

Appeal Decision

Inquiry held on 6 September 2016

by B M Campbell BA(Hons) MRTPI

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

Decision date: 5 October 2016

Appeal Ref: APP/X0360/X/15/3139117

**Land at Hare Hatch Sheeplands, London Road, Hare Hatch,
Reading RG10 9HW**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr R Scott against the decision of Wokingham Borough Council.
 - The application Ref CLE/2014/1462, dated 27 June 2014, was refused by notice dated 31 March 2015.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is the retail sale of goods to the public (Use Class A1).
-

Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs has been made by the Council against Mr Scott. This application is the subject of a separate Decision.

Preliminary matters

3. The area for which an LDC is sought comprises only part of the property known as Hare Hatch Sheeplands. The Appellant had given advance notification of a request to revise the area the subject of the application to that outlined in red on drawing 15_690A_001A.¹ No objection was raised by the Council to the minor adjustment of the area made therein and thus I shall adopt that drawing in my determination of this appeal.

Application for adjournment

4. At the start of the inquiry, an application was made by the Agent for the Appellant to adjourn until the following day as the Barrister appointed as advocate was unwell.

Application for a ruling

5. At the start of the inquiry, the Council asked for a ruling as to whether the inquiry should proceed given that the appeal could not succeed with an

¹ Appendix A.5 Matthew Green

enforcement notice in force relating to the appeal site. I was asked to make the ruling on the basis of the written legal submissions already made when this matter was first raised with the parties by the administrative staff in the Inspectorate prior to the submission of evidence. At that time the submissions of each party was cross copied to the opposing party. Those same submissions were presented again by each party as part of the evidence submitted and cross copied four weeks before the commencement of the inquiry.

Reasons

6. Having considered the submissions made in writing by each party I make the following findings:
 - (a) On an application made under s191 of the Act, the time to consider whether a use is lawful is at the time of the application (s191(4)).
 - (b) The application is dated 27 June 2014. At that time, there was an enforcement notice in force (issued 20 August 2013) requiring, amongst other things, the cessation of retail use at Hare Hatch Sheeplands including on land the subject of the application. Section 191(2)(b) is clear that a use cannot be lawful if it constitutes a contravention of any of the requirements of any notice then in force.
 - (c) The retail sale of goods for which the LDC was sought does not meet the requirements of s191(2)(b); it is in contravention of an enforcement notice in force. The case is unarguable. The application and subsequent appeal could not succeed.
 - (d) I do not accept the interpretation that an enforcement notice "then in force" in s191(2)(b) refers to being in force during a 10 year period of continuous use during which time the use might have achieved immunity from enforcement action (s171B(3)). The time for the assessment of lawfulness is at the time of the application. The words of the Act can bear no other interpretation.
 - (e) The Appellant suggests that the retail use became immune from enforcement action over time (s171B(3)) before the issue of the enforcement notice. If he had wished to rely on this argument then it should have been raised by way of an appeal against the subsequent enforcement notice on ground (d). He is now precluded from doing so as the time for appeal has passed (I note that an appeal was lodged but subsequently withdrawn).
 - (f) Section 285 (1) says the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought. The Appellant's request that I consider whether lawfulness through the passage of time was achieved prior to the issue of the enforcement notice or whether, but for the enforcement notice, a LDC could have been issued is not a matter for me to consider as an enforcement notice is in force. My remit is to consider only whether the decision of the Council was or was not well-founded (s195(3) & (4)) and that decision turns on whether the use was lawful "at the time of the application" (s191(4)).

- (g) Assessing whether the use for which this LDC is sought achieved lawfulness through the passage of time prior to the issue of the enforcement notice is a matter that could and should have been brought by way of an appeal against the enforcement notice on ground (d). It has no relevance to my consideration of whether the Council's decision was well-founded as it plainly was by the operation of s191(2)(b). Moreover, it is expressly precluded by s285(1). I do not accept the proposition that "any proceedings whatsoever" should be taken to mean court proceedings only.
- (h) The current case is remarkably similar to the circumstances in the matter of *Staffordshire CC v Challinor and another* [2007] EWCA Civ 864 given that lawfulness can be achieved through the passage of time and does not rely on confirmation by way of the issue of an LDC. In that case Lord Justice Hughes found:

It is an over-simplification and a misinterpretation of the authorities to contend that an enforcement notice cannot take away lawful use rights. It patently can have that effect in certain circumstances, and that is the undoubted result of section 285(1). Even in the absence of a CLU, a use which is within the existing use rights enjoyed by a piece of land is a lawful use: section 191(2) expressly provides that a use is lawful if it is immune from enforcement action because of the passage of time. Yet it has long been established that such lawful rights will be lost if an enforcement notice is served and the rights are not then raised as a ground of appeal.

That is precisely what has occurred here.

- (i) The argument that "as a matter of statutory construction it is strongly arguable that once a use gains immunity from enforcement and thus becomes lawful any subsequent enforcement notice should be interpreted in a manner which cannot take away that lawful use, whether or not the enforcement notice is appealed" simply runs contrary to the Court of Appeal's findings in *Challinor* as set out above.
- (j) Cases such as *Duguid v SSETR & West Lindsey DC* [2001] 82 P&CR 6 and *Swinbank v SSE & Darlington BC* [1988] 55 P&CR 371 mentioned by the Appellant are distinguished in the finding in *Challinor* that "an enforcement notice will be interpreted so as not to interfere with permitted rights under the General Permitted Development Order or with rights to use land for a purpose ancillary to a principal use which is itself not being enforced against. The authorities go no further than that and certainly do not establish any general right to assert existing use rights at a time when the enforcement notice has come into effect after an unsuccessful appeal or in the absence of an appeal. Such rights must be asserted at the time of appeal against the enforcement notice.
7. The application for a ruling follows the suggested legal position set out in the Council's Statement of Case for the appeal on which the Appellant had the opportunity to comment. Further comments were invited regarding the effects of s191(2)(b) and s285(1) on the appeal and, in response, legal submissions were made by both sides which were cross copied to the opposing party before the due date for the submission of evidence. The subsequent evidence of each party, submitted in accordance with Rule 15 of the Town and Country Planning

- (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002, included identical legal submissions as had been previously submitted for each party.
8. Given that I had been provided with comprehensive written legal submissions from each party which had remained unchanged; and given the clarity of the law relating to the operation of s191(2)(b) and s285 of the Act, I declined to adjourn on the basis that I could confidently rule on whether the appeal could succeed on the basis of those submissions. Nothing further was needed from either party and no injustice would arise from my so doing. Nonetheless, I adjourned for 20 minutes before giving that ruling so that the Appellant's Agent could liaise with his Barrister by phone and I have taken into account the further comments put arising therefrom.
 9. I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the retail sale of goods to the public was well-founded in that such a use is in contravention of the requirements of an enforcement notice in force at the time of the application. That being the case the appeal must fail and I ruled that I would hear no evidence on the matter of whether the use had continued for in excess of 10 years prior to the issue of the enforcement notice as whether it had or not would have no bearing on my decision and would thus be irrelevant. Rule 17(6) of the above mentioned rules enables me to do so.
 10. The Appellant's Agent presented a number of arguments as to why it would be in the public interest to make a finding as to whether an LCD could have been issued but for the enforcement notice (including assisting in the matter of an injunction currently before the High Court) but my remit is confined to considering whether the Council's decision was well-founded. It clearly was. In addition, whilst the circumstances in which the Appellant made a decision to withdraw his appeal against the enforcement notice might have some relevance in defence against prosecution of that notice (on which I express no view on the merits or otherwise) it can have no bearing on whether the use is lawful which is at matter of fact and law. I therefore ruled that I would not hear evidence on the circumstances which lead the Appellant to withdraw his appeal. A refusal to hear evidence on matters on which my decision could not turn avoided wasted expense being incurred by all parties through the unnecessary continuation of the inquiry.
 11. The appeal fails and I exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

B M Campbell

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Matthew Green

FOR THE LOCAL PLANNING AUTHORITY:

Ms Saira Kabir Sheikh QC