THE VALUATION TRIBUNAL FOR ENGLAND

Non-domestic rating; 2017 rating list; new entry in the rating list; comparable properties; allowances to be applied in the assessment; lack of planning consent; appeal allowed in part.

RE: Winscott Barton, Newton St Cyres EX5 5AL

APPEAL NO: CHG100416725

BETWEEN:	A R Browne & Son	Appellant
	and	
	Mr D Virk (Valuation Officer)	Respondent

PANEL: Mr J M Imperato (Senior Member)
Mr S M Hooberman

CLERK: Mrs A Keohane

HEARING: Remote Hearing No. 1 on 23 June 2022

APPEARANCES: Mr A Morrish of Alder King LLP representing the appellant, stated as acting as both advocate and expert witness
Mrs Browne, the appellant, by telephone only
Mr M Ingram representing the Valuation Officer, stated as acting as both advocate and expert witness

---

Summary of decision

1. Appeal allowed in part. The appeal property's assessment was reduced to £16,500 rateable value (RV) with effect from 1 April 2017.

Introduction

2. This appeal is a 2017 rating list appeal brought in respect of Winscott Barton, Newton St Cyres EX5 5AL (the 'appeal property'), which was entered into the 2017 rating list as store and premises at £35,250 RV with effect from 1 April 2017.

3. Mr Morrish, on behalf of the appellant, submitted a Challenge proposal that was received by the Valuation Officer on 7 October 2020. The proposal sought a reduction in the appeal property's assessment to £4,100 RV with effect from 1 April 2017.

4. After a review of the evidence and available information, the Valuation Officer revised the assessment to £26,500 RV with effect from 1 April 2017 and issued the Challenge Decision Notice on 1 November 2021. As the assessment had not been altered in the manner sought in the proposal, an appeal was made to the Valuation Tribunal, which was received on 26 November 2021, and was on the grounds that the valuation for the hereditament was not reasonable.

5. The appeal property is located on a working arable farm and comprises several buildings, namely, the Grain Store, constructed in 2000 and the Maize Pit & Lean-to and Middle Shed, open sided agricultural barns constructed in the main in the 1970s. They have a total significant area (TSA) of 2499.17m^2 and are valued on an Unadjusted Rate (UAR) of £19/m^2. The buildings are used for the storage of crops and animal feed by a third party. The Valuation Officer had been unaware of this use which had been ongoing for over 10 years, and the assessment was brought into the rating list with effect from 1 April 2017, following a report from the local authority.

6. Mr Morrish appeared on behalf of the appellant in the dual role of advocate and expert witness. In view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC), Mr Morrish confirmed that he was instructed under a contingency fee basis. He declared that he understood and accepted that his duty was to the Tribunal in giving his evidence and he would comply with this as well as the requirements of his professional body, regardless of whether the evidence supported the client's case.

7. It was therefore appropriate for the panel hearing the evidence to consider the "expert" evidence and assess what weight, if any, to give it in the context of the matters in issue before it.

8. Mr Morrish had submitted an Expert Report prior to the hearing to assist the panel, which he confirmed contained the information exchanged during the Challenge Process with photographs, together with the Valuation Officer's responses and Decision Notice. He confirmed that no new information had been included other than local authority decisions which allowed Certificates of Lawful Use for his comparable properties at Matthews Farm and Pidgeons Farm. The Valuation Officer was already aware of this, as allowances had been adopted in their assessments to reflect restricted planning. Mr Ingram, representative for the Valuation Officer did not raise any objection to this Report and it was therefore accepted by the panel.

9. This decision document is not intended to be an exhaustive record of the proceedings, but the parties can be assured that all of the evidence presented was fully considered by the panel before reaching its decision. The absence of a reference to any statement or item of evidence placed before it by the parties should not be construed as it being overlooked by the panel.

Issue

10. The disputed issues related to the following:
    - The rate to be adopted in the appeal property's assessment.
    - An allowance to reflect the appeal property's lack of planning consent.
    - Allowances for various factors affecting the appeal property, including highway issues.

Evidence and submissions

11. A bundle of evidence comprising the information exchanged between the parties during the Challenge process was provided for consideration. This included location plans; photographs of the appeal property; details of properties cited as comparable; the parties' respective valuations for the appeal property; copies of Mid Devon District Council's refusal to grant a Certificate of Lawful Use in respect of the appeal property dated 18 December 2019 and 29 June 2020; and an Appeal Decision allowing a Certificate of Lawful Use for the appeal property dated 4 August 2021 effective from 20 February 2020. Reference was also made to:

    - *Lotus and Delta Ltd v Culverwell (VO) & Leicester City Council* [1976] RA141
    - *Rozel Motor Co Ltd v Clark (VO)* [1983] LT RA 70
    - *Huque v Griffiths (VO)* [1986] LT 26 RVR 95
    - *Regent Lion Properties Ltd v Westminster City Council* [1990] LT 39 EG 57
    - *Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street Assessment Committee*
    - *Newbigin (VO) v S J & J Monk* [2017] UKSC 14
    - *Dawkins (VO) v Ash Bros Heaton* [1969] 2 AC 366
    - *Townley Mill v Oldham Assessment Committee* [1936] 21KB 585
    - *Williams (VO) v Scottish & Newcastle Retail Ltd & Allied Domecq Retailing Ltd* [2001] EWCA CA 185

12. In his written and oral presentation, Mr Morrish referred to the principles established by case law that required a property to be valued having regard to the actual conditions affecting the hereditament at the time the valuation was made. In respect of the appeal property, these conditions included the poor quality basic unheated and uninsulated buildings, some of which were open sided and unsecure, with poor floors and situated on a sloping and split site. The buildings had initially been constructed for agricultural use with no mains power or toilet/welfare facilities. Access to the site was via a substandard highway.

13. At the material day, which for the purposes of this appeal was 1 April 2017, planning consent existed for agricultural use only and the local authority had opposed granting a Certificate of Lawful Use on two occasions, which would formally allow commercial use. Following an appeal by the appellant, the local authority's decision was overturned, and a Certificate of Lawful Use was granted, with restrictions, effective from 20 February 2020.

14. Mr Morrish argued that the appeal property had to be valued *rebus sic stantibus* having regard to the mode and category of its occupation, namely as a grain store. He explained that it could not be assumed under *rebus* that the property benefitted from a planning consent when it did not, nor could the property be correctly valued as a warehouse/industrial property when no planning was in place at the antecedent valuation date (AVD) to allow this use.

15. The appellant had previously been the tenant of the Church Commissioners until they purchased the appeal property's freehold in November 2017. The rent had been £36,500 per annum, to include 469 acres of land, a farmhouse, two three-bedroom farm cottages and two sets of farm buildings at different locations. In this context, Mr Morrish viewed the appeal property's current rating assessment of £26,500 RV as excessive.

16. In the absence of any rental evidence for comparable buildings in the locality, Mr Morrish had regard to comparable assessments where end allowances had been granted for a lack of planning or a highly restricted planning consent. These assessments were as follows:

- Caravan Store at Pidgeons Farm, EX5 1PS. An agricultural building located within a farmyard with a Certificate of Lawful Use for the storage of caravans. The assessment was based on an unadjusted price of £31.51/m^2 and included a 75% end allowance for restrictive planning,10% for lack of services and 10% for poor access.

- Matthews Farm, Dulford, EX15 2EG. An agricultural building where planning was granted on appeal for car/caravan/boat storage. This assessment, based on an unadjusted price of £26.37/m^2, contained allowances to reflect access, divided or split unit, planning restriction and lack of services. These allowances had reduced the assessment from £25,591 RV to £4,900 RV.

- Beluga House at Bristol. A vacant former office/research building with restricted planning consent and a defective foul waste system. The assessment was reduced by an end allowance of 95% from £292,500 RV to £15,000 RV.

17. Mr Morrish referred to the scheme in which the appeal property had been placed (420989), which incorporated values of between £19/m^2 to £65/m^2. Sixteen of the 62 other properties in this scheme were situated on relatively new business parks. Victoria House, Unit 9 Greenham Business Park, was the largest of the remainder and one of only five including the appeal property larger than 1000m^2. Victoria House had been constructed in 2004 and its warehouse space was valued at £20.80/m^2. Mr Morrish did not consider this property to be akin to the appeal property.

18. Holbrook Barton Livestock Collection Centre was an agricultural type building also within the appeal property's scheme, stated to be newer and in a better location. The assessment had been agreed following a Challenge at a rate of £8.81/m^2 for the buildings, together with an allowance of 25% for a planning restriction.

19. Mr Morrish considered that scheme 436524 could be applicable to the appeal property as it related to grain stores. The description given of the buildings in the scheme matched that of the grain store at the subject. The values ranged from £5/m^2 to £27.50/m^2 depending on size, location and other physical factors, with £16/m^2 being the most commonly adopted value.

20. Having regard to his evidence, Mr Morrish sought a revised assessment of £4,100 RV based on an adjusted price of £2.38/m^2, with the open fronted buildings valued at 50% of this rate. To establish this level of value, his starting point had been the £19/m^2 adopted by the Valuation Officer, from which he had deducted 87.5% which equated to the allowances he considered were appropriate for the appeal property, which included a 40% allowance for the lack of planning.

21. Mr Ingram contended that the appeal property had been correctly placed in scheme 420989, which related to industrial units within rural mid Devon. The scheme referred to by Mr Morrish, 436524, related to grain stores in the Valuation Office Agency's East Unit area that had been valued by the rentals method. These

properties were usually restricted to the storage of grain, seed and pulses only, which would have an effect on value. As the likely source of the rental evidence for this scheme would be open market lettings of properties with this restriction, and the appeal property did not have such a restriction in place at the material day, Mr Ingram argued this scheme was not appropriate for the appeal property.

22. Mr Ingram considered the appeal property to be of a warehouse/industrial type and noted that it had actually been in commercial use at the material day, and for some years prior. Within the Challenge Decision, the Valuation Officer had referred to the Court of Appeal decision in *Regent Lion Properties Ltd v Westminster City Council* [1990] LT 39 EG 57*,* in which it was held that *'the law did not prohibit an owner or occupier of property from using it for a particular purpose simply because planning permission for that use is necessary under the Town and Country Planning Act 1971 and has not been granted'.*

23. Whilst stating the above, Mr Ingram explained that although restricted planning had not been in place at the material day, the Valuation Officer had incorporated an allowance of 25% in the appeal property's assessment to reflect that, due to its locality and nature, it would be likely that if any planning was granted it would be restrictive. This allowance had been an attempt to settle the appeal and had been incorporated in the assessment from 1 April 2017.

24. Mr Ingram stated that, whilst the lack of planning permission could influence rental values, it was for the appellant to provide evidence to show the extent. He did not consider that an arbitrary deduction was reasonable at the level suggested by the appellant, (87.5%), particularly when the property had been in beneficial occupation at the material day.

25. Other than the 25% allowance for restricted planning, the appeal property's assessment also had allowances to reflect it was unheated, had no insulation to the walls and roof (7.5% in total) and a 5% allowance to reflect the lack of services. Addressing Mr Morrish's contention that an access allowance was warranted, Mr Ingram argued that there was no evidence to support such an allowance. He provided a photograph showing the access to the property, which he considered was reasonable for its rural location.

26. Having regard to the above, Mr Ingram sought dismissal of the appeal.

Decision and reasons

27. The appeal hereditament must be valued for the purposes of non-domestic rating on the basis of the rent at which it might reasonably be expected to let from year to year on a number of assumptions detailed in paragraph 2(1) of Schedule 6 to the Local Government Finance Act 1988. The date of the hypothetical rent was 1 April 2015 (the AVD). Matters affecting the physical state or enjoyment of the property, or the locality were to be taken at the material day.

28. Addressing the Valuation Officer's assessment of the appeal property, the panel found anomalies in the valuation provided in the bundle. Mr Ingram was asked to clarify the rates on which the appeal property had been assessed. He confirmed that the unadjusted rate was £19/m^2, derived from evidence for properties within the scheme. Allowances had been made to reflect that it was unheated and had uninsulated walls and roof. This gave an adjusted rate of £17.61/m^2. The warehouse had been valued at this rate; however, a 25% reduction had been

applied for the open sided stores. From the resultant figure, 25% had been deducted for restricted planning and a further 5% for the lack of services, giving the current assessment of £26,500 RV.

29. Mr Morrish had asked the panel to consider the value of the buildings originally constructed for agricultural use, with substandard highway access and without the benefit of a planning consent for commercial use. Whilst Mr Morrish had indicated the appeal property comprised poor quality, basic farm buildings, the panel found that prior to issuing a Certificate of Lawful Use in August 2021, the decision maker had visited Winscott Barton and stated that he had found a range of large modern agricultural buildings, three of which were being used by a company to store agricultural feed prior to onward distribution.

30. In addressing the planning issue, the panel accepted that planning consent did not exist for commercial use at the appeal property at the material day. However, notwithstanding this, the appeal property had actually been in use by a third party at this date. Although a lack of planning could influence the rental bid of a hypothetical tenant coming fresh to the scene, there was no evidence to support the 40% allowance sought by Mr Morrish in the appeal property's assessment to reflect this. That said, the panel acknowledged that in the absence of planning consent, a hypothetical tenant may offer a reduced rental bid if there appeared uncertainty over the prospect of the continuance of the hypothetical tenancy. In recognition of this, the panel considered a 25% allowance in the assessment was reasonable.

31. Mr Morrish had referred to the *Williams (VO) v Scottish & Newcastle Retail Ltd & Allied Domecq Retailing Ltd* [2001] EWCA CA 185 judgment which addressed mode and category of occupation. In determining the mode or category of occupation of the appeal property at the material day, the panel had to consider the property as it physically stood, or *rebus sic stantibus*. As outlined in the Lands Tribunal and Court of Appeal decisions in the *Williams* cases, there were two strands to the *rebus sic stantibus* or reality principle, namely, the use to which a property was put, in effect, its mode or category of occupation and that its physical state was the same as at the material day. It was also determined that only the possibility of minor alterations should be allowed for on the occasion of its hypothetical letting. Within these decisions reference was also made to *Fir Mill Ltd v Royton UDC and Jones (VO)* [1960] R&IT 389, in which it was indicated that only two assumptions were permitted, namely, that the hereditament was vacant and to let and its mode or category of occupation by the hypothetical tenant must be conceived as the same mode and category as that of the actual occupier.

32. After consideration, the panel determined that the appeal property's mode or category of occupation at the material day could be viewed as industrial use and that it could be used for other industrial purposes with only minor changes being made, which would not offend *rebus*. The panel was therefore persuaded that the scheme proposed by Mr Morrish for grain stores was not applicable and that the appeal property had been correctly valued in line with the scheme in which it was placed (420989), covering industrial units situated within mid Devon, typically built or refurbished from 2000.

33. Mr Morrish had provided the details of both Pidgeons Farm and Matthews Farm to confirm that allowances of around 75% had been incorporated in their assessments to reflect restricted planning; however, it was noted that these had been granted Certificates of Lawful Use in September 2012 and June 2008 respectively, and

therefore any restrictions imposed would have been in existence at the AVD. This did not apply to the appeal property.

34. Mr Morrish had included in his evidence an extract from the Highways authority which indicated that the highway to the appeal property was substandard and not suitable for commercial use. The panel placed little weight to this evidence, as the highway had been used for over 10 years by the third party to access the appeal property. This suggested that the state of the highway had not prevented the continuation of the business enterprise carried out at the appeal property.

35. On balance, the panel found the Valuation Officer’s assessment of the appeal property to be a reasonable starting point and was correctly based on an adjusted rate of £17.61/m^2. However, the rate applied to the open sided buildings, constructed mainly in the 1970s, was considered to be excessive and therefore, Mr Morrish’s contention that the adopted value should be 50% of the adjusted rate was accepted. The panel therefore assessed the open sided buildings at £8.80/m^2.

36. The panel considered that certain allowances were warranted in the appeal property’s assessment, as set out in the revised valuation. The level of access allowance adopted was that applied to Pidgeons Farm and Matthews Farm and reflected that access to the appeal property required lorries to negotiate a 90 degree turn. The allowance to reflect the lack of services was also the same as that applied to Pidgeon Farm and Matthews Farm. The split site allowance and the allowance to reflect the poor floor/sloping site were determined following consideration of the location plans and plans showing the farm site, together with the photographs provided for the appeal property.

37. Having regard to the above, the panel came to the following revised assessment:

Floor	**Description**	**Area**	**Price per/m2 unit**	**Value/£**
Ground	Warehouse	973.15	17.61	17,137
Ground	Stores	1526.02	8.80	13,429
			Sub Total	30,566
Adjustments to the sub total				
	split site 5%			
	No main services/lack of facilities 10%			
	poor floor/sloping site 5%			
	lack of planning 25%			
	access 10%			
			Total of adjustments	13,808
			Total	16,758
			Say	£16,500 RV

Order

38. Under the provisions of Regulation 38 (4) and (9) of The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, as amended, the Valuation Officer is ordered to alter the rating list within two weeks of the date of the order to show Winscott Barton, Newton St Cyres EX5 5AL at £16,500 RV with effect from 1 April 2017.

39. Any appeal fee paid will be refunded in full in accordance with regulation 13E (1)(a) of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (as amended) provided there is no review of the Tribunal's decision. The refund will take around six weeks to process.

Date: 22 July 2022

Appeal number: CHG100416725

Right of Appeal
Any party who is aggrieved by the Tribunal's decision, and who appeared or was represented at the hearing, has the right of appeal to the Upper Tribunal (Lands Chamber). Any such appeal should be made within four weeks of the date of this decision notice.