TONBRIDGE & MALLING BOROUGH COUNCIL

AREA 2 PLANNING COMMITTEE

3 February 2010

Report of the Chief Solicitor

Part 1- Public

Matters for Information

1 PLANNING APPEAL DECISIONS

1.1 Site **Walnut Tree Farm, Addington Lane, Trottiscliffe**
Appeal **Against a refusal to grant a certificate of lawful use or development concerning the use of land as a family garden**
Appellant **Mrs Helen Venis**
Decision **Appeal dismissed**
Background papers file: PA/11/09 Contact: Cliff Cochrane 01732 876038

The main parties agreed at the Inquiry that a more appropriate description would be: 'Use of land as a garden ancillary to the residential use of the adjacent dwelling'. The Inspector determined the appeal on this basis.

Reasoning

In seeking a LDC, the burden of proof is on the Appellant to demonstrate on the balance of probabilities that the appeal site was used continuously as a garden ancillary to the residential use of the adjacent dwelling, in breach of planning control, for a period of at least ten years prior to the 'time of the application' to the Council (henceforth referred to as 'the relevant period').

For the Appellants- Main Points

Sworn affidavits were provided by Helen Venis, Eric Venis and Caroline Christie. Evidence was given on oath at the Inquiry by Trevor Venis and a letter of support from a neighbouring resident, Mr Tomlinson, was also produced. Taken together, these are intended to demonstrate that the appeal site, known as the 'second garden', has been used continuously as a garden ancillary to the residential use of the dwelling at Walnut Tree Farm since the Appellant and her husband purchased the property in 1994.

At that time Walnut Tree Farm operated as an agricultural concern, with the farmhouse and land adjacent to it forming a domestic enclave within the farm.

The appeal site was initially seeded with grass but, in 1998, was planted as a fruit and vegetable garden for the use of the family, rather than as a commercial element of the farm enterprise. The soil was found to be poor and, by 2000, the land had reverted to grass and was used as a play area and for other recreational purposes.

The farm business was restructured in 2002 to focus on growing and selling turf, diversifying into landscaping services in 2003. At this point, the second garden was provided with additional hard landscaping and two large hexagonal flowerbeds to showcase the skills on offer. The appeal site is too small to be put to productive agricultural use and, in any event, cannot be ploughed due to the presence of a septic tank.

For the Council - Main Points

An aerial photograph taken in 1999 shows the appeal site to have the appearance of cultivated agricultural or horticultural land rather than a conventional domestic garden. An application was made in 2005 seeking planning permission to construct a farm access through the appeal site, at which time the use of the land was described on the application form as ‘farm’.

A photograph taken on the site in 1994 shows a rough untended field, whereas it is contended in all three affidavits that the land was a garden at around this time. Additionally, the affidavits relate to a larger area than that for which a LDC is now sought. Two of them thus state that the garden activity took place on land to the south throughout the relevant period, whereas Trevor Venis confirms that this was not the case.

The last two points render the sworn evidence given in the affidavits unreliable. Moreover, the land has not displayed throughout the whole of the relevant period a sufficient number of the characteristics that the Council considers typical of a residential garden, such as garden furniture, attractive hardsurfaced areas and discernible boundaries with adjoining agricultural land.

Appraisal

It is common ground between the main parties that, in more recent years, the land in question has been used solely for the purpose for which lawful status is now claimed by the Appellant. The Inspector therefore focussed on the earlier part of the relevant period in determining the appeal. The fact that the Appellant was prepared to sacrifice part of the appeal site to create a farm access in 2005 does not in itself indicate that the land was not used as a garden ancillary to the residential use of the adjacent dwelling at that time. Given that planning permission was then being sought for an agricultural access, the Inspector did not find it surprising that the term ‘farm’ was used in the application, being a legitimate description of the holding in its entirety, irrespective of the precise use to which the

particular land that would accommodate the access was put. He therefore gave little weight to this component of the Council's argument.

Trevor Venis conceded at the Inquiry that the recollections recorded in Ms Christie's affidavit, which suggest that in 1994 the appeal site was tended to and landscaped, may be less than accurate. He also confirmed that the reference in all three affidavits to an area of land larger than the appeal site was an error, but otherwise stood by the sworn statements of Helen and Eric Venis.

His evidence was given on oath and the Inspector had no reason to doubt its reliability and, therefore, that of the statements made by his wife and father (other than with regard to the extent of the land), insofar as they demonstrate a genuine belief that the appeal site was used continuously for the purpose claimed throughout the relevant period. However, he found the interpretation so placed on what might properly be regarded as ancillary to residential use of the adjacent dwelling to be unjustifiably broad.

In this regard, the Appellant asserts that the rough field depicted in the 1994 photograph could be termed a garden. On the evidence before the Inspector, the land appears to have been far from suited to such a purpose at that time. Occasional amenity activity and the planting of a tree would not in themselves have signified garden use and, on the evidence before him, the use of the land at that time seems more likely to have been akin to that of a paddock, merely associated with a dwelling rather than ancillary to it and distinct from the use of the land closer to the house. Although the relevant period does not commence until nearly four years later, this issue is nonetheless indicative of a liberal interpretation of the term 'garden'.

More pertinent is the two year spell during which the appeal site was used to grow fruit and vegetables. The 1999 aerial photograph produced by the Council was taken during this period and shows by far the greater part of the appeal site to have been cultivated for horticultural purposes. He acknowledged that small fruit and vegetable plots often form part and parcel of a domestic garden and he had no reason to think that any form of commercial production took place on this site at that time. However, the intensity of cultivation depicted is such that, in practical terms, the bulk of the land would have functioned to all intents and purposes as a food production area and would not have been able to accommodate other residentially-related uses.

The Inspector considered it likely that the plot would have been perceived by most as an area of horticultural land associated with, but not ancillary to, the residential use of the adjacent dwelling, not dissimilar to an allotment. Crucially, the Council would not have been able to take enforcement action against the use now claimed during that period. Inability to take action disrupts the ten year continuity of unlawful use that the Appellant seeks to demonstrate. Use of the land for

purposes ancillary to the dwelling after horticultural use had ceased would amount to a new breach of planning control within the relevant period.

A third concern arises initially from references in the written evidence of neighbouring residents and Trottiscliffe Parish Council to the keeping of sheep, pigs, chickens and turkeys on the appeal site. Of these objectors, only Mr Mott appeared at the Inquiry to substantiate his views and accepted the explanation given by Trevor Venis that, for the most part, these allegations should apply instead to the field to the south. However, Mr Venis also confirmed that, for part of the relevant period, several ewes and lambs were introduced temporarily onto the appeal site on an annual basis. The use of the land for such a purpose on such a scale cannot be termed genuinely ancillary to residential activity but, rather, is agricultural in nature.

On the Inspector's assessment, the keeping of animals on the appeal site as described at the Inquiry was not so limited in duration, frequency or scale as to be de minimis. The Council would not therefore have been able to take enforcement action against the use now claimed when the site was being put to this purpose. Notwithstanding comments made by Mr Venis in closing, the Inspector was not aware of any exemption in planning law to the effect that lambing does not disrupt continuity for the purposes of establishing a lawful use. He found the occasional grazing of sheep on the land, for whatever purpose, to suggest a blurring of the distinction between farm and dwelling which, whilst not surprising in such circumstances, is relevant to his decision.

Moreover, the fact that sheep were allowed on the site in such numbers raises questions regarding the degree to which it was otherwise used for residentially related purposes at that time. A garden tended for purposes genuinely ancillary to the residential use of a dwelling would not normally be regarded as suitable for most farm animals by reason of the damage they would be likely to cause. Land that would not be damaged by the presence of sheep would generally be more akin to a paddock, lacking most of the characteristics of a domestic garden and thus limited in terms of its amenity value. Occasional recreational use of such land is not enough to convey ancillary residential status.

The Inspector noted that, on Trevor Venis' evidence, the site has been segregated from adjoining agricultural areas and mown regularly throughout the relevant period. However, this in itself does not make it a garden. Unsuitability of the land for productive agricultural cultivation does not necessarily mean that it has always been used instead for purposes genuinely ancillary to the residential component of the farm. On the Appellant's own evidence, conventional garden features such as the hexagonal flowerbeds and some of the paving and steps were only introduced in 2003.

The fact that Mr Tomlinson did not provide a sworn affidavit or appear at the Inquiry tempers the weight that the Inspector could give to his evidence. In any

event, he states only that he does not recall the land being used for agricultural purposes, rather than confirming that it was a garden ancillary to residential use throughout his time in the neighbouring dwelling. Moreover, although previously resident elsewhere in the village, he took up residence next door after the commencement of the relevant period. His letter was therefore of limited assistance to the inspector.

Other matters

The Appellant provides a reason for the similarity of the appearance in aerial photographs, apparently held by the Council, of the appeal site and adjacent land to the south. The inspector had no reason to doubt that the latter was used for turf production, that the former was seeded with grass or that both were mown at the same time. However, as such an argument has not been pursued by the Council and the photographs in question have not been submitted, the issue has not informed his decision. Comments regarding possible reasons for complaints being made to the Council and the timing thereof are also of limited relevance. Such considerations are not necessarily indicative of when a use of land actually commenced.

Summary

As set out in Annex 8 of Circular 10/97: Enforcing Planning Control: Legislative Provisions and Procedural Requirements, the onus is firmly on the Appellant to demonstrate her case on the balance of probabilities. However, the Inspector found her interpretation of what might constitute the use of land as a garden ancillary to the residential use of an adjacent dwelling to stray beyond reasonable parameters.

Consequently, at certain times between 1998 and 2008, it is likely that the Council would not have been able to take enforcement action against the use for which lawful status is now claimed. It has not therefore been demonstrated with sufficient precision and lack of ambiguity that, on the balance of probabilities, the use in question took place continuously throughout the relevant period.

Conclusion

For the reasons given above and having regard to all matters raised, the Inspector concluded that the Council's refusal to grant a LDC was well-founded and that the appeal should fail.

1.2 Site **Land south east of Hazeldene, Woodfold, Old Lane, Ightham**
Appeal **Against an enforcement notice alleging a breach of planning control namely, without planning permission the construction of a red brick hard surface which is a development within its own right and being in contravention of the approved hard surface as required by condition 4 of planning permission TM/07/01234/FL and approved as hard core with porous surface under planning reference TM/08/03163**
Appellant **Mr J Moore**
Decision **Appeal allowed, enforcement notice quashed and planning permission granted, subject to a condition.**
Background papers file PA/23/09 Contact: Cliff Cochrane 01732 876038

Appeal on ground (c)

In July 2008 planning permission was granted on appeal for a change of use for stationing of two caravans for residential use with associated hardstanding, fencing and sheds for occupation by a single gypsy family. The permission is personal and limited to three years. The recently constructed hard surface covers the access drive and the main yard, extending along the track into the smaller top yard. A concrete base remains in the far corner of the top yard. The Inspector considered the main issue to be whether the laying of this red brick hard surface amounts to development requiring planning permission.

The meaning of development is set out in section 55(1) of the 1990 Act as amended and it includes 'the carrying out of building, engineering, mining or other operations in, on, over or under land'. Engineering operations includes the formation or laying out of means of access to highways (s.336). Within the curtilage of a dwellinghouse the provision of a hard surface and its replacement in whole or in part is permitted development.

The appellant has explained block paving was laid on top of the already existing hardstanding, which consisted of a gravel layer over compacted hardcore. The extent of hardstanding was not increased. A 2cm layer of sand was laid over the gravel, smoothed and topped with the red brick paving. Sand was then brushed into the gaps to help bind the blocks. The Inspector had no reason to question this description because it is consistent with what she saw on her visit and it has not been disputed by the local planning authority. Kerb stones were also used to edge the access track and yard areas, although the enforcement notice makes no reference to them. The work was done by the appellant and members of his family, who as members of the gypsy community are likely to have skills in such work. According to residents the work took a few days and involved the use of mechanical diggers.

The inspector considered that a new hard surface has been constructed with new materials even though the previous hardstanding forms the base course. The work would have required some pre-planning, such as assessing the quantity of materials required and arranging their delivery, thinking about details of the paving, how it would fit with the lighting, where the drainage channel should be placed and so on. Whilst not a complex job, some skill and experience would have been required, particularly given the slope of the land. The area involved is significant and the paving is meant to last for the duration of the temporary permission. As a matter of fact and degree the Inspector concluded that the work falls within the meaning of development as an engineering operation.

This development on a residential gypsy caravan site does not benefit from the permitted development rights that apply to the curtilage of a dwelling house or to agricultural units, as set out in Schedule 2, Parts 1 and 6 of the GPDO. The Inspector also considered that the operation, which extends into two yards, does not as a matter of fact and degree fall within the scope of Part 9 of the GPDO, repairs to unadopted streets and private ways. Therefore the red brick hard surface requires planning permission.

The Inspector considered whether permission was obtained in November 2008 when the local planning authority approved a site development scheme (ref. TM/08/03163/RD). The scheme was in compliance with Condition 4 attached to the permission for the caravan site and which required details of foul and surface water drainage, site layout, external lighting and existing trees and hedges. The approved scheme confirmed that the surface water drainage would remain as existing, retaining the hard core with a porous surface in the yard area and allowing surface run off to the surrounding grass and planted areas. The extent of hardstanding was shown on the site layout plan. There were no details of and nothing to suggest that a new hard surface would be provided and therefore no permission for such work was granted. She concluded a breach of planning control has taken place and the appeal on ground (c) does not succeed.

Policy considerations and main issue

The site is in the countryside to the west of Ightham village within the Metropolitan Green Belt. General policies controlling development in the countryside apply with equal force in the Green Belt but in addition there is a presumption against inappropriate development. Planning Policy Guidance Note 2 (PPG2) identifies the relevant test for engineering and other operations. As the Inspector had explained, the red brick paving has not increased the extent of the hard surfacing within the permitted residential caravan site. The small scale development has maintained openness and does not conflict with purposes of including land within the Green Belt. Accordingly it is not inappropriate development and it does not have to be justified by very special circumstances. The Council did not attempt to argue differently and on behalf of local residents it was concluded that the breach of planning control ‘was not strictly inappropriate development’.

Policy CP24 of the Council's Core Strategy requires all development to be well designed and of high quality in terms of detailing and use of appropriate materials. The Inspector's attention was also been drawn to the location of the site within the Ightham Common/Ivy Hatch Area of Special Character, where Policy P4/8 of the Tonbridge and Malling Borough Local Plan requires any development to be designed and located so as to minimise or reduce its impact on the woodland setting. The use of the land as a gypsy caravan site is for a limited period until 17 July 2011 under the terms of the current planning permission. Within this context the Inspector considered the main issue is whether in this instance the red brick paving is a suitable form of surface material, taking account of its effect on the character and appearance of the site and its countryside setting, site drainage and accepted standards for family living.

Suitability of the red brick hard surface

The site is located on sloping ground in a valley characterised by paddocks, woodland and low density residential development. A range of surface materials are to be seen at properties in the locality, including tarmac, block paving, gravel, compacted earth and concrete. Access to the site is via Old Lane, a narrow sunken lane bounded by hedgerows. It has a poor quality surface and is unsuitable for motor vehicles particularly south of the site.

From the gateway at the entrance, the hard surfaced access runs through the centre of the site. It leads into the yard on the lower ground, where there is the caravan, and it also extends into the top yard, used for dog kennels, keeping a horse trailer and such like. The rest of the land comprises paddocks and areas of grass. The mature woodland and hedgerow boundaries have been retained and additional tree and hedge planting has been carried out, especially within the paddocks, along the access and on the northern boundary. The caravan site is in a secluded position and is well screened by vegetation, even when the Inspector visited at the beginning of December. Much has been made in representations of the visibility of the hard surface from public vantage points.

The Inspector found that when approaching along Old Lane, whether from the north or south, views of the hard surface are restricted by a combination of the vegetation, fencing and landform. Consequently the surface was only noticeable when by the field gate at the entrance to the site. Even then it was the access track up the slope that was visible, rather than the surfaced yards. The paving, which has not extended the amount of hardstanding on the site, has no significant effect on the rural, woodland character of the surrounding area. It has no adverse effect on the outlook from Thorpe Lodge, the property to the east.

The previous hard surface has been described as hard core, a grade 1 road stone embedded into the ground, providing a loose, stone grey, coloured surface. The brick paving is likely to be a better quality surface material, hard wearing and with a smoother and more even surface. It has the advantage of reducing dirt and

stones that would be carried into the mobile home and it provides a suitable surface for the children to play on immediately outside the home. The paving has already taken on a weathered appearance, enabling it to blend in better with the surrounding soft landscaping. It meets the standards identified by the Good Practice Guide for designing gypsy and traveller sites.

The appellant has explained that the site drains naturally down towards Old Lane. The intention is that surface water percolates down the gaps between the paving blocks, through the sand and into the hardcore base below. A drainage channel has been installed at the gateway entrance to intercept any water and prevent any discharge onto the lane. The Inspector accepted that block paving can be a hard permeable and porous surface, if constructed correctly. On the site visit, which was after a period of heavy rain, it appeared that surface water drains freely into the ground and no water was discharging onto the lane. In contrast, surface water was running down the lane from higher ground outside the site. She concluded there are no objections to the material in relation to disposal of surface water.

The Inspector also considered that the material is suitable even though the caravan site has a temporary permission. As demonstrated on the site visit, the blocks are easy to lift and remove and are not a permanent form of infrastructure. A planning condition could reasonably require their removal to ensure consistency with the time limited permission for the gypsy site.

Conclusion

The red brick paving is a suitable form of surface material within this residential caravan site. The development complies with Policy CP24 of the Core Strategy and Policy P4/8 of the Local Plan.

For the reasons given above the appeal succeeds on ground (a) and planning permission will be granted. The appeal on ground (g) does not therefore need to be considered.

Decision

The appeal was allowed and the enforcement notice quashed. Planning was granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the construction of a red brick hard surface on land at Woodfold, Old Lane, Ightham, Sevenoaks TN15 9AH referred to in the notice, subject to the following condition:

1) The red brick hard surface hereby permitted shall be removed within the three months following 17 July 2011 or within three months of Mr J Moore and Miss E Barton and their resident dependants ceasing to occupy the site, whichever shall first occur.

1.3	Site	**Land adjoining 2 Keepers Cottage, Swanton Road, Hurst Wood, Platt**
	Appeal	**Against (1) an enforcement notice issued by the Council alleging a breach of planning control, namely without planning permission the erection and use of a building for the purposes of a single family dwelling house and (2) against the refusal of permission for a triple carport with annexe, residential accommodation above.**
	Appellant	**Mr Ian Williams**
	Decision	**(1) Enforcement notice upheld, subject to variation and (2) appeal dismissed**

Background papers file: PA/22/09 Contact: Cliff Cochrane 01732 876038

Main Issues

The appeal site lies within the Metropolitan Green Belt, for which PPG2, in its revised form, has provided firm and consistent guidance since 1995. Therefore, the Inspector considered the first issue to be whether the use of this building for residential purposes constitutes inappropriate development for the purposes of PPG2 and development plan policy. Following on from this, secondly he considered that if the development is inappropriate, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development.

The Appeal against the Enforcement Notice on Ground (a) and the Section 78 Appeal –

Reasons

Whether inappropriate development in Metropolitan Green Belt

The effect of the actions of the local planning authority in issuing an enforcement notice alleging erection and use of a building for the purposes of a single family dwelling house without planning permission, but requiring only the cessation of the residential use, is that a building has been granted planning permission within the curtilage of the dwelling house at 2 Keepers Cottage, but it enjoys no specified authorised use. Under the provisions of section 55(2)(d) of the Town and Country Planning Act 1990, the use of any building within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such shall not be taken, for the purposes of the Act, to involve development of the land. From what the Inspector saw from his inspection of the site, most of the ground floor was in use for a garage by the appellant for the parking of his vehicles and as a workshop for his hobby purposes. These activities clearly fall within the purview of section 55(2)(d).

In contrast, part of ground floor and the entire upper floor of the building are occupied by accommodation that clearly gives the overall appearance of being a self-contained residential unit. There is a fully-equipped modern kitchen with a breakfast area off and a bathroom, containing a shower, WC and wash hand basin, at ground floor level, while at first-floor level are two bedrooms off a large living area. The living space may be occupied by close family relatives (the appellant's son, his partner and their daughter), but, in the Inspector's professional judgement, they inhabit this residential accommodation as a separate household. This use, therefore, has to be looked upon as an activity in its own right within the Metropolitan Green Belt that does not enjoy the benefit of planning permission.

The Inspector was satisfied that the use of this floorspace for residential accommodation, not incidental to the enjoyment of 2 Keepers Cottage, constitutes the making of a material change in the use of the land, the unauthorised building being a new structure in its own right, not an existing vacant building. According to paragraph 3.12 of PPG2, the making of material changes in the use of land are inappropriate development unless they maintain openness and do not conflict with the purposes of including the land in the Green Belt. By using this building for occupation by a separate household, Green Belt openness is harmed by the bringing of additional vehicles onto the site, by the generation of traffic on the approaches to the land in an isolated rural location and by the multiplicity of domestic artefacts and general paraphernalia in the surroundings of 2 Keepers Cottage. Therefore, the use of this building as residential development, which is not incidental to the enjoyment of the dwellinghouse at 2 Keepers Cottage, constitutes inappropriate development in this part of the Metropolitan Green Belt.

Very special circumstances

Paragraph 3.2 of PPG2 says that inappropriate development is, by definition, harmful to the Green Belt. It is for the appellant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. The only circumstances that are argued in favour of the appellant for permitting this residential use are his history of chronic poor health that are said to require his son, in particular, to live close by. Mrs Williams, who is in reasonable health, cannot drive, so that her son's presence, and that of the rest of his household, is said to be necessary to make provision for the appellant and his family by bringing in food shopping when the appellant is unwell, in addition to taking him to surgeries or hospitals for treatment, whether routine or emergency, when he feels unfit to drive.

The Inspector considered very carefully whether these might amount to very special circumstances that could be considered sufficient to justify a permission that would be personal to Mr Williams in the form suggested by the local planning authority in their representations dated 22 December 2009, by allowing the appellant's son and family to occupy the appeal building so long as Mr Williams

lives at 2 Keepers Cottage. On balance, he found, even if this condition were imposed, that the circumstances of Mr Williams's case are not so exceptional that they can be considered to outweigh the harm to green belt openness identified in paragraph 8 above. Firstly, it seemed to him that, although 2 Keepers Cottage is isolated at the end of an unmade track, it is not so remote from towns and villages that his son and family could not carry out the duties imposed upon them during the periods of the appellant's ill health by living in one of the significant number of settlements close by. Secondly, he considered that, from the amount of accommodation incorporated into 2 Keepers Cottage itself, there is sufficient living space to house a carer there full-time, whether a family member or otherwise, should the need arise. For these reasons, he was satisfied that there are no special circumstances that justify the use of this building for residential purposes that are not incidental to the use of the dwellinghouse at 2 Keepers Cottage as such. Therefore, the appeal against the enforcement notice on ground (a) and the section 78 appeal failed and planning permission was not granted on the deemed application.

The Appeal on Ground (f)

The requirements of an enforcement notice cannot insist that a building be put to a particular use; the most it can require is that the matters alleged in the notice are removed and/or the unauthorised activities cease. In this instance, the notice requires cessation as a single family dwellinghouse, so the only other requirements the notice can insist upon are the minimum steps necessary to prevent the continued use of this accommodation as a separate unit of residential accommodation. In the Inspector's judgement, these amount to the removal of the kitchen and its fittings, which duplicate similar facilities in the main house, and the removal of beds and similar items of furniture, which would reduce the likelihood of the building being occupied residentially overnight.

This can be achieved by deleting reference in the requirements of the notice to using the building for purposes ancillary to the use of the dwellinghouse known as 2 Keepers Cottages, which is not development in any event for the reasons set out in paragraph 6, but inserting in its place lesser steps that bring about the removal of the kitchen and beds. Therefore, the Inspector varied the enforcement notice in line with these amended requirements and, to that limited extent, the appeal on ground (f) succeeds.

Ian Henderson
Chief Solicitor