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Monday, 04 December 2023

Dear Sir/Madam:

Re: Sunset View, Pitton Road, Pitton, SP5 6AJ

Certificate of Lawfulness of Proposed Use/Operations

Use of land for the stationing of up to 3no caravans for residential purposes

Introduction

This application is submitted under the provisions of section 191 of the Town and Country Planning Act 1990 and seeks a legal declaration that the subject land has been used for the stationing of up to 3no caravans for residential purposes for a period in excess of ten years such that it is now lawful and therefore immune from enforcement proceedings.

The Relevant Statutory Provisions

The application is submitted under the provisions of sections 171B(1) – for "operational development"; and, 171B(3) – for *"any other breach of planning control".*

As stated above, the use that the application relates to is the use of land for the stationing of caravans for residential purposes.

In this case it is clear that the lawful use of the land would have been for agricultural purposes and the evidence on the change of use needs to be judged against this baseline.

The Legal Test

It is accepted that the onus of proof is on the applicant, although as confirmed in *F W Gabbitas v SOS & Newham LB* [1985] JPL 630 an applicant's own evidence does not have to be collaborated by independent evidence.

As the PPG makes clear at Paragraph: 006 Reference ID: 17c-006-20140306:

> *"In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability."*

The Facts of this Case

The applicant, Mr D Cartwright, has provided a sworn declaration, supported by some documentary evidence along with numerous aerial photographs.

The background, as set out in paragraphs 3 to 4 of the Declaration of Mr Cartwright is that the northern part of the site [edged with a thick black line on the plan at his DC3] has historically had 3no caravans on it – 2 statics and one tourer. These are clearly evident in the Google Earth aerial photographs that he attaches at DC2. These date from 1999, 2001, 2003, 2005, 2017, 2020 and 2021.

The northernmost caravan [labelled A on the plan at his DC3] was the original caravan which was lived by his wife's parents, John and Gwen Attrill, as they operated a smallholding and stayed there every weekend from Friday to Monday. The tourer [labelled B] and additional static [labelled C] were then added by members of his family, including him and his wife, who stayed in them for holiday purposes, generally most weekends from Friday to Sunday and the occasional 1 or 2 week stay.

He confirms that this use continues today although the southern static has now been replaced with a tourer and the land continues to be used for stationing of 3 caravans for residential purposes. At no stage has the use been abandoned.

There is also an electric supply and meter on the eastern end of the southern face of the current [green] caravan in the position of the original caravan [this is the second replacement caravan in that position] as evident in photograph 2 at his DC4. There is also a historic water supply and foul drainage is dealt with through the use of portaloos which were originally disposed of in the buildings adjacent to Pitton Road but since 2010 have been emptied into his Klargester which is sited on his plot to the south.

Gas bottles – for use for heating and cooking - have been supplied by Hire-It when he has requested them and a letter dated 15 August 2023 [attached at his DC5] confirms the delivery of 15kg Butane and 47kg Propane bottles since 1998.

He then concludes, on this site at paragraph 10, that the northern parcel of land has been continuously used for the stationing of 3 residential caravans. All caravans have been used only for residential purposes with his parents occupying the northern static most weekends from Friday to Monday. The other caravans were used by family members from Friday to Sunday but not every weekend and there were occasional stays of 1 to 2 weeks. He accepts that since 2010 the land to the south was separated from this area but this, northern, area which has been separated from the southern area by fencing since 2010, has continued to be used for the siting of 3 caravans for residential purposes.

Does the Residential Use of the Caravans Need to be Continuous?

It is accepted that not at all times have the subject caravans been in occupation continuously. In this regard I would draw attention to the case of *Wychavon District Council v Secretary of State for Environment, Transport and the Regions and Dunn* [2000] JPL 495. In this case the Court agreed with the Inspector that the use of a site as a caravan site was year round even though occupation was limited to the period from Lady Day to October 31st each year. The Inspector held that *'the use as a caravan site subsists throughout the winter months even though it is inactive. The use is seasonally dormant but does not cease at the end of October'* (quoted in the judgement of George Bartlett QC at paragraph 4 of the Official Transcript).

In the above case the use of the site for human habitation was continuous throughout the period even though the occupation was not. The caravan remained in a habitable state throughout the period even though it was not inhabited every night.

One should also consider the case of *North Devon District Council v Secretary of State for the Environment and others* [1998] 2 PLR 46, in which Christopher Lockhart-Mummery QC, sitting a High Court judge, found as follows:

> *"Clearly, continuous physical occupation is not required for there to be occupation in breach. Beyond those few comments, it would not be appropriate to indicate any guidelines. This question is quintessentially a question of fact [and] degree to be considered in the light of all surrounding circumstances, including the length of physical occupation and any other indications or evidence of continuing occupation, despite the physical absence of the occupiers."* (at p.54)

In this regard an appeal decision dated 11th June 2007 which post-dates these cases is highly relevant and I attach this to this covering letter. In this case the Inspector held at [77]: *"'I think it is perfectly possible for someone to divide their time between two established residential properties without the continuity of use of either of them being called into question..."*

The Inspector continued at paragraph 79:

> *"The correct test for continuity or continued use is whether the Council would have been in a position to issue an enforcement notice at any time."*

Accordingly, it is entirely possible (and in accord with common sense) that there does not need to be continuous physical occupation in order to establish a residential use of land.

Application of the principles in the decided cases and appeals clearly supports my professional view that the subject land has been continuously used for the stationing of up to 3no caravans for use for residential purposes for a period in excess of ten years.

Conclusions

The applicants' evidence in the form of his sworn declaration is clear, precise and unambiguous. It is supported by documentary evidence.

On the basis of this evidence, in my professional judgement, this evidence demonstrates, on the balance of probability, that the subject land has been used for the stationing of up to 3no caravans for residential purposes since at least 1999. This is a period well in excess of 10 years.

The certificate for the use of the land for stationing of up to 3no caravans for residential purposes, as edged in red on the submitted plan, should therefore be issued.

Yours sincerely,

STEPHEN JUPP
BA(Hons), LLM, MRTPI
Chartered Town Planner

Appeal Decisions

Inquiry held on 9 & 10 May 2007
Site visit held on 9 May 2007

by David Harrison **BA Dip TP MRTPI**

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

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Decision date: 11th June 2007

Sheepwalk Barn, Bures Road, Assington, Sudbury CO10 5NE
Appeal A: APP/D3505/X/06/2023222

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr R W Rice against the decision of Babergh District Council.
- The application Ref: B/06/585/CEU, dated 28 March 2006, was refused by notice dated 4 July 2006.
- The application was made under section 191(1) (a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is use as a single dwellinghouse.

Summary of Decision: The appeal is dismissed.

Appeal B: APP/D3505/C/06/2026116

- 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 Mr R W Rice against an enforcement notice issued by Babergh District Council.
- The Council's reference is B/05/33/ENF. The notice was issued on 6 September 2006.
- The breach of planning control as alleged in the notice is a material change of use of the premises from a use for agricultural purposes to a mixed use comprising a use for agricultural purposes and a use as a dwellinghouse.
- The requirements of the notice are to cease using the building as a dwellinghouse.
- The period for compliance with the requirements is four months.
- The appeal is proceeding on the grounds set out in section 174(2) [d] of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not 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 does not fall to be considered.

Summary of Decision: The appeal is allowed following correction of the enforcement notice in the terms set out below in the Formal Decision.

Procedural matters

1. At the Inquiry an application for costs was made by Mr R W Rice against Babergh District Council. This application is the subject of a separate Decision.

2. The appeals were heard concurrently and the evidence was given under oath.

3. The appellant's advocate, Mrs Sharples, submitted a letter from Addenbrooke's Hospital dated 1 May 2007 which describes Mr Rice's medical condition following an accident on 26 February 2006. He is reported to have made a good recovery but still has problems with short-term memory, concentration and higher processing. His doctor advises that he should return

to as many normal activities as possible but that he should have periods of rest and avoid stressful situations. Mr Rice requested time to regain his composure after he had given his evidence-in-chief and before he was cross-examined. The Council raised no objection and Mr Ian Rice gave his evidence and was cross-examined during this period.

4. All references to Mr Rice are to the appellant, Mr R W Rice, and not to his son Ian Rice.

Site description and background to the appeals

5. Sheepwalk Farm comprises about 22 hectares of pasture and was purchased by Mr Rice in 1994. Sheepwalk Barn was built in 1997. There are "barn" doors in the eastern elevation facing the road. The southern part, including the area inside the main doors is used for agricultural purposes and the northern part is used for residential purposes. Although the residential part occupies two storeys it is referred to as a "flat" by the appellant. Entry to the residential part of the building can be gained either from inside the barn (where a car can be parked) or from the north side where a "stable" door leads into the office/ground floor bedroom. This was furnished with a single bed, bureau, and table and 3 dining chairs. The ground floor kitchen was equipped with a sink, cupboards, fridge/freezer, cooker and a microwave. There is a separate shower room with WC. Upstairs is a bed-sitting room with a double mattress made up as a bed on the floor, bedside lamp, easy chair, wall-mounted electric heater, sofa and TV. There is a small window to the shower room (next to the barn door), a small window in the northern gable end of the bed-sitting room, and a rooflight. There is no natural lighting to the kitchen or to the ground floor office/bedroom.

6. The western part of the building is an open-sided cattle yard. This has been extended further to the west beyond the area indicated on the plan attached to the enforcement notice.

7. To the south of the barn is Moors Farm, which is occupied by Dr C Symons, who gave evidence on behalf of the Council. Over a field to the north of the barn is Kiln Cottage where Mrs M Chatters lives. She also gave evidence on behalf of the Council.

8. A LDC application for use of part of the building as a dwelling was submitted on 26 September 2005 and refused on 6 February 2006. A second LDC application submitted on 28 March 2006 is the subject of Appeal A. The enforcement notice was issued after the refusal of the second LDC application.

9. Annex 8 of Circular 10/97 Enforcing Planning Control refers to LDCs but the advice also applies to ground (d) enforcement appeal cases. In both cases the onus of proof is upon the appellant, and the test is the "balance of probability."

Common ground between the parties

Correction of the enforcement notice

10. The enforcement notice plan indicates a larger part of the building than the part actually used as a dwelling. It was agreed between the parties that the use of the building was divided into two distinct areas, and that the notice

could be "cut down" to relate specifically to the area now used as a dwellinghouse (or flat) which is the same area depicted on the LDC application plan. The allegation in the notice can be corrected so that it refers to use as a dwellinghouse and not to a mixed use. This would not cause prejudice to either party.

Statement of Common Ground and other matters

11. The Statement of Common Ground covered only a very limited number of points but the parties agreed other matters during the Inquiry. It was accepted by the Council that the work to construct the flat, including the installation of the staircase, took place at the time the barn was built in 1997. In *Gravesham B C v SSE & Another* (1982) 47P&CR 142 the Court of Appeal held that the essential feature of a dwellinghouse was its ability to afford those who used it the facilities for day to day private domestic existence. The Council accept that the flat has had these characteristics since it was constructed in 1997. It was agreed that Mr Rice had stayed overnight at the flat on occasions since it was first built.

Main issue

12. The dispute between the parties is the extent and frequency of occupation of the flat, and the point at which the level of use was sufficient to amount to a material change of use to use as a dwellinghouse.

13. Both parties referred to the case of *Swale Borough Council v SSE and Lee* COA 17 November 2005 [2006] JPL 886. The *Swale* case takes into account *SSE v Thurrock Borough Council* [2002] EWCA Civ 226, [2002] JPL 1278.

14. In paragraph 25 of *Swale* the judge states that "I accept that whether a building is, or was, being used for a particular purpose at a particular time or times is largely a question of fact. But it is not, in the planning law context, wholly such. It is necessary, as the *Thurrock* decision demonstrates, for the decision-maker to adopt the proper approach as a matter of law to his decision on that question. It is not always an easy question to answer. But I am in no doubt that the legally correct question for the Inspector here to have asked was whether this building had been used as a single dwelling throughout the whole of the four years preceding (6 March 2001), so that the planning authority could at any time during that period have taken the enforcement action."

15. I believe this test is the appropriate test for this case. The LDC appeal and the Enforcement Notice appeal give rise to the same main issue although the relevant date is different. The main issue is whether the use as a single dwellinghouse began more than four years before the date of the application for the LDC (i.e. 28 March 2002) and whether the use has continued since then, so that the Council could have served an enforcement notice at any time. In the case of the Enforcement Notice the relevant date is 6 September 2002.

16. The 4-year period of continuous use need not be the 4 years immediately preceding the date of the LDC application or the date of the issuing of the notice. Any 4-year period of continuous use before either of these dates would be sufficient to accrue lawfulness, which could then only be lost by

abandonment. However, in this case, the appellant seeks to demonstrate continued use during the 4 years immediately preceding the relevant dates.

The gist of the case for the appellant

17. The residential use commenced when the flat was first built, but at the very latest the use was established by 15 April 2002 which is when the breeding Charolais cattle were brought to Sheepwalk Farm. This was before 6 September 2002, the relevant date for the ground (d) appeal but after the relevant date for the LDC which was 28 March 2002.

The evidence

Mr R W Rice

18. Mr Rice has a house in Kenninghall but he also uses the flat at Sheepwalk Farm as a dwelling on a regular and frequent basis. He is a widower. He said the purchase of the land at Sheepwalk Farm was a business venture/hobby and living at the barn was part of the enjoyment of getting away from his farming business in Norfolk. It is a trip of about 40 miles each way.

19. In his witness statement of 12 August 2005 (prepared in support of the first LDC application) Mr Rice said he completed the construction of the barn including a separate single dwellinghouse in October 1997 and states that "I have used the accommodation every day including overnight since 1997. The dwellinghouse has been occupied by me continuously from 1997 to date." He included several written statements from people who recall various visits to the barn and confirm that he was living there on particular occasions. (These statements are not challenged by the Council). He also referred to the letter that Mr Steven Bainbridge, the Council's Technical Officer (Enforcement), wrote to him on 21 February 2005 stating that "the residential usage of the barn does institute (sic) a breach of planning control" and inviting the submission of a planning application.

20. In his statement prepared for the Inquiry he confirmed that what he said in the 12 August 2005 statement was true, and adds more detail.

21. From the beginning in 1997 the building had been fully equipped and furnished for day to day living. In addition to the bed-sitting room on the first floor the "office" on the ground floor also contained a bed so that two people could stay there.

22. In April 2002 he acquired a herd of Charolais cattle which calved between April and June 2003. These cattle are temperamental and need regular attention and he had visited them every day to check each animal and to provide feed. His general practice was to spend every other night in the barn i.e. 3 nights one week and 4 the next. During calving or if an animal needed additional attention he would stay extra nights as necessary, sometimes every night for up to one month. Even if he did not stay overnight he would use the flat "every day" as a residence. He would cook, eat and wash and rest there. He had a fully stocked fridge and kept personal belongings at the flat.

23. On 25 February 2006 he had a fall while staying in the flat and spent 6 weeks in hospital and was unable to drive for 6 months after that. He stayed in the barn about 14 nights a month during those 6 months accompanied either by

his son Ian, Mr Quinton Cardy or Mr D Eagle. The facilities were used every day.

24. Mr Quinton Cardy lived at the flat for 6 months between January and July 1999, and a Mr Easton lived there from February to March 2001 (during the foot and mouth disease alert). Ian Rice has also stayed there.

25. The breeding cattle were sold on 15 July 2006 but some young stock have been retained.

26. During examination-in-chief Mr Rice said that in 1997 and 1998 he usually stayed there 2 nights a week; usually at weekends and on Wednesday nights. Between 1997 and spring 2002 (when the Charolais arrived) there may have been periods of a few days or even a week when he did not go to the flat.

27. His car was kept out of sight in the barn for 90% of the time that he was there so it would be difficult for people to tell whether he was there or not.

28. In response to cross-examination he said that he also lived at Town Farm House in Kenninghall. This has 5 bedrooms and 3 bathrooms with a land-line phone and washing machine. The flat has neither of these. He had a mobile phone with him all the time at the flat.

29. The Herd Register submitted by Mr Rice (which records stock movements at Sheepwalk Farm and Town Farm in Kenninghall) shows that there were Charolais cattle at Town Farm in 2004, 2005 and 2006. It was suggested to him that these would have also needed attention and he was asked how he could care for two herds at the same time. He replied that a stockman was employed at Kenninghall and his son also helped.

Mr Ian Rice

30. Ian Rice is the appellant's son. He lives at Mill House, Town Farm, close to Town Farm House in Kenninghall. In his statement he confirmed that his father's statement to the Inquiry was true to his personal knowledge.

31. When his father had a fall while staying at the flat he was not missed until noon of the following day. This is an indication that he was staying there at that time. While his father was in hospital following his fall he (Ian) stayed overnight at the flat about 20 times. He carried on the same routine as his father had previously done, but also incorporated visits to the hospital. The breeding cattle were disposed of in July 2006 because his father was unable to give them the care they needed and he did not have the personal interest in them that his father had.

32. In response to cross-examination he said that his father lived at Town Farm House and at the flat. The farm office was at his own house which was close to Town Farm House.

The submissions on behalf of the appellant

33. There can be no doubt that an activity that takes place on some days of most weeks regularly and repeatedly throughout a period is a continuous use (throughout that period).

34. The appropriate test is found in *Swale BC v FSS & Lee*; whether the building has been used as a dwellinghouse for the whole of a period of four years following the change of use so that the local planning authority could at any time during that period have taken enforcement action. Mr Rice's evidence is that he slept there 3 or 4 times a week, sometimes more, and that he used the flat "every day"[1] to cook, rest and wash. This amounts to a continuous use such that an enforcement notice could have been served. It is not relevant that Mr Rice also owns a house at Kenninghall in Norfolk. It is not necessary for him to spend all his time at the flat for it to be a dwelling. The appellant does not need to demonstrate that this is his only residence.

35. The *Swale* case is relevant in identifying the correct test, but the facts of the case are quite different. The *Swale* case is distinguishable because it was concerned with gaps in occupation and not a building that is used every day and slept in every other night.

36. There is no need to examine the evidence before the beginning of March 2002 in any detail. However, even on the basis of the evidence of Dr Symons from 1997 to 2001 Mr Rice spent "about one night a week there, sometimes 2 or 3". It is submitted that this is enough for a use to be continuous; there is no minimum laid down anywhere, and it must be remembered that, as well as the nights, Mr Rice also spent days there.

37. Mr Winders, a Principal Development Control Officer with the Council, decided to issue the notice on the basis of the evidence of a breach identified in February 2005. There was no suggestion that the notice issued in September 2006 was in respect of a new or different breach of planning control. Mr Winders, quite rightly, was not concerned with whether or not anyone was actually in occupation on the day the notice was served. It would be ridiculous to suggest that in a given week the use was occurring on Monday and Wednesday but not on Tuesday and Thursday.

38. The Council had not been specific about when it considered that the material change of use took place. It is difficult to understand why it would have been in 2005 as both Mr Rice and the Council's witness Dr Symons say that there was regular use after the arrival of the Charolais cattle in April 2002.

39. The evidence of the neighbours supports that of Mr Rice. Dr Symons admitted Mr Rice could have been there on more occasions when he did not see him. Dr Symons' evidence is to be preferred to that of Mrs Chatters, mainly because he lives closer to the appeal site. Dr Symons' evidence is strikingly similar to Mr Rice's. The Council relies on the evidence of Dr Symons. Neither neighbour says (or has ever said) that the use was more than a use on 2 or 3 nights a week. The Council must therefore have taken the view in February 2005 and again in September 2006 that the use of the flat for sleeping on 3 nights a week constituted a breach of planning control by way of a change of use to a dwellinghouse.

40. There is clear evidence that from April 2002 Mr Rice was in occupation for 3 or 4 nights a week with additional more intensive periods of occupation during calving. This date was identified by Mrs Sharples in her closing submissions

[1] Mrs Sharples said that this did not mean literally every single day

because it is after this that there is the most clear corroborative evidence. If the conclusion was that the material change of use occurred between the relevant dates for the LDC and the enforcement appeal it would be possible to reach a different conclusion on each appeal.

The gist of the case for the Council

41. The extent of the use of the flat for residential purposes did not amount to a material change of use until shortly before February 2005. Before then, in the early part of the relevant 4-year periods, the residential use had been sporadic and intermittent.

The evidence

Mrs M Chatters

42. Mrs Chatters has lived at Kiln Cottage for over 50 years. She retired in 1990 and considers that she has been in a good position to observe any comings and goings at Sheepwalk Barn. She can see parts of the Sheepwalk Farm holding from her house when the trees are not in leaf, and walks her dog along the footpath which passes close to the barn almost every day of the week.

43. Mr Street kept about 200 sheep at the farm from about 1997 to 2000 but did not sleep there as he lived locally. During that time Mr Rice only visited "spasmodically" and only occasionally stayed the night there. In late 2000 Mr Easton brought about 300 sheep onto the land for grazing and lambing purposes. Mr Easton appeared to be spending most nights at Sheepwalk Barn during the time his flock remained on the land, including a period during the foot and mouth epidemic in the spring of 2001. He was there until the summer of 2001 (about 8 months). The cattle did not arrive until 10 months later (April 2002).

44. At paragraph 5 of her proof of evidence Mrs Chatters says that during the autumn of 2001 Mr Rice started grazing cattle at Sheepwalk Farm. For about the next 3 years neither Mr Rice nor anybody else regularly stayed the night at Sheepwalk Barn. In her evidence-in-chief she explained that by not regularly she meant "not very often at all". She also said that the autumn 2001 date in her proof was wrong and should have been April 2002 when the records showed that the cattle arrived. She initially described this as a "printing error" but later agreed that she had got the date wrong herself, and the correction was a result of seeing the date of the arrival of the Charolais in the Herd Register produced by Mr Rice.

45. From about the summer of 2003 Mr Rice started visiting Sheepwalk Barn more often than in the previous 3 years, but still only occasionally. From the autumn of 2005 "he started staying the night more frequently – probably 2 or 3 nights a week, at least.

46. When questioned about the differences between her evidence and that of Dr Symons she said that she had not seen his evidence and that he was "in a different position from us".

47. In addition to her proof Mrs Chatters has written several letters to the Council. She was cross-examined about a letter dated May 3 2006.

Dr C Symons

48. Dr Symons has lived at Moors Farm which is immediately next door to the appeal site since 1975 and he has been retired from medical practice since May 2003. He cannot see directly from his property to the barn because of a screen of trees but he regularly walks his dog along his drive, which is parallel to the appellant's and along the road past the entrance to Sheepwalk Farm, usually at around 10.30 at night. He believes he is in a good position to be aware of any comings and goings.

49. Once Sheepwalk Barn was erected a local shepherd (Trevor Street) kept sheep there from 1997 to sometime in 2000 but he did not use the flat as he lived about 2 miles away. During a period of about 6 months in the autumn and winter of 2000/2001 another shepherd (Richard Easton) started grazing sheep at Sheepwalk Farm and "irregularly" spent the night in the flat. He was confined to Sheepwalk Barn for about 5 weeks during the foot and mouth crisis in early 2001. Between 1997 and 2001 Mr Rice spent about one night a week there. Sometimes he may have stayed two or three nights a week there but on other occasions he would not be there at all for one or two weeks.

50. At paragraph 8 of his proof he states that "Since 2001 Mr Rice (senior) has probably spent two or three nights a week at Sheepwalk Barn. Sometimes he has not been there at all, but he has not usually been absent from Sheepwalk barn for more than about a week since 2001 except when ill last year and since then." When giving evidence-in-chief he said that this date was wrong and should be 2002. The change in Mr Rice's behaviour had been when the Charolais were brought to the site. (The Herd Register indicates that this was 15 April 2002). He commented that he was "hopeless about dates".

51. When cross-examined he said he couldn't swear that Mr Rice was wrong in his claim to be there more often, but he thought Mr Rice had "rather over-egged it".

Mr J Winders, Principal Development Control Officer, BDC

52. Mr Winders had no evidence of his own about the frequency of occupation of the flat but was familiar with the planning history of the site from reading the Council's files. Several planning applications had been submitted at Sheepwalk Farm but none had mentioned residential use of the barn and no site visits had revealed any such use prior to February 1995. An appeal against the refusal of a general livestock building was dismissed in April 2001 (APP/D3505/A/00/1055599) and no mention of a residential use at the site was made. He accepted that so far as he knew nobody actually looked inside the barn on these occasions.

53. In 2001 representations were made to the Council about residential use of Sheepwalk Barn. On 4 April 2001 the Council's Enforcement Officer discussed the issue with Mr Rice on the telephone. According to the Council officer's note (made at the time) Mr Rice said that during March 2001 a worker (Mr Easton) was unable to vacate the premises due to the foot and mouth

restrictions, but he had since left. (The note records that this was consistent with newspaper reports at the time, which referred to a "flat" in the barn where Mr Easton had lived). Mr Rice had said that lambing had now finished so there was no need for constant vigil. In the light of this the enforcement file was closed on 29 June 2001 and no further action was taken.

54. In 2005 a further investigation was carried out in connection with the alleged residential use of the barn. The Council's file note dated 15 February 2005 records that Mr Rice showed the Enforcement Officer (Mr Bainbridge) round the premises and photographs were taken of the first floor room which did not appear on the approved plan for the building. It was equipped with a table and chairs, settee, a bed (actually a mattress on the floor) and a heater. The note records that Mr Rice said that he slept there 3 nights a week because travelling back to Norfolk is a long distance[2]. When the cows are calving he or another employee will reside there for 5 weeks non-stop to prevent cattle rustling and to assist the cows if needed. Mr Rice said he had been residing there part-time for 7 years since the barn was constructed.

55. Mr Winders states that on the basis of the investigation by Mr Bainbridge the Council concluded that the facilities available (which also included a shower room, WC and kitchen on the ground floor) allowed for day to day private domestic existence and that a material change of use of part of the barn had taken place. Mr Bainbridge wrote to Mr Rice on 21 February 2005 inviting a planning application seeking to regularise the use of part of the building as a dwellinghouse. However, without further reference to the Council, Mr Rice submitted an LDC application on 26 September 2005. This was refused on 6 February 2006. The Planning Case Officer advised the Council's Solicitor that a Certificate should not be issued because Mr Rice had given conflicting information when enforcement investigations had been carried out. Newspaper articles indicated that Mr Rice was not in residence in 2001, and Council Tax records did not show a permanent occupation. At best it appeared to the Case Officer that the barn might have been occupied on an infrequent basis during calving or lambing.

56. A further LDC application was made and this is the subject of this Inquiry.

57. Mr Winders confirmed his opinion that having regard to the extent to which the flat was being used for residential purposes in February 2005 it could not be regarded as a lawful ancillary use to the primary agricultural use and a material change of use had occurred.

58. Mr Winders said he knew from evidence of local residents (Mrs Chatters and Dr Symons) "that the building had not been continuously used as a dwellinghouse in the past and this situation applies today." The use has been intermittent and irregular and has not occurred continuously over either of the relevant 4-year periods.

59. During examination-in-chief Mr Winders referred to the Planning Contravention Notice (PCN) completed on 4 September 2006 in which Mr Rice states that part of the cattle shelter/barn has been in use as a dwellinghouse since 1997. The response to the question "Please state how often the building

[2] The distance is about 48 miles by road

is used to provide residential accommodation" was "All the time". He had taken account of this before drafting the enforcement notice (which was issued two days later).

60. During cross-examination he was asked why use on 2 or 3 nights a week was now not considered to amount to use as a dwelling, whereas in 2005 it was sufficient to warrant the invitation of a planning application. When he was pressed to say whether he thought "use on 3 nights a week regularly" would amount to a material change of use he replied that it was "a moot point". When asked when he thought the breach of control had begun he said that it was probably begun (based on information from the local residents) at some time after the Charolais arrived (15 April 2002). Residential occupation was more limited before that. It had been right to issue the notice as there still appeared to be gaps in the occupation.

61. He agreed that it did not matter on which day of the week the notice was issued; whether Mr Rice was actually in occupation at the time was immaterial. He said in conclusion that the use of the flat for residential purposes was an intermittent irregular use and not a continuous use.

The Council's submissions

62. The appellant had failed to demonstrate that the use as a dwellinghouse has continued throughout either of the relevant 4-year periods. In *Thurrock* reference was made to weekend and holiday absences not preventing the issue of an enforcement notice, but in this case there are gaps of more than half the week and in all probability longer periods prior to 2005 when there were no cattle at the appeal site, or at other times when Mr Rice's farming duties in Norfolk required his attendance there.

63. It is clear from *Swale* that a different test applies between the continuous use of an established dwellinghouse where there may be breaks in continuity, and establishing the use of a building as a dwelling house when there can be no real absences. It is absolutely clear that use must not be discontinuous if established use rights are to be acquired. The Council does not say that Mr Rice would have needed to have stayed in the barn every night, but that occupation could not be divided between 2 properties with occupation principally elsewhere, and still achieve continuity of use. It requires a level of use commensurate with a home occupied on a full-time basis. Whilst occupation may not be needed every night, it would be expected to be the majority of the week. The availability of the property for such a use is irrelevant. What matters is the actual use. (*Swale* paragraph 29).

64. The Council argued that a breach of planning control arose when the property was used as a dwellinghouse and the breach ceased when the use ceased. The right to issue an enforcement notice occurred each time a breach arose albeit that it may have arisen on a weekly basis. The Council acknowledged that there were periods when the use was continuous during the calving season, but this would have been for a matter of weeks and not throughout either of the 4-year periods. The Council maintained that on the balance of probabilities the use was principally 2 or 3 nights a week since 2005 and

probably less than that prior to 2005 apart from periods of calving[3]. The use was intermittent and irregular before 2005. Even after 2005 there were absences of at least 50% of the week which must be considered to be significant and sufficient to break continuity. The periods of non-occupation were more than *de minimis.*

65. The Council's letter of 21 February 2005 arose out of information about occupation provided by the appellant himself. This letter cannot be construed as an acknowledgement that the use had been continuous throughout the preceding years. The issues of whether there has been a material change of use and the continuity of that use are quite distinct.

66. The Council raised the question of why Mr Rice would occupy what is essentially a bedsit as a principal residence when he has another 5 bedroom property elsewhere with full amenities such as telephone and washing machine. He admitted that he did not sleep at the barn for more than half the week and refers to the house at Kenninghall as "home". As he also occupied a house elsewhere, his occupation of the flat could not possibly be regarded as "continuous". Furthermore, as he had Charolais cattle at Town Farm between 2004 and 2006 it is likely that he would have needed to spend more time with them when they were calving.

67. The evidence of Mrs Chatters is that the use has been intermittent, and she is in a good position to monitor what was going on.

68. The most likely explanation is that Mr Rice has used the barn as a residence during periods when his farming activities required an on-site presence and infrequently at other times.

69. The evidence given by Mr Rice at the Inquiry contradicted his earlier evidence which claimed continuous use since 1997 including overnight. His evidence is uncertain and unreliable.

70. Whilst it is not disputed that a breach of planning control has occurred during a period exceeding 4 years, it cannot be said to have been a continuous breach throughout that time, and it follows that lawful use rights have not been established. The material change of use occurred shortly before February 2005 and the LDC and the enforcement appeals must therefore fail.

Assessment

71. I accept the Council's conclusion that, on the balance of probabilities, the residential accommodation was put in place in 1997 and that the flat has had the characteristics of a dwelling since then.

72. It is common ground between the parties that Mr Rice has stayed in the flat on various occasions between 1997 and the present, and I accept the evidence that others have stayed there for various periods, including his son Ian Rice, Mr Quinton Cardy, Mr Easton and Mr Eagle. However, I believe Mr Rice has consistently exaggerated the amount of time he has spent at the flat and the number of nights he has stayed there. By the time of the Inquiry he

[3] This is contrary to the evidence of Dr Symons

had reduced his "claim" to 3 or 4 nights a week, but I think even this is unlikely.

73. Having seen all of Mr Rice's written evidence and heard what he said at the Inquiry, I agree with the Council that his evidence is inconsistent and cannot be relied upon. The evidence of his son Ian was vague and added nothing substantial to the appellant's case. Apart from records of specific visits to the flat at times when Mr Rice was present (which were not challenged by the Council) there is a dearth of documentary evidence in support of his case. Evidence is cast in the most general terms without reference to any photographs, diaries or other factual proof of the frequency of the residential occupation. Mr Rice's evidence is based on sweeping generalisations ranging from "the dwelling has been occupied by me continuously since 1997" (paragraph 5 of his 12 August 2005 statement) to "every other night" (at the Inquiry). I pressed Mr Rice on the question of whether his August 2005 statement was consistent with his evidence at the Inquiry. I did not receive a clear answer, but Mrs Sharples said in closing that it was not inconsistent.

74. The evidence of the Council's witnesses is also rather generalised, but I think it is more reliable. I prefer the evidence of Dr Symons, the nearest neighbour. He confirms that Mr Rice was there 2 or 3 nights a week from April 2002. Dr Symons had the opportunity to reflect on his evidence once he discovered the mistake about the date on which the Charolais cattle arrived, but he said he was certain that Mr Rice had been there 2 or 3 nights a week since then. He did not retract his evidence that since April 2002 Mr Rice had not usually been absent for more than about a week.

75. The arrival of the Charolais cattle on 15 April 2002 is a significant event in my view. It is only after that date that Mr Rice would have any real reason to spend time at the flat on a regular basis. The evidence of occupation in the period before this is more uncertain. The intensity of use is likely to have been less, and there is evidence of gaps in the occupation which, according to Dr Symonds, did not occur again after April 2002.

76. In my view Mr Rice's claim to stay in the flat "every other night" (i.e. 3 nights one week and 4 nights the next) is too simple a formula. It takes no account of the presence or absence of livestock or periods when other people were living there. I also think it is unlikely that Mr Rice would spend so much time there in periods when there was no particular reason to. I agree with Dr Symons' comment that Mr Rice was "over-egging it".

77. It seems to me that on the balance of probabilities the flat was used for overnight stays for no more than 2 or 3 nights a week on a regular basis from April 2002 onwards. This means that Mr Rice was spending less than half of his time at Sheepwalk Barn and more than half of his time at his house in Kenninghall. I think it is perfectly possible for someone to divide their time between two established residential properties without the continuity of the use of either of them being called into question, but it is different when one of the "dwellings" is not yet established as in this case. I have no doubt that Town Farm House is Mr Rice's main home. I have not seen it, but the evidence is that it is much bigger (it has 5 bedrooms and 3 bathrooms) and it is no doubt a more comfortable and convenient place to live. It may be a small point in itself, but there are no clothes storage facilities at the flat and

clothes are kept and washed at Town Farm House. It is also near to where the farm office is based. By contrast, the accommodation at the flat is rather Spartan. For example, there are no windows in the kitchen or the downstairs office/bedroom.

78. If Town Farm House is Mr Rice's main home, can one man, on his own, establish a new second dwelling in this way when he is clearly already dwelling somewhere else for more than half the time ? I believe this is what has happened here. On the evidence of one of the Council's own witnesses, Dr Symons, on the balance of probability the flat at Sheepwalk Farm has been used by Mr Rice as a dwellinghouse regularly, on 2 or 3 nights a week usually without any gaps of more than a week since April 2002. It is not his principle place of residence, but it is nevertheless occupied as a dwelling with sufficient regularity to amount to a continuous use in my view.

79. The correct test of continuity or continued use is whether the Council would have been in a position to issue an enforcement notice at any time**.** Although in closing the Council argued that there were regular breaches of control followed by cessation of the use, this was not corroborated by Mr Winders, who was not concerned about exactly when the notice was actually issued, as he clearly thought that the use was continuous after February 2005. On the basis of the same facts, i.e. occupation on 2 or 3 nights a week, I conclude that a material change of use occurred in April 2002 when the residential use of the flat intensified and the use was continuous from April 2002 onwards. The pattern of occupation before and after February 2005 was not significantly different. I therefore intend to dismiss the appeal against the refusal of the LDC as the use was not established before 28 March 2002 and to allow the enforcement notice appeal on ground (d) as the use was established before 6 September 2002.

Conclusion on Appeal A : The Lawful Development Certificate

80. For the reasons given above and having regard to all other matters raised, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use as a single dwellinghouse 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.

Conclusion on Appeal B : The enforcement notice

81. For the reasons given above and having regard to all other matters raised, I conclude that the plan attached to the enforcement notice is incorrect, in that it identifies part of the barn that is in agricultural use as well as the part which is used as a dwelling. I will substitute a plan which identifies the area occupied by the dwelling only. I shall correct the allegation in the notice to reflect this. Subject to this correction the appeal on ground (d) succeeds.

Formal Decision

Appeal A : The LDC : APP/D3505/X/06/2023222

82. I dismiss the appeal.

Appeal B: The enforcement notice : APP/D3505/X/06/2026116

83. I direct that the enforcement notice be corrected: (i) by the deletion from paragraph 2 of the notice of the words “edged red” and the substitution of the words “edged and hatched black”; (ii) by the deletion from the allegation in paragraph 3 of the notice of the words “a mixed use comprising a use for agricultural purposes and a” and (iii) by the substitution of the plan annexed to this decision for the plan attached to the enforcement notice.

84. Subject to these corrections I allow the appeal, and direct that the enforcement notice be quashed.

David Harrison

Inspector

APPEARANCES

FOR THE APPELLANT:

Deborah Sharples	Head of Planning and Environment, Hewitsons Solicitors, Shakespeare House, 42 Newmarket Road, Cambridge CB5 8EP
She called:	
Robin Rice	The appellant
Ian Rice	Mill House, Town Farm, Kenninghall, Norwich, NR16 2DT

FOR THE LOCAL PLANNING AUTHORITY:

Kathryn Saward	Solicitor to Babergh District Council
She called:	
Mary Chatters	Kiln Cottage, Bures Road, Assington, Suffolk CO10 5NF
Dr Charles Symons	Moors Farm, Assington, Suffolk CO10 5NE
John Winders DipEP MRTPI	Principal Development Control Officer, Babergh District Council

DOCUMENTS

1 Attendance lists
2 Council's notification letter
3 Letters received in response to 2 above
4 Statement of Common Ground
5 Letter from Addenbrooke's Hospital concerning Mr Rice's medical condition
6 Bundle of legal authorities referred to by the Appellant

PLANS

A Extract from definitive footpath map submitted by Mr Winders