



Appeal Decision

Site visit made on 18 May 2022

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 August 2022

Appeal Ref: APP/D5120/X/21/3271688

Stuarts Nurseries, 57 North Cray Road, Sidcup DA14 5EU

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Adam Stuart of Stuarts Nurseries against the Council of the London Borough of Bexley.
 - The application, Ref. 20/03392/LDCE, is dated 23 December 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: Mixed use of the identified land in connection with green waste processing, open storage and distribution.
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Decision

1. The appeal is dismissed.

Application for Costs

2. An application for costs was made by Mr Adam Stuart of Stuarts Nurseries against the Council of the London Borough of Bexley. This application is the subject of a separate Decision.

Preliminary Matters

3. The appeal site consists of the land outlined in red on drawing/plan 35 submitted by the appellant. This land sits within a wider site, owned by the appellant, outlined in blue on the same plan. From the information provided, Stuarts Nurseries sits within the wider site.
4. Planning Practice Guidance (PPG) is clear that planning merits are not relevant at any stage in a lawful development certificate application or the appeal process for such an application¹. Therefore I have not taken any planning merits into account in my decision.

Main Issue

5. It is clear from the evidence that had the Council made a decision on the application its decision would have been to refuse. Therefore, the main issue is, if the Council had refused the application, whether the refusal would have been well-founded or not.

¹ Lawful development certificates, paragraph: 009 Reference ID: 17c-009-20140306

Reasons

6. Under section 191(1) of the 1990 Act, 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.
7. Section 191(2) of the 1990 Act states 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.
8. Section 191(4) provides 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.
9. The PPG states that the applicant is responsible for providing sufficient information to support an application². So in an LDC appeal, the onus is on the appellant to make out their case. In the case of applications for existing use, the PPG further states that 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.
10. Section 171B of the 1990 Act provides time limits within which enforcement action may be taken. For the use described by the appellant in this case, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach.
11. So based on the evidence provided, I must consider whether the mixed use of the identified land changed to green waste processing, open storage and distribution, and continued to be so used for 10 years after the date of the change and before the date of the application, such that the Council could have taken enforcement action at any time during that 10 year period.
12. From the information available, the wider site contains a number of planning units and different uses which share a common access from North Cray Road. The wider site includes dwellings, a garden centre and a variety of businesses of different types. These include a soil screening use. The appeal site has secure gates at the front from the shared vehicular access from North Cray Road and it is physically connected to the wider site at the rear via a second gated access.
13. Section 7 of the application form states that the use began on 1 January 2003. In a statutory declaration, the appellant states that since 2003 the appeal site has been continuously used for the storage and processing of green waste material, including chipped wood, logs and tree cuttings, which is then processed and shredded and then either sold as a mulch/compost or mixed

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

with soil to be sold at Stuarts Nurseries. Section 4 of the application form declares that the use is a B2 use, ie a general industrial use.

14. The same declaration states that the waste material is processed through a mobile 'screener' that is permanently sited within the land identified in red on plan 35 (ie on the appeal site). But this is contradicted by aerial photographs which have been provided by both main parties, which do not show that such equipment has been permanently sited on the land throughout the relevant 10 year period. From the information provided, no such equipment is clearly seen on the appeal site until 2013, ie 10 years after the use is said to have begun.
15. Elsewhere in the appellant's submissions are references to a 'shredder' being generally moved to a yard within the wider site, for maintenance and security, if it is not being used. But this does not explain the absence of the aforementioned screener from aerial photographs prior to 2013 (and there is nothing to indicate to me that in this case I should consider a screener and a shredder to be the same thing). Moreover, the described movement of the shredder suggests that the appeal site has some functional connection to the wider site, in addition to the aforementioned physical connection.
16. My attention has been drawn to a Planning Contravention Notice (PCN) completed by the appellant, dated 2 June 2007. The appellant states this PCN was not in connection with the appeal site. But the land to which this PCN relates is clearly shown on the plan attached to the PCN and it includes the appeal site. In response to question 2(a) of the PCN the appellant states that the land is predominantly a garden centre and that other uses are ancillary operations, other than a scaffolding yard that was due to vacate the site.
17. There is no mention in the PCN of the B2 green waste processing, open storage and distribution use described by the appellant in this LDC application. This contradicts the appellant's case, as had the B2 use described by the appellant in this LDC application subsisted at that time, on the balance of probability it would have been referred to in the PCN, as sanctions apply if false or misleading information is provided in response to a PCN.
18. The appellant's statutory declaration refers to a letter written by the appellant on 2 September 2013, to Rodney Kearns, an enforcement officer at the Council. The declaration states that in 2013 Mr Kearns had visited the land identified in blue on plan 35 in connection with an alleged breach of planning control. Letters from Mr Kearns, dated 3 June 2013 and 9 July 2013, refer to the appeal site being used for "soil screening" and for "waste transfer and soil screening", respectively. Neither of these reflect the use described by the appellant in this LDC application.
19. In his statutory declaration the appellant states that in a subsequent telephone conversation, Mr Kearns confirmed that due to aerial photographs it was clear that the Council could not enforce against "tree waste use" of the land identified in red on plan 35 because of the time period of 10 years. But it is not clear that "tree waste use" is the same as the use described by the appellant in this LDC application.
20. Mr Kearns's written response to the appellant's 2 September 2013 letter is set out in a letter dated 29 April 2014. This letter indicates that the use the appellant claimed at that time was lawful was the "storage of waste materials

and soil screen". I am not satisfied this reflects the use described by the appellant in this LDC application either. In any event, Mr Kearns states in this letter that the aerial photographs going back to 2002 show that a limited amount of material has been stored on the land for a number of years. This does not support the appellant's case for the lawfulness of the use described in this LDC application.

21. The appellant's 2 September 2013 letter indicates that Mr Kearns was concerned about a soil screener and piles of topsoil but that he had also mentioned tree waste, logs, chipped wood and brush. In a later letter, dated 9 May 2014, the appellant states that the screener and piles of topsoil were cleared in September 2013 and he indicates that he would be providing evidence for (an LDC for) the storage of green waste, logs, chipped wood and brush. He also states: "you still seem to think that we are screening soil". Taking into account that when one element of a mixed use is ceased there may be a material change of use of the whole planning unit, the above points indicate that whatever use may have been occurring had gone beyond just that now described in the LDC application, particularly given 'storage' is not the use class set out in section 4 of the LDC application form.
22. Statutory declarations have been provided from Leslie Searle and Jake Loader. Both declare they have rented land to/within the centre and south of the land outlined in blue on plan 35 from the appellant, since 1994 and June 2010 to July 2015 respectively. Both declare that the appellant has continuously used the land identified in red on plan 35 (ie the appeal site) in connection with the ongoing nursery and soil screening uses within the land outlined in blue on plan 35 (ie the wider site) since they commenced renting land from the appellant in connection with their business. A further statutory declaration has been provided by Darryl Mercer, in near identical terms, to the effect that the appellant's continuous use has occurred since the late 1990s.
23. But these declarations are contradicted by the appellant who states that the primary use of the adjacent site is not a nursery but a garden centre. Moreover, the use of the term "in connection with" in these declarations indicates that the appeal site is not a discrete B2 planning unit, as indicated by section 4 of the application form, but that the appeal site has a functional connection with the wider site, in addition to the physical connection I have already identified. This is compounded by the appellant's statement in his own statutory declaration that the processed green waste is sold at Stuarts Nurseries, ie on the wider site, from a business of which he is a partner.
24. This calls into question what the planning unit is in this case. The appellant's submissions do not explicitly address what the planning unit is. On evaluation of the site as a whole (ie the area outlined in blue), the Council considers it to comprise a number of planning units that share a common access to the highway, a common car park and a common accessway through the site. It is the Council's view that the wider site is not a single mixed use and that the planning units can be identified from the various permission red lines, certified areas and discrete buildings and external enclosed areas. I have no reason to disagree with this assessment.
25. In respect of the appeal site, the Council says it appears to have been used periodically but not continuously for substantially different and unrelated purposes, rather than being a planning unit in its own right and that it remains

part of the wider site. This is consistent with the “connection” identified in the statutory declarations of Leslie Searle, Jake Loader and Darryl Mercer and with what appears to be the appellant’s admission in his 9 May 2014 letter that soil screening had occurred on the appeal site, noting that this is a use which has been certified as lawful on part of the wider site. Taking the above into account, I am not satisfied that the appeal site has not been used as part of at least one activity occurring on the wider site during the time that the appellant says it has been used for the use described in this LDC application.

26. A plan attached to an enforcement notice dated 26 September 2018 records that the appeal site appears to be in a nil use. This also contradicts the appellant’s case. The Council states that if it were not a nil use or agriculture the land may well have been included in the formal enforcement action that had been taken up until this time. The appellant dismisses this claim, stating that the Council’s investigations were not thorough enough, ie that the use described in this LDC application could have been continuing. But I am not satisfied this is the case given that a further visit by the Council in January 2020 identified the appeal site as being used for an agricultural or nil use.
27. Taking all of the above into account, I am not satisfied that the appellant’s evidence is sufficiently precise and unambiguous to demonstrate on the balance of probability that the appeal site changed use to a mixed use in connection with green waste processing, open storage and distribution, and continued to be so used for 10 years after the date of the change and before the date of the application, such that the Council could have taken enforcement action at any time during that 10 year period.

Conclusion

28. For the reasons given above I conclude that the Council’s deemed refusal to grant a certificate of lawful use or development in respect of a mixed use of the identified land in connection with green waste processing, open storage and distribution, 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.

L Perkins

INSPECTOR