Road, Stapleford, Cambridge CB22 3AD

- 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 Fleet Cooke against an enforcement notice issued by South Cambridgeshire District Council.
- The Council's reference is PLAENF.3837.
- The notice was issued on 3 February 2010.
- The breach of planning control as alleged in the notice is without planning permission, the change in use of residential accommodation to a mixed use of residential and motor vehicles sale and repair.
- The requirement of the notice is to cease the use of the land for motor vehicles sales and repair.
- The period for compliance with the requirement is one month.
- 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 initial appeal on ground (a) has lapsed and 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 subject to corrections.

Procedural matters

1. At the Inquiry an application for costs was made by South Cambridgeshire District Council against Fleet Cooke. This application is the subject of a separate decision.

2. All oral evidence presented at the Inquiry was taken on oath.

3. The Appellant confirmed at the Inquiry that initial appeals against the enforcement notice on grounds (b), (c) and (f) were withdrawn.

The notice

4. The Council takes the view that, although currently vacant, the main building on the appeal site benefits from a lawful use as residential accommodation, and that land and other buildings within its curtilage are incidental to that use. However, at the Inquiry, the Appellant questioned the accuracy of the Council's description in section 3 of the enforcement notice of the use of the land prior to the alleged breach of planning control as 'residential accommodation'.

5. He pointed out that the site has been used in the past for horticultural purposes and dog breeding, with derelict kennels and runs associated with the latter still present today. However, the Council considers these activities to

have been ancillary to residential occupation and that, in any event, they were no longer ongoing by the time the notice was issued. Having neither seen nor heard any cogent evidence to the contrary I have no reason disagree, and thus find no justification for including reference to those uses in the allegation.

6. Nonetheless, in the interests of precision I will correct the notice at section 3 by rewording the allegation as follows: *Without planning permission, the material change of use of the land from use as residential accommodation and for purposes incidental thereto to a mixed use comprising residential accommodation, purposes incidental thereto and the sale and repair of motor vehicles*. For the sake of consistency within the notice, I will make a corresponding revision to the wording of section 5 and delete the superfluous sub-heading at the beginning of the notice, immediately above the names of those on whom the document was served. There is no injustice to any party in making any of these corrections.

The appeal on ground (d)

7. In appealing on ground (d), the burden of proof is firmly on the Appellant to demonstrate on the balance of probabilities that the material change of use of the land in question to a mixed use that included the sale and repair of motor vehicles occurred prior to the beginning a period of 10 years ending with the issuing of the enforcement notice (henceforth referred to as 'the relevant period'), and that such use continued unbroken thereafter and was not subsequently abandoned or supplanted before the notice was issued. The material date is therefore 3 February 2000.

8. The appeal site comprises a former public house, long since used as residential accommodation and for the breeding of dogs but currently vacant, together with the land and buildings that fall within its curtilage. At the time of my visit, some 16 vehicles were parked on various parts of the land. Most of these were confined to a relatively small area to the immediate east of the main building, in front of a garage, and displayed handwritten signs indicating their sale price. Others, lacking signage, occupied a narrow strip of land along the northern boundary of the eastern part of the site.

9. On the Appellant's oral evidence, given on oath, vehicles are advertised for sale in the press, access to the site for prospective purchasers is by appointment only, and on-site repairs are confined to those vehicles he has acquired for sale. He also asserted that he had been using the particular parts of the land identified above continuously for the sale and repair of motor vehicles, in conjunction with land to the east and north of the appeal site, for up to 15 years before the enforcement notice was issued.

10. Mr Cooke told the Inquiry that, for the last three years or so, he has sold on average at least one vehicle per week from the site and sometimes as many as three. Prior to this he sold about one vehicle per month, albeit that for unspecified spells of a few months during the relevant period no sales took place at all. He thus contends that the alleged mixed use is immune from enforcement action by reason of the passage of time, the sale and repair of motor vehicles first having taken place on the site prior to 3 February 2000 and having continued ever since.

11. The Council has produced no evidence that directly contradicts Mr Cooke's account of the history of activity on the appeal site and, at the Inquiry, its sole witness acknowledged the possibility that the Appellant's claims might be

correct. Nonetheless, in accordance with paragraph 8.15 of Annex 8 to Circular 10/97: *Enforcing Planning Control: Legislative Provisions and Procedural Requirements* (which although specifically concerned with Lawful Development Certificates is equally applicable to ground (d) appeals), I must consider whether the Appellant's evidence alone is sufficiently precise and unambiguous to justify allowing the appeal on the balance of probabilities. I must also explore, on the same basis, whether a material change of use took place *within* the relevant period rather than prior to it.

12. With regard to the first of these questions, I find Mr Cooke's evidence to be vague and imprecise. During the Inquiry he responded to several questions by indicating that he did not remember the answers. In particular, he was unable to supply reliable facts, figures or dates relating to numbers of vehicles on the site, sales levels beyond the broad estimates I have already referred to or the periods of time during which no sales took place. He has provided no documentary or photographic evidence whatsoever to refine or substantiate his oral submissions.

13. In addressing the second question, I am mindful of the High Court judgment in *SSETR & Holding v Thurrock BC* [2001] JPL 1388, subsequently upheld by the Court of Appeal. As reaffirmed therein, change of use is often a gradual process, involving fluctuations in intensity and shifts in precise location. In such cases, it was held, the only effective test is to compare the present use with the previous use, or the use in the base year (10 years prior to the taking of enforcement action) and assess whether there has been any material change.

14. It is common ground between the parties that the Appellant has been associated with High Trees in one way or another since well before the material date. Moreover, taking his oral evidence at face value, he may well have kept vehicles on parts of the appeal site with intent to sell, and carried out repairs thereto, since before the commencement of the relevant period. However, Mr Cooke's statements to the Inquiry indicate to me a likelihood that the level of sales and repair activity during the first seven or so years of that period was so small as to be *de minimis*. In other words, it was not of sufficient scale and intensity to signify a material change from the prevailing lawful residential use of the site.

15. The sale of one vehicle per month does not amount to significant sales activity. Moreover, on the Appellant's own evidence, no sales at all took place for periods of a few months. It is reasonable to assume, in the absence of any indication to the contrary, that repairs activity at these times was similarly limited. This raises serious questions as to whether sales and repairs, no matter how low key, were continuous for the whole of the relevant period. The correct approach in this regard is to ask whether there was any period during that period when the Council could not have taken enforcement action against the alleged use. It is also necessary to make a finding as to whether any periods of non-use were more than *de minimis*. There is no cogent evidence whatsoever before me to the effect that Mr Cooke's activities were sufficiently intense throughout the years in question to pass these tests.

16. I give little credence to the suggestion that the storage of vehicles on the land which were available for sale, whether or not any were actually sold, amounted to a 'sales' use. The Appellant's *modus operandi* was such that it was not strictly necessary to display 'for sale' signs on his vehicles and, indeed, he

confirmed at the Inquiry that such signage had not always been provided. In these circumstances, the mere presence of vehicles on site which the Appellant would be prepared to sell if asked to do so would not in itself have amounted to a sales use. It would have been more akin to vehicle storage and thus materially different to the mix of uses presently alleged, against which the Council would have been unable to act at those times.

17. In any event, the numbers of vehicles on site during these fallow periods are unknown and may in themselves have been so small as to be incidental to the lawful residential use. Although the Appellant cited references in the press to his vehicle sales activities, no newspaper articles or advertisements that might help to substantiate his claim have been produced. Mr Cooke further maintained that, as a dealer who makes his living primarily from the motor trade, a sale on his part of one vehicle alone would have constituted a material change of use, whereas a single sale by a non-trader would not. However, this is simply wrong in law. The Appellant's profession plays no significant role in determining the threshold beyond which planning permission is required.

18. The presence on the site in past years of vehicles associated with public house, residential, horticultural and dog breeding activities does not assist his case. These are materially different uses to that targeted by the enforcement notice. I accept that the absence from the Inspector's decision on appeal ref no APP/W0530/A/07/2040597 of any reference to vehicle sales or repair activity is not necessarily indicative that no such activity was taking place on the current appeal site when he made his visit to Hill Trees on 3 January 2008. After all, he was concerned at that time with land to the east of the current site, and the Council officer who accompanied him was not called to give evidence at this Inquiry.

19. However, notwithstanding this, I find that, in all likelihood, vehicle sales and repair activity on the appeal site lacked sufficient scale and/or continuity at certain times during the earlier part of the relevant period to, in itself, constitute a breach of planning control. I therefore conclude on the balance of probabilities that the material change of use alleged in the enforcement notice occurred at some time towards the end of that period rather than prior to its commencement. Accordingly, the alleged use is not immune from enforcement action by reason of the passage of time.

Conclusion

20. For the reasons given above and having regard to all relevant matters raised, I consider that the appeal should not succeed. I will uphold the enforcement notice subject to corrections.

Formal decision

21. I direct that the enforcement notice be corrected by:
    (i) the deletion of the sub-heading '**The change of use of residential accommodation to a mixed use of residential and motor vehicles sales and repair without the required planning permission**';
    (ii) the deletion of the wording of section 3 in its entirety and the substitution of the words 'Without planning permission, the material change of use of the land from use as residential accommodation and for purposes incidental thereto to a mixed use comprising residential accommodation, purposes incidental thereto and the sale and repair of motor vehicles.'; and

APPEARANCES

FOR THE APPELLANT:

Fleet Cooke	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Iain Bain	Of Counsel, instructed by Fiona McMillan, Legal and Democratic Services Manager, South Cambridgeshire District Council
He called	
Kate Wood BA(Hons) MRTPI	Team Leader, Development Control East, South Cambridgeshire District Council

INTERESTED PERSON:

Charles Nightingale	Ward Councillor, South Cambridgeshire District Council

DOCUMENT SUBMITTED AT THE INQUIRY

1 Court of Appeal judgment in the case of SSE & Terry Holding v Thurrock BC [2002] EWCA Civ 226, submitted by the Council

PLANS

A	Plan attached to the enforcement notice
B.1 to B.5	Plans associated with appeal decisions APP/W0530/C/01/1057198, C/05/2001784 & A/07/2040597, supplied by the Council

The Planning Inspectorate

Costs Decision

Inquiry held and site visit made on 12 October 2010

by Alan Woolnough BA(Hons) DMS MRTPI

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

Decision date: 4 November 2010

Costs application in relation to Appeal Ref: APP/W0530/C/10/2124575
Land at Hill Trees, Babraham Road, Stapleford, Cambridge CB22 3AD

- The application is made under the Town and Country Planning Act 1990 as amended, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by South Cambridgeshire District Council for a partial award of costs against Fleet Cooke.
- The Inquiry was in connection with an appeal against an enforcement notice alleging without planning permission the material change of use of the land to a mixed use comprising residential accommodation, purposes incidental thereto and the sale and repair of motor vehicles.

Formal Decision

1. I allow the application for a partial award of costs in the terms set out below.

The Submissions for South Cambridgeshire District Council

2. The application is made with reference to paragraphs A11 and A12 of Part A and paragraph B4 of Part B of the Annex to Circular 03/2009: *Costs awards in appeals and other planning proceedings*. The Council seeks a partial award of costs in relation to the grounds of appeal set out in section 174(2)(a), (b), (c) and (f) of the 1990 Act as amended, on the basis of unnecessary expense resulting from the Appellant's unreasonable behaviour in initially pursuing those grounds.

3. Paragraph B4 sets out examples of unreasonable behaviour which may result in an award of costs. These include failure to produce statements or proofs of evidence or required information in support of an enforcement notice ground of appeal, resulting in work being undertaken that turns out to be fruitless, and the withdrawal of any ground of appeal resulting in wasted preparatory work. In this case, the Appellant either allowed to lapse or withdrew at the last moment several grounds of appeal. Consequently, approximately 90% of the work undertaken in preparing the Council's Rule 6 statement was wasted, particularly in relation to ground (a).

4. The Council only received the letter from the Appellant confirming that he would proceed on ground (d) alone on 11 October 2010, the day before the Inquiry, by which time the deadline for submitting proofs of evidence had long passed. The Council's sole witness, Ms Wood, was thus obliged to assume that appeals on grounds (b), (c) and (f) were still running when writing her proof and preparing for the Inquiry. Work undertaken in this respect, and costs so incurred, proved unnecessary. Expense associated with instructing Counsel in relation to grounds (a), (b), (c) and (f) was similarly wasted.

The Response by Fleet Cooke

5. The Appellant was unaware that the Council could apply for costs, no such applications having been made against him in the past as far as he could recall. The Planning Inspectorate advised the Appellant that he should pursue only the appeal on ground (d). If the Council had done its job properly, it too should have known that work on the other grounds of appeal would have been unnecessary. The Appellant cannot be held responsible for the Council's actions in circumstances where it undertook work needlessly. He is struggling to make a living and does not have the funds to pay costs.

Reasoning

6. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The absence of a statement of case or proof of evidence from Mr Cooke, although alluded to in the Council's application, has not in itself led to unnecessary expense. I will therefore focus on the abortive grounds of appeal in reaching my decision.

7. The Council's Rule 6 statement was due by 1 June 2010 and was submitted six days earlier, on 26 May. The fees associated with Mr Cooke's appeal, required in order to prevent his case on ground (a) from lapsing, were due by 18 May and the relevant cheque was received by the Inspectorate on 17 May. In most circumstances, this should have made it clear to the Council in good time whether or not ground (a) should have been addressed in its statement of case, such that unnecessary coverage of that ground would not have been the fault of the Appellant.

8. However, the Appellant's cheque was subsequently returned by the bank unpaid and marked 'return to drawer'. The Inspectorate did not learn of this until 1 June, by which time the Council had prepared its statement in good faith. The submission by Mr Cooke of a cheque which, ultimately, could not be honoured amounts to unreasonable behaviour. His action in this regard led directly to the Council devoting time and effort in preparing an abortive case on ground (a) at the Rule 6 stage and thus incurring unnecessary expense.

9. The Appellant's letter of 5 October 2010 indicating that the appeal would now proceed solely on ground (d) was prompted by a letter from the Inspectorate dated 23 September. This was sent to the Appellant at my request, it being apparent upon my first perusal of the case file that he had provided no evidence to support these grounds of appeal and it being too late by that stage to provide such evidence prior to the Inquiry itself. Nonetheless, the ultimate decision as to whether to withdraw was left in the hands of the Mr Cooke and there is no indication that, had he not done so, a valid case on any of those grounds could have been presented.

10. The Appellant's behaviour in pursuing appeals on grounds (b), (c) and (f) until only one week before the Inquiry in circumstances where he had no basis for such appeals was therefore unreasonable, irrespective of the means by which he was eventually prompted to withdraw, particularly as the questionable nature of these grounds was first raised with him by the Inspectorate as early as 29 March 2010. Until withdrawal took place, the Council could not assume with confidence that these grounds would be abandoned by the Appellant, who might have opted to produce evidence to support them for the first time at the Inquiry itself.

11. Consequently, in order to address such an eventuality, Ms Wood was obliged to cover these grounds in preparing her proof of evidence and the Council had to issue instructions to Counsel in relation to them. This will inevitably have resulted in unnecessary expense. I have noted Mr Cooke's plea that he does not have the funds with which to pay an award of costs. However, this is not a consideration that I am able to take into account in determining this application.

12. I conclude that unreasonable behaviour resulting in unnecessary expense has occurred in this case. I therefore find a partial award of costs to be justified and set out below the relevant Costs Order.

Costs Order

13. In exercise of my powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other powers enabling me in that behalf, I HEREBY ORDER that Fleet Cooke shall pay to South Cambridgeshire District Council the costs of the appeal proceedings, limited to those costs incurred in preparing the Council's case in relation to the grounds of appeal against the enforcement notice set out in section 174(2)(a), (b), (c) and (f) of the Town and Country Planning Act 1990 as amended, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal more particularly described in the heading of this decision.

14. The Council is now invited to submit to Fleet Cooke, to whom a copy of this decision has been sent, 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.

Alan Woolnough

INSPECTOR