R. (Freedman) v Wiltshire Council [2014] EWHC 211 Admin

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Under s. 191(4) TCPA a local planning authority can substitute a lawful use of another description for that claimed in the application form, if the evidence before it supports that course. Whether the LPA had lawfully done so was decided in this case.

1. This case is of interest to planning lawyers for four main reasons:

    1.1 It confirms existing authority (*Panton v. SSETR* (1999) 78 P. & C.R. 186) that, when considering an application for a certificate of lawful use (CLU) under s. 191 TCPA 1990, the decision maker (here an officer of the council) can substitute for the description of the use in the application another existing lawful use, provided it is satisfied that the use set out in the substituted description had been carried on for 10 years.

    1.2 However, the officer had not considered, as he should have done, whether the substituted use had continued for 10 years and had, impermissibly, aggregated with the substituted use periods of the claimed use. Hence there was not a 10 year period of use for the substituted use. The decision was therefore quashed.

    1.3 The decision also establishes that a claimed use for vehicular parking ancillary to a principal use (B1 office, in this case) is materially different from vehicular parking generally. That is, perhaps, unsurprising because an ancillary use is dependent on, and normally does not survive, the principal use.

    1.4. The decision leaves undecided (on the facts of the case it was not necessary to deal with the issue) what procedural steps the authority should take if it thinks it should substitute a different use description for the one claimed. If there are objectors, it would seem appropriate to notify them and give them, as well as the applicant, a chance to deal with the issue. Otherwise, the decision might be procedurally unfair.

2. The Council had received an application for, inter alia, a B1 office use with *ancillary* parking. The evidence did not support any wider parking use. The application was heavily objected to and the officer decided to refuse the B1 use. However, he then granted a CLU for vehicular use generally; i.e., a use which would have allowed parking by the general public and not simply parking ancillary to the B1 use.

3. The judge found that s. 191(4) allowed the authority to modify or substitute the description given so that the use correctly reflected the existing lawful use. It was not limited to simply rephrasing the description of the use as set out in the application. If there was evidence to support the substituted use, the officer could lawfully substitute that use.

4. However, there was no such evidence. What the officer had apparently done (he helpfully gave detailed reasons for his decision) was to aggregate periods of *ancillary* vehicle parking with periods of parking generally. He considered that as long as there was parking of some description over the 10 year period a CLU could be granted for vehicular parking generally. That was incorrect because the two sorts of parking are materially different.

5. There was no suggestion of procedural unfairness, largely because the officer had allowed, and then considered, very detailed submissions on the facts from all concerned.

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