



Appeal Decision

by James Blackwell LLB (Hons) PGDip, Solicitor

an Inspector appointed by the Secretary of State

Decision date: 28th February 2024

Appeal Ref: APP/V3310/X/22/3300124

Waggon Nursery, The Bungalow, The Causeway, Mark, Highbridge TA9 4QJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Marilyn Joyce Puddy and Darren Puddy (Executors of Mr E Gowan) against the decision of Somerset Council (formerly Sedgemoor District Council).
- The application ref 33/21/00035/IL, dated 12 October 2021, was refused by notice dated 22 April 2022.
- The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended (1990 Act).
- The use for which a certificate of lawful use or development is sought is for the existing use of dwelling as residential without any agricultural or horticultural tie.

Summary Decision: The appeal is dismissed.

Preliminary Matters

1. The original appellant, Mr Gowan, is now deceased. The appeal is therefore proceeding in the names of his Executors, Marilyn Puddy and Darren Puddy, as referenced in the banner heading above. References to the appellants should therefore be construed accordingly.
2. Whilst the appeal application was determined by Sedgemoor District Council, Sedgemoor District Council has since become part of Somerset Council, a newly formed unitary authority. Somerset Council is therefore the local planning authority for the area in which the appeal site is located, which is again reflected in the banner heading above.
3. I have taken the description of use from the Council's decision notice, as this more accurately describes the use for which an LDC is sought. Whilst not explicitly mentioned in the description, the appeal concerns an alleged failure to comply with condition, and the appeal has been determined as such.
4. The outcome of the appeal hinges on the strength of evidence presented by the appellants, which pertains to a historic failure to comply with a planning condition, before the date of application. I have therefore not carried out a visit of the site, as it could not have demonstrated whether any failure to comply with the condition was ongoing at the time the application was made.
5. The Council's decision notice says the date of the appeal application was 14 December 2021, however the date of the application form is 12 October 2021. Whilst I have used the date from the application form, on the evidence before me, the discrepancy would not make any difference to the outcome of the appeal. I have therefore not queried this with the parties.

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6. Planning permission was granted in respect of the appeal property on 20 July 1994 under reference 1/33/94/19, for the erection of a horticultural workers bungalow (Original Permission). Condition 2 of the Original Permission says:
"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 dependents."
 7. The appellants contend that the bungalow had been occupied in breach of this condition for more than ten years at the time of application. As per s191(3) of the 1990 Act, the appellants therefore say no enforcement may be taken in respect of this failure to comply with condition, as the time for enforcement has expired.
 8. For a failure to comply with a condition to be lawful under s191(3) of the 1990 Act, it must also not contravene any requirements of an enforcement notice or breach of condition notice then in force. There is no suggestion from either party that this is the case, so I have proceeded on the basis that this element of the test is met.
 9. For the appeal to succeed, the appellants would therefore need to demonstrate, on the balance of probability, that the appeal property had been occupied in breach of condition 2 of the Original Permission, continuously and uninterrupted for a period of at least ten years expiring on or before the application. As an application for an LDC, the planning merits of the development are not relevant.
 10. I have considered the appellants' evidence in accordance with the principle established in *Gabbitas*¹. This says that where there is no evidence to contradict an appellant's version of events or make it less than probable, and their evidence is sufficiently precise and unambiguous, then it should be accepted.
 11. For completeness, whilst the description of development in the Original Permission refers to a "*horticultural workers bungalow*", the sole issue before me is the alleged lawfulness of the failure to comply with condition 2.

Main Issue

12. Against this background, the main issue is whether any failure to comply with condition 2 of the Original Permission was immune from enforcement, and therefore lawful for the purpose of the 1990 Act, as at the date of application.

Reasons

Background and Site Context

13. The appeal property comprises a bungalow and surrounding grounds, which were previously used as a commercial horticultural nursery. As highlighted, construction of the bungalow was consented by the Original Permission, and condition 2 attached to that permission requires the bungalow to be occupied by persons working, or last working, in agriculture or forestry (which would include horticulture).

¹ *Gabbitas v SSE & Newham BC* [1985] JPL 630

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14. It is worth highlighting that condition 2 would not have been breached if Mr or Mrs Gowan were "*last working in the locality in agriculture or forestry*". In other words, if Mr or Mrs Gowan's last job (whether before retirement or otherwise) was related to horticulture, then they would likely have occupied the bungalow in compliance with the condition, noting that the condition is not breached in circumstances where the widower of someone last working in agriculture occupies the bungalow.
 15. Mr Gowan is understood to have acquired the appeal property in 1997. Whilst the original application said that the use began on 22 February 1999, the appellants say Mr Gowan was not ever employed in agriculture or forestry. In turn, they say he was in breach of condition 2 of the Original Permission throughout his occupation.
 16. Given the requisite test of immunity for this type of appeal, the timeline of events is critical. In this instance, the appellants say that Mrs Harris ran the horticultural nursery between approximately 2000 and 2006. Evidence shows that Marilyn and Darren Puddy then took over the nursery in 2006, and ran it until its closure in or around 2012. However, notwithstanding this information, there is no information to explain who ran the nursery before 2000.

Evidence

17. Various documents have been submitted by the appellants in support of their case. These include Mr and Mrs Gowan's tax returns for 2001 and 2002; a letter dated 26 July 2001 which confirms Mr Gowan's late wife was entitled to an attendance allowance; documentation confirming the takeover of the horticultural nursery by Marilyn and Darren Puddy in 2006; end of year accounts in respect of the nursery for 2008 and 2009; and a letter from Mr Gowan's accountant dated 22 March 2021. Each of these documents are discussed in turn.
18. The 2001 tax return shows that Mr and Mrs Gowan received a small rental income of £520 in connection with the horticultural nursery during that financial year (understood to have been paid by Mrs Harris). Whilst the rental income received is unusually low, it is not necessarily indicative of Mr and Mrs Gowan having worked within the nursery themselves.
19. The letter dated 26 July 2001 confirms that Mr Gowan's late wife had certain care needs, due to her state of health. However, whilst Mr Gowan may well have been Mrs Gowan's sole carer, of itself, this does not demonstrate that Mr Gowan did not work in some other capacity during this time, or beforehand. Moreover, the letter does not confirm that Mr and Mrs Gowan were not "*last working*" in agriculture or forestry.
20. The documents relating to the takeover of the nursery by Marilyn Puddy and Darren Puddy do little to establish Mr Gowan's own involvement or lack of involvement with the horticultural nursery, whether before or during his retirement. The same is true of the end of year accounts dated 2008 and 2009. Indeed, notwithstanding that the nursery was run by Marilyn Puddy and Darren Puddy, this would not preclude the possibility of Mr Gowan having still worked within the business in some capacity. Again, the evidence also does nothing to confirm that neither Mr Gowan nor Mrs Gowan were last working in the horticultural or agricultural industry, particularly prior to 2000.

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21. The letter from Mr Gowan's accountant, dated 22 March 2021, says that "*Mr Gowan did not derive any income from either agricultural or horticultural activities at any time during the period of sixteen years when I acted for him in respect of his taxation matters*". Whilst this letter is more helpful, once again, it sheds no light on Mr or Mrs Gowan's last employment. Moreover, if Mr or Mrs Gowan had not derived any income from the nursery other than that received from Mrs Harris, then I am unclear why additional financial information, particularly from the years preceding 2000, would not have been submitted to help demonstrate this. The same is true if Mr or Mrs Gowan had derived income from some other type of work. This is a notable gap in the evidence.
22. Notwithstanding that Mr Gowan was reportedly a retired publican, the lack of detail regarding Mr and Mrs Gowan's last employment is problematic, as there are factors which cast doubt over any ongoing failure to comply with condition 2.
23. In a letter from Mr Gowan in 2019, the Council says he confirmed he had complied with the conditions attached to the Original Permission. Although I have not seen this letter, the appellants do not dispute its existence. Whilst not determinative in itself, as it could simply have been a mistake, this does raise questions over any potential breach of condition 2.
24. Planning permission was granted on 12 August 2013 under reference 33/13/00014, for a change of use of part of the appeal site from horticulture to equine/holiday use (Equine Permission). The Design and Access Statement submitted in support of this application says that "*Wagon Nursery has been established as a horticultural business since early 1980's, permission for a horticultural workers dwelling was approved in 1992 and the business thrived until recently. Due to the economic downturn, the applicants are having problems in sustaining the amount of business to make the nursery viable and have been trying to sell the site as a going concern for the past 2 years*". The statement goes on to say that "*The application submitted is to partially change the use of the site to include equestrian facilities and holiday accommodation, in order for the current owners to stay on the site by expanding the business and making it financially viable*".
25. Mr Gowan was the applicant for the purpose of the application, as shown on the application form. Whilst the appellants deny that Mr Gowan ever worked within the nursery, references to the "applicants" in the Design and Access Statement suggest otherwise. Indeed, the commentary specifically says that the "*applicants*" are having problems in sustaining the amount of business, and that the purpose of the application was to expand the business to make it financially viable, so that the current owners can remain on site.
26. Notwithstanding that Mr Gowan was supposedly retired, this evidence suggests he may have been working within the nursery at the time of, or shortly before, the relevant application in 2013 (noting that the nursery is said to have closed in December 2012). Notably, the case of *Shortt*² confirms that a person can be employed in agriculture (or horticulture as is the case here), without making money from the business. So even if Mr Gowan did not derive any income from the nursery, this would not preclude compliance with condition 2 if he had still worked there in some capacity.

² *Shortt & Shortt v SSCLG & Tewkesbury BC* [2015] EWCA Civ 1992

Period of Breach

27. To be immune from enforcement, the Council says the appellants must demonstrate a continuous failure to comply with condition 2 over the ten years preceding the appeal application. However, as per the case of *Ocado Retail*³, immunity from a failure to comply with a condition can be obtained during any ten-year period of continuous breach, expiring on or before such an application. Such immunity will subsist, provided there are no supervening events, such as abandonment of the acquired use rights. In turn, compliance with condition 2 needs to be considered by reference to the Gowan's occupation of the bungalow since their acquisition in 1997, and not just in the ten years preceding the application.
28. In this context, the lack of information regarding the nursery's operation prior to 2000 is particularly problematic. Mr and Mrs Gowan are understood to have lived within the bungalow, and therefore within the grounds of the nursery, from 1997 onwards. The nursery is said to have been established in the early 1980s, which means the Gowan's presumably acquired the property with full knowledge of the horticultural business and the associated agricultural tie.
29. Whilst a narrative of the nursery, and who ran it, has been provided for the years 2000 to 2012, no explanation of who ran the nursery before this time has been given. There is also no financial information before me to suggest it was run by a third party between the Gowan's acquisition of the nursery and Mrs Harris' involvement in 2000. On the evidence, it therefore seems more likely than not that the Gowan's ran the nursery during this time. The 2001 letter relating to Mrs Gowan's state of health also adds credence to this possibility, as it coincides with the nursery being taken over by Mrs Harris in or around 2000.
30. If Mr and Mrs Gowan did run the nursery before Mrs Harris took over in 2000, and neither worked in any other capacity since, then they would have occupied the bungalow in compliance with condition 2. This is because the condition would have been met if Mr Gowan or Mrs Gowan had "*last worked*" in horticulture. In turn, no ten-year period of continuous breach of condition 2 would have been established at any point.
31. Even if this was not the case, and some other person(s) ran the nursery prior to 2000, then subsequent planning applications, and most notably the application for the Equine Permission, are a strong indication of Mr Gowan's continued involvement with the horticultural business. Indeed, the Equine Permission suggests that Mr Gowan was working within the nursery up to its closure in or around 2012. If that were the case, then once again, Mr Gowan would have occupied the bungalow in compliance condition 2 at that point.

Summary

32. Given this degree of uncertainty, the appellants have not discharged their evidential burden. Indeed, the evidence is not sufficiently precise and unambiguous to demonstrate a failure to comply with condition 2 for a continuous and uninterrupted period of ten years, at any point during the Gowan's occupation of the bungalow. On the balance of probability, the failure to comply with the condition was therefore not immune from enforcement at the date of application.

³ *Ocado Retail Ltd v Islington LBC* [2021] EWHC 1509 (Admin)

Other Matters

33. The Council has raised a number of points concerning possible deliberate concealment in respect of the appeal application. However, as I am dismissing the appeal for other reasons, I have not considered these arguments further.

Conclusion

34. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the existing use of dwelling as residential without any agricultural or horticultural tie was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Formal Decision

35. The appeal is dismissed.

James Blackwell

INSPECTOR