Mishcon de Reya

Our Ref: DJF/EVC/8764.50

Your Ref:

Africa House
70 Kingsway
London WC2B 6AH
DX 37954 Kingsway

www.mishcon.com

J Keenan
London Borough of Barnet Council
Development Management & Building Control Services
Barnet House
1255 High Road
Whetsone London
N20 0EJ

4 March 2019

Dear Madam

Application ref: 19/0581/RCU
Retention of Unlawful Care Farming Facility at SweetTree Fields, Marsh Lane London NW7 4EY

We act on behalf of Simon and Rhona Conway of York Lodge, Highwood Hill London NW7 4HA. Our client's property is adjacent to the above development site.

This letter is written without prejudice to any objections our clients may submit as to the substance of the planning application referred to above. This letter, however, focusses on the position of the council in relation to its power to decline to consider the planning application.

We have seen reference to your council having considered whether or not it is able to decline to determine this planning application, but concluding that you would in fact have to proceed to consider the application.

It is essential, of course, that all decisions of a local planning authority are made in a rational and "Wednesbury reasonable" manner and in accordance with the legislation. We therefore strongly urge that you re-consider whether or not this application is one which it is appropriate for the council to exercise its power to decline to determine the application. We consider that the proposal in front of the council is not only one which does fall within the powers of the authority to choose to decline to determine, but is absolutely precisely the kind of application for which the power was created in the first place.

Legal Power

Whilst it is clear from the correspondence that the existence of power to decline to determine is not contentious, it is worthwhile setting out the power which is found at

Switchboard: +44 (0)20 3321 7000 London: Mishcon de Reya LLP
Main Fax: +44 (0)20 7404 5982 New York: Mishcon de Reya New York LLP

section 70C of the Town and Country Planning Act 1990 as inserted by the Localism Act 2011. The power enables your authority to:

"decline to determine an application for planning permission [...] for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or only part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control."

The section goes on to confirm that a pre-existing enforcement notice is one which had been issued prior to the date the application was received by the local planning authority.

In R(Banghard) -v- the Bedford BC [2017] EWHC 2391 (Admin), Nathalie Lieven QC sitting as a Deputy Judge referred to Parliament's intention to ensure fairness in all cases and the fundamental principle that an individual could have their application determined once. Chesterton Commercial Bank (Bucks) -v- Wokingham DC [2018] EWHC 1795 (Admin) clarified that the test for whether section 70C was applicable was based on whether there were similarities, not whether there existed differences, albeit acknowledging that differences could go to the question of whether the power was in fact exercised.

It is also worthy of note that, unlike section 70A, there is no second limb to the test of whether the power to decline to determine is engaged, in which case the council has to consider a significant change in material considerations. We do not seek to contend that material change of circumstances since the enforcement notice is not a real consideration for the council to take into account when deciding whether or not to exercise its discretion; however, the fact that government had the opportunity to insert an absolute threshold to that effect and chose not to reflects a willingness by central government to allow councils to be more strict in their application of 70C than 70A.

The PPG states in relation to both sections that "The purpose of these powers is to inhibit the use of 'repeat' applications that the local planning authority believes are submitted with the intention of, over time, wearing down opposition to proposed developments. They are, however, designed to be flexible and to give local planning authorities the discretion to entertain 'repeat' planning applications where they are satisfied that a genuine attempt has been made to overcome the planning objections which led to rejection of the previous proposal or there has been a material change in circumstances." (Para 058).

Planning History

The planning history is set out in section 3 of the applicant's planning statement. The crucial element of that being application 17/7627/RCU which was refused and the subsequent enforcement notice ENF/00355/17.

We do not consider the previous Certificates of Lawfulness to be relevant as it is clear from statute that use for purely agricultural purposes never constitutes development, and the proposed use is not agricultural but is proposed as a use for care farming which constitutes material change of use from agricultural in any event. The two Certificates of Lawfulness, therefore, add nothing to our discussion.

While much is made in the application documents of the officer's report recommending approval of the first retrospective application, it remains the case that it was refused, and for reasons set out in the decision notice. That is the formal decision of the council, *having taken into account all of arguments presented in the officer's report.*

The reasons for refusal are also re-stated as the reasons for issuing the enforcement notice.

The enforcement notice enforces against the use of the land without planning permission for "care farming" which the notice requires to cease, and against construction of ancillary buildings, structures and pathways, which are required to be removed to reinstate the property to the state prior to works taking place.

The application makes reference to the pigsty having been omitted from the original retrospective application. The relevance and consequence of that are not clear from the planning statement; however, it is clear that the pigsty is required to be removed by the enforcement notice and that, therefore, retrospective consent will now be needed for it if it is to be retained, and it appears from the current application that that is the intention.

The enforcement notice took effect on 4 September 2018 with 8 months for compliance. No act of compliance has taken place or works begun and the owner has until 4 May (a little over 2 months) to ***commence and finish*** the full removal and restoration of the site. Failure to do so by 4 May constitutes a criminal offence. As such, the enforcement notice would have been taken seriously by any reasonable person, and yet despite right of appeal against refusal of the first retrospective planning permission on 22 June 2018 and a right to appeal against the enforcement notice at any time between 30 July and 4 September 2018, the applicant took no steps to submit an appeal under either case, and the time limits for doing so have now expired.

Application of Section 70C

The enforcement notice requires complete cessation of the care farming activity and removal of all structures. That is the current default position of your local authority and has not been challenged by the applicant. Section 70C was expressly brought in to prevent repeat applications distracting and delaying enforcement proceedings because there was a clear recognition that the correct approach to receipt of an enforcement notice where the applicant wishes to retain some or all of the features and uses enforced against, is to appeal against that notice.

It is entirely right and proper that such a power exists, and there is an expectation from the public that the right will be used where the council has taken the important and considered step of bringing enforcement proceedings and that that enforcement will be carried out in full and not distracted and delayed by these sorts of applications.

Nonetheless, it is entirely accepted that your council needs to consider whether it is appropriate in all the circumstances to exercise the power to decline to determine. There are a number of factors which may affect this decision but it should be noted that the assessment should be as against the enforcement notice and not against any earlier planning application.

Key factors which your council will wish to take into account are:

1 **Material changes in circumstances which could have a bearing on whether the same decision to bring enforcement proceedings would be made today as was made when the enforcement proceedings were brought.**
Clearly, the longer the gap between the two the more likely there are to be material changes in circumstances. Here the gap between enforcement notice and new application was only 6 months during which no significant policy change has occurred and there has been no change of any note to the environment surrounding the site.

2 **Extent of overlap with enforcement notice.**

In this case the applicant has applied for precisely everything against which the enforcement notice has been served. This is entirely on all fours with the purposes of section 70C and not one of those marginal cases where there happens to be some degree of overlap between a new and fundamentally different application, and minor details of a former enforcement notice aimed at a different breach of planning control.

Both elements of those matters which are identified as the breach of planning control on the face of the enforcement notice are included in the application. Put simply, this application is an attempt to re-run the applicant's missed opportunity to appeal against the enforcement notice under ground a) (that permission should be granted) pursued by the wrong method.

3 **Alterations to the physical layout, extent of construction etc.**

The applicant has made no concessions with the physical layout or proposed degree of development in this scheme. There is no suggestion that some of the structures on site would be removed as a quid pro quo for granting planning permission for a reduced development. Again, this flies in the face of the purpose of section 70C which is to protect the public and local authorities from such repeated application bullying tactics.

4 **The extent to which there is a proposed reduction in intensity.**

Here the applicant has claimed that they have attempted to make some concession. This is found at paragraphs 6.60 to 6.63 of the planning statement which is at best a marginal suggested change, together with an invitation to impose a condition limiting visitors but set at a level which is at the maximum of the currently claimed visitor numbers.

As such, that proposed condition only protects against further *increased* intensity, not the existing intensity of use against which the enforcement notice is aimed, and which so concerned members.

In that case the proposed condition in no way differentiates the application from the status quo which the council considered to be so unacceptable as to require enforcement action to be taken.

5 **Other new changes to respond to the reasons for issue.**

It is instructive to note that although section 6 of the planning statement purports to address the reasons for refusal (for which for our purposes we must also read as overcoming the reasons for service of the enforcement notice), taken as a whole section 6 of the statement, except as noted above, simply argues with and denies the validity of the reasons for refusal rather than setting out how the scheme is proposed to be altered to address the concerns raised.

It is crystal clear that on any reasonable test for the application of 70C the legal power is made out and the planning balance is heavily weighted in favour of the exercise of the right to decline to determine. Reviewed in the light of Paragraph 058 of the PPG this case is entirely in the first limb, an attempt to wear down opposition and does not even pay lip-service to being and application in which "genuine attempt has been made to overcome the planning objections".

Put simply, the applicant chose not to appeal against a refusal of planning permission and chose not to appeal against the enforcement notice. It did not contest those reasons and is stuck with them, no matter how little it agrees with them now. It makes no attempt to change in response. A new almost identical application at this stage is too little too late. The local residents need to be protected from repeated applications for ***precisely*** the same matter, and the council should not be assisting the applicant in continuing to argue with and defy the will of the authority as set out in the enforcement notice issued in July which has already lawfully taken effect.

We, therefore, request that **within 10 working days** of this letter your authority re-consider the exercise of its powers under section 70C and confirm to us in writing within that period that the decision has been taken to decline to determine this application so that our clients and their neighbours need not waste more of their time repeating the same arguments again against this development in which nothing has changed since July last year.

We look forward to hearing from you as a matter of urgency setting out full reasons for your decision.

Yours faithfully

MdR LLP

Mishcon de Reya LLP

Direct Tel: +44 (0)20 3321 6764
Direct Fax: +44 (0)20 3006 8956
Email: daniel.farrand@mishcon.com