

Case Name: *Hunter v Secretary of State for Levelling Up, Housing & Communities & Anor* [2023] EWHC 1068 (Admin) (05 May 2023)

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Commentary:

This was a s.288 challenge to the decision of an inspector to dismiss a s.78 planning appeal for change of use of some agricultural land at Hillhead Farm (the "Land") to allow the siting of a temporary dwelling. The Land was farmed by the Claimant with a herd of over 60 breeding cows and the Claimant proposed to increase the size of his herd to over 100 cows within a three year period. His application stipulated that the dwelling was intended to house a rural worker – namely the Claimant himself and his family – and permission was sought for a temporary period of 3 years.

Of particular importance in policy terms to the planning application/s.78 appeal was Buckinghamshire Local Plan Policy H3 which stated as follows:

"Financial test for rural workers' dwellings

5.22 Occupational accommodation cannot be justified on agricultural, forestry or business grounds unless the business enterprise is economically viable. A financial test is necessary to establish whether this is the case for both temporary and permanent dwellings. New temporary dwellings will only be justified if the new enterprise is realistically expected to be profitable within a determined period. To justify a new permanent dwelling as sustainable development, the rural business enterprise must be well established. Applying the financial test can also help to establish the size and design of the dwelling which the farming, forestry or rural business unit can sustain"

In dismissing the s.78 appeal, the inspector had held that Policy H3 required the future economic viability of the enterprise to be demonstrated by a sound business plan and the Claimant's business plan was not sound for a number of reasons – including the fact that the projections for labour costs (£3,000) did not equate to what was stated in the planning statement (that the work on the Land would be carried out by a full time worker) and the enterprise would not be viable when the adjustment for the cost of the dwelling was factored in.

The Claimant challenged the inspector's decision under s.288 TCPA 1990. The Claimant presented his own case. The elements of the Claimant's complaint were as follows:

- a) His evidence to the Inspector demonstrated that his business plan turned a healthy profit in Year 3 and hence was viable;
- b) The Inspector was wrong in his conclusions about the required ratio of farm workers to herd size, and he was wrong to conclude that the size to which the herd was expected to grow in Year 3 would be unmanageable by a single agricultural worker;

- c) The Inspector was wrong to assert that the business plan should have made allowance for paying a second agricultural worker besides the Claimant himself. The Claimant being self-employed had no set wage and he was not required to pay himself one. The evidence of the Claimant and his witnesses demonstrated to the Inspector that small farming businesses like his own regularly relied upon unpaid help and this is what his business plan had assumed. At most he needed occasional help. Generally this was provided by his wife or his son, neither of whom he ever had to pay. The Claimant had nevertheless made financial provision in his business plan for the possibility of needing occasional paid labour in the sum of £2,500-3,000 per year and that was sufficient;
- d) As a separate but related point there was no provenance to the evidence from Bourne Rural at the appeal that a figure of £16,500 should be assumed as the agricultural wage required to pay a second worker. The Bourne Rural witness does not have sufficient expertise to express an expert view. £16,500 is not a figure prescribed by Parliament for agricultural workers, and there is a public interest in showing that this is not a generally accepted figure;
- e) Moreover the evidence about the average agricultural wage to be assumed was introduced by the Council through its witnesses for the first time at the hearing itself and hence the Claimant had no opportunity to respond to it, which amounts to procedural unfairness; and
- f) The fact that permission had been applied for on a temporary basis should have given the Council comfort that if the Claimant was wrong in his confidence about the viability of his enterprise there was little risk to the Council because the temporary dwelling would be removed after the period of 3 years.

In dismissing the claim, Mr Tim Smith (sitting as Deputy High Court Judge) held that the burden was on the Claimant to persuade the Inspector that the Council was wrong not to grant him planning permission and he had failed to discharge that burden. The conclusions reached by the Inspector were conclusions that he was able lawfully to reach on the strength of the evidence before him. Financial viability was identified as a key issue by the Inspector in advance of the hearing and the Claimant was therefore on notice that it would be discussed.

Case summary prepared by Emma McDonald