



Appeal Decisions

Site visit made on 7 January 2020

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6th February 2020

Appeal B) Ref: APP/X1165/X/18/3216205 15-17 Hatfield Road, Torquay TQ1 3BW

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (the Act) by the Planning and Compensation Act 1991 against a refusal in part to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Michael Barrow against the decision of Torbay Council.
 - The application Ref P/2017/0470, dated 3 May 2017, was refused in part by the Council by notice dated 15 October 2018.
 - 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 described as "B2".
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Decision

1. The appeal is dismissed.

Preliminary Matters and Main Issue

2. Following my site visit, I wrote to the Council concerning the enforcement notice that had been issued and which was subject to an appeal linked with this case. I pointed out some of the implications of the way in which the LDC had been issued. The Council withdrew the enforcement notice. Consequently, I will deal only with the above appeal which relates to the refusal in part of the application for an LDC.
3. The description that I have used above is taken from the application form. For clarification, B2 use is classified within the Schedule to the Use Classes Order¹ (UCO). Use Class B2 is described as being for an industrial process other than one falling within class B1. Use Class B1 is use as an office, for research and development, for any industrial process, being a use "which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit".
4. The Council issued a LDC following the submission of the application. The use of the site described has been altered on the LDC as the "use of the land for a mixed use of residential and use for the outside storage of a blue box trailer, a Rolls Royce (kept under tarpaulin), a dinghy, an orange buoyancy apparatus and the siting of an 18 foot portacabin". The Council also issued the LDC with a different plan from that which was submitted with the application. Reference

¹ The Town and Country Planning (Use Classes) Order 1987 (as amended)

to individual items within this description provides a point of reference for the scale of the outside storage use.

5. Section 191(4) of the Act allows for the modification or substitution of a description in this way where the Council or an inspector is satisfied of the lawfulness for those purposes based upon available evidence. The main issue in this case is whether the Council's decision to issue the LDC in these terms was well founded.
6. The onus of proof in LDC cases is upon the appellant and the standard of proof is on the balance of probabilities. If there is no evidence to contradict or make the appellant's version of events less than probable and this evidence alone is sufficiently precise and unambiguous, a LDC in the form requested should be granted. The planning merits, as have been raised by a significant number of people, are not relevant to the consideration of this appeal which turns on matters of law.

Reasons

The nature of the use

7. The use that the Council has accepted as being lawful involves the whole site within the appellant's ownership which is stated as being in a mixed use. At my site visit, I could see the large building that is agreed between the main parties as being in residential occupation. I did not go inside but as that aspect is not disputed, I did not consider that it was essential to do so. I could also see the area around the building and although could not gain access into the external enclosed areas, I understood the layout of the land shown on the plan that accompanies the LDC as issued. Furthermore, I am considering the lawfulness of the property as at the date of the application and based upon the evidence submitted rather than what was on site at the time of my visit.
8. As a starting point for considering the lawful use of the site, it is necessary to ascertain the correct planning unit and the primary use or uses of that unit. The planning unit is usually the unit of occupation and it seems clear in this case that the red-outline on the LDC plan as issued by the Council is the extent of the planning unit separated from adjoining properties by fences and walls around the external perimeter.
9. The residential occupation of the large building is a primary use and has been correctly identified in the way in which the LDC was issued. The way in which the appellant applied for the LDC could not be approved in that form because even if an industrial use is being undertaken it is as a part of a mixed use of the site, across the whole planning unit. The nature of the dispute is whether the other primary use is an external storage use or an industrial processing use similar in nature to a "B2" use. It is also necessary consider whether the particular mix of uses has been continuously undertaken for long enough to be immune from enforcement action. It is not correct to refer in this context to the classes within the UCO which have no purpose other than to define various permitted changes defined by the GPDO².
10. For unauthorised uses of land, the period of immunity in relation to s171B of the Act, is 10 years. The material date by which the use would need to have continued since to be immune, is therefore 3 May 2007.

² The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)

The evidence

11. Evidence submitted of past use and present use of the premises provided by the appellant include a Statutory Declaration. The appellant purchased the property in 2000 when it was being used commercially but as, according to the Statutory Declaration, an “antiques centre and store” and prior to that, the building was a hotel. The precise nature of the antiques use is not explained further and from the brief details given, it was not clearly an industrial processing use. The evidence is insufficient to indicate that an industrial processing use along with residential use had been commenced prior to the appellant’s ownership.
12. The appellant has provided a breakdown of things that have been brought to the site. Many of these items have been of marine or automotive nature including cars, boats, mooring equipment, buoyancy tanks, as well as equipment including a generator. From the chronology provided, the site has consistently had such items within it whilst he has owned it.
13. Between 2003 to 2004, reference is made to 12 vessels being stored and refitted as well as renovation on other vehicles and aircraft. At face value this indicates a significant level of industrial processing for at least this short period of time including steel fabrication.
14. Between 2005 to 2010, a vessel entitled the “Dartmouth Castle” was restored. Reference is made to fabrication being carried out at this site but also with “items being taken to Dartmouth”. It is not clear what nature or level of work was undertaken within the site at this time although it would seem clear that this vessel was brought to the site for the purpose of being repaired. It is also not clear what impact of Mr Barrow’s “very serious accident” in 2007 would have had in terms of the work undertaken. The “Dartmouth Castle” was sold back to the previous owners in 2010. During the same period, in July 2010, a hull of another vessel known previously as the “Devon Princess IV” was decommissioned and sold. There was a degree of mechanical work involved in this process including the removal of equipment and engines, over the course of 12 weeks. This hull was owned already by Mr Barrow rather than being brought to site with the specific purpose of being changed into another form or stripped down for selling in parts. During this period, the picture of use on the site is not precisely defined in terms of the degree to which industrial processes were being undertaken or the intensity of such operations, their effect upon the character of the site, or whether there was an intentional or accidental slowing down from the previous period of more intense use.
15. In 2011 fishing equipment from “One More Drift” was bought by Mr Barrow and although that boat is said to have been refitted, it is not explained whether this was at the site or elsewhere. In addition, car maintenance including welding was undertaken to the appellant’s own vehicles prior to MOT certification. Again, the level of industrial activity as opposed to storage is not clear. Work undertaken to the appellant’s own vehicles would seem most probably in my view to be incidental to the residential occupation of the property, although the degree of such activity and the consequent impact upon the character of the site is not clear from the information submitted.
16. The “Glass Bottomed Boat” was purchased in 2012 for the appellant’s own use. This large vessel was present at the time of my site visit. The appellant states that “considerable” work has been carried out on the vessel although no detail

is provided regarding the amount of work over a considerable period and the effect that this would have on overall use of the property. In 2012, the Council's Senior Planning Investigations Officer visited the site and considered, setting out in writing, that storage of the boat and Mr Barrow's own cars was ancillary to the residential occupation of the site. That officer's opinion is not consistent with the Council's subsequent decision to issue the LDC in the manner it did. It is however reasonable in my view to consider that the officer had not witnessed a significant amount of industrial processing at that time.

17. In 2015, another vessel, the "Mary Gurnie" was purchased with machinery being overhauled at the site as well as some fabrication. However again, there is very little detail provided about these activities or how much of this work was undertaken at the site. Between 2013 and 2017, more cars which Mr Barrow confirms were for his hobby with an intention to restore them with the degree of work undertaken not being set out in any detail.
18. Mr Barrow has held a public service vehicle (PSV) operators since living at the site. This and the operation of 17 seat PSV from the site is not an industrial process and does not therefore lend weight to the form of LDC that the appellant has requested. It seems that the Council has considered this as an ancillary activity which would tally with some of the evidence submitted about this. Similarly, a cherry picker has been on site and various letters refer to this having arrived around 2007 around the time of Mr Barrow's serious accident. It would appear that it has been used for maintenance of the property rather than any processing use on the site. I have no evidence to indicate that these elements of the activities on site are anything more than incidental to the residential occupation of the large building.
19. The letters from the appellant's chartered accountants confirm that the use of the site has been at least partly commercial which is consistent with the description of the use as certified by the LDC. Whilst the writer of the letters has clear knowledge of the appellant's accounts, the degree of knowledge of the site and any activities witnessed at first hand is not apparent.
20. Various letters from third parties are generally supportive of the appellant's case although generally give non-specific assertions about the use of the site. Some do help to confirm certain elements of the appellant's version of events. However many, rather than providing details about the nature, extent and periods over which any industrial activities have taken place, use the general term "B2". It is not clear whether the term has been explained and understood or whether, for example, the concept of incidental use has also been explained to set this in context. In the absence of these statements and others being sworn before a solicitor or commissioner of oaths, they have limited weight. Although there are a lot of letters, they are insufficient in weight and substance to provide sufficiently precise evidence to demonstrate the appellant's case on the balance of probabilities.

Conclusion

21. Overall, since Mr Barrow's occupation of the property there appears to have been variety in the manner in which the site has been used. At times there have clearly been industrial processes taking place alongside the residential use of the building, but the evidence is insufficiently clear or unambiguous to demonstrate that the fabrication, maintenance and other engineering activities (described by the appellant as "B2") have been a primary use rather than being

incidental to the residential occupation and use of the site for storage. It is possible for incidental uses to change, expand or decrease without constituting a material change, so long as they remain subsidiary to the primary purpose of the planning unit as a whole. It is not clear on the balance of probabilities that any level beyond incidental use has been material or continuous between the material date and the submission of the application, 10 years later.

22. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the "B2" use, 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.

A Harwood

INSPECTOR