



Appeal Decision

Site visit made on 19 April 2021

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 May 2021

Appeal Ref: APP/D3640/X/19/3241266

Fenns Lane Nursery, Fenns Lane, West End, Woking GU24 9QE

- 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 Mrs Caroline Elliott of J W Elliott & Sons (West End) Ltd against the decision of Surrey Heath Borough Council.
 - The application Ref 19/0397, dated 9 May 2019, was refused by notice dated 5 September 2019.
 - 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 has been described as: Use of buildings A&B and C as Class B2 (General Industry) of the Town and Country (Use Classes) Order 1987 (as amended), D and E and Container and Storage areas as Class B8 (Storage and Distribution) of the Town and Country (Use Classes) Order 1987 (as amended) and F as Class B1 (Light Industry) of the Town and Country (Use Classes) Order 1987 (as amended).
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Summary of Decision

1. The appeal is allowed in part and is dismissed in part, as set out below in the Formal Decision.

Preliminary Matters

2. In the banner heading above I have adopted the description of the certificate from the Council's decision notice in the interests of brevity, but I have had full regard to all the evidence submitted for the purposes of my assessment.
3. The main parties opted for the appeal to be determined by means of written representations and did not identify any injustice that would otherwise arise. I am content to determine the appeal on the written evidence that is already before me and do not consider that injustice would arise.
4. My assessment is based upon matters as they existed at the time the application was made, in May 2019. Since that date, the Use Classes Order has been amended, but nevertheless, any certification will be based upon the Order that was extant at that time.

Main Issue

5. The main issue is whether the Council's decision to refuse a certificate of lawfulness for the use of land and buildings is well founded.

Reasons

6. In cases such as this the onus is on the appellant to demonstrate her case on the balance of probabilities. The planning merits or policy considerations of the uses are therefore not relevant to my assessment. Neither are general representations in support or objection to the uses described, nor decisions, including those for lawfulness, at other sites.
7. The site is a former nursery which consists of a number of buildings and land/outside areas. The appeal application relates to five of the buildings at the site as well as some outside areas. For the purposes of my assessment I will therefore consider each in turn, as described and annotated in the appellant's evidence and then adopted by the other parties. A relevant period for the determination of the certificate is 10 years preceding the date of the appeal application, which is dated 9 May 2019 (a relevant period).
8. During my site visit I was able to inspect the relevant parts of the site, including inside the buildings. However, my site visit only represents a snapshot in time and follows-on from a relevant period.

Building A

9. This comprises the first half of a comparatively small tin building located near the front of the site, as accessed from Fenns Lane. The lawfulness for a Class B2 use (General industrial) is sought.
10. The appellant's evidence in the form of statutory declarations dated 27 February 2019, is that the tenant of the building is a ceiling, coving and decoration manufacturer who, has let the building continuously since November 2006. Various ledger account evidence also demonstrates on the balance of probabilities this to be the case. Such a use was also evident during my site visit and there is little contradictory evidence before me concerning the use during a relevant period.
11. Whether or not that business is small scale, the use of what is described as Building A is accepted by the Council as amounting to a Class B2 use, and I have very little evidence before me to demonstrate on the balance of probabilities otherwise. The appellant's evidence is therefore sufficiently precise and unambiguous concerning the continuity of the use during a relevant period and so as a matter of fact and degree the appellant has discharged the necessary burden of proof to demonstrate her case on the balance of probabilities.
12. It is therefore appropriate to issue a certificate for a Class B2 use for this identified part of the building, only.

Building B

13. This comprises the second half of the small tin building. There is very little evidence that there is any internal access between the two parts of the building. During my site inspection Building B was used for an entirely separate purpose being for what appeared to be predominantly the storage of books and furniture.
14. The appellant's evidence is that this part of the building is let to the same tenant. There is however contradictory evidence before me concerning Building

B, which, in conjunction with observations during my site visit, cast considerable doubt in my mind about the certificate sought by the appellant for a Class B2 use. That contradictory evidence relates to Building B being rented to a different person. The appellant has provided very little evidence to address this point. In light of this, I find the appellant's evidence vague and imprecise.

15. Even if the entirety of the building were let to the same tenant, it is the use that is relevant. Moreover, the appellant has described and annotated the building as being in two parts which adds weight to the prospect of it being used by a different person, or for a different use/s.
16. It is the case that the appellant's own evidence needs to be sufficiently precise and unambiguous to justify the grant of a certificate. As a matter of fact and degree, based upon the evidence before me, the appellant has not discharged the necessary burden of proof to demonstrate her case on the balance of probabilities.

Building C

17. The building is said to have been purpose built in 1984. It is a large building in terms of scale and height and of metal construction. The lawfulness for a Class B2 use is sought, although submissions have also been made by the appellant pertaining to a mixed Class B2 and B8 use.
18. The statutory declarations state that Building C has been in use for uninterrupted car repairs and servicing by a number of companies from September 2011. These are then listed. Prior to that, the building was used for vehicle repairs by JW Elliott & Sons, for which the appellant is a director. At the time of my site visit it appeared to be in use for the storage of machinery and equipment.
19. It is said on behalf of the appellant that they became a commercial landlord in October 2001 and that the site ceased trading as a nursery in 2002. The building was then used by the appellants as part storage and part vehicle repairs until commercial lettings began in September 2011.
20. There is however evidence before me in the form of aerial photographs which may show the site as an active nursery in more recent times. Whilst the appellant may dispute the dates of these, the onus is on her to demonstrate her case on the balance of probabilities. Moreover, there is very little evidence before me pertaining to the nature and extent of the said use between 2002 and September 2011 to demonstrate on the balance of probabilities a Class B2 or mixed use of Building C.
21. There is also a Statutory Declaration from a Mr Meaney, who lives immediately alongside the site, which states that nursery activity ceased in 2012 and that Building C was used for the nursery business and to store nursery equipment. The appellant has provided little evidence to directly refute this latter contention.
22. There is therefore considerable doubt in my mind concerning the actual use of this building prior to September 2011 and then whether any such use amounted to an ancillary activity to the wider nursery site, as opposed to the creation of a separate planning unit for Class B2 purposes.

23. It remains the case that the appellant's own evidence needs to be sufficiently precise and unambiguous to justify the grant of a certificate. As a matter of fact and degree, based upon the evidence before me, the appellant has not discharged the necessary burden of proof to demonstrate her case on the balance of probabilities.
24. In light of the appellant being unable to demonstrate on the balance of probabilities a Class B2 use over a relevant period, I have no need to consider the evidence for the period from September 2011 in any detail.

Building D

25. The building is of considerable size formed by two different adjoining structures and is open-ended. The lawfulness for a Class B8 use (Storage) is sought.
26. The Statutory Declarations of the appellant are that this building has been let to a Mr Jesperson and the Cuckoo Valley Shooting Club (the club) for the storage of equipment, which has continued from 2007. Various ledger accounts are also said to demonstrate payments from the club for a relevant period. There is however very little evidence concerning the use or activities of Mr Jesperson.
27. In respect of the club, the evidence before me is that a very small area was actually used for storage. Whilst it is said it was up to the club as to how much of the building they used, there is no tenancy agreement to demonstrate on the balance of probabilities the terms of their agreement and with that usage. I also note the extremely low monetary payments made by the club for what otherwise would have been the exclusive use of a sizable building.
28. Moreover, the club have provided written evidence that their use only amounted to the storage of two pallets in this sizeable building. The appellants evidence is therefore imprecise in respect of the actual use of the building and this casts considerable doubt in my mind as to whether the use by the club was de minimus in planning terms, or part of a mixed use in Building D, as opposed the creation of a separate planning unit for Class B8 purposes.
29. It remains the case that the appellant's own evidence needs to be sufficiently precise and unambiguous to justify the grant of a certificate. As a matter of fact and degree, based upon the evidence before me, the appellant has not discharged the necessary burden of proof to demonstrate her case on the balance of probabilities.

Building E

30. The building is a reasonably modest timber structure which at the time of my site visit contained a boat, associated items and a small makeshift kitchenette area. The lawfulness for a Class B8 use is sought.
31. The Statutory Declarations of the appellant are that this building has been continuously let to different businesses for storage purposes since January 2003.
32. It is then stated on behalf of the appellant who those businesses/people were (totalling 5 during a relevant period) and further accounts evidencing payments were provided. However, the number of tenant's casts considerable doubt in my mind as to the continuity of the contended Class B8 use. There are no

Statutory Declarations from those tenants, and whilst it is not necessary for the evidence of the appellant to be corroborated, it must in itself be sufficient clear and unambiguous. To simply state that the building has been used for storage purposes since January 2003 is not sufficiently precise evidence to demonstrate the use contended on the balance of probabilities given the varied number of tenants. There is therefore considerable doubt in my mind concerning the uninterrupted and continuous use of Building E for a relevant period for the certificate sought by the appellant of a Class B8 use.

33. As a matter of fact and degree, based upon the evidence before me, the appellant has not discharged the necessary burden of proof to demonstrate her case on the balance of probabilities.

Building F

34. The building is a small portacabin structure located towards the front of the site and at the time of my site visit was in use as an office. The lawfulness for a Class B1 use (Business) is sought.
35. The Statutory Declarations of the appellant are that this building has been continuously used as an office by JW Elliott & Sons Limited since 2002, when the business became a commercial landlord for the estate.
36. That it has been used as an office since 2002, when the portacabin was installed at the site, is not in dispute between the parties.
37. Irrespective of my findings in relation to the other buildings at the site, or when the nursery use actually ceased, the evidence of the appellant is sufficiently unambiguous to demonstrate on the balance of probabilities that Building F has been used as an office during a relevant period, and that this was not ancillary to any horticultural use of the wider site that may have subsisted. Whilst finely balanced, there is then little specific contradictory evidence before me to demonstrate on the balance of probabilities that the building has been used for purposes ancillary to any lawful nursery activities at the site, other than to dispute when the nursery use actually ceased. In any event, that cessation may not even be relevant. For these reasons, on the balance of probabilities I am inclined to accept the appellant's statutory declaration pertaining to the office use described. It then does not matter for the purposes of my assessment as to what business the subsequent office use pertained, or, whether that business was listed at company's house.
38. The appellant's evidence is therefore sufficiently precise and unambiguous concerning the use during a relevant period. As a matter of fact and degree the appellant has discharged the necessary burden of proof to demonstrate her case on the balance of probabilities, albeit this only amounts to a Class B1.(a) office use.
39. It is therefore appropriate to issue a certificate for a Class B1.(a) use of the building.

Storage area/containers

40. That there have been storage containers and the parking of cars, caravans and the like is not in dispute between the parties, although the extent of the area from where this has taken place is disputed. The lawfulness for a Class B8 use is sought.

41. There are aerial photographs before me which indicate an increase in the extent of the area concerned over time, and that identified on the plan by the appellant appears to be larger than can be deciphered in the photographs. Even if I am wrong, it is for the appellant to demonstrate on the balance of probabilities a sufficiently precise and unambiguous area, and there is little evidence before me as to how the area proposed has been arrived at in respect of a relevant period. This casts considerable doubt in my mind, and it is not for me to try and estimate such an area on behalf of the appellant in the absence of precise evidence.
42. Moreover, that an area is said to have been used for the storage of containers is inadequate, particularly when there is evidence before me concerning activities within those containers which would not amount to Class B8 storage, such as vehicle breaking or repairs. There is little evidence before me from the appellant concerning the physical use of the containers and this again casts considerable doubt in my mind about the actual land use that has subsisted over a relevant period, and, with it the certificate sought by the appellant for Class B8 storage. The physical use may therefore be different than the mere presence of a container alone, and this will be a determining factor when it comes to lawfulness.
43. As a matter of fact and degree, based upon the evidence before me, the appellant has not discharged the necessary burden of proof to demonstrate her case on the balance of probabilities.

Car park areas/circulation areas

44. I have found that the appellant has only demonstrated her case on the balance of probabilities in respect of Building A and Building F. Moreover, there is then very little precise or unambiguous evidence before me concerning any lawfully associated curtilages, circulation areas or non-nursery car park areas to demonstrate the appellant's case of lawfulness for a relevant period on the balance of probabilities.

Other Matters

45. There are some references in the evidence before me to a subsequent application to the Council which I have taken to be under reference 20/0132/CEU. However, there is no corresponding appeal before me, and I consequently do not have all the evidence pertaining to that application. I have therefore determined the appeal application solely on the written evidence before me.
46. A further area has been raised by interested parties where timber is currently located. However, this area has not been identified by the appellant as being expressly part of their appeal application and there is very little evidence before me concerning the use or activities. I have accordingly not considered this area further.
47. The topic of concealment has also been raised by interested parties however this has not been specifically raised by the Council and I have insufficient evidence before me to demonstrate on the balance of probabilities there has been the deliberate concealment of activities taking place at the site.

Conclusion

48. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use was not well-founded, in-part, and that a certificate of lawful use should be issued in the terms described below. In all other regards the refusal was well founded, and the appeal should fail. I will exercise accordingly the powers transferred to me in sections 195(2) and 195(3) of the 1990 Act as amended.

Formal Decision

49. The appeal is allowed (Building A and Building F only) and attached to this decision is a certificate of lawful use describing the existing uses which are considered to be lawful.

50. In all other regards the appeal is dismissed.

Paul T Hocking

INSPECTOR



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 9 May 2019 the uses described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto 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 appellant has demonstrated the lawful use of Building A and Building F on the balance of probabilities.

Signed

Paul T Hocking

Inspector

Date: 10 May 2021

Reference: APP/D3640/X/19/3241266

First Schedule

Use of the part of the building annotated as 'A' on the plan attached to this Certificate (known as Building A) for purposes falling within Use Class B2 (General industrial) of The Town and Country Planning (Use Classes) Order 1987 (as amended).

Use of the building annotated as 'F' on the plan attached to this Certificate (known as Building F) for purposes falling within Use Class B1.(a) (Office) of The Town and Country Planning (Use Classes) Order 1987 (as amended).

Second Schedule

Land at: Fenns Lane Nursery, Fenns Lane, West End, Woking GU24 9QE

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: 10 May 2021

by **Paul T Hocking BA MSc MRTPI**

Land at: Fenns Lane Nursery, Fenns Lane, West End, Woking GU24 9QE

Reference: APP/D3640/X/19/3241266

Scale: DO NOT SCALE

