



Appeal Decision

Inquiry held on 10 September 2019

Site visit made on 10 September 2019

by Tim Belcher FCII, LLB(Hons), Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 25 October 2019

Appeal Ref: APP/P1615/X/18/3205840

Burway Farm, Buttermilk Lane, Rudford, Gloucester, GL2 8DY

- The appeal is made under Section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 ("the 1990 Act") against a refusal to grant a Certificate of Lawful Use.
 - The appeal is made by Mrs C. Amos ("the Appellant") against the decision of the Forest of Dean District Council ("the Council").
 - The application Ref P0564/18/LD1, dated 5 April 2018, was refused by notice dated 6 June 2018.
 - The application was made under Section 191(1)(a) of the 1990 Act.
 - The use for which a Certificate of Lawful Use is sought was described in the appeal form as "for land used as retail purposes (Use Class A1)".
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Procedural Matters

1. All evidence at the Inquiry was given on oath or by affirmation.
2. The Appellant seeks to show that the use which he claims is lawful has been carried on in excess of ten years and that the use has not been abandoned since it became lawful. The burden of proof rests with the Appellant and he has to show what the lawful use of the Appeal Site is and prove this on the balance of probabilities.
3. Use Class A1 of the Town and Country Planning (Use Classes) Order 1987 sets out what uses fall within Use Class A1 and need not be repeated here. However, the retail sale of goods must be to visiting members of the public.

Terminology

4. In this Appeal Decision I will refer to:
 - a) The land edged red on the application plan as "the Appeal Site".
 - b) The building numbered 1 and identified on the aerial photograph dated 2009¹ ("the 2009 Aerial Photograph") as "Building 1".
 - c) The building numbered 2 and identified on the 2009 Aerial Photograph as "Building 2".
 - d) The building numbered 3 and identified on the 2009 Aerial Photograph as "Building 3".

¹ Exhibit 3 to the Appellant's Statutory Declaration dated 5th June 2019

- e) The building numbered 4 and identified on the 2009 Aerial Photograph as "Building 4"
- f) The access road within the Appeal Site which lies adjacent to Building 1 and runs between Buildings 1 & 2 and Building 3 and identified on the 2009 Aerial Photograph as "the Internal Access Road".
- g) The land adjoining Building 4 and adjoining part of the Internal Access Road and identified on the 2009 Aerial Photograph as "Area 5".
- h) The area of grass land adjacent to Area 5 and identified on the application edged in blue as "the Grass Land".
- i) The Appeal Site together with the Grass Land as "the Land".

Relevant History

- 5. Prior to Doug Treweeke acquiring the ownership of the Land in the mid-1980s:
 - a) He lived in a flat owned by James Pugh.
 - b) He designed and built prototype polytunnels in a barn belonging to James Pugh.
 - c) The Land was used for agricultural purposes.
- 6. Doug Treweeke used Building 3 for the production of polytunnels and this use continued from the mid-1980s until about 2010. The production of polytunnels involved, amongst other things, the purchasing of the component parts and materials including lengths of galvanised steel, anti-hot spot tape, timber, polythene and ancillary products that were sold along with the polytunnels such as greenhouse heaters, ground cover sheets/matting and spunbonded fleece.
- 7. Doug Treweeke advertised polytunnels for sale in gardening publications such as Amateur Gardening. The polytunnels were marketed under the name "Polytunnels Direct" from Wychwood Garden Supplies at Burway Farm. The widths of the polytunnels were either 7 or 14 feet – the length was what was required by the purchaser.
- 8. The polytunnels were manufactured principally by Doug Treweeke in Building 3 and then delivered by courier to the customers or alternatively the finished polytunnels could be collected by the purchaser from Burway Farm.
- 9. There is no evidence that the manufacturing process resulted in any complaints to the Council by persons living close to Building 3.
- 10. Richard Mitchell, a partner at Trioscape Garden Centre (located about 1m from the Appeal Site), recalls purchasing polytunnels and associated products (listed in his letter dated 6 June 2017) from Doug Treweeke between 1993 and 2012.
My comment: The 2012 date cannot be correct as the polytunnels manufacturing use ceased around 2010.
- 11. Betty Slattery's recollection was that 75% to 80% of polytunnels were manufactured and sold to mail order customers. The remainder were made for customers that came to and then placed an order at the Appeal Site.

12. I will refer to the polytunnel manufacturing and sale use described above as "the Polytunnel Business"
13. The remainder of the Appeal Site was used for market gardening ("the Market Gardening Use").
14. Betty Slattery explained that:
 - a) Prior to working at the Appeal Site, she was a cleaner / gardener that worked for various people in the village and nearby area.
 - b) Doug Treweeke asked her to come and work for him at the Land in about 1988. She agreed and initially worked on a part-time basis.
 - c) Within a year or so of commencing work on the Land a flock of about 100 hens was acquired. Eggs were sold from the roadside via an honesty box or were sold to a shop in Newent.
 - d) The flock grew to about 500 hens over the years. The hens were kept in hen houses built on skids that were moved around the Land. She and Doug Treweeke gave up the egg production side of the business, but no date could be established as to when that happened.
 - e) She began to grow tulips within part of the Appeal Site and recalls selling them from the roadside at 50p a bunch.
 - f) The business of growing and selling flowers grew and she then started to grow vegetables such as tomatoes and lettuces.
 - g) Some local people who were aware of the Polytunnel Business would, from time to time, also purchase polytunnel related goods from the Appeal Site such as replacement polythene covers, fleece, bird netting; shade netting, pond netting and ground cover. These goods were not displayed – customers would simply ask whether they were available and if they were a sale transaction would usually follow. There was no evidence as to the frequency of such transactions or the amount of revenue that these sales generated.
 - h) She would assist Doug Treweeke with the Polytunnel Business (if, and when, required).
 - i) By about 1991 she was working full-time in the business operating out of the Land.
 - j) By about 1993 she recalls that the business carried on at the Land was busy.
 - k) Boards would be displayed at the entrances to the Appeal Site (there are two entrances that are linked by the Internal Access Road).
 - l) She recalls that in the early 1990s Building 1 replaced the tin shed. Building 1 was used for several uses including:
 - Completing the sales transaction of produce grown in connection with the Market Gardening Use.
 - An office where Doug Treweeke conducted his business transactions in connection with the Polytunnel Business principally over the

telephone but also in person if someone called at the Appeal Site to order a polytunnel. All polytunnels were bespoke – there was no stock of finished polytunnels awaiting purchase.

- m) Within Area 5 a number of polytunnels were erected. They were used in connection with the Market Gardening Use. However, a potential purchaser of a polytunnel could view what they would get if they placed an order for one.
 - n) No food produce or flowers were sold from the Appeal Site that had not been grown at the Appeal Site.
 - o) Building 2 was used for ancillary storage principally in connection with the Market Gardening Use.
 - p) Clearly the Market Gardening Use did not generate much activity in the winter season and the polytunnels within Area 5 were used for preparing the following season's produce in connection with the Market Gardening Use.
 - q) She and Doug Treweeke did all the work in connection with the cultivation of produce for the Market Gardening Use. When produce was ready for sale it would be harvested and displayed ready for purchase either on tables or racks generally outside the door leading to the sales counter in Building 1.
15. Accounts for Doug Treweeke (Wychwood Garden Supplies) for the majority of the years between 1991 and 2009 were produced. Betty Slattery confirmed that the accounts were for both the Polytunnel Business and the Market Gardening Use and the figures do not distinguish between these two uses.
16. In about 1999 Betty Slattery became a partner in the business run from the Appeal Site.
17. Photographs from Google Streetview of the entrances to the Appeal Site show boards advertising: "Market Garden Seasonal Produce - Horse Muck; Runner Beans; Peppers" and "Produce - Flowers Cabbage Lettuce; Plants - Purple Sprouting; Runner Bean; Tomato; Beetroot; Courgette; Leeks; Calabrese".
18. Another sign stated: "Polytunnels; Replacement Covers; Fleece; Bird Net; Shade Net; Pond Net; Ground Cover".
19. Yet another sign stated: "Free Range Eggs - £1.70 a doz".
20. Finally, a sign within the Appeal Site stated: "Market Garden Seasonal Produce – Flowers". These signs reflect the evidence given by Betty Slattery and local residents.
21. I was also informed of some other very minor uses which were carried on within the Appeal Site including an ad-hoc photocopying service and, the storage, display and sale of bric-a-brac. However, there is no evidence that these minor uses were other than transitory and / or de-minimis.
22. 2010 was the year when Doug Treweeke went into a nursing home and ceased his direct active involvement with the Polytunnel Business. Betty Slattery also underwent a major heart operation.

23. According to Betty Slattery both businesses had ceased trading by the Autumn of 2010. No active use has been made of the Land since that date.
24. Doug Treweeke died in 2012 and the Land was left to Betty Slattery.
25. Betty Slattery sold the Land to the Appellant and his wife.
26. In June 2015 the Appellant applied for a Certificate of Lawful Use in respect of the Land. The existing use was described as, "Garden centre with retail outlet". The application was refused on 14 July 2015.
27. In March 2017 an application was made by Mrs C. Amos to change the use of part of the Appeal Site and to erect a four bedroom two-storey dwelling-house and associated garage on it. This application was refused in September 2017 and an appeal against that refusal was dismissed in January 2018.

Reasons

28. When the Certificate of Lawful Use application was submitted to the Council the Appellant explained that the existing use was as a "garden centre with associated retail outlet".
29. The Land is currently not in any active use. The Appellant uses part of Building 2 for storage of timber and part of Building 3 for the drying out of wood which is then used as firewood. The Appellant and his wife live about 80m from one of the entrances to the Appeal Site.
30. In my view the Land comprises a single planning unit as it is owned and occupied by the Appellant and his wife. There is no evidence that the Land has been split into any smaller planning unit or that any part of the Land has been occupied by any person other than the owner of the Land at the relevant time.
31. My assessment of the evidence is that the Polytunnel Business became lawful through the passage of time prior to 2010. The use of Building 3 for the manufacture of polytunnels included sales of no more than 25% of the polytunnels manufactured in Building 3 to visiting members of the public.
32. Building 1 was largely destroyed by fire sometime during 2010. The destruction of Building 1 ends any lawful use that Building 1 may have acquired prior to that date.
33. Area 5 was used for the Market Gardening Use. As explained above Betty Slattery confirmed that all the produce that was sold from the Appeal Site was grown within Area 5. I am aware of a letter dated 20 June 2014 from Donald Davidson who claims that he supplied Doug Treweeke and Betty Slattery with free range eggs for at least 14 years. He does not confirm:
 - a) What the 14 year period he was referring to.
 - b) How many eggs were supplied.
34. Betty Slattery did not give any evidence to suggest that eggs in significant numbers were bought in and it seems unlikely to me that this would account for any significant use of the Appeal Site given that Doug Treweeke and Betty Slattery chose not to continue their own egg production use on the Land.
35. I am in no doubt that prior to the Market Gardening Use ceasing it had become lawful through the passage of time. I do not consider that the Market

Gardening Use of the Appeal Site amounts to a Class A1 Use. The Market Gardening Use at the Appeal Site involved a relatively small-scale production of flowers and vegetables as cash crops which were sold directly to customers.

36. I have insufficient information / evidence to conclude that the sale of the items referred to in paragraph 14(g) above was carried on at such a level as to amount to a separate retail use.
37. Building 2 remains largely intact following the fire that largely destroyed Building 1. On the balance of probabilities Building 2 was mainly used ancillary to the Market Gardening Use e.g. for ancillary storage of produce and equipment used in connection with the Market Gardening Use.
38. Building 4 is a toilet which could not be inspected at the site visit because it was covered in vegetation and was inaccessible. The Appellant confirmed that the toilet facilities remained within Building 4. The use of Building 4 was ancillary to the Polytunnel Manufacturing Use and the Market Gardening Use.
39. I have had regard to the case of *Williams -v- Minister of Housing and Local Government and Another* (1967 18 P.& C.R. 514) but this does not assist in the determination of this appeal.
40. I therefore consider that the lawful use of the Appeal Site is the mixed use explained above. This mixed use does not fall within any Use Class and in planning terms the Appeal Site has a sui generis use.
41. I have considered whether the mixed use has been abandoned. I am aware that the use ceased in 2010 and that the Appellant does not intend to use the Appeal Site for the lawful mixed uses which I have identified. However, he did confirm that he maybe minded to sell the Land with the benefit of any certificate of lawful use that can be achieved for it including the resumption of the mixed use or a use that was not materially different from the lawful use.

Overall Conclusions

42. The appeal is allowed and attached to this decision is a Certificate of Lawful Use describing the existing mixed use of the Appeal Site which I consider to be lawful.

Formal Decision

43. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a Certificate of Lawful Use in respect of the mixed use which I have identified above was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under Section 195(2) of the 1990 Act and grant a Certificate of Lawful Use.

Tim Belcher

Inspector

APPEARANCES

FOR THE APPELLANT

Freddie Humphreys of Counsel
Instructed by Paul Barton of Bruton Knowles Property Consultants

He called:

Cyril Amos – Appellant
Betty Slattery – Former owner of the Land.
James Pugh - Local Resident
Roger Rackliff – Local Resident
Paul Barton – BSc(Hons), DipTP, MRTPI – Associate Town Planner with Bruton Knowles Property Consultants

FOR THE FOREST OF DEAN DISTRICT COUNCIL

Christian Hawley of Counsel
Instructed by the Council's Solicitor

He called:

Martin Burke – Accountant – Member of the Association of Accountancy Technicians & the Association of Chartered Certified Accountants employed by Publica Group Support Limited
Stephen Colegate – BA(Hons), MA, MRTPI – Principal Planning Officer & Team Leader for Planning Enforcement/Appeals



Certificate of Lawful Use

("the Certificate")

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991) ("the 1990 Act")

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 5 April 2018 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to the Certificate, was lawful within the meaning of Section 191(2) of the 1990 Act for the following reason:

The mixed use specified in the First Schedule became lawful prior to the use ceasing in 2010. Whilst the use has ceased it has not been abandoned. No enforcement action can be taken in respect of the use because the time for enforcement action has expired. Further, the mixed use does not constitute a contravention of any requirements of any Enforcement Notice then in force.

Tim Belcher

Inspector

Dated: 25 October 2019

Reference: APP/P1615/X/18/3205840

First Schedule

The mixed use of the land for:

- a) The Polytunnel Business use within Building 3.
- b) The sale of no more than 25% of the polytunnels manufactured in Building 3 to visiting members of the public.
- c) The Market Gardening Use of Area 5
- d) The use of Building 2 ancillary to the Market Gardening Use
- e) The use of the toilets within Building 4 ancillary to the Polytunnel Business use and Market Gardening Use.

Second Schedule

Burway Farm, Buttermilk Lane, Rudford, Gloucester, GL2 8DY

NOTES

The Certificate:

1. Is issued solely for the purpose of Section 191 of the 1990 Act.
2. Certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under Section 172 of the 1990 Act, on that date.
3. Applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan.

Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

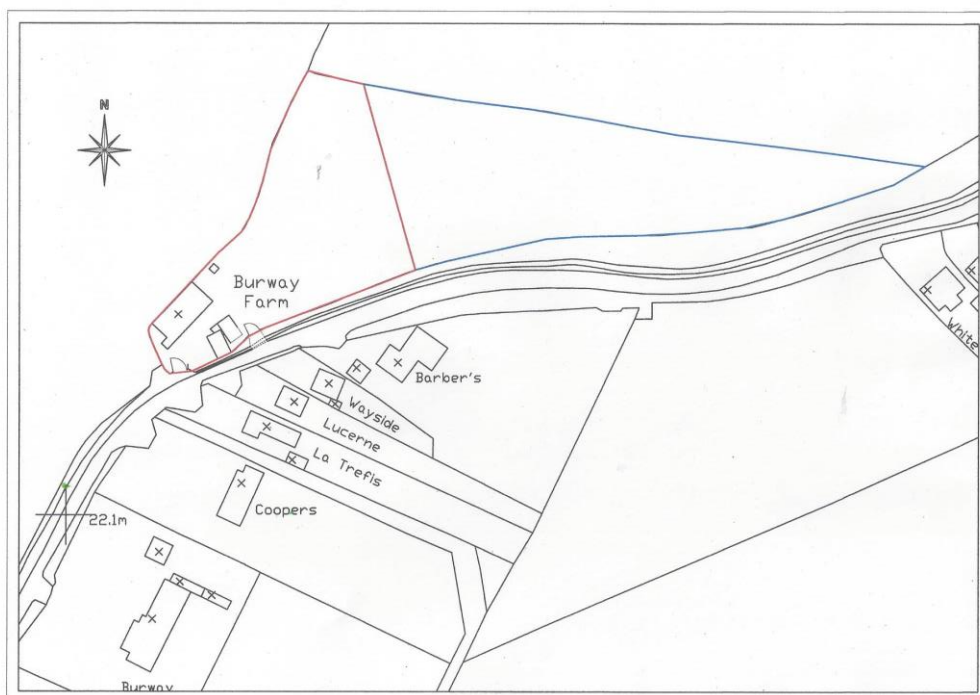
This is the plan referred to in the Certificate dated 25 October 2019

by Tim Belcher FCII, LLB(Hons), Solicitor (Non-Practising)

Burway Farm, Buttermilk Lane, Rudford, Gloucester, GL2 8DY

Reference: APP/P1615/X/18/3205840

Do Not Scale



Location plan
Scale 1:1250