

## Commentary

This is another quite demanding question that, on the face of it, seems simple. Do not be deceived. There are several difficult areas of concern that need to be considered and analysed. However your first decision is about the format of your answer. You have been asked for an attendance note and you must adopt this form to ensure your answer is given in the right way. Conveyancing is a system that relies heavily upon rigorous file management along with the accurate recording of events and details. An attendance note being a record of a telephone conversation or a meeting between the client and the solicitor is a fundamental constituent element of just such a file.

The areas of concern should be considered in turn and especially the planning issue which patently merits careful examination. However the question is not just about planning, it actually touches upon other important issues highlighted in the following answer. In conveyancing it is common to find that competent answers will require a broad base stretching over several topics. Finally remember this is a practical matter and in practice you must always record your time. This being the case, end your attendance note with an indication of how long you think the conversation was. For any solicitor or licensed conveyancer, time is money.

## Suggested answer

Suggested telephone attendance note of advice: -

E-MAIL MEMO

Re Ms. Helder and her proposed house purchase with garage.

Subsequently telephoning back Ms. Helder and advising her as follows: -

### 1. Planning

There are two potential planning difficulties, first was the garage built with planning consent and secondly has there been a material change of use of that garage from a mere garage for the storage of cars conveniently close by the house into commercial garage premises? (s.55(1) Town and Country Planning Act 1990)

i) So far as the building of the garage is concerned I advised the client that this appeared to be a building that would have required a planning consent from the local planning authority, usually the local authority, prior to erection. However, there is a time limit for enforcement action of four years and this has passed so no enforcement notice can be served by the local authority requiring its demolition. (s.172(4) Town and Country Planning Act 1990)

ii) I further advised Ms. Helder that there has been a material change of use of in relation to the garage from residential to business use. This would have required planning permission that it seems was not granted. There is a ten-year time limit for the service of an enforcement notice by the local authority in these circumstances and the council could therefore serve an enforcement notice upon the owner of the property at any time

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requiring the business use to cease. (s.4 Planning and Compensation Act 1991) A buyer would buy subject to the breach and the possibility of an enforcement notice affecting them in the future. A local search would reveal the existence or otherwise of an enforcement notice. Failure to comply with an enforcement notice is a criminal offence.

There is a third difficulty allied to planning and that is whether or not the seller obtained building regulations approval from the local authority for the garage at the time it was built. Indeed, even assuming the garage did not need a planning consent, it would have had to comply with building regulations that have been issued to ensure that buildings comply with precise and detailed standards of construction. In the case of *Cottingham v Attey Bower & Jones (A firm)* [2000] EGCS 48 it was noted that injunction proceedings under s 36(6) of the Building Act 1984 enable a local authority to take enforcement proceedings at any time after the works have been carried out. This provision in effect creates an unlimited obligation upon conveyancers to seek copy building regulation approvals. Proper approvals are required. Indeed, the concern must remain that without building regulations approval the premises may have been erected in a sub standard condition. If this was the case then there could be grave potential problems for a purchaser who would be responsible for the maintenance of the structure.

## 2. Title

The title will need to be checked to establish whether the land is subject to a restrictive covenant prohibiting business use. It is very likely that the developer of the estate would have imposed such a covenant when he sold the house to the first purchaser. He may have created a building scheme so that the covenants are enforceable by the owners of the other houses on the estate. Furthermore, there is the distinct possibility that there was another restrictive covenant imposed at the same time requiring the original developers' permission for the erection of new buildings on the estate, such as the double garage. There is the possibility that a restrictive covenant indemnity policy could be obtained to protect Ms. Helder in the light of a claim against her for breach of covenant, although the premium for this could be expensive.

## 3. Side Road

A local search of the property will reveal whether the road is a public highway. If not, the deeds must be checked to see if the owner has the right to walk and drive cars along it. Clearly if there is not such express legal right of way there are very real difficulties for a proposed purchaser who might face the daunting prospect of being lawfully denied access to the garage by the legal owner of the side road. If the local authority decide to adopt the road in the future then the cost of making up the road to an adoptable standard will fall on the frontagers, who would include the owner of the property in question.

## 4. Advice

In the light of the above, I advised Ms. Helder against making any firm plans to proceed until we were in receipt of further information and in particular until we knew precisely the position concerning planning issues, building regulations, the ownership of the road, and whether or not there were any adverse restrictive covenants affecting the property. She was informed that a local authority search would reveal information about the side road

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that would inform her decision as to whether or not she should proceed. I went on to say that planning consents relating to the property would be referred to in the search result and that further more specific enquiries could be directed to the local planning authority. I also indicated that we would carefully check the seller's title deeds to see if there were any such problematic restrictive covenants but, that if there were, there could be the possibility of obtaining a restrictive covenant indemnity policy from an insurance company. Insurance cover might also be possible in the absence of a building regulations approval. It was difficult to be optimistic about the business use question and we would probably be advising her not to go ahead if this aspect was crucial to her.

Time taken 1 hour  
Trainee Solicitor