Appeal Decision

Site Inspection on 21 November 2014

by Graham Self MA MSc FRTPi

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

Decision date: 27 November 2014

Appeal Reference: APP/H1840/X/14/2214455
Site at: Knotts Field House, Holt Fleet Lane, Ombersley WR9 0HG

• The appeal is made by Mr Alan Wilkinson under Section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against the refusal by Wychavon District Council to grant a certificate of lawfulness.

• The application (Reference No. W/13/01168/LUE) dated 29 May 2013 was refused on 17 October 2013.

• The application was made under Section 191 of the Town and Country Planning Act 1990 as amended.

• The application sought a certificate of lawfulness for: "residential occupation of dwelling in breach of occupancy condition".

Summary of Decision: The appeal fails.

Procedural Matters

1. It became apparent to me before the site inspection that some documents which should have been appended to the appeal statement (including an affidavit by Mr Wilkinson) were missing. At the inspection I therefore made arrangements with both sides to allow these documents to be submitted. I have received the documents and taken them into account.

2. In his email sent with the documents, the appellant's agent also made additional submissions on a matter not previously raised as part of the appellant's case. This followed my attempt, during the site inspection, to see where alterations mentioned in written evidence had been made to the house, but I did not invite any submissions on this matter or make any arrangements for that to be allowed. By submitting new arguments at this late stage, the agent has taken inappropriate advantage of my preparedness to allow him to submit missing material, which I did out of fairness to the appellant even though the information on the case file suggests that his agent was at fault. Nevertheless I deal with the matter later in this decision.

The Appeal Site and Related Matters

3. The appeal site (the area edged red on the application plan) is located north of Holt Fleet Lane and east of premises which I refer to below as the Knotts Field Nursery site, although apparently this name is not how it is now generally known. Access to the appeal site from the road is through the Knotts Field Nursery site. The access and the vehicular circulation and parking areas are also shared with
two buildings next to the house. These buildings are evidently used for industrial purposes - one is occupied by a manufacturer of timber buildings, the other is occupied by a person or company carrying out vehicle repairs or maintenance.

4. The road entrance leads into an area used for car parking and some retail displays. To the west is a shop (which appears to be a general store selling a range of household and consumer goods, as well as a rear section selling items associated with gardening). Next to the shop there is a restaurant. The land further west behind the shop is occupied by some greenhouses. At the time of my inspection a caravan apparently used as a dwelling was standing on land towards the rear of the Knotts Field Nursery site.

Background

5. At the centre of this case is a planning permission which was evidently granted on appeal in 1998 for "alteration and retention of a nursery manager's house" at the appeal site. This permission was subject to several conditions. Condition 3 stated: "The occupation of the dwelling shall be limited to a person solely or mainly working, or last working, in the locality in agriculture or in forestry, or a widow or widower of such a person, and to any resident dependants". It is the breach of this condition which the appellant claims to be lawful.

6. In order to obtain the certificate sought under this appeal, the appellant has to show that no enforcement action can be taken against the breach of Condition 3 of the 1998 permission because the breach had become "immune" and therefore lawful by the date of the certificate application. Normally (and as will be seen later, this word is significant), lawfulness may be gained if the breach occurred ten years or more before that date and was continuous until then.

7. Documentary evidence submitted by the appellant includes an affidavit by Mr Wilkinson, statements by people who have known Mr Wilkinson for a number of years, and letters written by others. In summary, the general thrust of these documents is that Mr Wilkinson has not worked in agriculture or horticulture for many years and that he has worked in businesses involving retailing, wholesale distribution or transport. Mr Wilkinson states in his affidavit that his time was and still is taken up in "trading activities".

8. The 1998 appeal apparently concerned retrospective permission for an unauthorised house combined with permission for proposed alterations to make it smaller. It is clear from his decision that the inspector who held a hearing into the appeal had reservations about the justification on agricultural grounds for a dwelling at the appeal site. In his decision, the inspector referred to the horticultural nursery at the site as "clearly still active but the current operation appears relatively small-scale". He found that there was no functional need for a nursery manager to live at the site, and he was unable to conclude that there was a financial case for a manager's dwelling. Nevertheless he took into account that if permission were not granted, the then appellants could opt to implement either one of two planning permissions for a dwelling which the council had previously granted. These would have been located slightly nearer the road. The inspector evidently considered that the cost or waste of resources involved in demolishing the existing house and building another one would not be justified.

9. The later planning history includes enforcement action in 2007 and a resultant appeal decided in 2008. These proceedings related to the alleged use of parts of the site for retail purposes and the siting of caravans. An inquiry was apparently

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1 The application was evidently expressed as: "Alteration and retention of existing nursery manager's house".
held, at which Mr Wilkinson gave evidence on oath. The inspector's decision records part of Mr Wilkinson's evidence thus:

"As far as the nursery is concerned he [Mr Wilkinson] accepts that the glasshouses were in a dilapidated state prior to 2007....However, refurbishments have taken place and are ongoing with future intentions to expand growing for sales....A number of vegetable and salad crops have been cultivated this year and over the years small trees and shrubs have been grown on for sale. Bedding plants are also being propagated....about £20,000 in turnover has been generated from produce grown on site this year. He and his son presently work full-time in the business....He maintains that the shop is ancillary to the nursery rather than the other way round as claimed by the council."

10. In 2010 planning permission was granted for "change of use of part of horticultural ancillary sales area to farm shop for sale of locally sourced products". In 2011 Mr Alan Wilkinson's son, Mr Brett Wilkinson, appealed against a condition imposed on that permission. A statement of case prepared by a firm of surveyors instructed by the then appellant and submitted as evidence in 2011 stated: "It is understood a farm shop type activity has operated for at least the last six years with sales principally based around produce and goods from the holding though it is understood some bought in produce has always been offered". This statement also stated that "approximately 1 acre of the site is occupied by the appellants [sic] house and garden".

11. The basis of Mr Alan Wilkinson's case in the present appeal is that he has never worked in agriculture or horticulture, and has no agricultural experience or knowledge. He maintains that he still attends Birmingham wholesale market six days a week and that he has been buying, distributing and selling food products from the wholesale market since 2002. It is also argued that what has been operated at the site has been a retail and transport business involving goods being brought in, with only minor insignificant horticultural activity. The supporting statements and other material make broadly similar points. For example, a Mr Cashmore (a chartered accountant) writes that he has visited Knotts Field Nursery at least twice a year since the 1990s and it has always been his understanding that "the goods sold in the shop are not goods which have been grown on site".

Assessment

12. Both main parties in this appeal appear to agree that Mr Alan Wilkinson has lived in Knotts Field House since at least 2002. It is also common ground that no enforcement action has been taken against any breach of the agricultural occupancy condition during the ten year period.

13. As noted in paragraph 2 above, the appellant's agent has, at a very late stage, raised the issue of whether the 1998 planning permission was ever implemented. The key part of the permission was retrospective permission for the unauthorised development which had been carried out (the building of the house). I do not have detailed evidence about the alterations but they do not appear to have been so major as to be at the heart of the permission. Moreover, as I explain later, I do not place any reliance on any of Mr Wilkinson's evidence, so I cannot be sure whether or not the alterations were carried out.

14. It is also relevant to note that the "retention" of a building is not development as defined in the Planning Act, so the only sensible way of interpreting the 1998 application and permission is as retrospective permission for the construction of the house. A retrospective application seeking permission for constructing a
building and at the same time for altering it so that it forms a different building would be contradictory within itself. Also, no condition was imposed on the permission requiring alterations to be made.

15. Having regard to all those points, and since the house exists, I find that the permission was implemented to an extent sufficient to bring the occupancy condition into effect.

16. The appellant’s agent's suggestion that the house now on the site was never authorised raises a wider legal issue. The status under planning law of not just the use of the house, but the use of the whole of the larger area comprising the appeal site and the Knotts Field Nursery land, is rather more complicated than both sides appear to have realised. I explain why below.

17. The situation here is that within what is effectively a single unit of occupation or control, several land uses overlap, as they share access and vehicle circulation areas. There are only imprecise, unmarked boundaries between most of these areas and uses or around the land where they overlap (for example, the land around the caravan, and the parts of the car park used for access to the rear; also some of the land next to the house is clearly shared between industrial and residential uses). The whole area also appears to be in effect within Mr Wilkinson’s control, even if not legally owned by him because of a family trust arrangement.

18. In these circumstances I judge that for the purposes of planning law, the appeal site together with the Knotts Field Nursery site comprises a single planning unit in mixed (or “composite”) use. This mixed use appears to include use as a dwellinghouse, use for stationing a caravan for separate residential occupation, use as a retail shop and restaurant, use for outside sales of timber buildings, and use for two different industrial purposes. (There may also be some other components involving storage and horticulture - the extent of such activities at the time of the certificate application is unclear.)

19. The available evidence tells me that no planning permission has been granted for this mixed use, and the current mixture of uses appears to have started during the ten years prior to August 2013, probably when the shop was opened in 2006. Thus the mixed use is unauthorised, and that applies to all its components irrespective of their previous legal status. Because the house is in the same planning unit as land in mixed use it shares this mixed use, so the use of the house (and adjacent land) under planning law is not residential. However, the apparently unauthorised status of the use of the larger site (including the house) does not affect the fact that the house physically exists as a result of operational development and was subject to the occupancy condition.

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2 A further indication of overlapping uses and the existence of a single planning unit in mixed use is given by the fact that the area edged red on the application plan (which anyway does not extend to the public highway) includes part of a building next to the house which is used for non-residential purposes.

3 The courts have held that where a mixed use is unlawful, the components of the use are unlawful even if they might otherwise have been immune from enforcement. The leading judgment on this point is in the case of Beach v SSETR & Runnymede BC [2001]. The gist of this judgment, using letters to label component uses of a mixed overall use, is that if mixed use A+B+C changes materially to an unauthorised or unlawful mixed use A+B+C+D, components A, B and C can lose any immunity rights they may have gained.

4 A similar situation applies to the rest of the larger site as a whole. Thus, for example, the industrial units and the shop all share the mixed use, rather than being in industrial or retail use respectively.
20. There is a history of contradictory evidence about what has been going on at this site and the wider Knotts Field Nursery site. Even evidence about the ownership and occupation of the house, which should be a straightforward matter, is contradictory. The statement made in evidence on behalf of Mr Brett Wilkinson in 2011 referred to (here I insert an apostrophe in what must be the logically correct position) “the appellant’s house and garden”, indicating that the house and its garden was then owned or occupied by Mr Brett Wilkinson. I believe the house was then and still is owned by the Wilkinson Settlement Trust, of which Mr Cashmore and Mr Dudley are trustees. The caravan which I saw during my inspection is apparently lived in by Mr Brett Wilkinson, and other evidence suggests he has been living there for some years. If that is so, it is difficult to see why agents acting on his behalf described the house as his house in 2011.

21. Summarising what I have recorded in paragraph 9, Mr Alan Wilkinson gave evidence on oath in 2008 that the Knotts Field nursery business generated a turnover of about £20,000 in that year, that he and his son worked full-time in the business and that the shop was ancillary to the nursery. Evidence was given for Mr Brett Wilkinson in 2011 that sales at the shop were principally based around produce and goods from the holding. Yet now, Mr Alan Wilkinson maintains in essence that he has “never been involved in the limited growing activity that has taken place on the site” and that the shop has always been a retail operation with very little input of produce from the nursery.

22. In the circumstances, I consider Mr Alan Wilkinson's evidence to be unreliable, whether it is given first-hand in his affidavit, or second-hand as told to his agent and reported in the statement or other documents written by the agent.

23. I place more reliance on statements or letters written by others, which taken together, cast considerable doubt on whether there has been anything much more than small-scale, intermittent horticultural activity at the appeal site during the ten-year period after May 2003. The statements and letters also indicate that Mr Wilkinson's main means of employment has for some years been to do with the wholesale distribution of food produce and related goods, and more recently with running a retail business. Taking account of all the written evidence, I am inclined to believe that Mr Wilkinson has probably not been solely or mainly employed in agriculture or horticulture during the relevant ten year period.

24. The council's argument that Mr Wilkinson was mainly employed in agriculture through being a company director is weak. There is no good reason to think that Mr Wilkinson's directorships amounted to sole or main employment such as to comply with the occupancy condition, particularly as the company known as Farm Emporium Ltd was not basically engaged in farming or horticulture.

25. Mr Wilkinson was evidently unable to work for a period of about a year, in approximately 2009-2010. It is therefore possible that for about a year, within the ten years before May 2013, the condition was complied with by virtue of Mr Wilkinson being dependent on his wife; and she evidently undertook some work in the nursery, although this appears to have been a hobby activity and it seems doubtful that it she was employed elsewhere in agriculture. In any event I have decided that it is not necessary to reach any conclusion on that point, for the reasons explained below.

26. There is another issue, which is why I use the word "normally" in paragraph 6. Submissions have been made for the appellant on the topic of deliberate concealment, which has relevance following legislation in 2011. Mr Wilkinson claims (through his agent) that at no time whatsoever has any occupier of the dwelling made any attempt to conceal the circumstances of their work. He also
claims that he "has never taken any steps, either active or positive, or in any other sense, to deceive anyone with respect to his work and business activities or his occupation of the dwelling".

27. Having considered the evidence before me, I do not accept those claims. Whilst the appellant's agent correctly states that a failure to disclose something does not in itself amount to deliberate concealment, Mr Wilkinson has done more than merely fail to disclose. He has deliberately given false evidence in the past, to the effect that the primary use of the appeal site was as a nursery business and that he worked in the business full-time. I do not of course know exactly what Mr Wilkinson said when apparently he was cross-examined at the 2008 inquiry, but it is clear from what is recorded in the inspector's decision that the gist of Mr Wilkinson's evidence was as I have just described. At the very least, his evidence was designed to cause such obfuscation as to be misleading and deceptive about the extent to which he worked in the nursery business and about the scale of the nursery activity.

28. It seems likely that the evidence given for Mr Brett Wilkinson at the appeal hearing in 2010, about the primary use of the Knotts Field site being for nursery purposes, was also false. Mr Alan Wilkinson evidently attended this hearing. But the exact nature of his role in relation to his son's appeal in 2010 is unclear, and since this does not directly relate to Mr Alan Wilkinson's occupancy of the house, it is a secondary matter.

29. Mr Wilkinson has apparently not been prosecuted for perjury. However, he cannot have it both ways. Either he was telling the truth under oath in 2008, in which case he was working solely or mainly in horticulture at that time, so the occupancy condition was being complied with (thereby interrupting the continuity of the ten-year period required to gain lawfulness). Or he gave untruthful evidence then, in which case the occupancy condition was being breached, and has probably been breached throughout the ten years before May 2013. On balance, I judge that the latter is more probable than the former. Giving untruthful evidence, especially while under oath, about what was going on in relation to his occupation of the appeal property and the wider Knotts Field site was active and positive deception intended to conceal the real circumstances; and this happened during the relevant ten-year period.

30. As I have previously commented, a breach of planning control consisting of failure to comply with a condition may become "immune" and so lawful if no enforcement action can be taken against it. In this instance, I judge that enforcement action could be taken because of what I have found to be deliberate concealment in the past by the appellant as described above. Therefore the council's refusal to grant a certificate of lawfulness was well founded, though not for the same reasons as were specified by the council.

31. To avoid possible doubt, I record here that even if I had found the breach of the 1998 condition to be lawful, it would not have resulted in the current use of the house being lawful, for the reasons explained in paragraphs 16-19 above. I make no comment about what could or should happen in relation to the current mixed use of the larger site as a whole.

Formal Decision

32. I dismiss the appeal.

G F Self
Inspector