Case No: CO/1636/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

IN THE MATTER OF A STATUTORY REVIEW PURSUANT TO S288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Priory Court
33 Bull Street
Birmingham B4 6DS

Neutral Citation No; [2019] EWHC 797 (Admin)

Monday, 18 February 2019

BEFORE:

MRS JUSTICE ANDREWS DBE

BETWEEN:

UPTON HISTORIC PARKLAND CONSERVATION GROUP

Claimant

- and -

SECRETARY OF STATE FOR HOUSING, COMMUNITIES & LOCAL GOVERNMENT

Defendant

-and-

(1) NEIL BALDWIN
(2) MALVERN HILLS DISTRICT COUNCIL

Interested Parties

MR VANDERMAN appeared on behalf of the Claimant

DR BOWES appeared on behalf of the Defendant

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. MRS JUSTICE ANDREWS: This is a challenge to a decision which was made by the Defendant's planning inspector on 14 March 2018 on an appeal by the developer, allowing the developer's appeal and giving notification of prior approval under the provisions of Schedule 2, Part 3, Class R of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended), ("the 2015 Order") for the change of use of an agricultural building and land to commercial use.

2. The relevant law is not in dispute. Under the 2015 Order, planning permission is deemed granted for certain types of development. Class R includes a change of use of the building and any land within its curtilage from use as an agricultural building to a flexible use as therein defined. However, permission will not be deemed to be granted if the circumstances in Schedule 2, Part 3, R.1 apply. The material part of this states:

> "Development is not permitted by Class R if:
>
> (a) the building was not used solely for an agricultural use as part of an established agricultural unit -
>
> (i) on 3 July 2012 ..."

If the building was brought into use after that date, the position under (iii), which I paraphrase, is that permission will not be deemed granted if the building has been subject to the mixed use described in (a) at any time within the ten years prior to the date that development under Class R began. The date does not matter for the purposes of this appeal.

3. The sole issue is whether there was a material error of law in the appeal decision by the planning inspector in reaching the conclusion that at all material times the land was solely used for agricultural use.

4. The site is a barn which mainly comprises an open-sided steel-framed agricultural building, with curtilage land appended. It is located within a small fenced-off section of the Hill Parkland and it is adjacent to a wider area of Parkland, which until 2015 was sometimes occupied by cattle and retired racehorses.

5. The developer made an application for prior approval for changed use of the barn from agricultural use to a flexible commercial use under Class R, and initially the local planning authority, ("the Council"), refused permission. I was shown by way of background the decision refusing permission, and it is probably worth mentioning it very briefly.

6. The planning officer referred to the definition of "agriculture" in the Town and County Planning Act 1990 as including the breeding and keeping of livestock and the use of land as grazing land. The officer continued as follows:

> "This means that the use of the building in connection with keeping horses on adjacent land will only be an agricultural use if the horses are raised for meat

> or if they are working horses, eg for ploughing, or if the horses were turned out onto the adjoining adjacent land for grazing only. The most common agricultural use relating to horses is using the land for grazing and, as soon as anything is done that is more than merely grazing, eg additional feeding on the land, rugging the horses or riding them, then the use of the land becomes equine use. In the current application it has been established that retired racehorses were using the adjacent land and fed hay from the barn."

He specifically mentioned a statutory declaration provided by a Mrs Rimmell, who referred to racehorses being fed hay that was stored in the barn. The planning officer said:

> "This would appear to take the building out of the definition of agricultural use and into equine use."

7. He then went on to address the possibility of mixed use for the keeping of cattle and the keeping of horses. He said that if that were the case, then the unit as a whole could not be considered as solely within an agricultural use. Rather, there would be a mixed use.

8. That was the decision that was appealed to the inspector. Before considering how the inspector dealt with it, it is perhaps worth mentioning the two main authorities that were referred to by counsel on the appeal which relate to cases of this type. It was common ground between them that the word "solely" does not literally mean solely, because agricultural use may embrace ancillary uses as a matter of planning law.

9. The case that perhaps is most clearly in point is a decision of Sullivan J (as he then was), *R H Fox v First Secretary of State and Kettering Borough Council* [2003] EWHC 887 (Admin). That was a case in which the planning inspector, having carried out an accompanied site visit of the land in question, was called upon to determine whether the land was being used solely for agricultural purposes with ancillary use for the grazing of one or two horses, or whether it was mixed use. The inspector decided that it was mixed use. That was the decision that was being impugned before the judge.

8. Among the fact-findings made by the inspector in that case was a finding that the horses were being brought feed, although they would also graze in the summer. There was reference to a man being seen with a bucket, feeding horses from it, and thus it was clear that they were not simply being turned out on the land with a view to feeding them from the land. The inspector said it was only if the land was being used for the purpose of grazing that no planning permission was required. He made a finding that whilst it was clear that sheep and horses would graze the land, it was also clear that the horses, at least, were also being supplied with food from elsewhere. At the time of his site inspection there was a feeding manger within the building. On the basis of the evidence before him, he concluded that it would appear that, as a matter of fact and degree, the current use of the land was not merely agricultural but comprised the mixed use alleged by the enforcement notice, and that that was a material change of use for which no planning permission had been granted.

9. Sullivan J addressed the challenge to that decision in paragraphs 19 and following. In particular, he addressed the argument that was put before him by counsel for the landowner, based upon the earlier decision of *Sykes v Secretary of State for the Environment & Another* [1981] 42 P & CR at [19], that the correct test was to consider what the predominant use of the land was, and the fact that the horses may on occasion be fed from another source was not evidence that they were not primarily using the land for grazing. There was a reference to Donaldson LJ's judgment in *Sykes* and to the fact that he had stressed that what the inspector had to decide was the purpose for which the land was being used:

> "If horses are simply turned out on the land with a view to feeding them from the land, clearly the land is being used for grazing. If, however, horses are being kept on the land and are being fed wholly or primarily by some other means so that such grazing as they do is completely incidental and perhaps achieved merely because there are no convenient ways of stopping them doing it, then plainly the land is not being used for grazing but merely being used for keeping the animals. On the other hand, of course, if animals are put on to a field with a view to their grazing and are kept there 24 hours a day, seven days a week over a period, it would not, I would have thought, be possible to say that, as they were being kept there, they were not being grazed. It is quite possible for horses to be both grazed and kept in the same place."

10. On the basis of that authority, counsel in *Fox* submitted that the inspector had applied the incorrect test. Sullivan J did not accept those submissions. At paragraph 24 he gave some consideration to the fact that in the case before him, the council had accepted that there was *some* agricultural use. That was in contradistinction to *Sykes*, an all-or-nothing case, where there could not have been mixed use: it was either agricultural or non-agricultural use. The council in *Fox* was contending that there was a mixed use for agriculture and the keeping of horses.

11. Sullivan J found that the inspector, on analysing the evidence, found that there was clear evidence that the horses on the land were having feed brought to them. He then looked at the decision as a whole, and said it was quite wrong to portray it as turning purely on the observation that a man was observed to be feeding the horses from a bucket. He said the inspector looked at the matter in the round, and made the following observations:

> "Whether the current use of the land was agricultural or whether there was a mixed use with the keeping of the horses on the land being a use in its own right was pre-eminently a question of fact and degree for the inspector, having regard to all of the evidence. He was entitled to have regard to the evidence dealing with the extent to which the horses on the land were supplied with food from elsewhere, and also to the fact that there was a feeding manger within the stable building at the time of his site inspection. Looking at all of that material (the number of horses, the council's own observations, what he saw with his own eyes on the site) the

> inspector was entitled to conclude that as a matter of fact and degree, the current use of the land was not simply an agricultural one, including the grazing of horses, but was the mixed use alleged in the environment notice. The inspector referred to the relevant authority of *Sykes* and therefore there was no force in the submission that he then proceeded to misdirect himself."

12. As Sullivan J recognised in *Fox*, therefore, the question of whether or not the use is solely agricultural or predominantly agricultural with ancillary use, or mixed use, is a matter of fact and degree depending on the evidence and the planning judgment of the individual inspector, being a judgment to which this court must, of course, pay particular deference, given the expertise of such individuals. This court should be slow to interfere with a decision of a planning inspector who is accepted to be someone who will know the law in this area and whose decisions should not be pored over as though they were a pleading. They are directed towards an informed audience, and one must take great care and exercise caution not to scrutinise them as though they were a statute. However, that is not to say that the court should not scrutinise them carefully if the reasoning or the way in which they approached the decision appears to have gone wrong.

13. In this case the inspector correctly began her decision by defining the matter in dispute, as to whether the proposal would meet the requirements of paragraph R.1(a). She said the main issue in this case is whether the proposed change use would accord with the limitations set out in schedule 2, part 3, paragraph R.1(a) of the order and therefore be permitted development. She correctly quoted the relevant paragraph, R.1(a), and in paragraph 6 of her decision, she correctly stated the legal test: that the building was not solely used for agricultural use as part of an established agricultural unit on the relevant date.

14. In paragraph 7 she correctly quoted section 336(1) of the Town and Country Planning Act and the defined meaning of "agriculture". She said at the end of that paragraph that the list set out was not exclusive. Agriculture may include the use of land for grazing horses, but it does not include the breeding and keeping of horses (and she cited an earlier authority on that). Keeping horses involves activities other than putting them out to graze.

15. She then identified in paragraph 8, that the matter in dispute was whether the hay that was kept in the barn was being stored to keep retired racehorses on land adjacent to the appeal site. Having thus defined what was in issue, she then proceeded to make certain fact-findings. These fact-findings, in paragraphs 9 and 10, can be summarised as follows: that the horses were brought from a riding stables, a racehorse training facility, and put on the field mostly through the spring and summer of the relevant years. It was not clear how long they would stay on the field at any one time, but there was evidence that suggested that they would be returned to the riding stables. She referred to some evidence that suggested that the horses were visitors to the field, and she said that the conclusive evidence pointed to hay from the agricultural building being taken from the building on the appeal site to the field -- sightings suggested that the hay was taken out twice daily. Evidence that she heard, indicated that animals were attended to on the field, and photographs of the animals showed that there were both cattle and horses

occupying the field at the same time. She concluded that in the absence of any evidence to suggest otherwise, it was reasonable to conclude that the hay from the building was used to feed both cattle and horses.

16. In paragraph 11 the inspector stated that, whilst third party evidence pointed to the hay being purchased from a company, and she did not doubt the connection between good quality feed and the diet of retired racehorses, this did not suggest that the hay was given to the horses in isolation of the cattle. That reinforced her earlier conclusion that the hay was being used to feed both types of animal.

17. At paragraph 12 she said there was nothing before her to indicate that activities such as breeding and grooming, which are commonly associated with the keeping of horses, took place on the appeal site or the field nearby. The horses spent time at the riding stables, which is a recognisable place for grooming and other activities associated with the keeping of horses. She concluded that, in all likelihood, therefore, the horses were on the field to graze.

18. Then comes the impugned paragraph, paragraph 13:

> "On the balance of probability, I conclude that the building on the appeal site was not being used solely for the purposes of feeding the horses and keeping them on the field, and *therefore I find that the building was solely used for an agricultural use as part of an established agricultural unit."* [Emphasis added]

19. In paragraph 14 she then went back to refer to the test in Part 3 of Class R, which was sole use for agricultural use, and in the rest of the decision she addressed the question of timing, which as I have stated earlier is not material to the appeal.

20. On behalf of the claimant, Mr Vanderman challenges paragraph 13 (which is the conclusion paragraph, he says) and he submits that clearly indicates that the inspector has fallen into error because she says, essentially, that because the building on the appeal site was not being used solely for the purposes of feeding the horses and keeping them on the field, the building was solely used for an agricultural use. There is, so Mr Vanderman submits, a clear link between the finding of non-exclusive feeding and the conclusion that the inspector has reached. That ties in, he says, with the findings at paragraph 11 of her decision, which is that even though the hay was being purchased from outside, it was not being given to the horses exclusively in isolation of the cattle.

21. On behalf of the defendant, Dr Bowes submits (and I agree) that one has to look at the decision as a whole. The inspector plainly applied the correct legal test, and he says that it is quite clear, not least from paragraphs 7 and 8, that she was well aware of the difference between grazing, on the one hand, and keeping, on the other. Bearing in mind what was said about the test in *Sykes* and *Fox*, he submits that it was a matter of planning judgment for her to determine whether this was keeping or grazing. She has made findings of fact which are not impugned and are unimpeachable, and whilst she did make a finding that the hay was used to feed both types of animal, notwithstanding

that, looking at the final sentence of paragraph 12, the inspector came to the conclusion that the horses were grazing and that the field was being used for the agricultural purpose of grazing and therefore, implicitly, that such feed as they were brought out twice a day from the barn was ancillary to that grazing purpose.

22. Despite the attractive way in which Dr Bowes, as always, puts his legal arguments, I am afraid I am unable to accept that characterisation of this decision. I agree that the inspector has undoubtedly addressed her mind to the correct legal test, and certainly she appears to be aware that there is a difference between keeping horses on the field and using the field to graze. However, the real question for her was whether, despite the grazing, there was mixed use, as the council found, because the hay in the barn purchased from a commercial supplier was being used twice daily to feed the horses, or whether the use of hay for feeding that she found was merely ancillary to the grazing use of the land in the field next to the barn.

23. It seems to me that it is quite clear from an overview of the decision that the reasoning has gone wrong here. When one starts at paragraph 11, the planning inspector seems to consider that, just because the hay is not being given solely to the horses, it must therefore follow that they are not being "kept" on the field. She does not appear to have turned her mind to cases such as *Fox*, for example, which indicate that it is possible to find that the feeding of hay both to sheep, in that case, and horses was consistent with the horses being kept on the field. Moreover, the fact that other activities commonly associated with the keeping of horses take place off site is not a valid reason, in and of itself, to reach a conclusion that they are not being kept on the site, irrespective of the finding that they are being regularly fed with hay from the barn which had been purchased for that purpose, and not just brought the occasional top-up.

24. I agree it is a matter of fact and degree, but if one looks at paragraph 13 and reads that in context, it is quite clear that that fact-finding that the hay was not being given to the horses in isolation of the cattle is the key finding on which the inspector rests her decision. Given that that is the case, I am not persuaded that that the way in which this was phrased was a simple mistake, and Dr Bowes, in fairness, did not argue it was. He submitted that this was simply a drawing together of the inspector's earlier findings and conclusions in a way which was unimpeachable, because it simply repeated what had been said at an earlier stage of the decision and drew all the threads together. In the light of the word "therefore" in the passage in paragraph 13 that I have highlighted, I find it very difficult to accept that conclusion. The earlier finding that the horses were on the field to graze is certainly a fact-finding, but it is simply an explanation of what the horses were doing there. It is not a finding that the field was being used solely for the purposes of grazing (or agricultural purposes). I cannot elevate it in the way that Dr Bowes suggests, so as to turn the paragraph in which it appears into the paragraph in which the inspector reached her conclusion, rather than paragraph 13 which begins with the words, "On the balance of probability, I conclude that ..."

25. For those reasons, I am persuaded by Mr Vanderman that there has been a substantial, rather than a superficial, error in this decision. That would normally lead to a quashing of the decision. I must therefore consider whether this is a case for the exercise of my discretion to send it back.

26. Dr Bowes submits that this is not a proper case for sending back because, in the light of the inspector's fact-findings, it is highly likely that the same decision will be reached. I cannot say that. If her decision were not informed by the material error that I have identified, it may well be that she would reach the same conclusion, because it is a matter of fact and degree for her, as *Fox* says; but it is equally likely that on these facts and absent the logical fallacy in her reasoning, she might well reach the same decision as the council did when they refused the planning permission. For that reason, it seems to me that the proper thing to do would be to quash this decision and remit it so that the inspector can think about it again.

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This transcript has been approved by the Judge