
Appeal Decision

Site visit made on 9 September 2016

by Sukie Tamplin DipTP Pg Dip Arch Cons IHBC MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 11 October 2016

Appeal Ref: APP/E1855/X/16/3147848

Waste Incinerator, Hangmans Lane, Hanley Castle, Worcs WR8 0AJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Peter Styles against the decision of Worcestershire County Council.
- The application Ref 15/000025/CL, dated 13 July 2015, was refused by notice dated 22 December 2015.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is use for Sui Generis: Waste Treatment/incineration.

Summary of Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision.

Application for costs

1. An application for costs was made by Mr Peter Styles against Worcestershire County Council. This application is the subject of a separate Decision.

Background and procedural issues

2. The Hanley Swan Waste Incinerator¹ was constructed in 1970/71 by a partnership of two local councils. Following completion it is common ground that it was in use as an incinerator for the disposal of waste until early 1995 when it was closed down because of the anticipated costs of complying with more rigorous control of emissions. Hence it is agreed that it was in operation for a continuous period of about 23 years.
3. During the operational period it appears to have undergone various changes in ownership because of the impact of changes in the organisation of local government and responsibility for public services.
4. There is no indication that there has been any use of the building since 1995 other than some occasional use of parts of the building by the fire service for training purposes. This use has not resulted in any impediment to or removal of the incineration apparatus which appears to remain complete within the building. Similarly intermittent contract grazing by a local farmer around the building has not resulted in change or use of the facility itself.

¹ Also referred to in the evidence as 'Waste Incinerator' and 'Haylers End'

5. It appears to be agreed that a permission granted in 1995² for a waste transfer station at the site was not implemented and has since lapsed. The site was sold to the appellant by the County Council at an auction in 2007.
6. An application under S191(1)(a) of the Act³ seeks to establish whether, at the time of the application, any existing use of buildings or other land is lawful. S191(2)(a) says in turn that uses are lawful if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired). Planning merits form no part of the assessment of an application for a lawful development certificate (LDC) which must be considered in the light of the facts and the law.

Reasons

7. The Council's case appears to be based on two premises, firstly, that it is not certain the incineration plant had 'deemed consent', and secondly, that there has been no incineration use during the 10 years prior to the date of the application. Third parties have raised a third issue, which is whether or not the previous use has been abandoned and thus the premises no longer have a lawful use as an incinerator. I shall consider these in turn in my decision.

Deemed consent

8. The plant was commissioned by a partnership between Malvern Urban District Council and Upton upon Severn Rural District Council in the early 1970's. None of the parties have been able to find any direct evidence of planning permission being granted for the plant but it is suggested that deemed consent would have been granted by the then Ministry of Housing and Local Government (MHLG) in association with the loan sanction by the MHLG pursuant to S41 of the former Town and Country Planning Act 1962.
9. It seems highly improbable that two public authorities would have constructed a large incinerator without planning permission particularly given the need to apply for a loan. The appellant has provided contemporaneous minutes of Council meetings that refer to a contract being let to construct the plant, the agreed height for the chimney and other documents concerning water abstraction for cooling purposes. However there is no formal record of a planning decision notice. In these circumstances whether or not there was a 'formal planning permission' is open to question.
10. But whether or not this plant had an express or deemed planning permission, there can be no doubt about the use of the premises for waste incineration. It is common ground that the incineration of waste continued, without interruption, during the period 1972-1995. In those circumstances, because there has been use as an incinerator in excess of 10 years, no enforcement action could have been taken in 1995 when the incinerator ceased to operate.
11. It is also suggested that the change of ownership over the years as the property was transferred from one public authority to another, may have in some way invalidated any deemed permission. But S75(1) of the Act says that any grant of planning permission to develop land shall enure for the benefit of the land and of all persons for the time being interested in it. There is no

² Council reference 95/00053/COM

³ Town and Country Planning Act 1990 as amended

counter evidence before me that any time limits were imposed or that a condition of any permission limits it to a particular person or authority. In these circumstances changes in ownership would have had no bearing on the lawfulness of the use.

12. Moreover the incinerator was clearly built for the purpose of waste incineration and in these circumstances S75(3) of the Act says that if no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed. Given its highly technical and specialist nature I am satisfied that, as a matter of fact and degree, the building was used for the purpose of waste incineration up until 1995 when it was closed.
13. Hence, taking all these factors together and in the light of S191(2) of the Act the use was lawful by the time operations ceased, whether or not the incinerator had been the subject of a grant of express or deemed planning permission.

Use as an incinerator

14. The Council's evidence appears to be almost completely confined to an assessment of the use in the 10 years before the date of the application for an LDC. In this respect it seems to be common ground that the incinerator was not in operational use after 1995.
15. S171B (3) of the Act says that for the purposes of whether or not enforcement action can be taken, the relevant period is the 10 years beginning with the date of the breach. The evidence demonstrates that the incineration plant was complete and operational by 1972 and also similarly demonstrates that it continued without interruption until early 1995. Hence, whether or not there was a formal planning permission for the incinerator, by 1995 it had become lawful by reason of the passage of time.
16. It appears to me that the Council have misunderstood and misconstrued the application for the LDC because the relevant period is not, in this case, the 10 years before the date of the application because the use was already lawful by reason of the previously accrued period of continuous use for about 23 years. Nor is there any evidence that the building was erected and the use commenced without planning permission. The absence of evidence of a breach is not evidence that there was a breach of planning control. Moreover, as concluded above it is in my opinion extremely unlikely that not one but two public authorities would have built the incinerator without obtaining the necessary planning permission.

Abandonment

17. However, the rights to a lawful use of land may be lost in certain circumstances, which include, 1. formal discontinuous action; 2. voluntary loss by legal agreement; 3. planning conditions; 4. material change of use to another use; 5. abandonment; and 6. a new chapter in the planning history. Of these only two, Nos 5 and 6 are relevant to the subject appeal.
18. In terms of No 5, it is suggested that, whether or not the use was lawful before operational activity ceased in 1995, the use has subsequently been abandoned. Consequently, it is argued, the site has no lawful use.

19. Case law has held that a planning permission which is capable of being implemented cannot be abandoned (*Pioneer Aggregates (UK) Ltd v SSE* [1984] 2 All ER 358. Thus if, on the balance of probabilities, there is a deemed planning permission for use of the appeal site, that planning permission remains extant and in the light of *Pioneer Aggregates* cannot be abandoned unless there is a successor use.
20. In the alternative, if I accept that the appellant has not demonstrated that there was a planning permission, it is necessary to consider the tests of abandonment⁴. These are 1. the physical condition of the land, 2. the period of non-use, 3. any other use; and 4. the owner's intentions. No one test is to be accorded more weight than another. I consider these in turn below.
21. In terms of the first and second tests, the plant and equipment remain in situ and there is evidence of the paperwork and way-leaves dating from the final months of waste incineration in about 1995. It appears that the plant simply ceased to function actively when the previous operator decided that it would not be economic to meet higher air quality and particulates standards. There has been superficial deterioration of the building since 1995 but by and large the building and the equipment it contains appear to have the physical ability, subject to meeting other non-planning legislative requirements, to recommence incineration of waste.
22. There has been a significant passage of time since the last time the plant was in operational use currently amounting to about 20 years. However the Council retained ownership until the site was sold at auction in 2007. This may suggest, given that the building was not stripped of its equipment or any other chattels, that after operations ceased, the plant was simply mothballed until about 2007 pending a possible resumption. This finding is supported by later evidence from Hanley Parish Council who have provided a copy of part of a Committee report to Malvern Hills Council dated March 2011. This says that it was the view of legal service officers at that time that the site could be re-commissioned and it would be possible to refurbish the existing incinerator. There is little or no evidence that the condition of the incinerator and its equipment has altered significantly since that 2011 report. Consequently these first and second tests do not, on the balance of probability, indicate abandonment.
23. Turning to the third test, in 1995 planning permission was granted for the use of the site for a waste transfer station. However there is no evidence that this permission was ever implemented and it has now lapsed. Various other planning applications have been made but in terms of those that have been approved there is similarly no evidence before me to suggest that these were implemented. As I have noted above, in recent years there has been grazing around the building and intermittent use for training purposes by the local fire service, but neither of these low level occasional and temporary uses would prevent recommencement of active use as an incinerator.
24. Consequently I find on this third test that the use as an incinerator has not been replaced, since its closure, by any other use of the building.

⁴ *Trustees of Castell-y-Mynach Estate v SSW* [1985] JPL 40 as confirmed by *Hughes v SSETR & South Holland DC* [2000] JPL 826

25. Finally it is necessary to consider the intentions of the owner, the appellant in this appeal. Third parties suggest that the real intention of the appellant is to redevelop the site for housing purposes. In evidence of this three planning applications have been submitted for 24⁵, 7⁶ and 3⁷ dwellings respectively. These have been refused and two have been subsequently dismissed at appeal.
26. I agree that the appellant appears to have an interest in residential development but he has also submitted applications to refurbish the existing building (2011 & 2012) and appears to have investigated the potential for re-opening the site for the purpose of resuming the incineration of waste (2010). In these circumstances, it appears to me that he is reviewing the viability of various options for the future use of the site, including the recommencement of incineration at the plant. Hence, the evidence in terms of the intent test is neutral in this appeal.
27. I have previously found that it is improbable that the plant was constructed and operated without planning permission, deemed or otherwise and thus in accordance with *Pioneer Aggregates* the use cannot be abandoned unless it is replaced by a different use or development. However, even if I accept the proposition that there was no planning permission, I find that, for the reasons I have given above, the tests of abandonment are not met. In coming to this conclusion I have taken into account the reported description in the 2007 auction of the property as a 'former incinerator'.

Other matters

28. It is asserted that following the auction in 2007, the original planning unit which contained a number of buildings related to the original incineration plant, including an office, workshop and store, has been split. Consequently these buildings are now under separate control. In this scenario it is suggested that a new chapter in the planning history has commenced. But there is no evidence to suggest that these 'other buildings' were an essential part of the operation of the incinerator, nor that the separation of those buildings which appear to be incidental or ancillary to the main use has any bearing on the main purpose and use of the site subject of the LDC as a waste incinerator.
29. Accordingly, even if previously ancillary buildings are now in a different use and in different ownership this is not determinative. In this case a new chapter in the planning history of the appeal site has not resulted from the separation of ancillary buildings.

Conclusions

30. For the reasons given above I find firstly that the use of the site for waste incineration was lawful at the time it ceased in 1995, whether or not, it had the benefit of a formal planning permission. Secondly I find that the lawful use of the site as a waste incinerator has not been lost by subsequent events.
31. Hence I conclude on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of use for Sui Generis: Waste Treatment/incineration was not well founded and that the

⁵ 2011

⁶ 2012

⁷ 2015

appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Decision

32. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the existing use which is considered to be lawful.

Sukie Tamplin

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 13 July 2015 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The existing use of the appeal site is lawful by reason of the passage of time and because the lawful use has not been lost following the cessation of operational use, by reason of any subsequent events or circumstances.

Signed

Sukie Tamplin
INSPECTOR

Date **11 October 2016**

Reference: APP/E1855/X/16/314748

First Schedule

Use for Sui Generis: Waste Treatment/incineration.

Second Schedule

Land at Waste Incinerator, Hangmans Lane, Hanley Castle, Worcs WR8 0AJ

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 11 October 2016

by Sukie Tamplin DipTP Pg Dip Arch Cons IHBC MRTPI

Land at: Waste Incinerator, Hangmans Lane, Hanley Castle, Worcs WR8 0AJ

Reference: APP/ E1855/X/16/3147848X/

Scale: NTS

