



Appeal Decision

Site visit made on 9 March 2021

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5 May 2021

Appeal Ref: APP/Z5630/X/20/3256116

Seething Wells Filter Beds, Portsmouth Road, Surbiton

- 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 Sean Reardon of Cascina Ltd against the decision of the Council of the Royal Borough of Kingston-upon-Thames.
 - The application Ref 20/00627/CEU, dated 11 March 2020, was refused by notice dated 19 June 2020.
 - 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: 'Use Class B8'.
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. I have recently dealt with another appeal¹ on this site and this is the subject of a separate decision.

Main Issue

3. The main issue is whether the Council's decision to refuse the certificate was well-founded or not.

Reasons

4. Section 191(1) of the 1990 Act referred to above, states that if any person wishes to ascertain whether any existing use of land is lawful, they may make an application for the purpose to the local planning authority specifying the land and describing the use.
5. Section 191(2) provides that, for the purposes of this Act uses are lawful at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

¹ APP/Z5630/X/21/3267837

6. Section 191(4) states that if, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
7. As set out in the Planning Practice Guidance (PPG)², the applicant is responsible for providing sufficient information to support an application. In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.
8. The 'Use Class B8' description in the heading above has been taken from the application form. Use Class B8 is defined in the Use Classes Order³ as use for storage or as a distribution centre. But as set out in the PPG⁴, an application needs to describe precisely what is being applied for (not simply the use class) and the land to which the application relates. Without sufficient or precise information, a local planning authority may be justified in refusing a certificate.
9. It is clear from the evidence provided that the parties have approached the use contemplated by the application as "water storage" and I have determined the appeal on this basis.
10. The appeal site has previously formed part of a water treatment works constructed in the mid-nineteenth century. It contains 'beds' which received water from the River Thames and filtered it through sand, gravel and shells, ready for pumping into reservoirs. The appellant indicates that, as with other water treatment infrastructure, the appropriate use class was sui generis⁵.
11. The water treatment works was decommissioned in 1992 and the evidence indicates the use described above ceased. Filtration material, referred to above, is thereafter said to have been removed from the beds as part of the decommissioning. The appellant has indicated their view is that since 1992 the appeal site has been maintained for "water storage", that for the purposes of the Use Classes Order this is a B8 use and that this use has been carried out for at least 10 years prior to the date of the application. This being the case, the use may be lawful due to section 171B(3) of the 1990 Act.
12. From the information provided and my inspection of the site, it is clear that the appeal site before me remains is part of a wider site. The red line site plan provided is drawn more narrowly than the red line site plan for the previous LDC appeal⁶. It excludes land to the southwest where a pumphouse is situated, shown on drawing S/DC 11, as well as the access for the wider site from the highway.

² Lawful development certificates - Paragraph: 006 Reference ID: 17c-006-20140306

³ The Town and Country Planning (Use Classes) Order 1987

⁴ Lawful development certificates - Paragraph: 005 Reference ID: 17c-005-20140306

⁵ In a class of its own

⁶ APP/Z5630/X/19/3224185 dated 23 February 2020

13. Notwithstanding the area to which the LDC relates, there is no physical or functional separation between the LDC application site and the wider site that was associated with the water treatment works.
14. The Council disputes that the LDC site has been in a B8 use for the preceding 10 years, drawing my attention to specific case law⁷ in this regard and how "store" is defined in the Oxford English Dictionary. Considering both of these sources, I am not satisfied the appeal site has been used for what can be fairly called "storage". There is no evidence water held in the beds has been put to any use or "stored" for any purpose. Indeed, the evidence indicates when the appellant has drained the beds the water was disposed of into the River Thames.
15. I have taken into account the fact that filtrate material may have been removed from the beds and operational development (structures) on the land may have been maintained. But I am not satisfied that either of these factors, together or separately, mean that a material change of use of the appeal site to water storage has occurred. Moreover, it does not follow that the cessation of the filtration process, described above, means that water on the land is now "stored" and a B8 use has therefore commenced.
16. Based on the information available, it seems to me that the beds and other physical works on the land, and their use, were an ancillary component of the former sui generis use and they simply remain as a legacy of the previous use. Rainwater obviously falls on to the beds and adds to water in them and they may be filled by water from the river. But this does not mean that a material change of use to storage, pursuant to Use Class B8, has occurred.
17. I cannot disagree that the beds have held water. But the same could be said of any large receptacle open to the sky (and in this case below ground level). It should be no surprise that such a receptacle holds water. It does not mean that a Use Class B8 storage use has been carried out, particularly given the history of the site where holding water was a fundamental component part of the overall sui generis use. Since then, the evidence does not demonstrate on the balance of probability, that water has been held for any primary storage purpose.
18. The appellant considers that water has been stored in dedicated water storage infrastructure, formally consented for water storage and suitable for future water distribution. The appellant refers to the storage of water as 'holding a resource against a future use', as well as developing a commercial market, waiting for an increase in the value of the resource being stored and the storage of water being undertaken on a site with 'demonstrable opportunity for onward supply'. But this is not a fair representation of the situation, taking into account the history of the site, where the infrastructure in question was provided as part of a wider water treatment works where water was treated rather than just stored and simply remains. Moreover, whether or not the infrastructure on the land is suitable for the future distribution of water is not evidence that a B8 storage use has been carried out for 10 years prior to the application.
19. Considering all of the above points, the applicant's evidence does not demonstrate on the balance of probability that the site has been used for what

⁷ *Crawley BC v Hickmet Ltd*, (1998) 75 P. & C.R. 500 (1997)

can fairly be called “storage”. Based on the evidence provided, I am not satisfied the use described in the application has been carried out for 10 years prior to the date of the application.

Other Matters

20. The previous LDC application, allowed on appeal⁸, relates to the construction of infrastructure, pursuant to section 191(1)(b) of the 1990 Act, on a site larger than the appeal site which is before me. It did not certify the lawfulness of any use to which the land may have been put, pursuant to section 191(1)(a).
21. My attention has been drawn by the appellant to other appeal decisions⁹. But their outcomes relate to the specific facts in those cases. So I am not satisfied conclusions in those cases can necessarily be transferred to the appeal which is before me.
22. The appellant has expressed concern about weight which may have been attributed by the Council to objections received in response to the application. But as is made clear in the PPG¹⁰, planning merits are not relevant at any stage in this particular type of application or appeal. I have considered whether the specific matter is lawful, based on the facts of the case and relevant planning law.
23. The conduct of the Council, referred to by the appellant, is not a matter for me to consider in the context of an appeal under section 195.

Conclusion

24. For the reasons given above I conclude that the Council’s refusal to grant a certificate of lawful use or development in respect of Use Class B8 was well-founded and that the appeal fails. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

L Perkins

INSPECTOR

⁸ APP/Z5630/X/19/3224185 dated 23 February 2020

⁹ Including APP/F9498/W/15/3134763 dated 11 April 2016, APP/X1118/W/18/3194959 dated 4 June 2018 and APP/Y0435/X/09/2103771 dated 25 August 2009

¹⁰ Lawful development certificates - Paragraph: 009 Reference ID: 17c-009-20140306