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Sykes v Secretary of State for the Environment and another South Oxfordshire District Council v Secretary of State for the Environment and others

QUEEN'S BENCH DIVISIONAL COURT

December 15 1980

(Before Lord Justice DONALDSON and Mr Justice KILNER BROWN)

Estates Gazette February 28 1981(1980) 257 EG 821

Town and Country Planning Act 1971 — Appeals against decisions of Secretary of State raising points of general interest as to the need for planning permission where land is used in connection with horses — Planning authorities said to be concerned about proliferation of uses of small areas of land for schooling horses, teaching young riders, practising for gymkhanas and other recreational activities connected with horses — Judgments seek to clarify position — Although the use of land as grazing land, being a use for "*agriculture*"*, is not subject to planning control, even if the use is for the grazing of* "*non-agricultural horses*" *(ie horses used for recreation), it is necessary to define what is meant by such use — The use must be for the purpose of grazing — Grazing must be the predominant or substantial use — Incidental grazing by horses fed otherwise would not be enough — Common sense rather than reference to legal precedents should be the guide for inspectors and planning officers — In the main appeal the finding of fact that the land was used for grazing could not be attacked — Point raised in other appeal as to need for clarity and precision in enforcement notice — Appellant was admittedly using land only for exercising ponies, not for grazing, but notice required him to desist from using the land as* "*a paddock*" *— Notice ambiguous — Strictly speaking, the concept of a paddock is merely that of an enclosure, not a use — In any case, interpreted as a use it could have meant use for grazing, which was not a breach of planning control, just as easily as use for the keeping of ponies — Planning authority's appeal on the grazing point dismissed — Landowner's appeal on enforcement notice point allowed*

The first-named appeal was by David John Sykes against the Secretary of State and the South Oxfordshire District Council as respondents, the issue being the validity of an enforcement notice served by the second respondents. In the second-named appeal the South Oxfordshire District Council as appellants challenged a decision of the Secretary of State that, in view of a finding of fact that land was used for grazing of horses, there was no breach of planning control. It was argued on behalf of the planning authority that the grazing did not escape planning control unless the horses were themselves used for agricultural purposes. The respondents to this appeal were the Secretary of State and Timothy B Underwood, Elizabeth Underwood and Peter Brian Lance.

D E W Turriff (instructed by Bircham & Co) appeared on behalf of David John Sykes in the first-named appeal and on behalf of Timothy B Underwood and Elizabeth Underwood, respondents

in the second-named appeal; Simon Brown (instructed by the Treasury Solicitor) represented the Secretary of State in both appeals; D N R Latham (instructed by Sherwood & Co, agents for J B Chirnside, chief executive and solicitor, South Oxfordshire District Council) represented the council in both appeals.

Giving judgment, **DONALDSON LJ** said: Today we have been concerned with two appeals against decisions of the Secretary of State in his planning jurisdiction. Both appeals have something in common in that they raise the question of whether and to what

extent it is necessary to have planning permission if you are using land in connection with horses which are themselves kept for recreational purposes.

Both cases arise in South Oxfordshire. The exact details of the appeal sites are irrelevant for present purposes. In the case of Mr and Mrs Underwood they kept three racehorses, two point-to-point horses, a driving pony, two family ponies and one retired mare which had been badly injured, all on the 2 1/2 acres of land concerned. In the case of Mr Sykes, he kept two show ponies on his rather smaller piece of land.

The Underwoods were successful in their appeal to the Secretary of State, who took the view that what they were doing, as found by the inspector, did not constitute a breach of planning control. In the case of Mr Sykes, he reached the opposite conclusion. In the case of the Underwoods the South Oxfordshire District Council appeals and in the other case Mr Sykes is the appellant.

Let me put Mr Sykes' appeal on one side for the moment because he is only concerned with the second of the two points which arise in the Underwood appeal. He cannot contend in his case that what he was doing was a permitted development because it has been found that he was not using the land for grazing purposes in any way at all. He was using it merely for exercising the ponies. He has, however, a point on the form of the notice to which I will return.

In Mr and Mrs Underwood's case, as I say, the Secretary of State took the view that no planning permission was needed because there was no breach of planning control in the use which they were making of their land, and it is that point which I think has to be examined and it is that point which is of general interest, as I understand it, to the Secretary of State and to planning officers throughout the country.

The matter starts with section 22(2)(e) of the Town and Country Planning Act 1971, which provides:

> The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say— … (e) the use of any land for the purposes of agriculture …

I think I can omit the rest of the words as being immaterial for present purposes.

“Agriculture” is defined, somewhat indigestibly, in section 290(1) of the Act as follows:

> "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.

The Secretary of State in his decision letter [Ref APP/5355/C/77/5117 dated May 15 1980] dealt with Mr Underwood's appeal in the following terms. He said:

> In regard to ground (b) of the appeal against Notice A, it was argued on behalf of your clients, citing the judgment of the Court in *Rutherford v Maurer* [1962] 1 QB 16 and *McClinton v McFall* (1974) 232 EG 707, that the use of the appeal site for the grazing of horses was an agricultural use and, as such, did not amount to development within the meaning of the 1971 Act. The inspector found as facts, which are accepted, that Mr Underwood, purchased the appeal site in 1975 and, since then, it has been used for grazing his horses as an alternative to their accommodation in the stable buildings at "The Well House". There was no evidence to show that the site had been used for any other purpose in connection with these horses.

The Secretary of State's decision letter continued:

> The inspector concluded: "Site A is a well defined field. Although now open to the extreme rear part of the land purchased as the property 'The Well House', that area is not embraced by Notice A and is physically separated from the land containing the buildings concerned in Notice B. Site A should therefore be considered as an isolated planning unit.
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> "The judgment given in *Belmont Farm Ltd v Minister of Housing and Local Government* (1962) 13 P & CR 417 was concerned with land and buildings which as a whole were used as a stud farm, a situation not pertaining at Site A.
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> "The other two cases cited by the appellant's advocate, *McClinton v McFall* and *Rutherford v Maurer*, although not concerned with planning law, were concerned with circumstances very similar to those of Notice A. In both cases the courts appeared to have had no doubt that the grazing of land by horses, whatever the purposes of those horses, came within a definition of agriculture similar to that given in section 290 of the 1971 Act.
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> "Following those last two judgments rather than that given in *Belmont Farm Ltd v Minister of Housing and Local Government*, as Site A has only been used for the grazing of horses, which can aptly be described as use for the purpose of a horse-paddock and which comes within the definition of agriculture, no development requiring planning permission has occurred by reason of section 22(2)(e) of the 1971 Act, and the appeal succeeds on ground 88(1)(b)."

The Secretary of State continued:

> These conclusions have been considered. The inspector's view that Site A is a separate planning unit is accepted, subject to the qualification that that unit is seen as including parts of “The Well House” land to the north of the fence, behind the stables. Though occupied with the remainder of “The Well House” land — comprising the house and its curtilage, including the stables — Site A, together with that northern part of “The Well House” land is seen as being a separate planning unit, as a physically distinct area which has a separate use; namely for grazing horses. Following the inspector's view of the matter, it is further considered that, as a “use of land as grazing land”, this use is within the definition of “agriculture” in section 290(1) of the 1971 Act and that, by virtue of section 22(2)(e) of that Act, it is consequently a use which is not to be taken as involving the development of land. From this it follows that the introduction of that use did not constitute a breach of planning control, and the appeal succeeds on ground (b).

Mr Latham for the South Oxfordshire District Council submits that this is wrong and that, properly construed, section 22(2)(e) does not permit the use of land for the grazing of horses unless those horses are themselves being used for agricultural purposes. If you have, for instance, a carthorse, you could graze that on the land assuming that the carthorse would be used for agricultural purposes, although one can of course use carthorses for other purposes. On the other hand, horses which are used purely for recreational purposes are not, he submits, within the definition. If you read the definition literally that clearly is not correct. But Mr Latham relies heavily upon the decision of this court in *Belmont Farm Ltd v Minister of Housing and Local Government* (1962) 13 P & CR 417.

In that case this court was concerned with a different limb of the definition, namely, the words “keeping of livestock” with its parenthetical qualification relating to creatures kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land. This court held that, taking account of that parenthesis, the words “keeping of livestock” had to be restrictively construed and did not cover the keeping of horses for purposes other than agricultural purposes. In Mr Latham's submission, the same approach should be adopted in relation to the words “use of land as grazing land”.

For my part, I see no reason why the words should be construed restrictively in that way. There are no qualifying words such as exist in relation to the words “keeping of livestock”. There are no such qualifying words as exist at the end of the definition in relation to the use of land or woodlands. It is thus quite clear that, if Parliament had intended to qualify the apparent width of the words “use of land as grazing land”, it could have done so, and I see absolutely no reason why we should imply any such limitation.

The whole of the decision in the *Belmont Farm* case, as appears from the judgment of Lord Parker CJ, turned upon the qualifying words and what was to be implied from them. There is nothing, as I see it, in that judgment which would have any application to the words with which we are concerned. Accordingly I would give them their natural meaning. As it seems to me, faced with the inspector's conclusion of fact that this land — the Underwoods' land — was used for the grazing of horses, the Secretary of State's decision was wholly correct.

The form of the notice of appeal does not permit Mr Latham to attack the findings of fact, and indeed he might have had some difficulties in view of the semi-sacrosanct nature of findings of fact in this field. But it is, I think, fair to say that the Underwoods may perhaps have been fortunate in their findings of fact in this case because it is not, as I see it, every grazing of land by horses which

enables an owner of land to say that he does not need planning

permission. Section 22(2)(e) says in terms that what is permitted is the use of the land, and I substitute the relevant part of the definition, for the purposes of using that land as grazing land. The concept of there being more than one cause or more than one purpose is well known to the law.

What an inspector in these circumstances has to decide is: what was *the* purpose — and I stress the word “the” — for which the land is being used? If horses are simply turned out on to the land with a view to feeding them from the land, clearly the land is being used for grazing. But if horses are being kept on the land and are being fed wholly or primarily by other means so that such grazing as they do is completely incidental and perhaps achieved merely because there are no convenient ways of stopping them doing it, then plainly the land is not being used for grazing but merely being used for keeping the animals. On the other hand, of course, if the animals are put on to a field with a view to their grazing and are kept there for 24 hours a day, seven days a week over a period, it would not, I would have thought, be possible to say that as they were being kept there, they were not being grazed. It is quite possible for horses to be both grazed and kept in the same place.

The predominant question here is: what use was being made of the land? Was it for the purpose of grazing? I do not find any particular difficulty in deciding what is a predominant use. To take an example which I mentioned in argument, if somebody goes to a restaurant and smokes after the meal they do not go to the restaurant in order to smoke; they go for the meal. There is no difficulty about that. I cannot see any difficulty in most cases in recognising whether the land is being used for grazing or for the keeping of non-agricultural horses. It is only if it is being used for the purpose of grazing that no planning permission is required.

Let me now turn to the second problem, which arises out of the fact that in the case of the Underwoods' enforcement notice they were required to desist from using the land as “a horse paddock”, and in the case of Mr Sykes' enforcement notice he was required to desist from using the land as “a paddock”. It is unnecessary to say anything about the Underwoods' case since, as I have already said, I would support the Secretary of State's decision in allowing the appeal. Therefore that notice is dead. But as far as the Sykes' notice is concerned, it is crucial because this is the only ground upon which he can have the Secretary of State's decision set aside.

For my part, I think that he is entitled to have it set aside. I say that for this reason. Section 87(6) of the Act provides:

> An enforcement notice shall specify — (a) the matters alleged to constitute a breach of planning control; (b) the steps required by the authority to be taken in order to remedy the breach …

It follows from that, and indeed there is ample authority to support the proposition, that there must be a clear indication to the addressee of the notice as to what it is that he is doing wrong and what he must do in order to stop doing it. Both those propositions call for some clarity of expression on the part of those who prepare the enforcement notice. To require somebody to stop using land as a paddock seems to me to be wholly lacking in any clarity whatever. It is open, to start with, to the comment that you do not use land as a paddock; it either is or is not a paddock. A paddock is not a concept of use at all; it is a concept perhaps of enclosure. But Mr Brown says that in this context it must mean “for the keeping of horses”. It seemed to me that it could equally well mean “for the

grazing of horses", which is not a breach of planning control at all. It is a thoroughly unsatisfactory term, and as it is ambiguous as well as being unsatisfactory I think that the section is not complied with. In the case of Mr Sykes' appeal, too, I would allow the appeal and remit the matter to the Secretary of State for further consideration.

Agreeing, **KILNER BROWN J** said: With regard to the question of principle which this court was asked to consider, it seems to me that in this situation, as we are told and it may well be so, there is growing anxiety felt by a number of local authorities as to the proliferation of small areas of land used for the purpose either of keeping horses for recreational purposes or alternatively for using them for schooling or for teaching young riders, particularly in the more difficult art of show jumping and performing in gymkhanas. But in the end it is always a question of common sense. I would have thought that planning officers in the first place should apply the sort of test which my Lord has indicated and to see really what is the land used for, and, as Mr Brown for the Secretary of State rightly said, you look to see what is its substantial use. It is easy enough to detect the situation where a piece of land — a paddock, a small meadow, call it what you like — is simply used for the purpose of schooling horses or training young riders. The amount of grazing which occurs on that land is merely incidental while each horse and rider is waiting his or her turn to be trained. On the other hand, there may be, as the inspector found in the case of the Underwoods, normally speaking a degree of actual and substantial grazing which was carried out.

Again I would deprecate the use of reference to authorities such as those which were cited before the inspector. In view of the judgment given by my Lord, I would hope that henceforth inspectors and planning officers would be able to approach the growing problem using their common sense, assessing each situation upon the facts as they appear to be. Having said that, I agree with the judgment of my Lord.

The appeal by Mr Sykes was allowed with costs against the district council. The appeal by the district council against the Secretary of State and others was dismissed with costs.