
Appeal Decision

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 June 2020

Appeal Ref: APP/B1740/X/19/3224782

Calmore Croft Farm, Salisbury Road, Calmore, Southampton SO40 2RQ

- 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 S McCarthy against the decision of New Forest District Council.
 - The application, Ref 17/11692, dated 8 December 2017, was refused by notice dated 6 March 2018.
 - The application was made under section 191(1)(a) and 191(1)(c) 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 'lawful use of the site for the combination of B1(Industrial), B8 (Storage) and C3 (Residential) with no agricultural tie'.
-

Decision

1. The appeal is allowed in respect of a mixed use as a commercial plant yard and use for storage 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.
2. The appeal is dismissed in respect of the residential use.

Procedural Matters

3. It has not been necessary to carry out a site visit as, in this particular case, where all the information needed is included with the application and appeal documents, a decision can be reached on the papers without causing prejudice to any party.
4. The Procedural Guide - Certificate of lawful use or development appeals – England, dated 23 March 2016, states at paragraph A.9.4. "Where the appeal concerns a case which will be decided purely on the basis of technical and/or legal interpretation of the facts, the Inspector may decide the case without a site visit." In addition, Footnote 13 within Appendix F states that a small number of appeals do not require a site visit and can be dealt with on the basis of the appeal documents. The parties were contacted on 23 April 2020 and it was agreed by both parties that as the appointed Inspector I could proceed to a decision on this basis.
5. The application seeks to ascertain the lawfulness of the use of a site which comprises an area of former poultry farm buildings and two bungalows, known as Bungalow 1 and Bungalow 2. The agricultural buildings and surrounding

area have a commercial use as described in the appeal summary above. However, the appellant has revised this in his Final Comments following the finding made by the Council that the office use is ancillary to the primary use. He accepts that the use is best described as a commercial plant yard but he includes a reference to use Class B8 in brackets. This relates to storage and distribution and from all I have read the activities taking place on site do not fall into this use class.

6. Government advice in the Planning Practice Guidance is that an LDC application needs to describe precisely what is being applied for. In cases relating to an existing use, the Secretary of State has the power under section 191(4) of the Act to modify the description of development.
7. In this case the use of the site is essentially the operation of a commercial plant yard, where heavy machinery and equipment used in the construction industry are stored, hired out and returned. There is also the operation of a related storage use. Items stored include building materials, general construction items, company vehicles and items removed from demolished buildings. I believe the scale of the storage use is not ancillary to that of the plant yard but is a primary use in its own right given how much of the site is used for that activity.
8. As such, I shall proceed on the basis that the description of the development of this part of the site is modified to a mixed use as a commercial plant yard and storage. It is also necessary to modify the description in respect of the bungalows. This is because the existing description is imprecise and it is apparent from the appellant's submissions that he is seeking to establish whether both bungalows have a lawful residential use, which is unfettered. As such, I shall modify the description to the use of Bungalows 1 and 2 for residential purposes, which is unfettered. It is considered that there would be no injustice caused to either party by my doing so for the reasons already given.

Main Issue

9. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development was well founded. That turns on whether the appellant can show, on the balance of probabilities, that:
 - (i) There was a material change of use of the land for a mixed use as a commercial plant yard and for storage purposes, which took place more than 10 years before the date of the application;
 - (ii) The two bungalows on site have a lawful residential use, which was unfettered, for 10 years before the date of the application; and
 - (iii) Both uses have continued without material interruption thereafter, so as to be immune from enforcement.

Reasons

10. Section 191(2) of the Act indicates that uses and operational development are lawful at any time if (a) no enforcement action may then be taken in respect of them because, for instance, the time for enforcement action has expired and (b) they do not contravene the requirements of any enforcement notices in

force. Lawfulness in this case is to be decided at the time of the application, that is 8 December 2017.

11. Subsection 191(2)(b) is met here as there are no enforcement notices in force in respect of either use. With regard to subsection 191(2)(a), sections 171B(1) and (2) say that where there has been a breach of planning control consisting of a 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 period for the consideration of the commercial use is more than 10 years before the date of the application, so 8 December 2007 is the relevant date.
12. With regard to the bungalows, the time period is also 10 years but not for the reason given by the appellant, namely a breach of condition, but for the material change of use of the land to residential. This is because when an application is made to erect a dwelling house, it is generally thought that the application comprises operational development. However, wrapped within that application is also an application for the material change of use of the land.
13. The Courts have held that where appellants seek immunity from prosecution in breach of planning control on the grounds of the expiry of the relevant time limits, they need to show 4 years in respect of operational development and the material change of use of a building (my emphasis) for residential purposes. However, it is 10 years for the material change of use to all uses of land, including residential.
14. There is no dispute between the parties that both bungalows were erected more than 4 years before the date of the application. The appellant seeks to show that the subsequent residential use is a lawful unfettered residential use that has taken place 10 years before the date of the application.
15. In addition, the appellant states¹ that the whole site outlined in red comprises one planning unit but from all I have read I consider the site in fact comprises two planning units. This is because there are two units of occupation, namely the commercial yard and the residential area and these are physically and functionally separate from each other, which results in two planning units.

The evidence for the commercial use

16. The appeal site comprises a former poultry farm on 2.4ha of land with at least six agricultural buildings and an ancillary office and mess room, amounting to approximately 5531sqm of floorspace. There are also two bungalows within the site, each surrounded by a garden, and two domestic garages. It would appear that the poultry farm had ceased operations by November 2005 as this is when Savills marketed the site. The sale details show that this was with vacant possession except for an employee in Bungalow 2, who was due to be rehoused.
17. The site was acquired by the appellant on 31 January 2007, as shown on the Land Registry information. The site was subsequently leased to Churchill Retirement Living Limited (Churchill), the operators of the current use, on 1 June 2007. A copy of the lease agreement shows that this was for a period of 5 years initially and it states the permitted use was for storage and as a distribution centre within class B8. There were two subsequent deeds of variation signed in 2012 and these show that the lease was extended from 5 to

¹ Statement of Case paragraph 2.5 and Final Comments paragraph 1

7 years and then to 15 years. An aerial photograph of the site from 2007, when the trees were in leaf, shows a remarkably tidy site with no external storage and all the buildings, referred to as A-F in the appellant's evidence, in situ.

18. Churchill, also known as CRL Plant Services Limited (CRL) have a head office in Ringwood, Hampshire but their yard was originally in Woolsbridge. When this yard was vacated and the firm moved to the appeal site, the appellant had to apply for a change to their Goods Vehicle Operator Licence (GVOL). The witness statement dated 31 January 2018 from Mark Church, Operations Manager for Churchill, states that he organised for the licence to be transferred in February 2007. This was for two vehicles and the trailer. The bundle of documents connected to the licence show an undated letter from Mr Church at head office. It is not clear who he is writing to but the letter includes a partially completed GVOL transfer form and states that he has to submit the form no later than Thursday 29 March 2007.
19. Thereafter in his statement, Mr Church confirms the use of each building. In the main, all buildings are used for storage except building D which is in a state of disrepair and part of building C houses the office and mess room. Parts of building E are used for the company vehicles and part of building F is also used as the vehicle wash point. Externally, between buildings A and B, welfare cabins are stored when not in use and in the open area (amounting to approximately 3866sqm) adjacent to building F, large vehicles are stored with associated equipment and pallets of building materials. Mr Church also states that he has been employed by Churchill since May 2004, has been based at the appeal site since 2007 and that it has been used as a plant and storage yard since that time, to date.
20. The bulk of the evidential material comprises copies of invoices, collection and receipt notes. The earliest invoice is dated 31 March 2009 from Convenient Hire addressed to CRL at the appeal site and concerns the hire of portable toilet facilities. The next is an invoice from Hampshire Rigging Services with the date of the order showing 18 June 2010 addressed to CRL at the site. It is for re-certifying various amounts of plant, something which they do on a regular basis as there are a succession of other orders² up to 3 February 2019.
21. The appellant has many dealings with Gillard's Transport Limited as there are a significant number of invoices, collection and receipt notes from them. The invoices are addressed to head office but the notes are all concerned with the appeal site and it is referred to in many ways including 'Churchills Totton', 'Calmore', '(Churchills storage) Southampton' and 'Churchill yard Calmore Farm'. The earliest invoice is dated 31 August 2010 and others³ follow in regular succession up to 21 November 2018. The notes begin 26 February 2012 and continue⁴ to 30 January 2018.

² Others are dated: 7 Aug 2010, 6 May 2011, 14 Mar 2012, 18 Jul 2012, 12 Dec 2012, 11 Jun 2013, 2 Jan 2014, 11 Feb 2015, 9 Feb 2016, 28 Sep 2016, 7 Feb 2017, 8 Jan 2018

³ Other invoices are dated: 30 Nov 2010, 29 Feb 2012, 21 Mar 2012, 17 May 2012, 31 Dec 2013, 31 Jan 2014, 12 Nov 2014, 26 Feb 2015, 21 Oct 2015, 31 Jul 2016, 19 Jun 2017, 14 Aug 2017, 9 Jan 2018

⁴ Other notes are dated: 7 Mar 2012, 13 Mar 2012, 1 May 2012, 4/5 Dec 2012, 10 Dec 2013, 17 Dec 2013, 14/15 Jan 2014, 4 Nov 2014, 17 Feb 2015, 5 Oct 2015, 14 Oct 2015, 26 Jul 2016, 10 Aug 2017, 3 Jan 2018

22. Manitowoc Crane Care also issue regular⁵ invoices beginning 27 October 2010 and continuing to 9 September 2019. These are addressed to head office but show the consignee address as the appeal site.
23. The appellant also submits a bundle of electricity bills which reference the appeal site and the name of the user being Churchill. They begin September 2009 and continue⁶ to the 25 June 2019.
24. In addition, there are three more items and a bundle of photographs. There is an extract from a website called Free Index dated May 2012, which provides a profile of the company at that time. This references CRL at the site and states that the company has over 10 years' experience of the hire and sale of city tower cranes. There is a copy of an email dated 24 January 2014 from Mr Church at the appeal site to a ledger clerk at head office. There is also another aerial photograph dated 26 May 2017 and photographs of the site from July 2017. The aerial photograph shows lots of external storage between buildings A and B and around building F. The July photographs show a hard surface area around building F, where there are shipping containers, vans, plant and other vehicles. They also show inside building F where there is a flatbed truck and stored items, material stored adjacent to building E and pallets stacked adjacent to building A.
25. Finally, there is a partial copy of a tenancy agreement between Mr S McCarthy, Mr McCarthy and Buchannan Events Ltd dated 30 November 2009 for use of part of building A. However, no use is specified and the document is not mentioned in any of the appellant's submissions.

Assessment

26. In an appeal relating to an LDC, the burden of proving relevant facts rests with the appellant and the test of the evidence is the balance of probabilities. The appellant's own evidence does not have to be corroborated by 'independent' evidence. If there is no evidence to contradict or otherwise make the appellant's version of events less than probable, the appellant's evidence alone may be sufficient to justify the grounds of a certificate. This is provided that it is sufficiently precise and unambiguous.
27. The Council do not dispute that there has been a material change of use but they question whether the operation of that use has been continuous inside all of the buildings and whether there has been the extent of external storage as claimed. They confirm that planning permission was granted in 1977 for the office and mess room and that they investigated an enforcement complaint in 2012 concerning the erection of a security fence around the perimeter of the site. Photographs taken at the time show an area of building materials being stored. In addition, an aerial photograph from 2013 shows open storage to the rear of the site. However, none of these photos are submitted with the Council's case.
28. From all I have read, it seems to me that it was the appellant's clear intention to make use of the whole site, except for the bungalows, for the claimed use.

⁵ Others are dated: 14 Mar 2012, 26 Feb 2013, 23 Oct 2014, 26 Aug 2014, 27 Mar 2015, 24 Sep 2015, 2 Sep 2016, 5 Jan 2017, 8 Nov 2017, 14 Feb 2018

⁶ Others are dated: 7 Oct 2009, 15 Jun 2010, 28 Jun 2010, 27 Mar 2012, 27 Jun 2012, 3 Nov 2014, 3 Feb 2015, 27 Mar 2015, 26 Jun 2015, 22 Sep 2015, 24 Jun 2016, 29 Sep 2016, 22 Dec 2016, 30 Mar 2017, 25 Sep 2017, 17 Apr 2018

This is demonstrated by the signing of the lease, the subsequent deeds of variation and the transfer of the GVOL. In addition, Mr Church confirms the site has been used as a plant and storage yard from June 2007, to date. The email from 2014 shows he is based there as well as his witness statement.

29. Within the witness statement he provides details of the use of each building adding that in respect of building D, where the roof has collapsed, it is no longer suitable for storage use. He also adds other details such as the location of the company vehicles and vehicle wash rather than just listing 'storage' for every building or not even setting out the use of each building. With regard to external storage, he is quite specific, pointing out that it occurs on the hard surface around building F, an area which is referred to as being 'South of the site' as there is a hedge line separating building F from the rest of the site.
30. He also specifies that storage occurs between buildings A and B. He could have claimed that it occurs west of building A, as shown on the 2017 aerial photograph. However, photographs are but a snapshot in time and perhaps such a use in this area has not been continuous. Nevertheless, the 2017 photograph does support what is stated about the other areas of external storage.
31. Evidence of the appellant's intention is also corroborated by the details of the enforcement complaint. A person is unlikely to go to the extent and expense of erecting security fencing around a 2.4 hectare site if there was not anything of value to protect within the site. He could have just erected it around the hard surface area adjacent to building F, where building materials, vehicles and plant are stored but it would appear that items stored in the buildings were also in need of protection.
32. There are gaps in the appellant's evidence, such as the absence of any electricity bills in 2011 and 2013. However, on perusing the bills, there are periods when readings are not taken and credit amounts to significantly high levels with large amounts of money being carried forward, which may explain the omission. In addition, other than the transfer of the GVOL in 2007, there are no other documents to evidence the operation of the use until March 2009. The details set out in the lease though, show that rent is payable at regular intervals and it seems unlikely that rent was being paid for such a large site when no use was taking place. Furthermore, the volume and regularity of the invoices, collection and receipt notes are a strong indication that the use has continued at least from March 2009 to date.
33. With regard to building D, mention is made that the roof collapsed 'recently' but no details are provided as to when that happened and, as such, when the appellant stopped using the building. It is not clear therefore whether there has been 10 years use of this building before the date of the application. In addition, in the schedule of buildings on the site set out in the application covering letter, an open sided barn is mentioned with an area of 50sqm. This though is not referenced on the site plan in the same way as buildings A to F are labelled, is not mentioned in the sale particulars and does not appear to be shown on the topographical survey drawing. Furthermore, Mr Church does not refer to it in his statement and it is not mentioned elsewhere.
34. Finally, with regard to the 2009 tenancy agreement with Buchanan Events, it is not clear what purpose it serves or indeed whether the unknown use took place. I have therefore given it little or no weight.

35. In arriving at my conclusion, I am conscious that the Council have a number of concerns. It is inevitable when seeking to document a material change of use that sometimes there are gaps in the evidence as I have outlined. This is why the test for the evidence is 'on the balance of probabilities', namely what is more likely than not. That balance need only be slightly more than half in order to satisfy the test but that is not to say that my finding applies to all of the site.
36. It is considered, having regard to the totality of the evidence, that it does not make the appellant's version of events less than probable. In my view, the appellant's evidence is sufficiently precise and unambiguous, except in respect of building D and the open sided barn, to support the use of the site as a commercial plant yard and for storage purposes. As such, I conclude that the material change of use for these activities took place before the relevant date and they have continued without material interruption to date. The development is therefore lawful except in the areas I have detailed.

The evidence for the use of the bungalows

37. The use of the bungalows is first mentioned in the sale particulars, where it is stated 'The bungalows are believed to have been constructed in the mid 1960's and according to the Planning Permission they are subject to agricultural occupancy conditions'. The appellant sought to ascertain the details of this planning history but within the response from the Council dated 7 December 2017 it was stated 'The appears (*sic*) to be no planning permissions in 1960 for the erection of dwellings so we assume they were built Pre-1948'. In addition to this information, the appellant also submits copies of tenancy agreements which show a residential use for the following periods:
- Bungalow 1: 1 July 2016 - 30 June 2017, 1 July 2017 - 30 June 2018, 1 July 2018 - 30 June 2019 and 1 July 2019 - 30 June 2020;
 - Bungalow 2: 1 September 2009 - 28 February 2010 and 1 May 2019 - 30 April 2020.

Assessment

38. It is apparent from the planning history, or rather the lack of a record of any planning history for the erection of the bungalows, that the claim made in the 2005 sale particulars appears to be without foundation. In the absence of any other information held at the Council, it can only be assumed that the bungalows were erected before formal records were required to be kept. As such, the issue of whether their occupation is restricted in anyway, such as by an agricultural occupancy condition, does not fall to be considered.
39. Turning now to whether there has been a residential use for any 10 year period before the relevant date, the sale particulars set out that Bungalow 2 was occupied by an employee in 2005. Bungalow 1 may also have been occupied by an employee before October 2005 (the date on which it is stated agricultural activity ceased) as the sale particulars state the property was in Council Tax Band B and the liability that was due.
40. As such, it is possible that during the operation of the poultry farm the residential use of both bungalows became established, as the planning history provided by the Council shows that the farm was in operation from at least 1975 until its demise 30 years later.

41. The tenancy agreements, however, do not show an uninterrupted 10 year residential period for either property before the date of the application, which was 8 December 2017. The appellant states that both properties have been rented out since he acquired them in 2007⁷ but he also states that they have been rented out since 2009⁸. There is no explanation offered for these different dates. The documentary evidence shows that a couple occupied Bungalow 2 from 1 September 2009 to 28 February 2010 but thereafter there is a gap until a new person occupies it after the application is submitted. As such, their occupation does not support the appellant's case, which has to be made out before the date of the application.
42. The first tenancy agreement for Bungalow 1 is dated 1 July 2016 for 12 months and although it is renewed for the following 12 month period, there is no tenancy agreement dated 2012, as stated by the appellant. Furthermore, subsequent agreements are dated after the date of the application and therefore do not support the appellant's case.
43. I have had regard to all of the appellant's submissions and I am satisfied that, in respect of the agricultural occupancy condition, his evidence is sufficiently precise and unambiguous. However, that is not the case with regard to the lawfulness of the residential use.
44. On this point the appellant's evidence is not sufficiently precise and unambiguous. The tenancy agreements do not cover the relevant period and, whilst it is possible that the residential use of both bungalows was already established, this has not been substantially evidenced or demonstrated by the appellant.
45. My conclusion is therefore that the appellant has failed to show, on the balance of probabilities, that both bungalows have a lawful residential use, which has continued, without material interruption, for a period of 10 years before the date of the application so as to be immune from enforcement.

Conclusions

46. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of a mixed use as a commercial plant yard and use for storage was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.
47. 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 use of Bungalows 1 and 2 for residential purposes, which is unfettered, 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.

D Fleming

INSPECTOR

⁷ Application covering letter

⁸ Statement accompanying appeal form

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 8 December 2017 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 material change of use to a mixed use as a commercial plant yard and use for storage took place by 1 June 2007 at the latest. This use became lawful by continuing for a period of over ten years prior to the date of submission of the application and does not contravene the requirements of any enforcement notice in force.

Signed

D Fleming
Inspector

Date: 17 June 2020

Reference: APP/B1740/X/19/3224782

First Schedule

Mixed use as a commercial plant yard and use for storage, except within Building D and the open sided barn (identified in the application covering letter), and external storage limited to the area between Buildings A and B and the hard surface area to the south and west of Building F.

Second Schedule

Land at Calmore Croft Farm, Salisbury Road, Calmore, Southampton SO40 2RQ

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: 17 June 2020

by D Fleming BA (Hons) MRTPI

Land at: Calmore Croft Farm, Salisbury Road, Calmore, Southampton SO40 2RQ

Reference: APP/1740/X/19/3224782

Scale: not to scale

