



Appeal Decision

Inquiry held on 8 June 2010

Site visit made on 8 June 2010

by George Mapson DipTP DipLD MRTPI

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

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**Decision date:
19 July 2010**

Appeal Ref: APP/R0660/X/09/2115961

Garden Centre, 9 Lees Lane, Newton, Macclesfield, Cheshire, SK10 4LJ

- 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 Paul Schofield against the decision of Cheshire East Council.
- The application Ref 08/2378P, dated 20 October 2008, was refused by a notice dated 20 August 2009.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The existing use for which a certificate of lawful use or development is sought is use as a garden centre.

Summary of decision: The appeal is dismissed

Application for costs

1. At the inquiry an application for costs was made on behalf of the Council against the appellant, Mr Paul Schofield. This application is the subject of a separate Decision.

Procedural matters

2. The LDC application is accompanied by a plan that shows, edged red, the land in question. Within that land there is the house, No. 9 Lees Lane, which is now used as a café. At the inquiry the appellant accepted that its lawful use is as a single dwellinghouse and that its present use, which began after 2005, is unlawful.

Evidence in LDC cases

3. In an LDC appeal the matters to be determined are solely matters of evidential fact and planning law. The burden of proof rests on the applicant. To fulfil that burden, relevant evidence must be adduced to support the assertion that the use in question is lawful. The relevant test of the evidence is the balance of probability.
4. All the oral evidence presented at the inquiry was taken on oath. On behalf of the witnesses it was declared that the facts set out in their written evidence were true to the best of their knowledge and belief at the time that they were written and remained true.

Main issue

5. The main issue is whether the Council's decision to refuse to grant a lawful development certificate was well-founded.

Distinctions between use as a plant nursery, a mixed use, and use as a garden centre

Characteristics and effects of a use of land as a plant nursery

6. The Concise Oxford English Dictionary defines a nursery as “a place where plants, trees, etc., are reared for sale or transplantation.” Section 336 of the 1990 Act includes “nursery grounds” within its definition of “agriculture”¹.
7. Usually a plant nursery use entails propagating plants, growing them to a usable size and then selling them on. Sales can be either retail (in small quantities to the general public) or wholesale (in larger quantities to other businesses or commercial gardeners). Some nurseries operate on a private basis and supply particular estates or institutions. The main characteristics of a plant nursery can be summarised as follows.
8. Firstly, a plant nursery operation tends to be labour-intensive. Although some have introduced mechanisation and automation into the process, the skill of the plantsman or horticulturist remains a key ingredient in the business, in ensuring the good health of plants. The intention is that sufficient quantities of particular plants arrive at the same time, in the same condition, ready for sale.
9. Secondly, a plant nursery operation will propagate using greenhouses, polytunnels, or cloches; some sort of structure that provides light and ventilation, while affording protection from harsh weather, especially frost.
10. Thirdly, a plant nursery operation tends to be highly seasonal. Much of the activity is concentrated in the spring, summer and autumn months. Even during those seasons there is no guarantee that there will be a demand for a product. Winter is usually a dormant time with less demand for garden plants. To cover this period some nursery businesses buy in seasonal plants, such as Christmas trees and poinsettias, for resale.
11. A plant nursery may grow on plants on a large scale and sell all of them from the premises. The courts have held that those sales are regarded as ancillary to the primary agricultural use, however large the volume and scale² (subject to the caveat that selling is not done “abnormally”). In short, if it is home grown produce from the holding itself, it is protected and incidental.

Characteristics and effects of a mixed use of land comprising use as a plant nursery (agriculture) and use for the sale of imported produce (retail)

12. The sale of produce that is imported is not ancillary to use of land as a plant nursery³. However, it is a matter of fact and degree as to when it becomes a primary use on its own, as opposed to being *de minimis*. The land continues to be used for agricultural purposes, but another dominant use has joined it; the sale of imported produce.

¹ Section 336 states that “agriculture” includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and “agricultural” shall be construed accordingly;

² *Allen v SSE and Reigate and Banstead BC* [1990] JPL 340.

³ *Bye Williams v MHLG and Another* [1967] 18 P&CR 514. This case dealt with sales from a building within a three acre nursery garden. The Court held that there were three main considerations. Firstly, the “planning unit”. The issue was whether it should be taken as the building (the shop or place from which the goods are sold) or the whole of the site. It was held that it was the whole of the nursery garden, not the separate building. Secondly, the primary use. This was agricultural, with the provision of facilities for selling the produce of the land. Thirdly, the extent to which a quantitative change in the activities may amount to a material change of use. It was held that the sale of fruit and goods produced not on the land, but elsewhere, changes the character of the use.

13. Once those sales exceed the level of *de minimis*, it is possible that a material change of use to a mixed use has occurred. Whether and when such sales amount to 'development', and thus a component of a mixed use, is determined as a matter of fact and degree, having regard to the particular circumstances of the case.
14. In some reported cases⁴ various percentages of imported goods have been cited and some local authorities have adopted these as a 'rule of thumb' in deciding whether a material change of use has occurred. However, these percentages derive from figures quoted in those individual cases; there is no 'magic number' to be applied generally. The level of overall sales and the proportion that are sales of imported produce must to be looked at in each case. As with any change of use the *materiality* of the change is assessed in the light of a host of factors (see paragraphs 17-19 below).

Characteristics and effects of a use of land as a garden centre

15. The Concise Oxford English Dictionary defines a garden centre as "*an establishment where plants and garden equipment etc., are sold*". As the Court of appeal judgment in *Wiggins v Arun DC*⁵ confirmed, the use of land as a garden centre falls within Class A1 of the Use Classes Order 1987. The primary use is for the retail sale of goods to visiting members of the public. Generally there is little, if any, home-grown produce. Most of the stock is imported for immediate resale with little horticultural tending, other than watering.
16. Many garden centres evolve from plant nurseries, or from mixed uses (of the type described at paragraphs 12 to 14 above), to a point where they sell a wide range of goods, not just those related to plants and garden equipment. In such cases a tipping point is reached at some stage and a material change of use occurs.

Tests of materiality of a change of use

17. There is no definition in the 1990 Act of a "*material change of use*", but "*material*" means material for planning purposes. The concept depends on matters of fact and degree, intensity and extent in each case. For a material change of use to have occurred the new activity must be substantially different from the one that preceded it.
18. An analysis of a material change of use considers, amongst other things, the primary use of the land; the scope of that use; the extent of any lawful ancillary uses; the planning unit to which the primary use is attached; and the status in law of that use. There are two main tests for the materiality of a change of use. The first test relates to a change in the character of the use itself, including the land where it is located. The second test relates to the effect of the change upon neighbouring uses and the locality.
19. In the case of an application for a Certificate of Lawfulness, the appeal must be judged on the basis of the situation that existed on the date that the application was made; in this case, 20 October 2008. The relevant date, therefore, is ten years earlier; 20 October 1998.

Reasons

The appeal site

20. The appeal site has traded under various names during that ten year period. The Land Registry shows that on 22 May 1987 Cheshire County Council transferred the freehold

⁴ In *Bromley LB v George Haeltschli and Son* [1977] 244 Eg 49, the Court held that it was a matter of fact and degree when "outside" sales become material. In that case, the sale of about 20% imported produce was not ancillary. In *Allen*, the appeal Inspector indicated that the "cost of the purchases of non home-grown produce was some 14% of the overall cost and the sale of those products equated to some 11% of the overall turnover."

⁵ *Wiggins v Arun District Council* [1997] 74 P&CR 64

of the land and dwelling at No. 9 Lees Lane to Mr Michael Long and Mrs Dorothy Long. They apparently operated a plant nursery business there that traded as "*Hardy Plant Nursery*".

21. Councillor Mrs Jackson recalled that in the late 1990s (possibly around 1997) a Mr Graham Judd and a Miss Ruth Roberts began to run the nursery business. They changed its name firstly to "*Purely Perennials*" and later to "*All Seasons Nursery and Plant Centre*". However, as time went by the business began to fail and in 2003 the site was put up for sale. It remained on the market for two years.
22. The appellant visited the site for the first time shortly before he purchased it on 19 December 2005. According to the Land Registry, he completed its purchase on 10 February 2006. It appears from the Official Copy of the Register of Title that Mr and Mrs Long were still the registered owners at that time. The plan attached to the Registry document identifies the land as "Nursery". Shortly afterwards the appellant began to operate his garden centre business, which trades as "PSS Nurseries".

The gist of the parties' cases

23. The appellant's case is that the appeal site comprises a single planning unit, the primary use of which has been as a garden centre for a period of at least ten years preceding the date of his LDC application. This assertion is based on the amount of retail sales that were occurring at the site during that period. The level of sales takes the use of the site outside the scope of a nursery use and within a garden centre use. He claims that the nature of the retail business has not changed during that period and has continued actively throughout. The majority of produce sold has been imported with a view to selling directly to members of the public. It was not imported for the purposes of growing on. Consequently, the primary use of the site has been retailing, and not agriculture.
24. The Council's case is that the lawful primary use of the planning unit is use as a plant nursery, which is an agricultural use of land⁶. The sale of produce grown on that land is an ancillary use of land for the purpose of agriculture and, as such, not 'development' in planning terms. The seasonal sales of Christmas trees and poinsettias, and the sale of plant pots, compost and fertiliser, were subordinate to the primary use of the land as a plant nursery. The accounts of the Council's witness and others establish that a material change of use of the land to its present retail use occurred after the appellant bought it in 2005. The present use has subsisted for considerably less than ten years prior to the date of the LDC application and is therefore unlawful.

My consideration of the evidence

25. The appellant acknowledged that he has no direct knowledge of the site or how it was operated before 2005, and he called no witnesses with any such knowledge to give evidence. There are no statutory declarations or sworn statements⁷ that clearly explain how the site operated over the relevant ten year period. The appellant has produced no accounts, receipts or invoices to show the level of goods bought and sold at any time, let alone over that period. He knew very little about the business that he was buying in 2005 and has gleaned little additional information about it since. He did not see any accounts before buying it. He has no detailed knowledge about the plants that

⁶ Section 336 of the 1990 Act states that "agriculture" includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and "agricultural" shall be construed accordingly;

⁷ There is a sworn affidavit from Mr Darrah, a customer who claims to have bought plants and garden related products from the nursery since 1971.

- were grown on the site, or about the goods supplied to the previous business, or who provided them.
26. His case relies entirely upon letters from an employee (Ms Amanda Featherstone), one supplier of shrubs (Mr Nash of Davenham Nursery Limited) and various customers, and upon Mr Darrah's affidavit.
 27. Ms Featherstone has worked for the appellant since 2007 and worked part-time for the previous operator of the nursery from 1998 to 2005. She was working at the garden centre when I carried out my site inspection immediately after the close of the inquiry. The appellant could have called her to give direct evidence to the inquiry, but he did not do so.
 28. Instead he relied upon her letter of 17 October 2008 to Macclesfield Borough Council (the predecessor authority to Cheshire East Council) in which she stated that her duties when working for the previous owner included "*the growing, care and maintenance of plants and shrubs, providing advice and information to customers, serving and assisting customers in the shop and taking payment at the till.*" These duties are consistent with use of the land as a nursery.
 29. Mr Nash, in his '*To whom it may concern*' letter of 6 January 2009, states that for at least thirty years he has supplied owners of the site with shrubs on a retail only basis. But he gives no idea of the quantities sold or the frequency of these sales.
 30. Neither of these letters, nor any from customers of the business, indicate a use of the appeal site as a garden centre. They shed no light on how the site was operated before the appellant bought it to assist in a comparison between the character and effects of its use over the relevant period. They might indicate that plants were grown and that some were sold to the public, but this is not at odds with use as a nursery. They do not indicate or establish the use of the land as a garden centre.
 31. The evidence presented on behalf of the Council provides a much clearer picture of the changing character and effects of the differing uses of this site over the years. Mrs Tutton and Councillor Mrs Jackson have lived in the area for many years and knew the site well.
 32. Councillor Mrs Jackson told me that she had worked at the nursery as a helper when Mr Long owned it. While he - and later Mr Judd and Miss Roberts - operated it, the business was a "*working nursery*" with plants grown in the polytunnels and Christmas trees and other trees and shrubs grown on the land. After December 2005, the character of the use changed.
 33. Mrs Tutton said that she moved into the locality in 2000 and travelled past the site each day on her way to and from work. She also visited the nursery as a customer. Prior to the appellant's purchase of the site, the nursery was run in a low key manner. Many polytunnels were in use for horticultural purposes, including the preparation of hanging baskets. Some were priced up for sale, but not all. There were no labels indicating the plant species or how to look after them. That situation changed markedly after 2005.
 34. In his letter of 28 November 2008 to the Macclesfield Borough Council, the Clerk of Mottram St. Andrew Parish Church states that "*As far as the Parish Council know this land has always been used as a nursery rather than a Garden Centre as until the acquisition in 2005 the site was owned by plantsmen who grew the bulk of the shrubs and plants which were on sale.*"
 35. In his email of 2 December 2008 to the Macclesfield Borough Council, the occupier of No. 10 Lees Lane stated that he had lived at that address since 5 June 1998 and confirmed that the land at No. 9 Lees Lane "*has been run solely as a nursery*" by

people he knew as Graham and Ruth. He believed that they had purchased the property from Mike Long who also ran it as a nursery.

36. The Council has put forward three aerial photographs (Google satellite images) of the site, which were taken in 2000, 2005 and 2010. They show a significant change in its character and appearance after 2005.
37. The evidence suggests to me that sometime after December 2005, the primary use of the site became use for retailing rather than for agricultural purposes. Horticultural activities either ceased altogether or were vastly reduced. Propagation no longer takes place on the site and the polytunnels have been either empty or used for domestic storage. The sale of larger bulky goods, such as garden furniture and ornaments, slabs and stones, and other items has become the dominant activity on the site. A significant part of the site has taken on the appearance of a reclamation site.

Conclusions

38. I find no clear and unambiguous evidence to demonstrate, on the balance of probability, that the primary use of the land since 20 October 1998 has been continuous use as a garden centre. On the evidence before me I find that the primary use of the land prior to December 2005 was either use for agricultural purposes with some ancillary sales of home grown products, or a mixed use of the type described in paragraphs 12 to 14 above. The use of the land as a garden centre commenced after December 2005.
39. I have taken account of all the matters raised at the inquiry and in the written representations, including the advice in Circular 10/97 (Annex 8, paragraph 8.15) and the judgment in *Gabbitas*⁸. However, for the reasons given above I find that the appellant has failed to discharge the burden of proof placed upon him to demonstrate, on the balance of probability, that the appeal site has a lawful existing use as a garden centre.
40. I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the land as a garden centre 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

41. I dismiss the appeal.

George Mapson

INSPECTOR

⁸ *F W Gabbitas v SSE and Newham LBC* [1985] JPL 630. The Court held that the applicant's own evidence does not need to be corroborated by 'independent' evidence in order to be accepted. If the LPA have no evidence of their own, or 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 that the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate "on the balance of probability".

APPEARANCES

FOR THE APPELLANT:

Mr Martin Carter

Of Counsel, instructed by
Jackson Barrett & Gass, Solicitors

He called:

Mr Steven Hartley
BA(Hons), Dist.TP,
DMS (Dist.), MRTPI,
MRICS

Planning Consultant,
Hartley Planning and Development Associates Limited

Mr Paul Schofield

The appellant

FOR THE LOCAL PLANNING AUTHORITY:

Ms Estelle Dehon

Of Counsel, instructed by the Borough Solicitor,
Cheshire East Council

She called:

Mrs Nicola Folan
LLB(Hons)

Solicitor, Cheshire East Council

Mrs Emma Tutton
BSc, DipURP, MRTPI

Principal Planning Officer, Cheshire East Council

INTERESTED PERSONS:

Councillor Mrs Theresa Jackson

Former Mayor of Cheshire East Council and Ward
Member

DOCUMENTS HANDED IN AT THE INQUIRY

- 1 Documents handed in on behalf of the Council
 - 1.1 The Council's notification of the inquiry and appeal, and list of addressees
 - 1.2 The Statement of Common Ground
- 2 Document handed in on behalf of the appellant
 - 2.1 Appearances for the appellant
 - 2.2 Opening statement for the appellant
 - 2.3 Reported case: *Wiggins v Arun District Council* [1997] 74 P&CR 64 (COA)