
Appeal Decision

Site visit made on 7 June 2017

by Martin Joyce DipTP MRTPI

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

Decision date: 22 June 2017

Appeal Ref: APP/N1920/X/17/3168276

Wyevale Garden Centre, Dancers Hill Road, Bentley Heath, Barnet EN5 4RR

- 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 Existing Lawful Use or Development (CLEUD).
- The appeal is made by GFL Management & Wyevale GC against the decision of the Hertsmere Borough Council.
- The application, Ref: 16/2079/CLE, dated 24 October 2016, was refused by notice dated 21 December 2016.
- The application was made under Section 191(1)(a) of the Town and Country Planning Act 1990 (The Act) as amended.
- The use for which a CLEUD is sought is (a) use as a car wash, (b) a single shipping container used for storage for the car wash and (c) wash screens and fences.

Summary of Decision: The appeal is dismissed.

Preliminary Matters

1. The application has been made in respect of an existing use of part of the land that falls within the overall boundary of the Potters Bar Wyevale Garden Centre, in the terms set out above. The Council's decision notice, however, describes the development as the "continued use of land as a car wash facility with associated storage, 2m wash screens and 1.6m fences as ancillary to A1 use (Garden Centre)". Whilst this is a reasonably accurate description of what has occurred on the site, I have seen nothing to indicate that the appellants agreed to any change in the description of the development. Therefore, I shall deal with the appeal on the basis of the wording set out in the original application.

The Case for the Appellants

2. The appellants' case is based upon a contention that the use of an area of land as a car wash facility, within an overflow car parking area, is ancillary to the primary use of the site as a garden centre, which has a lawful Class A1 retail use¹. There has therefore been no material change of use of the land. Moreover, no unlawful building operations have taken place. The shipping container used for associated storage purposes was brought onto the land ready-assembled and its siting is not, therefore, a building operation, whilst the wash screens and fencing are development permitted under Class A of Part 2 of Schedule 2 to The Town and Country Planning (General Permitted Development (England) Order 2015 as amended (GPDO).

¹ Class A1 of the Town and Country Planning (Use Classes) Order 1987 as amended.

3. In this context, the appellants contend that there has been no physical or functional separation of the car wash from the remainder of the garden centre, with no separate access or creation of a new planning unit. Access is made through the sole garden centre access point, and opening hours are controlled by the times at which the garden centre use is open. Moreover, the car wash occupies only 1.8% of the land area of the overall planning unit and is used almost exclusively by users of the garden centre, as shown in surveys undertaken since the use commenced in February 2016. This indicates that 98% of users of the car wash are Wyevale customers, and also that the number of cars using the facility are small, on average 66 per week. All of these matters show the low-key nature of a use clearly ancillary to the principal use of the site as a garden centre.
4. Other appeal decisions show that the siting of a shipping container is not, in itself, operational development, whilst the Council do not dissent from the view that the wash screens and fencing erected are permitted development being less than 2m in height. In all of these circumstances, therefore, a CLEUD should be granted.

The Case for the Council

5. The Council contend that a material change of use has occurred. A car wash facility of this nature does not fall within the lawful Class A1 use of the site and it dominates an area which appears distinct and physically separate to the main garden centre use. The new use has a boundary treatment on three sides, a separated tarmacked area and road markings, and is not an integrated subservient use. The business appears physically separate with its own branding and advertising in the local vicinity as a discrete enterprise. It also pays its own business rates distinct from the garden centre.
6. New building development has taken place, as part of the change of use that has occurred, including the erection of a large canopy. Whilst a planning application for the canopy and other development was made, it was withdrawn pending the outcome of this appeal. Other operational development includes the laying of tarmac with directional road markings on formerly rough ground, the erection of fencing and the siting of shipping containers with long-term intention for their retention on the site.
7. It is accepted that there is no separate access for the car wash, but the opening of the gates to allow users to reach the facility could easily be arranged. As for the survey undertaken, this does not distinguish between those who use both the garden centre and the car wash, and those who come onto the site solely for the latter use. The level of investment that has taken place would suggest that a far larger operation than 66 washes per week is intended.
8. With regard to the appeal decisions put forward by the appellant, these relate to cases where planning permission was being sought and are not, therefore, applicable to an application of this nature. Other appeal decisions have also found that the siting of shipping containers, when intended for long-term and residual usage, is an act of operational development. As a matter of fact and degree, therefore, a material change of use requiring planning permission has occurred and a CLEUD should not be granted.

Appraisal

9. The main issue in this appeal is the question of whether or not the use of the land as a car wash facility, with its associated operational development including the siting of a shipping container, wash screens and fencing, is ancillary to that of the overall site as a garden centre, or whether there has been a material change of use of the land.
10. In considering this issue, it is necessary to state at the outset that the planning merits of the development are not before me in this appeal, only the question of whether or not the use implemented is lawful. Further, I draw attention to the fact that the burden of proof in an appeal on legal grounds such as this lies with the appellant, having regard to national procedural guidance², as referred to in the Planning Practice Guidance, and pertinent case law³, with the relevant test being on the balance of probabilities⁴.
11. At the outset, I start by observing that arguments about whether or not individual elements of the development that has taken place require planning permission are misplaced. The use needs to be considered in its entirety and cannot be disaggregated into smaller components. The fencing and the siting of a shipping container, used for storage purposes in association with the use, are part and parcel of the overall car wash use and have helped to facilitate that use. Reliance upon the provisions of, amongst other things, the GPDO is immaterial if the use itself is not lawful.
12. Turning therefore to the use before me, I saw that the car wash facility occupies a distinct area of land, of about 450 sq m, in the eastern part of the overall site. Directional signage and road markings have been provided, as well as an individual notation on the main garden centre advertisement next to the A1000 Barnet Road, and smaller notices on other garden centre signage. The car wash occupies a roughly rectangular site, with various structures sited around the main vehicle circulation areas. These include two shipping containers used for storage and office purposes, a wooden building, of about 4m by 3m, used as a customer waiting room, wash screens, and a drying area beneath a large canopy. Wooden fencing of up to about 1.6m in height surrounds the facility on three sides, the north-western side being unbounded to allow access and egress from the main garden centre site.
13. The appeal is based upon a contention that the car wash use is ancillary to the lawful use of the garden centre, which the Council does not dispute is a Class A1 retail use, and does not, therefore require planning permission as it has not resulted in a material change of use of the land, or involved the creation of a new planning unit. For this contention to succeed, it needs to be shown that the car wash use is incidental or ancillary to the lawful Class A1 retail use of the overall planning unit. In this context, the appellants claim that matters such as the small scale of the development, access restrictions, the sharing of services with the main user of the site, and the intention to provide a service to customers of the garden centre, including the provision of loyalty cards, make the car wash use incidental and ancillary.

² Annexe E of Procedural Guide "Enforcement Notice Appeals – England", 23 March 2016, Planning Inspectorate.

³ *Nelsovil v Minister of Housing and Local Government* [1962] 1 WLR 404.

⁴ *Thrasivoulou v Secretary of State for the Environment No 1* [1984] JPL a732.

14. Ancillary uses, however, are not distinguished by scale, although that may be relevant, rather the essential feature is that there should be some functional relationship between the ancillary use and the primary use. Moreover, that functional relationship should be one that is normally found, so that a car wash may reasonably be considered ancillary or incidental to the use of land as a car service or repair garage, or even a petrol filling station, as both uses concern the care and maintenance of motor vehicles. However, where the primary use is a retail use, for the sale of goods to visiting members of the public, an ancillary use has to be of a similar nature. In my view, the provision of a car wash, with fixed structures and equipment on a discrete area of land that has been defined and surfaced for those specific purposes, does not meet such criteria. It is not ordinarily incidental to the primary use, a matter also considered in pertinent case law in *Harrods*⁵, where it was found that extraordinary activities, even though subordinate to the lawful use, are excluded if their introduction amounts to a material change of use of the planning unit. That case involved the use of the roof of the building as a landing site for the chairman's helicopter, and the car wash use in this case is similarly "extraordinary". It is not a use that would normally be expected to be found at a garden centre, unlike, say, a franchise for the sale of garden sheds and summerhouses, as I noted on adjoining land.
15. The creation of a defined and discrete area for the car wash use, and the provision and siting of the various structures associated with it, may have resulted in the formation of a new planning unit or resulted in a material change of use of the overall planning unit to that of a mixed use of Class A1 retail and use as a car wash, but in either case the car wash use is not lawful as there has been no grant of planning permission for the change of use that has occurred.
16. I have considered all of the various arguments put forward by the appellant, including the current level of usage and the appeal decisions submitted in support. The only decision relating to a similar facility, at a garden centre in Windsor⁶, did not directly consider the question of whether such a use required planning permission, as there was no appeal under Section 174(2)(c) of The Act, rather it dealt with the planning merits of that use – a matter not before me in this appeal. Another appeal decision⁷, produced by the Council, similarly concerned the planning merits of a car wash use, whilst they have drawn attention to the fact that retrospective planning permission was sought by the appellants for a very similar development at the Chipperfield Garden Centre.
17. It may well be that the car wash does provide a service for patrons of the garden centre, although the submitted survey information is of too general a nature to confirm whether or not joint customers of the car wash also shop at the garden centre, but even if that were the case it would not create the functional relationship necessary to confirm the use as ancillary.

Conclusions

18. In all of the above circumstances, and for the reasons given above, I conclude that the Council's refusal to grant a CLEUD in respect of (a) use as a car wash,

⁵ *Harrods Ltd v Secretary of State for the Environment Transport and the Regions v Kensington and Chelsea RBC* [2002] JPL 1258 (CoA).

⁶ CLG Ref: APP/T0355/C/10/2126788, dated 10 November 2010.

⁷ CLG Ref: APP/X/1925/C/14/2220448 & APP/X1925/A/14/2219678, dated 19 January 2015.

(b) a single shipping container used for storage for the car wash and (c) wash screens and fences, was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in Section 195(3) of the 1990 Act as amended.

Other Matters

19. I have taken account of all other matters raised in the written representations but they do not outweigh the conclusions I have reached in respect of the main grounds and issues of this appeal.

FORMAL DECISION

20. The appeal is dismissed.

Martin Joyce

INSPECTOR