



Appeal Decisions

Inquiry held on 29 July 2008

Site visit made on 30 July 2008

by **D H Brier BA MA MRTPI**

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

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Decision date:
27 August 2008

Appeal Ref: APP/X0415/C/07/2059918 & 2059919

Land adjacent to Jewsons Yard, Chesham Road, Hyde End, Bucks HP16 ORD

- 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 M C Finch & Mrs S M Finch against an enforcement notice issued by Chiltern District Council.
- The Council's reference is 2007/00019/ENF.
- The notice was issued on 21 September 2007.
- The breach of planning control as alleged in the notice is change of use of the land from use as part of a builders' merchants to use for the commercial storage of vehicles, plant, machinery and other equipment, together with ancillary repairs and maintenance thereof.
- The requirements of the notice are cease the use of the land for the commercial storage of vehicles, plant, machinery and other equipment, together with ancillary repairs and maintenance thereof and remove all such vehicles, plant machinery and equipment from the land.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (d), and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees in respect of the appeal by Mrs S M Finch (ref APP/X0415/C/07/2059919) 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 in her case.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld.

Appeal Ref: APP/X0415/X/07/2062615

Land adjacent to Highfield and Jewsons Yard, Chesham Road, Hyde End, Bucks HP16 ORD

- 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 M F Equipment (UK) LLP against the decision of Chiltern District Council.
- The application Ref CH/2007/1808/EU dated 3 October 2007 was refused by notice dated 29 November 2007.
- 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 B8 open storage of building materials, plant, machinery and associated vehicles and equipment.

Summary of Decision: The appeal is dismissed.

Preliminary Matters

1. The evidence at the inquiry was taken on oath.
2. At the inquiry the section 174 appeal on ground (e) was withdrawn.

The Appeals Site and Background

3. The appeals site lies in the Metropolitan Green Belt and the Chilterns Area of Outstanding Natural Beauty (AONB). It was previously part of a larger area of land that extends to the south. The Statement of Common Ground (SOCG) chronicles the history of this larger area, noting that it was used as brickworks prior to the Second World War. The SOCG refers to the subsequent use of buildings for the storage of timber, but both parties also indicate that the land was used as a sawmill. According to the appellants, in 1989 the land was acquired by Harcros who stored a variety of building materials, both in the open and in the buildings, and in 1997 the land was acquired by Jewsons who continue to operate from it. The appeals site was acquired from Jewsons by the appellants in 2005. It is separated from Jewsons' current premises by a metal palisade fence. It has its own separate access and is now used for the storage of plant and equipment used in the construction industry.

Section 174 Appeal on Grounds (c) and (d) and the Section 195 Appeal

4. As all these matters are closely inter-linked in this case, I deal with them jointly.
5. The history of the land, of which the appeals site forms part, is not in dispute. In particular, the Council accept that around 1991 the former sawmill had become a builders' merchants, selling building products both to the trade and to the public. It is further accepted that after 10 years, that is around 2001, the builders' merchants use had become lawful by virtue of it being immune from enforcement action. In essence, the matter at issue is whether the builders' merchants use in this instance constitutes a B8 storage and distribution use. The appellants contend that Jewsons' yard, being primarily used for the storage and distribution of building materials and equipment used in the construction trade, is a B8 use. On the other hand, the Council, citing *Young v Secretary of State for Transport, Environment and the Regions [2001] EWHC 141*, argue that a builders' merchants use will typically be sui generis because it contains a mixture of uses, in particular retailing.
6. Both parties agree that the severance of the appeals site from Jewsons' premises resulted in the formation of a new planning unit, but this in itself does not necessarily mean that there has been a material change of use. It seems to me therefore that the question hinges on the nature of the particular builders' merchants use. In so saying, I am mindful that the term "builders' merchants" does not appear in the Town and Country Planning (Use Classes) Order 1987. And, in *Monomart (Warehouses) Ltd & Others v Secretary of State for the Environment & Others [1977] 34 P.& C.R.* it was held that such words did no more than identify the nature of the goods involved. That said, the appellants refer to the judgement in *Meadows & Others v Secretary of State for the Environment [1983] JPL 538* wherein it was held that "store" could apply to premises where goods were disposed of by wholesale transactions as well as being stored. I also acknowledge that, in the light of *Monomart*, a warehouse

could have a degree of retail sales without it ceasing to be a warehouse, but the retail sales must be no more than incidental to this.

7. First-hand evidence regarding the nature of the builders' merchants use was provided by Mr Holman, the manager of the Jewsons premises at Hyde End. I heard that he first started work at the premises in 1988 when they were operated by Sabah Timber Limited who stored and supplied timber and building materials, an activity that continued when Harcros acquired the site in 1989 and when Jewsons subsequently acquired Harcros in 1997. According to Mr Holman, the yard and buildings were used for the storage of materials and equipment used in the construction industry, and the bulk of the trade involved supplying other Jewsons' branches and local builders. Some 90% of the business was conducted with the building trade, and about 10% directly with members of the public.
8. Further information regarding the manner in which the builders' merchants use operated is contained in the Council's note of a site meeting that took place in February 2002. This comprehensive note, which also refers to the 90% - 10% split between trade customers and the general public, goes on to mention the milling of timber, the presence of a saw to make specialist pieces, and timber being machined down to smaller sizes. Among the staff listed are "2 machinists for saw mill." The author of the note did not appear at the inquiry and so could not be cross-examined about its contents, but as the accuracy of the document was not called into question, I attach some weight to it as an indicator of how the premises were operating in early 2002.
9. As regards the proportion of trade business relative to that generated by the general public, Mr Holman told me that the 90% - 10% split was based on his experience. However, although I heard that the company's accounting system differentiated between public and trade sales (cash sales as opposed to account or trade sales), no documents or any other records regarding sales transactions were produced. Likewise, although Mr Holman referred to 100 to 108 collections per day, no indication regarding the relative numbers of trade and retail customers who visit the site was forthcoming. While Mr Holman came over as an honest and candid witness, the absence of such information makes it very hard to make an objective assessment of the actual degree of retail activity at the premises. This is in sharp contrast with the Birmingham appeal decision, relied upon by the appellants, where trading statistics were put before the Inspector. I therefore find this matter somewhat inconclusive; I am not satisfied that the evidence is sufficiently clear or robust to demonstrate that retail sales to the general public are incidental to the builders' merchants use, as the appellants claim.
10. Another factor which has a bearing on the question, and which distinguishes this case from the Birmingham appeal decision, is the sawmill component. Although the Council's evidence refers to the main function of the site as a sawmill having ceased by 1991, in cross-examination Mr Holman accepted that the sawmill was functioning between 1997 and 2005 and the facility still remains now. This is consistent with the Council's observations in 2002. Having seen that the woodworking machinery only occupies a small proportion of the larger of the 2 buildings on the Jewsons' site, it may be that this activity is a relatively minor part of the builders' merchants business as a whole. Moreover, a facility that enables timber to be cut to size for customers could be regarded

as being incidental to this. However, the acceptance that the sawmill remains points to a rather more substantial activity. So does the 2002 note. Indeed, as 2 out of the 9 staff members at the premises recorded were sawmill machinists, it is difficult to conclude that this activity was ancillary or incidental to the builders' merchants use. It strongly suggests to me that it was more likely to have been a component part of a composite use.

11. It is clear from the evidence that the storage of items, both in the open and under cover within buildings has been a major facet of the manner in which the land has been used over the years, and I saw that this remains the case at the Jewsons' premises. The degree of storage, together with the general absence of information and price tags (other than in a fairly limited area in the vicinity of the counter where smaller items were displayed) is such that the overall character of the premises is far removed from that of say a typical DIY retail store. My impression was that the main thrust of the operation is directed towards supplying trade customers and the evidence indicates that it is likely to have done so prior to and since the relevant dates¹.
12. Even allowing for the Council's concern about the degree of distribution, and the period of time when 'portaloo's were stored on the site as part of a separate hire operation, on the face of it, the conclusion reached in the preceding paragraph lends strong support to the appellants' case. However, mindful that the onus on making the case rests with the appellants, I am not satisfied that the evidence regarding the retail and sawmill element of the builders' merchants use in question is sufficiently clear and unambiguous for me to be able to conclude that as a matter of fact and degree they are incidental to a B8 use, as opposed to being component parts of a composite, sui generis use. As I see it, the appellants have not discharged the burden of proof that rests with them.
13. In the light of the foregoing, my view is that the use in question is functionally and physically distinct from the previous use of the land as a builder's merchants and the character of the use has changed to the extent that there has been a material change of use. In the apparent absence of any relevant planning permission, I find the matters alleged in the notice do constitute a breach of planning control. Accordingly, therefore, the section 174 appeal on ground (c) fails. As both the ground (d) and LDC appeals effectively rely on the ground (c) appeal proving successful, they fail also.

Section 174 Appeal on Ground (a) the Deemed Application

Planning Policies

14. Relevant planning policies are contained in the Council's Local Plan (CDLP), adopted in 1997. Reflecting the guidance in PPG2, which advises that there is a general presumption against inappropriate development in the Green Belt, and such development should not be approved unless there are very special circumstances, strict controls upon development in the Green Belt apply by virtue of Policy GB2. The policy lists categories of development for which planning permission may be given, amongst which, under clause (f), are material changes of use which maintain openness and do not conflict with the

¹ As the enforcement notice and LDC applications are dated 21 September 2007 and 3 October 2007 respectively, there is a slight difference in the relevant 10 year periods.

purposes of including land in the Green Belt. Policy GB22A addresses, amongst other things, storage and distribution development in the Green Belt. One of the circumstances where such development will be permitted is contained in clause 1.(c), namely where sites accord with the criteria in Policy GB2(f) and are currently used or were last used for business, general industrial or storage and distribution purposes where the use is authorised or otherwise lawful. Policy LSQ1 is directed at the Chilterns AONB and states that development should conserve and where appropriate and practicable enhance the area's special landscape quality and high scenic character.

Main Issues

15. I consider the main issues are, firstly, whether the proposal constitutes inappropriate development in the Green Belt. And, secondly, if so, whether there are any very special circumstances which would outweigh the general presumption against inappropriate development that applies in the Green Belt.

Issue 1

16. Addressing CDLP Policy GB2(f), which echoes the guidance in paragraph 3.12 of PPG2, the appellants contend that the open storage use is an employment use which maintains the openness of the site and would not conflict with the main purpose of including land in the Green Belt. I acknowledge that the deemed application concerns the use of land as opposed to operational development. I am also mindful of the site's history and the Council's acceptance that the builders' merchants use, a feature of which was outside storage, is lawful. However, when it comes to the question of appropriateness my view is that it is the actual use in question that is the key consideration rather than a comparative assessment of its impact relative to that of the use deemed to be lawful, including the implications of section 57 in that respect. In so saying I am mindful that, contrary to what was claimed in the closing submissions for the appellants, in cross-examination their planning witness accepted that the use in contention is inappropriate development.
17. It may be that the effect of the use on openness may be similar or no worse than the builders' merchants use, as is claimed, but that argument is more akin to saying that the status quo would be maintained. It does not go to the heart of the matter, namely the effect of the disputed use upon openness. To my mind, the use of the land for the outdoor storage of vehicles, plant, machinery and other equipment inevitably impinges upon openness, albeit no buildings are involved and the appeals site is very different in nature from an open field. The use is neither consistent with maintaining the quality of openness, nor with the fundamental aim of Green Belt policy to keep land permanently open. And, although the use does not extend beyond the well defined and vegetated outer limits of the commercial enclave here, it is also inconsistent with the third of the purposes of including land in Green Belts set out in paragraph 1.5 of PPG2, namely assisting in safeguarding the countryside from encroachment.
18. In the light of the foregoing, my conclusion is that the use in question constitutes inappropriate development in the Green Belt, in which case it does not accord with CDLP Policy GB2(f).

Issue 2

19. No very special circumstances have been advanced as such. Particular reference was made to section 57 of the 1990 Act and the 'fallback' provisions contained therein. I accept that reversion to a builders' merchants use could have a similar impact on the surrounds, particularly if the land in question was used for outdoor storage as part of that use, as appears to have been the case in the past. However, no evidence that shows or suggests that such a scenario is likely, or is even a possibility, has been put forward. Mindful that the land appears to have been deemed surplus to Jewsons' requirements some 3 years ago also, I am not inclined to attach much weight to this factor. Nor do I regard the submissions that openness would be maintained in the sense that it would not be made worse, or that the use would be no worse than the lawful one, as good reasons for permitting inappropriate development in the Green Belt.
20. As regards CDLP Policy GB22A 1.(c), notwithstanding my findings regarding the nature of the particular builders' merchants use, for the purposes of the policy, it is sufficiently similar to a business use to fall within the ambit of paragraph 4. However, even though the explanatory text indicates that the policy seeks to protect employment sites in the Green Belt, in the light of my conclusion concerning Policy GB2(f), I find that the disputed use is contrary to Policy GB22A 1.(c).
21. Despite the manner in which the appeals site has been used over the years, I consider the introduction of the use in question marked a new chapter in the planning history of the land. PPG2 advises that inappropriate development is by definition harmful to the Green Belt. I am not satisfied that there are any very special circumstances sufficient to outweigh this harm. And, while the argument that there is little difference between the use in question and the builders' merchants use has also been advanced insofar as the AONB is concerned, I do not find the storage of large bulky items of equipment consistent with the conservation of the natural beauty of the sensitive landscape within which the site lies and which CDLP Policy LSQ1 seeks to protect. I see this as a further disadvantage which adds to my concern – a concern which could not be overcome by conditions, including those aired at the inquiry.
22. In the light of the foregoing the appeal on ground (a) fails and planning permission will not be granted on the deemed application.

Appeal on Ground (g)

23. Having heard that the appeals site had only been found after a lengthy search and there is nothing to indicate that there is a suitable alternative at present, I fully appreciate why the compliance period is seen as being too short and a longer period is sought. I acknowledge that the area's Green Belt and AONB status is likely to limit opportunities somewhat. However, other than the length of time it took to find the appeal site and references to there being a dearth of sites, competition being strong, and there being a lot of correspondence on the matter, the precise nature of the claimed problem was not elaborated upon.
24. Mindful that a business enterprise is involved and the enforcement action could have implications for its well-being, the difficulties I have been acquainted with are not matters I set aside lightly. That said, my view is that 6 months offers

a reasonable opportunity for a search for alternatives to be made together with any related arrangements that might ensue. In the absence of clear evidence regarding availability or otherwise of land, I am not satisfied that the compliance period is unreasonably short. In so saying, I have had regard to the provisions of section 173A (1) (b) of the 1990 Act which give the Council the discretion to extend the compliance period if need be.

25. In the light of the foregoing, the appeal on ground (g) fails.

Conclusions

26. For the reasons given above and having regard to all the other matters raised, I conclude that the section 174 appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application. I also conclude that the Council's refusal to grant a certificate of lawful use or development in respect of B8 open storage of building materials, plant, machinery and associated vehicles and equipment was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Formal Decision

Section 174 Appeal Ref: APP/X0415/C/07/2059918 & 2059919

27. I dismiss the appeal and uphold the enforcement notice. I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Section 195 Appeal Ref: APP/X0415/X/07/2062615

28. I dismiss the appeal.

D H Brier

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Christopher Boyle Of Counsel instructed by Buttery & Watson.

He called

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Mr R Buttery BA DipTP Partner, Buttery & Watson, Aylesbury.
MRTPI

FOR THE LOCAL PLANNING AUTHORITY:

Mr Wayne Beglan Of Counsel instructed by Chiltern District Council.

He called

Mrs S E Shah BA BTP Senior Planning Officer, Chiltern District Council.
MRTPI

INTERESTED PERSONS:

Ms K Kay 4 Rowan Cottages, Hyde End.
Mr C Jones 54 St Leonards Road, Amersham. Representing
The Chilterns Society.
Mr S Smith Wheatsheaf Cottage, Hyde End.
Mr R Moreton Little Hundridge Farm, Little Hundridge Lane,
Hyde End. Representing The Little Hundridge
Lane Residents Association.

DOCUMENTS

- 1 List of persons present at the inquiry.
- 2 Inquiry notification letter and distribution list.
- 3 Statement of Common Ground.
- 4 Extract from Encyclopedia of Planning Law - section 57 of the 1990 Act.
- 5 Extract from Encyclopedia of Planning Law - Commentary at 3B-972.1.
- 6 Meadows & Others v Secretary of State for the Environment [1983] JPL 538.
- 7 Monomart (Warehouses) Ltd & Others v Secretary of State for the Environment & Others (1977) 34 P.& C.R.
- 8 Appeal Decision ref APP/P4605/C/04/1144321 & 1144322 dated 21 September 2004.
- 9 List of suggested conditions.
- 10 Closing Submissions by Mr Beglan.
- 11 The Queen on the application of C W Young Ltd v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 141.