

PLANNING COMMITTEE – 29 SEPTEMBER 2004

REPORT OF THE CHIEF SOLICITOR

MISCELLANEOUS ITEM - ENFORCEMENT ACTION IN RESPECT OF FOXMOOR NURSERIES, HAYWARDS LANE, WELLINGTON

BACKGROUND

Members will recall that at the meeting of this Committee on the 17 February 2004, a report was presented relating to alleged breaches of planning permission at Foxmoor Nurseries, Haywards Lane, Wellington and disputes between Foxmoor Nurseries and the Council as to the interpretation of the Section 106 (S106) Agreement governing the site.

At that time the Committee was advised that prior to any formal Court action the Council ought to enter into mediation with Foxmoor Nurseries to try and resolve the outstanding legal issues between the parties. That mediation has now taken place and some progress has been made, but other issues remain unresolved.

There has also been, as a result of the mediation, a full inspection of the site.

REQUIREMENTS OF THE S106 AGREEMENT

Under the terms of the S106 agreement there are four main requirements, as follows:-

1. The permitted use not to occupy more than 50% of the total glasshouse area;
2. No retail sales from the property;
3. The permitted use to be carried out by Foxmoor Nurseries or an associated company or person; and
4. If Foxmoor Nurseries cease to trade, the glass houses to revert to horticulture.

THE MEDIATION

The mediation was conducted by a barrister experienced in both company law and planning law and concentrated on trying to resolve the issue of the definition of an associated company or person. This was successful and a formal agreement was reached that an associated company or person would be one with a 10% shareholding or a director with 5% voting rights. The agreement also provided that Foxmoor would notify the Council of any change of shareholding or directors.

The parties were however unable to reach agreement on the definition of the permitted use. The Council's view is that the permitted use is restricted to the use described in the original application, which is essentially linked to the production of horticultural plastic products, whereas Foxmoor Nurseries believe they have an unrestricted B1 (light industrial) use.

A further issue raised in the course of the mediation which was not resolved was a differing interpretation of B1 use and B8 use (distribution and storage). The Council's view is that many of the uses at the site are B8 and therefore not in any event permitted. This view was strengthened on the subsequent site visit but there is not yet sufficient evidence to issue individual enforcement notices against the tenants.

OTHER ISSUES

1. There is a prohibition against retailing in the S106 agreement but at least one of the units, and possibly more are retailing from the site.
2. As late as July, Foxmoor Nurseries were advertising space at the site for workshop and storage use.
3. The permission covers a different area from that currently in use.
4. At the time of the inspection the Flower Tower business run by Foxmoor Nurseries did not appear to be functioning.

THE PRESENT POSITION

It is unlikely that any further agreement will be reached between the parties and therefore the Committee is likely to have to consider taking enforcement action against the individual tenants as well as the owners. In deciding on the nature of such action, the Committee will need to be mindful of the effect of any proposed action on the individual businesses and the impact on the local economy.

Further, more detailed information is needed as to individual businesses before a recommendation can be made to the Committee as to which businesses are to be considered B1 and which are to be considered B8, and as to the proposed terms of any enforcement action.

It is therefore intended that Planning Contravention Notices should be served on all the tenants at the site to ascertain the nature of their enterprises. Tenants should also be invited to make any representations to the Committee prior to any decision to take enforcement action. At the same time tenants will be reminded that retailing from the site is prohibited and advised to stop immediately.

Further specialist legal advice is also needed as to the interpretation of the S106 agreement and in particular, as to whether the agreement limits the

permission to light industrial uses of a horticultural nature or whether the site enjoys an unrestricted B1 use.

Following receipt of this additional information and advice, a further report will be brought to Committee advising what action should be taken.

RECOMMENDATION

Members are RECOMMENDED to note the report and to endorse the action currently being taken.

Chief Solicitor

Contact Officer:- Judith Jackson 01823 356409 or
j.jackson@tauntondeane.gov.uk