TAUNTON DEANE BOROUGH COUNCIL

AGENDA ITEM NO. 17

PLANNING COMMITTEE – 31 OCTOBER 2007

The following appeal decision has been received:-

Appeal against enforcement notice served in respect of unauthorised uses at Foxmoor Nurseries, Haywards Lane Chelston.

Foxmoor Nurseries successfully appealed against the Enforcement Notice served in respect of alleged unauthorised uses at the site at Haywards Lane Chelston. Although the Inspector found that the unauthorised uses as alleged were taking place she allowed the appeal on the basis that the current use of the site which is a mixture of B1 (light industrial), B2 (industrial) and B8 (storage and distribution) was no more detrimental than the existing authorised B1 use. A copy of the decision letter is attached setting out the detail of the decision.

However, Members will note at paragraph 34 the Inspector refers to the S106 agreement relating to the site which sought to limit the type of operations at the site and refers to enforcement of the terms of the S106 agreement as “the only recourse available to the Council” to restrict the uses at the site.

Counsel’s advice is being sought as to the extent to which the agreement could be enforced in the light of the Inspector’s decision and a report will be made to the next meeting of this Committee.

A partial award of costs was also made which is currently under negotiation.

Appeal Decision

Inquiry held on 14 – 16 August 2007

Site visits made on 14 & 15 August 2007

by Katie Peerless Dip Arch RIBA

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

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Decision date:
3rd. September 2007

Appeal Ref: APP/D3315/C/06/2033375
Foxmoor Nurseries, Haywards Lane, Chelston TA21 9PH

- 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 Foxmoor Nurseries Ltd against an enforcement notice issued by Taunton Deane Borough Council.
- The Council's reference is PD/11/A/800.
- The notice was issued on 9 November 2006.
- The breach of planning control as alleged in the notice is: without planning permission, the change of use of the land from use for horticulture and dependent B1 to a mixed use for various independent industrial enterprises unrelated to any on-site horticultural use, predominantly B8.
- The requirements of the notice are: (i) Stop using the land for independent industrial enterprises unrelated to on-site horticulture. (ii) Remove from the land all goods, materials, machinery, vehicles and other items associated with the unauthorised users.
- The period for compliance with the requirements is six months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.

Summary of Decision: The appeal is allowed subject to the enforcement notice being corrected, and planning permission is granted in the terms set out below in the Formal Decision.

Application for costs

1. At the Inquiry an application for costs was made by Foxmoor Nurseries Ltd against Taunton Deane Borough Council. This application is the subject of a separate Decision.

Procedural matter

2. Although not previously noted on the appeal form, the appellants have since put forward evidence to support an appeal on ground (a). As the appropriate fees have been paid, the deemed planning application falls to be considered. The Council has addressed this matter and gave evidence to confirm its view that planning permission should not be granted.

Planning history

3. Planning permission ref: 46/96/022 granted permission for, amongst other things, two glasshouses on the appeal site. One has been built but the other has never been completed, although the foundations for it were laid. In 2001, planning permission ref: 46/2000/034 allowed a change of use of 50% of the existing glasshouse to a B1 use.

4. The only conditions attached to this permission were the standard commencement condition and one regulating the type of external materials. The appellants also entered into an agreement under S106 of the Town and Country Planning Act 1990 that restricts the users of the B1 space to Foxmoor Nurseries Ltd and any associated or subsidiary companies. The meaning of *'associated company'* was subsequently defined and agreed following mediation between the Council and the appellants but there still appears to be some dispute as to whether the arrangements put in place between the appellants and their tenants comply with this definition. Nevertheless, this is not a matter that can be considered at this appeal and I am restricted to determining only the planning issues raised as a result of the appeal against the enforcement notice.

The enforcement notice

5. The Council now concedes that the allegation in the enforcement notice should be corrected to reflect the fact that that the permitted B1 use is not, in the terms of the relevant planning permission, reliant on the horticultural use. Even with the deletion of the reference to a dependence on the horticultural use, I consider that the allegation still remains inaccurate. The enforcement notice identifies the whole of the site, including the land surrounding the glasshouse and the uses specified in the allegation should be amended to reflect this. In order to more accurately reflect the actual uses on the site and make clear what the deemed planning application, if successful, would encompass, I consider that the allegation should read *'without planning permission, the change of use of the land from use for horticulture and B1 to a mixed use for horticulture and various industrial enterprises (including B1, B2 and B8).'*

Main issues

6. I consequently consider that the main issues in this case are:

(i) In respect of the appeal on **ground (b):**
whether there are any current uses of the site that fall outside the previously permitted horticultural and B1 uses.

(ii) In respect of the appeal on **ground (c)**:
whether any uses that may be identified under the appeal on ground (b) are permitted by the terms of the General Permitted Development Order 1995 (GPDO) or otherwise immune from planning control.

If the enforcement notice is upheld on grounds (b) or (c)

(iii) In respect of the appeal on **ground (a) and the deemed planning application**:

the effect of the retention of the unauthorised uses on:

(1) highway safety and the free flow of traffic in surrounding roads and

(2) sustainability objectives including minimising the need for private transport.

If the enforcement notice is consequently upheld on ground (a):

(iv) In respect of the appeal on **ground (f)**:

whether the requirement to cease the industrial uses goes beyond what is necessary to remedy any breach of planning control.

(v) In respect of the appeal on **ground (g)**:

whether the time for compliance with the terms of the enforcement notice is reasonable.

The site and surroundings

7. The site is situated outside the village of Chelston, some 2km from the town of Wellington and is accessed from Haywards Lane, a country road leading away from the main A38 trunk road. Haywards Lane splits in two towards the junction with the A38, with the south western arm joining West Buckland Road at an oblique angle. There is no entry to this part of the road from the A38 and the north western arm splits in two as it meets the A38, with the left turn arm from the A38 being one-way. The construction of the M5 motorway, which also runs close to the site, has cut off Haywards Lane and turned it into a no-through road. The access to the site is about 400m from the northern junction with the A38 at a point where the road is about 6m wide.

8. The existing glasshouse has a floor area of about 18,580m². The site also contains parking areas, a one-way perimeter road running around the building, five portacabins and two empty storage containers. The north eastern part of the site, beyond the glasshouse and hardstanding, is undeveloped and partially planted with trees. The foundations of the uncompleted glasshouse lie to the south east.

9. The glasshouse has been sub-divided internally with metal partitioning to provide a number of lock-up units of varying sizes, located around the outer edges of the building, accessible from the perimeter road. Cladding has also replaced parts of the external glazing. The central area formerly used for the propagation and growing-on of plants is presently empty. At the time of the site visits, the area of hardstanding was also being used for the storage of vehicles and items associated with the uses in the lock-up units.

Reasons

The appeal on ground (b)

10. The appellants maintain that, because the original allegation was incorrect, the matters described in the notice have not occurred. Although there is no dispute that there are uses other than B1 taking place in the glasshouse, the appellants believe that the elements of B8/B2/sui generis uses do not predominate and are, in the main, ancillary to the authorised B1 uses.

11. The site identified on the enforcement notice includes all the area in the ownership of the appellants between Haywards Lane and the A38 spur to the M5, in total some 22 acres. There is no allegation that there are any unauthorised industrial uses taking place beyond the developed areas around the glasshouse. The Council also concedes that the extant planning permission does not prevent outside storage.

12. The area in industrial use is submitted to currently be about 8878m² but the areas occupied by each of the individual tenants, as calculated by the appellants, have not been agreed by the Council. However, from what I saw at my site visits, it would appear unlikely that there is any major discrepancy in these figures and the Council has not put forward any evidence to contradict them. It is agreed that the area presently vacant but still available for horticultural use is at least 50% of the glasshouse. The appellants confirmed at the Inquiry that there is no intention to abandon the horticultural use.

13. In the Statement of Common Ground, it is also agreed that there is an area of about 1460m² within the glasshouse (units 4, 5, 15, 19 and 45) that falls squarely within the B8 use class and which is not connected to any B1 use. Agreed areas of B2 or sui generis uses (units 2 and 16) amount to about 380m². Areas that are classified as being vacant or are agreed as being in B1 use (units 1, 1a, 3, 10, 20 and 34) amount to about 1885m².

14. I note the claims by the appellants that, of the remaining areas over which there is ambiguity or disagreement as to the relevant use class, the predominant use is B1. However, some of the units clearly included only a minimal element of B1 activity with the majority of the area being used for storage. I do not accept that this degree of B1 activity is enough to cause all the floor space within the unit to fall into this category. Rather, I prefer the argument that the correct classification should be B8 with any B1 operations being ancillary to this use. This situation applies to units 7, 12, 13, 14, 18, 36, 39, 42, 43 and 44, where any activity connected with the preparation, repacking or assembly of the goods kept within the units appeared to be of a minor nature and subsidiary to the storage element. The total floor area of these units amounts to some 3155m².

15. There are two units (17 and 32), with an area of about 206m², which in my assessment do fall within a B1 use. In unit 17, where Riverford Organics pack and distribute organic vegetables, there was evidence of packing boxes but no goods being stored. I am told that vegetables are brought in to the unit in the morning and sorted into boxes during the day for later distribution. There was no access to unit 32, but there was evidence of partly assembled garden furniture stored outside and I have no reason to doubt the appellants' description of the activity that the tenant of this unit carries out.

16. In respect of the remaining units, the appellants argue that, on this site, the distinction between B2 and B1 uses is somewhat academic, as the classification depends on whether an activity would be unacceptable in a notional residential area. At Foxmoor Nurseries, there are no residential properties close enough to the glasshouse to cause residents to be disturbed by the operations within the building, whether they are B1 or B2 uses. This situation applies to units 6, 11, 31, 33, 35, 37, 38, 40 and 41 - an area of about 1790m² - which is, in the main, occupied by joinery or automotive repair workshops.

17. Nevertheless, irrespective of whether the B1/B2 argument is accepted, it is clear from the above figures that there is a substantial floor area, which I consider to be at least half the B1 area permitted within the glasshouse, that is not in such a use, with a considerable proportion in B8 use. This is a significant amount and I find, therefore, that a material change of use, as described in the amended allegation of the enforcement notice, has occurred and the appeal on ground (b) consequently fails.

The appeal on ground (c)

18. The appellants argue that each individual unit in the glasshouse should be treated as a *'building'* as defined in the GPDO and is therefore entitled to the relevant permitted development rights. This would allow a change of use of an area of 235m² from B1 to B8 in each unit.

19. Whilst I accept that such rights can apply to a *'part of a building'*, I am not persuaded that all the sub-divisions of the glasshouse that have taken place since the planning permission allowing the change of use was granted can be treated as such. The permission allowed the use of part of the original building to be changed to B1 and there has been no suggestion that the site contains more than one planning unit. It is a matter of law, but my interpretation is that only the part of the building that was defined by the planning permission ref: 46/2000/034 and granted a B1 use can benefit from the right to change an area of 235m² to B8 use. To suggest otherwise would, I consider, be perverse and allow changes of use far in excess of the limits clearly envisaged by the terms of the GPDO.

20. I consider that the precedent set out in legal authority submitted by the appellants *(Rambridge v SSE & East Hertfordshire DC* which refers to *Hendricks v SSE)* to support their argument to be largely unrelated to this case, as it concerns permitted development rights in respect of a dwelling house. There is no dispute that the permitted development rights apply to a *'part of a building'*, but any sensible interpretation of the GPDO indicates only that not all of a building needs to be in B1 use for that part to benefit from the permitted change of 235m² to B8.

21. Therefore, on my assessment of the current uses on site, only 235m² of the B8 uses can be claimed as permitted development. There remains a considerable floor area that does not fall within the permitted B1 use and does not benefit from planning permission. The appeal on ground (c) consequently fails.

The appeal on ground (a) and the deemed planning permission

22. Both parties agree that the starting point for consideration of the deemed planning application should be the terms of the existing planning permissions and how they relate to the activities on the site. Although it is clear that the Council originally intended the B1 use to be linked to the horticultural enterprise, due to the wording of planning permission ref: 46/2000/034 this can now only be regulated through enforcement of the S106 agreement. As explained previously, the terms of that agreement are not under consideration in this appeal.

23. Although the description of the development in the planning permission ref: 46/2000/034 refers to *'B1 (light industry) use'*, the Use Classes Order 1997 makes clear that a change of use within a particular use class does not constitute development. As the type of B1 use on this site has not been limited by condition, there is nothing within the planning permission to restrict it to any particular sub-category within that use class. Therefore, if planning permission is to be refused, I consider that it should be demonstrated that there would be clear harm caused not only by a change to another use class from a light industrial use, but also by a change from all the other possible uses, such as offices, that fall within the permitted B1 use class.

Highway safety

24. The Council considers that the uses that are taking place on the site are generating more traffic than the use permitted under planning permission ref: 46/2000/034. It considers that this is detrimental to highway safety and that Haywards Lane is unsuitable for the number of vehicle movements it is currently experiencing.

25. The appellants have carried out a traffic survey and have counted the numbers of vehicles entering and leaving the site over two 3 hour periods during the morning and evening on one day in July 2007. The results of this survey were compared with information on potential traffic generation from the TRICS database for a variety of B1/B2 and B8 uses for a site of this size and location.

26. The Council questions the relevance of this information, considering that only the specific circumstances presently existing at the site should be taken into account. However, TRICS is a nationally accepted tool for estimating traffic flows at a particular site and, in my view, the prospective traffic arising from the permitted use is a relevant material consideration when assessing potential harm. The Council has not questioned the results of the investigation of the TRICS database, which are included in the Statement of Common Ground, but it nevertheless maintains that traffic generated by the current site use has increased since the unauthorised uses commenced. This view is also held by local objectors to the appeal. The Council has, however, produced no evidence to support this stance apart from the opinion of its witness and the one hour traffic count carried out by a local resident.

27. The TRICS data put forward by the appellants demonstrates that generally a B1 use is likely to generate more traffic than a B8 use. The actual amount will vary according to the nature of the use, with a B1 office producing a significantly greater number of movements than a B1 light industrial use. I note that the results of the survey indicate that the actual traffic counted on the day of the survey was, during the morning peak, slightly higher than that predicted for a B1 light industrial use and this is also born out by the additional TRICS data provided at the Inquiry that compares B1 office, B1 light industrial and B8 commercial warehousing uses. Nevertheless, the actual numbers of traffic movements at the site at peak hours fall at the lower end of the range of what could be expected for a full B1 office use. Consequently, I am not persuaded that the Council has sufficient reason to conclude that the present uses on the site have, or are likely to, generate more than the potential number of trips than could arise from the permitted use.

28. Whilst I do not doubt that traffic levels in Haywards Lane have increased since the 2001 planning permission was granted, I am therefore unable to conclude that this is solely due to the change from the permitted B1 use to the unauthorised mixed use at the site. No objection to the proposed change of use has been received from the County Highway Authority, which was concerned, at the time of the original application, to ensure that road improvements were carried out before the Foxmoor Nurseries business commenced. If there was concern over the potential traffic levels in Haywards Lane, I believe that the Highway Authority would have made representations to that effect.

29. The suitability of the road to handle the type of traffic generated at the appeal site has also been questioned by the Council and the local residents. They believe the width of the road is too narrow to cope safely with the articulated lorries and other goods vehicles that access the Foxmoor Nurseries site. The appellants refer to the recently published Manual for Streets, which shows that a carriageway width of 5.5m can accommodate two lorries passing each other. Whilst there are sections of Haywards Lane that are narrower than this, the majority of the road is wider and I consider that it has been demonstrated that the geometry of the road is suitable for the current traffic levels.

30. No restriction on the size of vehicles that can use Haywards Lane has been imposed by the Highway Authority and the larger vehicles using the road could also be associated with any kind of industrial activity, including the permitted B1 use. Once again, I note there has also been no request from the Highway Authority for any additional upgrading of the road.

31. I can sympathise with local residents who have seen an increase in traffic in Haywards Lane since the Foxmoor Nurseries enterprise moved in and I can understand their concern over the use of this country road by heavy goods vehicles. However, it has been shown that a significant amount of vehicle movements can result from the extant planning permission and it seems to me that the grant of a new planning permission, which could contain conditions to address some of the local concerns, would go some way to regulating the situation for the benefit of the residents.

32. I therefore conclude a change to allow a mix of B1/B2/B8 industrial uses on the site would not be detrimental in terms of highway safety, provided the permission was regulated by conditions designed to limit the traffic movements to and from the site. In that situation there would consequently be no conflict with the relevant policies from the Taunton Deane Local Plan 2004 (TDLP).

Sustainability

33. It was agreed that the site is previously developed land and the appellants make the point that, since one type of industrial use has been established on it, it now makes little difference in terms of sustainability whether this use is B1, B2 or B8. In fact, given the findings on the likely number of vehicles accessing the site, a B8 use is arguably more sustainable than B1 or B2. I agree with this assessment and conclude that there is consequently no conflict with policy EC1 of the TDLP.

Other matters

34. In the enforcement notice, the Council makes reference to the current development being unacceptable in a rural area. It has, however, put forward no evidence to explain why the proposed change of use is more objectionable in this location than the permitted operations on the site. I appreciate that what is now happening at Foxmoor Nurseries is not the scenario envisaged by the Council when application 46/2000/034 was granted planning permission. However, in the absence of planning conditions limiting that operation, the only recourse available to the Council is, in my opinion, through the S106 agreement.

35. I have considered whether the grant of a fresh planning permission would undermine the existing S106 agreement that aims, amongst other things, to ensure that the tenants on the site are associated with the Foxmoor Nurseries enterprise. Both parties expressed the opinion that the agreement would not be affected by a new planning permission and would continue to be applicable to the activities on the site. Having studied the agreement, I concur with this view.

Conditions

36. I have considered the conditions suggested by the Council and the appellants, in the event of the appeal succeeding, in accordance with the guidance given in Circular 11/95. I have amended the suggested wording where necessary to follow this guidance.

37. I shall impose a condition to limit external storage around the glasshouse, in order to prevent any unsightly overspill around the site or extend the area of industrial floorspace available on it. I shall also prevent any ancillary retail sales from the site to ensure that levels of traffic are not further increased. To improve the sustainability credentials of the site, and ensure that traffic levels are kept to a minimum, I shall require the submission and implementation of a travel plan. I shall also limit the hours at which deliveries can be taken to and from the site, to protect the amenities of local residents.

38. The appellants expressed a willingness to accept a condition limiting the floor area of the B8 use if found to be required. I do consider that this is necessary, given that a complete B8 use of the area could generate more traffic than the B1 light industrial use that the Council intended to be the original basis of the planning permission. I am also concerned that, at present, there is seemingly nothing other than the physical limitations of the building that prevents a full B1 office use on the site. Because the traffic levels associated with such a use could be significantly greater than a mixed use, I also propose to limit the B1 office floorspace to 50% of the 9290m² of glasshouse to which the change of use applies.

39. I find no need to limit the further subdivision of the units within the glasshouses. The overall area permitted to have a non-horticultural use will remain the same and I have been given no evidence to indicate that a greater number of smaller units would generate additional traffic movements.

Conclusions

40. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should succeed on ground (a) and planning permission will be granted. The appeal on grounds (f) and (g) does not therefore need to be considered.

Formal Decision

41. I direct that the enforcement notice be corrected: by the deletion of the words '*without planning permission, the change of use of the land from use for horticulture and dependent B1 to a mixed use for various independent industrial enterprises unrelated to any on-site horticultural use, predominantly B8*' and the substitution of the words '*without planning permission, the change of use of the land from use for horticulture and B1 to a mixed use for horticulture and various industrial enterprises (including B1, B2 and B8)*' in the allegation.

42. Subject to these corrections, I allow the appeal, and direct that the enforcement notice be quashed. I grant planning permission on the application deemed to have been made under section 177(5) of the Act as amended for the development already carried out, namely the use of the land and buildings at Foxmoor Nurseries, Haywards Lane, Chelston TA21 9PH, as shown on the plan attached to the notice, for use for horticulture and various industrial enterprises (including use classes B1, B2 and B8), subject to the following conditions:

1) No raw materials, finished or unfinished products or parts, crates, packing materials or waste shall be stored on the site except within the building or within storage areas as may be approved in writing by the local planning authority.

2) No retail sale shall take place from the premises.

3) A Travel Plan relating to the site shall be submitted to the local planning authority within three months of the date of this permission and shall thereafter be implemented in accordance with the approved details.

4) No deliveries shall be taken at or despatched from the site outside the hours of 0730 to 2000 on Mondays to Fridays, 0800 and 1330 on Saturdays nor at any time on Sundays, Bank or Public Holidays.

5) The non-horticultural uses shall occupy no more than 50% of the existing building on the site. Of these uses, no more than 50% shall be within use class B1 (office) and no more that 50% shall be in use class B8.

Katie Peerless

Inspector

APPEARANCES

FOR THE APPELLANT:

James Maurici	Of Counsel instructed by Bond Pearce Llp
He called	
David Ian Stewart MA (Cantab) DipTP MRTPI	David Stewart Associates
Gideon Sumption	Director, Foxmoor Nurseries Ltd
Andrew John Kenyon BEng (Hons) FIHT	Peter Evans Partnership Ltd, 21 Richmond Hill, Clifton, Bristol BS8 1BA

FOR THE LOCAL PLANNING AUTHORITY:

James Leckie	Of Counsel instructed by the Legal Department of Taunton Deane Borough Council
He called	
Jason Grove BA MSc	for Taunton Deane Borough Council

INTERESTED PERSONS:

Margaret Blogg	Chair, West Buckland Parish Council, 4 Peacocks Close, West Buckland TA21 9JY
David Lucas	Chelston Cottage, Wellington TA21 9PH
John Lucas	Chelston Nurseries, Wellington TA21 9PH

DOCUMENTS

1 Letters of notification and circulation list
2 Representations from interested parties
3 Proof of Evidence of Mr Gray – not presented to Inquiry
4 VOSA report on application for operating centre at Foxmoor Nurseries
5 Peter Evans Partnership's 1996 Preliminary Highway and Traffic Assessment for Foxmoor Nurseries
6 Statement of Common Ground
7 Extract from Manual for Streets
8 Statement by Mr J Lucas
9 Statement by Mr D Lucas
10 Statement by Mrs Blogg
11 TRICS data relating to B1 office, B1 industrial and B8 commercial warehousing uses
12 Bundle of legal authorities submitted by Mr Maurici
13 Bundle of correspondence relating to appellants' costs applications
14 List of suggested conditions submitted by the Council
15 Notes of Mr D Lucas' closing statement
16 Notes of Mr Maurici's closing statement
17 Notes of Mr Maurici's costs applications

PHOTOGRAPHS

1 Bundle of photographs submitted by Mr J Lucas