The Planning Inspectorate

Appeal Decision

Site visit made on 26 October 2021

by Roy Curnow MA BSc(Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date:3rd December 2021

Appeal Ref: APP/B9506/C/21/3276618
Land at B & W Nurseries, Salsibury Road, Plaitford, Romsey, SO51 6EE

- 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 Mr Alex Hensher of Capital Venture Southern Limited against an enforcement notice issued by New Forest National Park Authority ('the Notice').
- The enforcement notice, numbered 20/0056, was issued on 29 April 2021.
- The breach of planning control as alleged in the notice is Without planning permission, the change of use of buildings on plant nursery site to a mixed use of plant nursery and residential living accommodation.
- The requirements of the notice are:1. Permanently cease all overnight/residential accommodation at the site; and 2. Remove domestic facilities from outbuildings faciliting [sic] the use of the site for overnight accommodation, comprising bed, cooking and drinking facilities and domestic storage.
- The period for compliance with the requirements is 9 months.
- The appeal is proceeding on the grounds set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended.

Decision

1. It is directed that the enforcement notice is varied by:

   the deletion of the word "faciliting" and the substitution of the word "facilitating" in paragraph 5.2 of the Notice

   Subject to the variation, the appeal is dismissed and the enforcement notice is upheld.

Procedural Matter

2. The Notice's first requirement refers to 'faciliting' the use. This is clearly a typing error and should read 'facilitating'. The Appellant has not questioned what is meant here and, as such, my changing this requirement would not prejudice any party.

Reasons

3. The appeal site comprises land and buildings that the evidence shows was formerly occupied and used as a nursery business, trading as B & W Nurseries. It lies on the south side of the A36, to the southeast of the settlement of Plaitford. The evidence shows that, in planning terms, it lies in the open countryside outside any settlement, where residential development would only be allowed in certain circumstances.

Ground (d)

4. A Ground (d) appeal is made on the basis that, at the date the Notice was issued, no enforcement action could be taken in respect of any breach of planning control alleged in the Notice. As no appeal was lodged on Ground (a), the planning merits of the alleged breach cannot be taken into account in my decision. It is for the Appellant to demonstrate its case on the balance of probability.

5. S171B of the 1990 Act sets out time limits in which enforcement action may be taken against breaches of planning control. Its terms that are relevant to this appeal are:

   S171B(2) "*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 the period of four years beginning with the date of the breach"*; and

6. S171B(3) "*In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach"*.

7. If the National Park Authority's (NPA) position, set out in its Notice, is correct, the breach alleged in the Notice is a matter that is subject to the 10-year time limit in S171B(3). The Appellant's position is that there is not a mixed use of the land; the land is no longer used as a nursery and any plant nursery activities are undertaken ancillary to the use of the site as a single dwellinghouse. Therefore, it claims that the residential use is subject to the 4-year time limit in S171B(2). Although, arguing it is in different usage, both parties' positions are that the land is a single planning unit. Given the terms of the judgement in *Burdle*[1], the evidence before me, and what I saw at my site visit, I agree.

8. The Appellant company states that it bought the site in 2012 and that it had already been out of use for some time when this occurred. Therefore, it sets out in its Statement of Case that the land had not been used as a commercial nursery for at least 9 years and is "currently not occupied". I take the latter term to relate to the site's use as a plant nursery.

9. Whether land is unoccupied or unused is not the same as the land not having, or having lost, a certain use. The mere cessation of a use is not development that could lead to a material change of use.

10. However, in certain circumstances, the use of land can be held to have been abandoned. Established case law[2] sets out four criteria for abandonment: the period of non-use; the physical condition of the land or building; whether there had been any other use; and the owner's intentions as to whether to suspend the use or to cease it permanently. The weight attached to each of the criteria is a matter of judgment for the decision-maker[3].

11. The use of the land as a plant nursery was commenced at least 10 years prior to 18 July 2003. This is the date on which a certificate of lawfulness[4], under S191 of the Act, was issued for this use. The certificate was issued for "retail

[1] *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207
[2] *Trustees of Castell-y-Mynach Estate v Taff-Ely BC* [1985] JPL 40
[3] *Bramall v SSCLG* [2011] JPL 1373
[4] Test Valley Borough Council Reference Number 02/00060

sales of plants, trees, shrubs and gardening requisites (excluding garden furniture)". The Appellant does not challenge the use of the term 'plant nursery' in the Notice, and I find that this succinctly reflects the description on the certificate of lawfulness.

12. What might be termed the 'active use' of the nursery ceased sometime between the date the certificate was issued and the date of purchase by the Appellant. The only evidence I have in this regard is that it was not in such use at the latter date. Therefore, it has only been demonstrated that the use has not been carried out for in the order of 9 years. This is a short period that, of itself, is not indicative of abandonment.

13. There are a number of buildings, including large glasshouses, on the site. These and the remainder of the land, including gravel and concrete areas outside the buildings, are linked by concrete roadways. The roads are generally in a good state of repair, with moss and weeds growing on and through them in places.

14. Two large glasshouses flank the roadway that runs from the main access onto the A36. That on the left, as one enters the site, appeared to be slightly larger and appeared to be in a good state of repair. The majority of its glazing was in place, with just a few sheets of glass missing or broken. Inside, a network of paved paths ran between gravelled areas on which were plentiful signs of the nursery use. These included tables, plant displays and a great number of pots. Notwithstanding that the glasshouse on the opposite side of the roadway had more sheets of glass missing, and was infested with bramble, it, too, appeared to be in a good state of repair. Save for weed clearance and some minor repair work, it appeared that both could easily be brought back into nursery use.

15. I did not enter the third glasshouse, which lies to the southeast of the first of those mentioned, above. It had a worse bramble infestation than the second glasshouse, above. Whilst it had more glazing sheets missing or broken, the vast majority were intact. From what I could see, it also appeared to be in a fairly good state of repair.

16. Beyond the glasshouses, essentially to the south of the latter two glasshouses I refer to, above, is a range of smaller buildings. For these, I refer to the numbering scheme on the plan attached to a statutory declaration made by Mr Ivan Stoilov and submitted by the Appellant.

17. Building 2 is a small shed. It was not in such a good state of repair as the glasshouses or other buildings on the site. Building 3 is a much larger block building with a pitched roof clad in corrugated material. It has a concrete floor. Its walls, windows, door and roof appeared to be in a good state of repair and it was watertight. Building 4 was a small block building that houses two toilets. These worked, being served by a rudimentary gravity water system comprising a tank raised up above them on pallets. Building 5 is a block building with a corrugated roof that also has a concrete floor. Its windows, doors, roof and interior appeared to be in a good state of repair.

18. It appeared that these buildings, save for No 2, could be brought back into nursery use quite easily. It appeared that Building 2 would need to be replaced or have considerable repair work undertaken to it.

19. The concrete roadways were in a good state of repair and would benefit from some vegetation clearance. The concrete and gravelled areas outside the buildings were often overgrown, but could be cleared relatively easily. In addition, there was evidence around the site of its nursery use. This included small composting windrows and large amounts of pots for plants. The boundaries of the nursery were readily apparent on site.

20. Overall, the physical condition of the land and buildings was very much that of an out of use plant nursery that with relatively small amount of work might easily be brought back into use. It was not, therefore, indicative of the use being abandoned.

21. Although not having been used as a nursery since the Appellant bought it in 2012, there is no specific evidence to demonstrate a clear intention to cease the use of the land permanently. That it has apparently sought planning permission for residential development on the land and has allowed residential use to occur there is different from demonstrating the required clear intent.

22. The last test in the assessment of abandonment is whether there has been a material change of use of the land. This is, of course, also the issue that is the subject of the Ground (d) appeal.

23. Mr Stoilov, whose statutory declaration carries significant weight, states that he has occupied the site as his home since June 2015. I note the potential discrepancy between this date and those in answers given by the Appellant to questions in a Planning Contravention Notice (PCN), dated 28 August 2020. I have taken the situation to be that Mr Stoilov might have been present on the site between 2013 and 2015, even staying overnight at times, but he did not live there. He would know best where and when he used the site as his home.

24. It should be noted that Mr Stoilov has no legal rights over the buildings that he uses. He neither owns them, nor does he pay rent for their use. His presence is accepted and tolerated by the Appellant company, as it provides a degree of security on the site.

25. The Appellant points to Mr Stoilov's use of Buildings 1-5, which are separate from one another, to provide his home. He uses them for separate aspects of residential life. This is described as a single dwellinghouse by the Appellant. There is no statutory definition of dwellinghouse, though the Courts have defined this as having the facilities required for day-to-day living (the *Gravesham*[5] 'test').

26. S171B(2) refers to the change of use of any building to a dwellinghouse, and S336(1) defines a building as including any structure or erection, and any part of a building. This, as is the case with the judgement in *Gravesham*, is based on the use of the word 'building' in the singular. I have not been provided with supporting evidence, in the form of appeal decisions or case law, to support the Appellant's case that the use of a number of separate buildings in the way so used by Mr Stoilov amounts to the creation of a single dwellinghouse.

27. On the basis of the evidence before me, and as a matter of fact and degree, I find that whilst the buildings were used for residential purposes, the manner of their use does not amount to the creation of a single dwellinghouse. Therefore, whilst I have no doubt that Mr Stoilov has lived on the site for a period in

[5] *Gravesham BC v SSE & O'Brien* [1983] JPL 306

excess of four years, that is not the relevant period here. This is ten years, as set out in S171B(3). No material change of use of the land has been proven for this period. Therefore, in terms of the matter of abandonment, there has been no material change of use of the land.

28. I find that, on the balance of probability, the plant nursery use remains extant. This is not ancillary to the residential use, nor is that use ancillary to the plant nursery use. Consequentially, I find that the single planning unit is in the mixed use alleged in the Notice. It has not been demonstrated that the mixed use was commenced on or before the relevant date and carried out continuously for ten years thereafter. Therefore, it is not immune from enforcement action. For the reasons given above, the Ground (d) fails.

Human Rights Act (HRA) and Public Sector Equality Duty (PSED)

29. The appellant states that Mr Stoilov began living on the land of his own accord, as there were no other suitable hosing options available. Further, it states that he has not been offered any viable alternative housing options and would be homeless if the Notice came into effect. I have not been given any substantive evidence that Mr Stoilov has taken up his situation with the NPA, or a Council that might deal with homelessness, especially in the period since the Notice was issued. However, a likely consequence of the Notice coming into effect would be that he would not have a home.

30. Article 8 of the HRA sets out the right to respect for an individual's home. Dismissing the appeal will interfere with this right for Mr Stoilov and will engage the operation of Article 8. However, this interference is in accordance with the law and is necessary for the reasons given. Thus, the requirements of the Notice and the period for compliance, (which is not challenged), are proportionate. I have not been made aware of an alternative approach that would achieve the purpose of the Notice in a manner that interferes less with Mr Stoilov's rights, and I cannot see one.

31. I need also to pay due regard to the matter under S149 of The Equality Act 2010, taking into account its three aims. Here, the NPA's action does not amount to discrimination, harassment or victimisation. I have not been made aware of Mr Stoilov having a 'protected characteristic'; however, the Notice is not aimed at him on this basis. It is legitimately aimed at a residential use that is inappropriate in planning policy terms and significantly harmful. Lastly, it does not affect his participation in public life. For these reasons, the Notice accords with the HRA and the PSED in the Equality Act 2010.

Conclusion

32. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

Roy Curnow

Inspector