
Appeal Decision

Site visit made on 10 January 2017

by Wendy McKay LLB Solicitor (Non-practising)

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

Decision date: 7 February 2017

Appeal Ref: APP/E2001/X/16/3147463

Rear of Cowick Farm, Thorne Road, East Cowick, Goole, DN14 8SY

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
- The appeal is made by Mr Robert Lunness against the East Riding of Yorkshire Council.
- The application (Ref 15/00097/CLE) is dated 9 January 2015.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is the use of building for storage and repair of civil engineering contractor's plant and machinery.

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 Decision.

Main Issue

1. The main issue is whether the use sought to be certified is lawful by virtue of being immune from enforcement action because the time for enforcement action has expired.

Reasons

2. Neither the identity of the Appellant, nor the planning merits of the operation, use or activity, is relevant to the purely legal issues which are involved in determining an LDC appeal. The onus of proof in an LDC appeal is on the Appellant and the relevant test is "*the balance of probability*".
3. The Appellant submits that the primary use of the site is the storage and repair/maintenance of engineering contractor's plant and machinery. The scope of that use includes storing plant, machinery and vehicles within the building and the yard; storing tools, parts and materials used for repair and maintenance works within the building and the yard; repairing and maintaining plant and machinery within the building; storing large-scale materials such as metal plates for barge repairs in the yard and the loading and unloading of plant and machinery and materials in the yard.
4. S.171B of the 1990 Act provides that for such a material change of use, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach. The relevant date for assessing the lawfulness of the use is therefore 9 January 2005 being 10 years before the date of the LDC application.

5. The Council has refused two previous LDC applications for a similar use to the appeal proposal. Both the previous applications showed a different red line compared to the current appeal site. The earlier applications were refused in 2013 and 2014 on the grounds that there was insufficient evidence to show that a contracting business had operated from the site after 2007 and because of insufficient information to determine the predominant use of the site and whether there had been a potential mixed use of the site for all or part of the relevant period.
6. The Appellant originally lived at Bankside Farm, to the west of the appeal site. He subsequently built and lived in nearby Brinkton Lodge Farm between 2002 and 2014 which was subject to an agricultural occupancy condition. In 2012, the Council granted an LDC for the continued use of the dwelling without compliance with the agricultural occupancy condition and planning permission was granted for the removal of the relevant condition. In dealing with these applications, the Council was satisfied that during the relevant immunity period neither the Appellant nor other family members occupying the property had been solely or mainly occupied in agriculture.
7. The current appeal was made on the grounds of non-determination of the LDC application within the appropriate period. In support of this appeal, the Appellant has submitted documentary evidence including six sworn affidavits, business paperwork and evidence relating to the removal of the agricultural occupancy condition mentioned above.
8. The Council has subsequently indicated that, had it determined the application, it would have refused to issue an LDC. Its Statement of Case sets out the main areas of concern. These include: that the evidence which has been submitted is not sufficiently precise to identify that a civil engineering business has operated on the site after 2007; the large number of bills, receipts and invoices submitted in support of the application do not provide a clear link to the claim that the relevant part of the building and the yard within the application site was used as claimed; there is insufficient evidence that a civil engineering contracting business has operated on site for the prescribed 10 year period. Furthermore, the Council points to the contradictory evidence submitted by the Appellant at the time of the previous LDC applications and also to that which has been provided by third parties.
9. There have been objections raised by third parties to the grant of an LDC for the site. In their letters opposing this appeal, the occupants of Cowick Farm indicate that they have first-hand knowledge of agricultural activities taking place in the building and on the land. The current occupant of Brinkton Lodge Farm has seen little evidence that the yard or buildings have been used for the purpose applied for during his period of occupation.
10. The Appellant's Final Comments provide a detailed response to the submissions made by the Council and third parties in relation to this appeal. He explains the practical difficulties associated with the delivery of post direct to the site. All mail is directed primarily to the registered business address of KE Luness Aggregates or to the Appellant at his home address. As the Appellant is the registered owner of the site, utility bills, and the like, tend to go direct to him at his home address. The Appellant points out that, unlike the sworn statements submitted on his behalf, the third party submissions do not take the form of sworn statements. He asserts that no neighbours can see inside

the building. He confirms that the access track which is included within the red line outline of the current application could be removed from consideration. He suggests that the description of the use sought could be amended to 'storage and repair of plant and machinery (B2 use)'.

11. The Appellant also explains what is demonstrated by the various receipts, documents, bills, HGV medical certificate and letters regarding self-assessment and the background to the barge documents that have been submitted on his behalf. Further details are provided as to the way in which the business has operated and the shared use of the site by KE Luness. The Appellant submits documentary evidence of his work for the Environment Agency.
12. The Council has reassessed the balance of probabilities in this case in the light of the new clarity and evidence provided by the Appellant in its latest submissions. The Council now recommends that, subject to an alteration to the description of the use which will also include agricultural use of the yard within the red line area, the LDC should be granted.
13. The Appellant and the Council have agreed the following suggested wording for the LDC: *"On the basis of the information submitted it is considered that sufficient evidence has been provided to demonstrate that, on the balance of probabilities, the building outlined in red on the attached plan has been used for the storage and repair of contractor's plant and machinery (B2 use), and that the area of the yard hatched in green, which forms part of a larger yard, has had a mixed use of the storage and repair of contractor's plant and machinery (B2 use) and an agricultural use for a continuous period of at least 10 years preceding the date of this application."*
14. A revised plan showing the relevant building and the yard area but excluding the access track from the red line area has also been submitted. Having regard to all the available evidence, I find, on the balance of probabilities, that the revised description accurately reflects the development which has taken place and that the building and yard area, as defined by the revised plan, have been continuously used for those purposes throughout the relevant 10 year immunity period. By virtue of s.171B (3) of the 1990 Act, those uses are immune from enforcement action. Since no enforcement action may be taken in respect of them because the time for enforcement action has expired, those uses are lawful as provided by s.191(2)(a) of the 1990 Act.
15. For the reasons given above, I conclude, on the evidence now available, that the Council's deemed refusal to grant a certificate of lawful use or development in respect of the use of the building for storage and repair of civil engineering contractor's plant and machinery was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under s.195(2) of the 1990 Act as amended.

Decision

16. 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.

Wendy McKay

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 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on date of application the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched and cross-hatched 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 Appellant has provided sufficient evidence to demonstrate, on the balance of probabilities, that the building cross-hatched in black on the attached plan has been used for the storage and repair of contractor's plant and machinery (B2 use), and that the area of the yard hatched in black, which forms part of a larger yard, has had a mixed use for the storage and repair of contractor's plant and machinery (B2 use) and an agricultural use for a continuous period of at least 10 years preceding the date of the application. By virtue of s.171B (3) of the 1990 Act, those uses are immune from enforcement action. Since no enforcement action may be taken in respect of them because the time for enforcement action has expired those uses are lawful pursuant to s.191(2)(a) of the 1990 Act.

Signed

Wendy McKay
Inspector

Date **7 February 2017**

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First Schedule

The use of the building cross-hatched in black on the attached plan for the storage and repair of contractor's plant and machinery (B2 use), and the use of the yard area hatched in black on the attached plan for a mixed use for the storage and repair of contractor's plant and machinery (B2 use) and an agricultural use.

Second Schedule

Land at the rear of Cowick Farm, Thorne Road, East Cowick, Goole, DN14 8SY shown hatched and cross-hatched in black on the attached plan.

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 uses described in the First Schedule taking place on the land specified in the Second Schedule were lawful, on the certified date and, thus, 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 uses described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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: **7 February 2017**

by Wendy McKay LLB Solicitor (Non-practising)

Land at: Rear of Cowick Farm, Thorne Road, East Cowick, Goole, DN14 8SY

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Scale: 1:1250

