

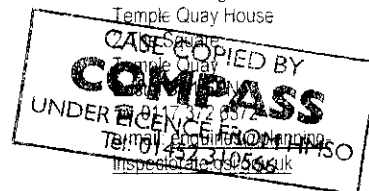
Appeal Decision

Site visit made on 11 November 2003

by **Martin Joyce** DipTP MRTPI

an Inspector appointed by the First Secretary of State

The Planning Inspectorate
4/09 Kite Wing
Temple Quay House



Date

10 DEC 2003

Appeal Ref: APP/D0515/X/03/1124089

Chatteris Airfield, Lower Mount Pleasant Farm, Block Fen Drove, Stonca, March, Cambridgeshire PE15 0EA

- 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 lawful development certificate (LDC).
- The appeal is made by Chatteris Leisure Ltd against the decision of the Fenland District Council.
- The application Ref: F/YR03/0449/CERTLU, dated 2 April 2003, was refused by the Council by notice dated 15 July 2003.
- The application was made under Section 192(1)(a) of the 1990 Act as amended.
- The use for which a Certificate of Lawfulness is sought is the use of an existing airfield and parachute centre including parachute dropping zone by one additional light aircraft for parachuting.

Summary of Decision: The appeal is allowed and a Certificate of Lawfulness is issued, in the terms set out in the Formal Decision below.

Procedural Matters

1. An application for costs was made on behalf of the appellants against the Council. This application is the subject of a separate Decision.

The Appeal Site and the Surrounding Area

2. The appeal site comprises approximately 15.8ha of former farmland to the south-east of the village of Wimblington that is now used as an airfield by a parachute club and by fliers of microlight and other light aircraft. The former farmhouse has been partially converted into bed and breakfast accommodation, whilst two large former barns are used to store microlights and small aircraft, and for training, office, catering and storage purposes associated with the parachute club. There are a number of caravans sited between the two former barns; these are used as weekend accommodation by parachutists and fliers. I also saw a number of other outbuildings used variously as office accommodation, for storage purposes, as classrooms, and as toilets. A new toilet block is being erected as is a hangar to house the single light aircraft currently used by the parachute club.
3. Access to the site is gained from an unmade farm track that runs south from Block Fen Drive, but a new access road is currently under construction to the west of this track. The wider site comprises flat open land mainly covered with grass or scrub vegetation. The south-eastern area closest to the buildings is utilised for take-off and landing, with grass runways being cut as required, whilst the western part of the site is used as a parachute drop zone.

Planning History

4. The use of the site as an airfield for a microlight and private light aircraft club began before 1994. On 6 April 1994, planning permission (Ref: F/93/0770/F) was granted for its continued use, together with the retention of associated ground facilities and storage of private light aircraft, and for the use of the airfield as a parachute centre including parachute drop zone, office and toilet facilities using one light aircraft and stationing of caravans for use by club members. A condition of this permission required the discontinuation of the use and the restoration of the former use as a Microlight Aircraft Club on or before 5 April 1997.
5. On 9 May 1997 a further, permanent, planning permission (Ref: F/96/0888/F) was granted for the "continued use of the existing airfield for use by microlight aircraft club together with retention of associated ground facilities and storage of private light aircraft, use of airfield as a parachute centre including parachute drop zone, office & toilet facilities using 1 light aircraft & stationing of caravans for use by club members", subject to ten conditions.
6. Various other planning permissions have been granted in relation to the various buildings on the land, and in connection with the stationing of caravans and temporary buildings, but none of these permissions are directly relevant to the appeal before me.

The Case for the Appellants

7. The appellants wish to utilise an additional aircraft for parachuting activities, to meet peak demand during summer weekends and to provide for increasing numbers of parachutists. They acknowledge that the Council have sought to limit the use of the airfield for parachuting purposes by reference to the description of the use set out in the planning permission of 9 May 1997, but point out that that permission does not include an express condition limiting the use to a single aircraft. Therefore, the limitation of the lawful use of the site by reference to that description and without an express condition cannot be enforced having regard to the judgement in *I'm Your Man v Secretary of State for the Environment (SSE)* [1998] TLR 25 September 1998. This submission is also supported by an appeal decision (Ref: APP/X1118/A/02/1088229) reported at JPL 494 [2003].
8. Furthermore, with reference to the Council's second reason for refusal of the application, it is submitted that the proposed operation of two aircraft for parachuting purposes will not constitute an intensification of use having regard to relevant case law. This includes the judgements in *Guildford RDC v Fortescue* [1959] 2 QB 112, *Glamorgan County Council v Carter* [1963] 1 WLR 1, *Brooks and Burton v SSE* [1977] 1 WLR 1294 CA, *Kensington and Chelsea Royal London Borough v SSE and Mia Carla Ltd* [1981] JPL 50 CA, *Lilo Blum v SSE and the London Borough of Richmond upon Thames Council* [1987] JPL 278, and *Westminster City Council v British Waterways Board* [1985] JPL 102 HL.
9. It is also submitted that the planning merits of the proposal are not relevant in the light of the relevant case law and the appropriate legal tests, and in respect of the advice given in Circular 10/97. The Council cannot therefore take enforcement action against the proposed use of a second aircraft for parachuting purposes and the appellant is entitled to a Certificate of Lawfulness of Proposed Use.

The Case for the Local Planning Authority

10. The Council considers that the main issue in this case is whether, in the absence of a particular condition imposed on the relevant planning permission, the activity is restricted to the use of one parachute aircraft only. In this context it is accepted that the judgement in *I'm Your Man* is the recognised authority for such consideration. This concluded that there are no limitations if the restriction is not controlled by formal condition or contained within the description of the development on the decision notice. In this case, however, the limitation is clearly contained within the description of the development and, as such, the Council did not consider it necessary to formulate a restricting condition due to the precise nature of that description and which is not open to interpretation.
11. Whether intensification of a use is sufficient to constitute a material change of use requiring a formal grant of planning permission is a matter of fact and degree. However, the use of the site by one aircraft is continually generating complaints from surrounding residents in respect of noise and loss of privacy. The effect of a second aircraft would be to increase usage of the site and to materially impact on the surrounding area. It is considered that such usage would be so significantly different in character and effect on its surroundings that formal planning permission needs to be sought.

Appraisal

12. There are two main matters to be resolved in this appeal. Firstly, whether the relevant planning permission (Ref: F/96/0888/F) restricts the use permitted on the appeal site to one aircraft in association with parachuting activity and, secondly, whether the use of a second aircraft would result in an intensification of the use such as to occasion a material change of use.
13. On the first matter, I have examined the decision notice relating to application No F/96/0888/F closely. The description of the proposal is "continued use of the existing airfield for use by microlight aircraft club together with retention of associated ground facilities and storage of private light aircraft, use of airfield as a parachute centre including parachute drop zone, office & toilet facilities using 1 light aircraft & stationing of caravans for use by club members". The notice then states that "permission to carry out the above development in accordance with the application, plans, drawings and any clarifying or amending information submitted by you is Granted subject to any condition(s) set out below". Ten conditions follow, none of which restricts the number of aircraft used in association with either the microlight aircraft club or the parachute centre. Neither does it limit the number of private light aircraft permitted to be stored at the site.
14. The Council clearly considers that the lawful use of the site by the parachute centre includes a restriction that the developers or operators may only use one aircraft because that is what is stated in the description of the use. However, such an interpretation is at odds with the judgement given in *I'm Your Man* where it was held that, notwithstanding that the description of the development was for the use of buildings for a temporary period of seven years, that permission was a permanent one because there was no condition requiring the use to cease after the end of that period. Having regard to that judgement, and to the North Devon appeal decision (Ref: APP/X1118/A/02/1088229) drawn to my attention by the appellants when similar logic was used in respect of the absence of a holiday occupancy condition, I can only reach the same conclusion in respect of this appeal. That is that the absence of a condition that limits the number of aircraft to be used in association with the

parachute centre, the appellants are not restricted to the use of a single aircraft. It must follow, therefore, that the use of a second aircraft for such purposes would not be a breach of that planning permission.

15. This leads me to consider the second matter and the question of intensification. The Council consider that the use of a second aircraft by the appellants would intensify the use to such a degree that a material change of use would occur. However, they do not state what change of use would occur, and this contention seems to me to be contrary to the principles established in several of the judgements put forward by the appellants. Firstly, in both *Fortescue* and *Glamorgan County Council*, it was held that a use of a caravan site is not materially altered by the bringing on to the site of a larger number of caravans. Further, in *Brooks and Burton* it was held that there could not be an intensification of a use within the same class of the Town and Country Planning (Use Classes) Order. Whilst the use of this site as an airfield is a *sui generis* use, there would clearly be no change in its overall use through the employment of an additional aircraft by one of the users of the airfield. Moreover, in both *Mia Carla* and *Lilo Blum* the question of the character of the land was considered as determinative. In this appeal the character of the land would not materially change from that of an airfield whether the appellants used one or two aircraft.
16. The Council seek, in this context, to rely on a claim that the use of a second aircraft would lead to further complaints from neighbouring residents, but that is a subjective matter relating to the planning merits of the use. Planning merits are not, of course, before me in this appeal. I conclude, therefore, that there would be no intensification of use amounting to a material change of use of the appeal site from the use of a second aircraft by the appellants.

Conclusions

17. For the reasons given above and having regard to all other matters raised, I am satisfied, on the evidence now available, that the Council's refusal to grant an LDC in respect of the use of an existing airfield and parachute centre including parachute dropping zone by one additional light aircraft for parachuting was not well-founded and that the appeal should succeed. I shall exercise the powers transferred to me in Section 195(2) of the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991.

FORMAL DECISION

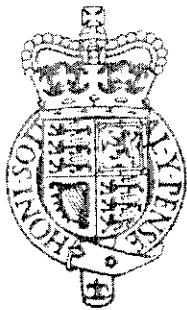
18. In exercise of the powers transferred to me, I allow the appeal and I attach to this decision a Certificate of Lawfulness describing the extent of the proposed use which I consider to be lawful.

Information

19. Particulars of the right of appeal against this decision to the High Court are enclosed for those concerned.

Marti Joyce

INSPECTOR



Lawful Development Certificate

The Planning Inspectorate
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2 The Square
Temple Quay
Bristol BS1 6PN
☎ 0117 372 6372

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT
PROCEDURE) ORDER 1995: ARTICLE 24

IT IS HEREBY CERTIFIED that on 2 April 2003 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and cross-hatched in black on the plan attached to this Certificate, would have been lawful within the meaning of Section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The use of the existing airfield and parachute centre including parachute dropping zone is not limited to a single aircraft by the planning permission Ref: F/96/0888/F, and the proposal does not involve a material change of use of the land.

Martin Joyce

Signed
MARTIN JOYCE DipTP MRTPI
Inspector

Date 10 DEC 2003
Reference: APP/D0515/X/03/1124089

First Schedule

The use of an existing airfield and parachute centre including parachute dropping zone by one additional light aircraft for parachuting.

Second Schedule

Land at Chatteris Airfield, Lower Mount Pleasant Farm, Block Fen Drove, Stonea, March, Cambridgeshire PE15 0EA.

NOTES

1. This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).
2. It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, would

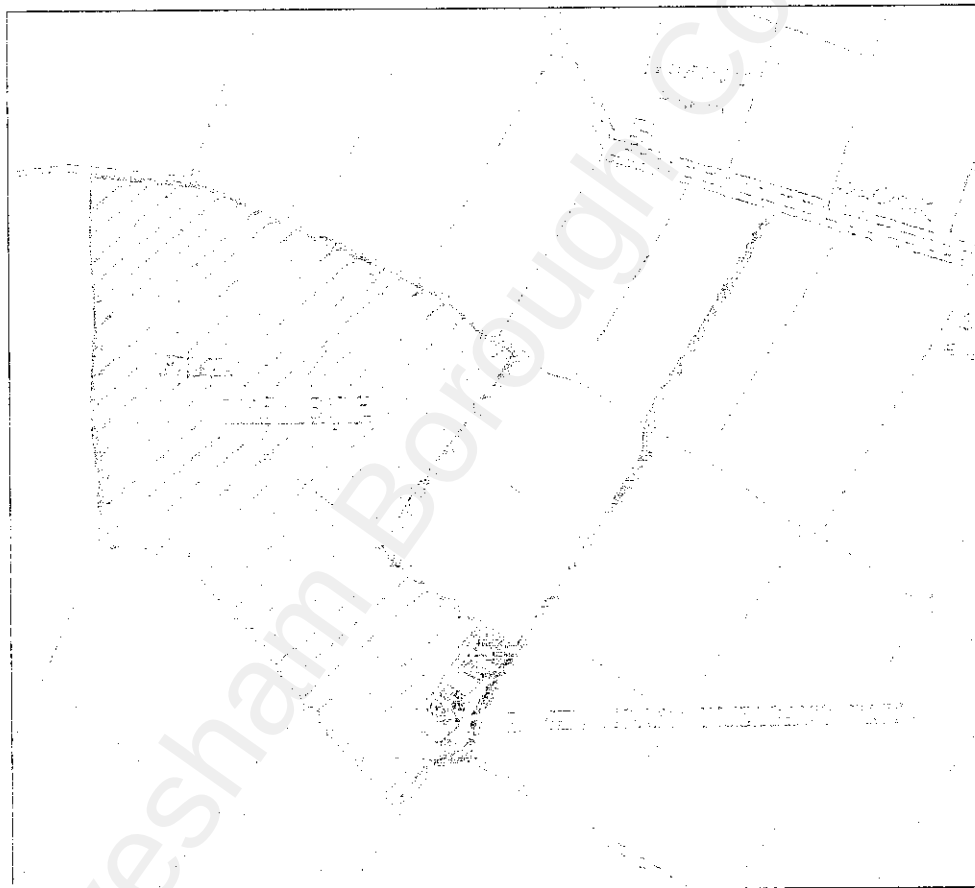
- not have been liable to enforcement action, under Section 172 of the 1990 Act, on that date.
3. This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the Local Planning Authority.
 4. The effect of the certificate is subject to the provisions in Section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness

This is the plan referred to in the Lawful Development
Certificate dated: 10 DEC 2003

by **Martin Joyce** DipTP MRTPI

**Land at Chatteris Airfield, Lower Mount Pleasant
Farm, Block Fen Drive, Stonea, March,
Cambridgeshire PE15 0EA**

Reference: APP/D0515/X/03/1124089





Costs Decision

Site visit made on 11 November 2003

by **Martin Joyce DipTP MRTPI**

an Inspector appointed by the First Secretary of State

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Date

10 DEC 2003

Costs application in relation to Appeal Ref: APP/D0515/X/03/1124089

Chatteris Airfield, Lower Mount Pleasant Farm, Block Fen Drive, Stonea, March, Cambridgeshire PE15 0EA

- The application is made under the Town and Country Planning Act 1990, Sections 195, 196(8) and Schedule 6 and the Local Government Act 1972, Section 250(5).
- The application is made by Chatteris Leisure Ltd for a full award of costs against the Fenland District Council.
- The appeal was against the refusal of the Council to issue a certificate of lawfulness for the use of an existing airfield and parachute centre including parachute dropping zone by one additional light aircraft for parachuting.

Summary of Decision: The application is allowed in the terms set out below in the Formal Decision and Costs Order.

The Submissions for the Appellants

1. The appellants contend that the Council has acted unreasonably in refusing to grant a Certificate of Lawfulness of Use (CLU). In particular, they have failed to have proper regard to reported judicial authority and well-publicised appeal decisions relevant to the proposal, contrary to the advice in paragraph 10 of Annex 1 to Circular 8/93. They have also persisted in this when formulating their statement of case by importing a clause that is not supported by the relevant case law and a recently reported appeal decision at JPL [2003] 494. Moreover, they have wholly ignored the clear advice set out in the Encyclopaedia of Planning Law and Practice (EPL) to which their attention was drawn in pre-application correspondence based on the leading case of *I'm Your Man v Secretary of State for the Environment (SSE)* [1998] TLR 25 September 1998. In addition, in pursuing their "intensification" argument, the Council have ignored both judicial guidance and the views of a leading planning barrister as clearly set out in the August 2000 issue of JPL, a copy of which was sent to the Council on 12 June 2003.
2. It is submitted that the unreasonable conduct of the Council is highlighted by the total absence, in their submissions on the appeal, of reference to case law or any appeal decisions to support their case, other than the reference to *I'm Your Man* which is manifestly misrepresented. This is contrary to the advice in paragraph 8 of Annex 3 to Circular 8/93. Therefore, had the Council directed itself correctly in law, having regard to the advice of its own legal department which, it is understood, recommended the grant of the CLU, this appeal would not have been necessary. A full award of costs should therefore be made in the light of the Council's unreasonable behaviour.

The Response by the Council

3. The Council contends that they have acted reasonably given the information available to officers by way of the nature of the use, relevant guidance and case law. They have been

mindful of the description and content of the relevant planning permission and of the intensification of use which would occur if two aircraft were to operate as opposed to one.

The Further Submissions of the Appellants

4. On the final point of the Council's response, the appellants draw attention to the advice given in paragraph 8.15 of Annex 8 to Circular 10/97, which reminds Local Planning Authorities that the planning merits of the operation, use or activity are not relevant to the consideration of the purely legal issues which are involved in determining an application of this nature. The Council's response to the costs application indicates that they had regard to the planning merits of the proposal contrary to the advice of this Circular. This in itself constitutes unreasonable behaviour.

Conclusions

5. I have considered this application for costs in the light of Circular 8/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.
6. Although the appellants refer to paragraph 10 of Annex 1 to Circular 8/93, it is the advice in the subsequent paragraph (No 11) that is more pertinent to this application for costs. This states, *inter alia*, that a planning authority may be held to have acted unreasonably if they fail to take into account reported judicial authority, or well-publicised appeal decisions relevant to their reason for refusal, or relevant policy statements in Circulars. There is also reference to the need to have regard to relevant judicial authority in paragraph 8 of Annex 3 to the Circular.
7. In this case, I am satisfied that the appellants drew the Council's attention to the judgement in *I'm Your Man* prior to their determination of the application for a CLU. The Council accepts that this judgement is the recognised authority but it has submitted that it was concluded that there are no limitations on a planning permission if the restriction is not controlled by formal condition or contained within the description of the development on the decision notice. Therefore as the development was restricted by that description, their decision on the CLU was justified. This is, however, an erroneous interpretation of that judicial authority, where it was determined that a temporary use of buildings for a period of seven years was, in effect, a permanent permission because no condition had been imposed that required the use to cease after seven years. There is, in my reading of that judgement, no support for the second, and crucial, element that the Council claim. The appeal before me is analogous to that case, as there is no condition that restricts the use of the appeal site as a parachute centre in terms of the number of aircraft that may be used, notwithstanding the description of the use. Therefore the fact that Council rely on an erroneous interpretation of the *I'm Your Man* judgement shows a serious misunderstanding of relevant judicial authority.
8. The Council also refused the application for a CLU for the reason that they considered that the additional use of an aircraft would amount to an intensification of the use of the land. In this aspect of the case they appear not to have considered any relevant judicial authority, notwithstanding the fact that several judgements are germane to this matter, including *Guildford RDC v Fortescue* [1959] 2 QB 112, *Glamorgan County Council v Carter* [1963] 1 WLR 1, *Brooks and Burton v SSE* [1977] 1 WLR 1294 CA, *Kensington and Chelsea*

Roy v London Borough v SSE and Mia Carla Ltd [1981] JPL 50 CA, and *Lilo Blum v SSE and the London Borough of Richmond upon Thames Council* [1987] JPL 278. Whilst this case law may not have been directly drawn to the Council's attention prior to their determination of the CLU application, I consider that the principles surrounding the question of whether a material change of use of land can be occasioned by intensification are so well known that the Council should have been aware of them. It is, therefore, disingenuous of them to seek to claim that the use of an existing airfield by one additional aircraft would result in a material change of use through intensification, and I find no evidence that they addressed the matter correctly in a legal sense by examining whether such additional usage would materially change the character of the land. Moreover, there is some merit in the appellants' argument that the Council considered the planning merits of the use of an additional aircraft in arriving at their decision. The Council's appeal statement contains reference to a contention that the use of an additional aircraft would lead to further complaints of noise and loss of privacy from residents of the surrounding area. I conclude on this aspect of the application that the Council has also shown a serious misunderstanding of relevant judicial authority, and the principles of determining an application for a CLU set out in Circular 10/97, contrary to the guidance given in paragraph 11 of Annex 1 and paragraph 8 of Annex 3 to Circular 8/93.

Conclusions

9. I find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 8/93, has been demonstrated. I therefore conclude that an award of costs is justified.

Formal Decision and Costs Order

10. In exercise of my powers under Section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990, and all other powers enabling me in that behalf, I HEREBY ORDER that the Fenland District Council shall pay to Chatteris Leisure Ltd, the costs of the appeal proceedings, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal under Section 195 of the Town and Country Planning Act 1990 against the refusal of a certificate of lawfulness for the use of an existing airfield and parachute centre including parachute dropping zone by one additional light aircraft.
11. The applicants are now invited to submit to the Fenland District Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Supreme Court Costs Office is enclosed.

Martin Joyce

INSPECTOR