



Appeal Decision

Site visit made on 7 January 2021

by Timothy C King BA (Hons) MRTPI

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

Decision date: 26 February 2021

Appeal Ref: APP/K3605/X/20/3251785

Hawks End Yard, Franklyn Road, Walton on Thames, Surrey KT12 2AV

- 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 Kenneth and Michael Hawkins against the decision of Elmbridge Borough Council.
 - The application Ref 2020/0202 is dated 21 January 2020.
 - 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 applied for is described as *'B8 open storage for materials and equipment with lock-up B8 timber store and associated vehicular parking for use as an operating centre.'*
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Decision

1. The appeal is dismissed.

Procedural matters and planning history

2. S171B(3) of the 1990 Act as amended says that where there has been a breach of planning control involving the change of use of land no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
3. On this basis the appellants must successfully demonstrate, on the balance of probability, that the breach of control commenced ten years before, ie prior to 21 January 2010 (hereinafter referred to as "*the material date*") and has continued since.
4. This application follows a previous unsuccessful s191 application for a LDC made in September 2019. This involved the use of the land, the subject of the current application grouped together with an adjoining plot, for which Class B8 use rights were claimed. The application was refused on 8 January 2020, on the basis of the Council considering that the application had failed to satisfactorily demonstrate that the whole site had been used for Class B8 storage purposes for the requisite period of ten years prior to the date of the application made.
5. As mentioned, the current application now relates to only part of the wider site, and claims its immunity from enforcement action for the open storage of materials and equipment, with an on-site lock-up timber store, and associated vehicular parking for use as an operating centre.

6. In an appeal under s195 of the Act against the refusal of a LDC the burden of proof is upon the appellant. The test of the evidence is one of balance of probability. As such, the planning merits of the matter applied for do not fall to be considered. The decision will be based strictly on the evidential facts and on relevant planning law.
7. A LDC does no more than certify conclusively at a point in time that a use is lawful. As such, a use confirmed as lawful through a LDC is capable of being abandoned with the occurrence of a material change in circumstances.

Main Issue

8. The main issue in this appeal is whether, on the balance of probability, the use was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990.

Reasons

9. The appellants indicate that Sheargold Scaffolding Ltd started renting the yard from January 1997.
10. Following an enforcement investigation in 2010 regarding the use of the land the Council issued a letter dated 24 September 2010, headed 'Business use of land'. In essence, the letter said that the case was considered closed, stating:
"... it seems likely that Sheargold Scaffolding and Show Site Services Ltd may have been operating from the compound for sufficient time to have immunity from any enforcement action against the unauthorised change of use for that area of land where the businesses operate from."
11. Show Site Services, whose business involved equipment hire, apparently occupied part of the wider site between 1992 and 2016.
12. I note from the application form relating to the current appeal, under the heading 'If applicable, please give the ref. no of any existing planning permission, lawful development certificate or enforcement notice affecting the application site', mention is here made of the above letter (with its ref no being that of the enforcement investigation - INV/2009/0925). However, this is not an official document of the type and weight requested. Moreover, and most importantly, it cannot be deduced from the letter that the immunity indicated in the letter relates directly to a Class B8 use; that essentially now applied for.
13. In terms of the evidence provided for the current appeal a letter from E.V. Hawkins confirms that from 1 January 2013 MIT Build & Renovations would be taking over occupation of the site from Sheargold Scaffolding. A subsequent letter from MIT, dated 20 August 2019, indicated that its Scaffolding division was in occupation on that date. On this basis, and the indication that Michael Sheargold stayed on as Manager, suggests that Sheargold and MIT were likely involved in similar operations.
14. A Statutory Declaration has been provided by Richard Eves saying that he visited the site on 1 October 2019 and noticed MIT moving off the land. Also, on that date, Lowery Ltd, a firm involved with the storage of building materials, apparently commenced using the on-site store building for this purpose. It is

not clear to me, though, from the declaration, whether Lowery's use of the land was to a larger extent.

15. At my site visit I observed the said store building, and also two shipping containers, along with a number of vehicles parked at the site. However, any substantive use of the land would appear to have ceased.
16. Fundamentally, in this particular case, the appellants describe the use as B8 open storage with a B8 timber store. However, there are two important issues to bear in mind here. Firstly, the actual planning unit needs to be clearly identified and, secondly, the description and nature of the use applied for, and for which immunity from enforcement action is claimed, must be examined.
17. As regards the planning unit the leading case in which this was defined is *Burdle v SSE* [1972] 3 All E.R. 240. In this judgement it was suggested that there may be three possible situations which can be identified when considering the planning unit. First, there may be a single main purpose, to which any secondary activities are ancillary or incidental. Second, there may be a variety of activities which do not have a primary/ancillary relationship to each other but are composite within the whole planning unit. Finally, there may be sites where separate and distinct areas are occupied for unrelated purposes. In such instances these areas are actually separate planning units and each is to be considered by itself.
18. At my site visit I noted that the two sites are now demarcated by fencing, which appeared recent in age. Indeed, the photographs provided by the Council dated 9 March 2020 – presumably taken at the site visit relating to the determination of the LDC application – appear to show that there was no physical divide between the two sites at that time. In this regard, although the site plan submitted with the application covers only the area immediately to the west of that enclosed by the broken line – the two areas were linked for the previous LDC application – it is not clear from the evidence whether the red-ringed area relating to the current appeal represents an actual planning unit or whether, instead, the planning unit has historically been the wider area of land.
19. Given the above it is not demonstrated from the evidence whether, having regard to *Burdle*, the site operations during the relevant ten-year period, reflected that of the second or third scenarios, and whether Show Site Services (between 1992 and July 2016) and then Moore's Tree Company (from August 2016) occupied a distinctly separate planning unit of occupation in both physical and functional terms. Although I acknowledge that the judgement indicated there need not necessarily be a wall or fence or other physical boundary feature between separate uses, this is only relevant should it be possible to identify separate and distinct areas of occupation for unrelated purposes.
20. As regards the relevant use(s) itself I consider that the appellants, although claiming that the red-ringed area of land was used for Class B8 Use purposes from the material date to the date of the application, have not properly compared, contrasted and analysed the respective operations of Sheargold and MIT. In this respect it is interesting to note that a scaffolders yard is not mentioned on the application form. To my mind a storage and distribution use

involves the storage of items on the land for their subsequent one-way dispatch. In contrast, the inherent activities relating to a scaffolders business, involve the scaffolding parts and apparatus being taken from and later returned to the yard. On this basis I would consider that use rights which might have accrued from the occupation of Sheargold and MIT relate to a sui generis use rather than that which could wholly fall within Class B8. The stated 'vehicular operating centre' further clouds the issue.

21. S191(4) of the 1990 Act as amended allows the decision maker a discretionary power to modify the description of the existing use, operation or other matter. This discretion should not be read as empowering the grant of an LDC for something different to what is applied for or as justifying the certification of something obvious. In this particular instance I am mindful of the stated Class B8 use on the application form. If I was minded to allow this appeal I would therefore have to ignore the actual use class applied for. Instead, the process would require that I attempt to accurately describe a sui generis use for an LDC document reflecting that which might have acquired immunity.
22. The above approach is clearly at odds with the appellants' claims and would therefore likely prejudice their case and cause them injustice. However, this does not, of course, preclude them from making a new application for a LDC to the Council properly based on the nature of Sheargold and MIT's operations and their previous use of the land providing there has been no material change in planning terms. In this connection regard should be had to the extent and period of Lowery's occupation and the nature of any other subsequent use of the land although, as mentioned, the land did appear to have fallen vacant at the time of my site visit.
23. In view of my findings the planning unit itself is also an important consideration and would need to be clearly and convincingly defined with full reference to the particular areas of occupation of the site by the various previous occupiers.

Conclusion

24. Having interpreted and weighed up all the evidence available, for the above reasons, I must conclude that the appellants have not discharged the burden of proof with sufficient precision and unambiguity. On the balance of probabilities, there is nothing compelling to confirm their claims.
25. I therefore conclude, on the evidence available, that the use was not lawful on 21 January 2020, within the meaning of section 191(2) of the Town and Country Planning Act 1990.
26. Accordingly, I will exercise my powers under section 195(3) of the Act.

Timothy C King

INSPECTOR