



Appeal Decision

Site visit made on 8 November 2022

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 December 2022

Appeal Ref: APP/H2265/X/21/3286276

**Land Opposite September Cottage, Pinkham, East Peckham, Tonbridge
TN12 5EU**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (the Act) 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 Nigel Regelous against Tonbridge and Malling Borough Council.
- The application ref TM/21/01700/LDE is dated 14 June 2021.
- 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 storage of plant, machinery and building materials and private storage of motor vehicle and associated tools (Sui Generis).

Summary decision: The appeal is dismissed.

Background and Main Issue

1. This appeal under section 195 of the Act follows the failure of the Council to give notice of their decision on an application for an LDC under section 191 of the Act. The Council indicate that had they determined the application for an LDC, it would have been refused.
2. Section 191(2) of the Act states that uses are lawful at any time if no enforcement action may then be taken in respect of them. The application for an LDC seeks to demonstrate that, at the date of application, no enforcement action could be taken in respect of the use of the land for storage of plant, machinery and building materials and private storage of motor vehicle and associated tools. The appellant suggests that this would be a mixed use for business and personal storage for the purposes of the application for an LDC. I see no reason to disagree. That mixed use is outside those defined in the Town and Country Planning (Use Classes) Order 1987 as amended (UCO), otherwise known as "sui generis".
3. Part of the appeal site comprises stables that, I understand, were granted planning permission under reference TM/01/00125/FL. That was subject to condition 2 limiting use of the stables to the private stabling of horses owned by the owner/occupier of the application site. As the LDC relates to a use other than that approved, the development would be in breach of that condition.
4. Under section 171B(3) of the Act, no enforcement action may be taken if the use described were to have continued for a period of ten years beginning with the date on which the use started (the relevant period).

5. I note that it is possible that part of the mixed use could have continued for the relevant period but the other part of that use may have started later. It is likely that the mixed use commenced when the second part of the use started.
6. The application was made on 16 June 2021. Consequently, the mixed use would become lawful if the relevant period had occurred prior to that date. That period could be any period before the date of application, but there could not be any significant interruption. Such an interruption would comprise a period when the Council could not have taken enforcement action against the use of the appeal site. Once that right has been accrued, it is not lost if the right has not been exercised for a period of time, provided there has been no abandonment or new use introduced
7. Section 191(4) of the Act allows the local planning authority to modify the terms of the application, and to issue a certificate in somewhat different terms to those applied for, so that it accords with the facts and evidence. In addition, under section 193(4) of the Act, the LDC may be issued for the whole or any part of the land specified in the application. These powers are also granted to the Secretary of State or an Inspector in the case of an appeal. I will take that into account in coming to my decision.
8. The main issue on an appeal under section 195 of the Act is whether, if the Council had refused the application, the refusal would have been well-founded.
9. The burden of proof for an LDC is on the appellant, with the relevant test of the evidence being on the balance of probability. Case law indicates that evidence does not need to be corroborated by independent evidence to be accepted, but does need to be sufficiently precise and unambiguous, even if there is no evidence to contradict it.

Reasons

The site

10. The land opposite September Cottage comprises a field with two sections of hard surfacing and buildings. Access to the field is through a tall, solid gate and fence from the access track between this land and September Cottage. The gate leads directly into the first area of hardstanding and buildings, which I shall refer to as yard A, and contains structures referred to as buildings 1, 2 and 3, including shipping containers. The appellant's Statutory Declaration states that these had been located on the site for at least 10 years, although it is unclear whether that relates to the shipping containers or all three buildings. A track leads across the field to a second area of hardstanding, yard B, enclosed by a post and rail fence and gate, with former stables, building 4, located in that area.
11. On my site visit I saw a variety of storage, including logs for personal use and various materials and equipment relating to the appellant's business outside the buildings in yard A. This overflows from the area of hardstanding onto the adjacent grass. The buildings include a workshop and storage of personal vehicles and motorbikes as well as storage of various tools, vehicles, machinery, equipment and materials relating to the ground works business.
12. The grass area is located between the two yards and adjacent to the track. It is enclosed within the red line of the application. There is limited evidence of storage on that grass area, with most of it free of storage during my site visit.

That is reflected in the various aerial photographs taken over the years. On that basis, I consider this area should be excluded from the site area. The boundary with yard B comprises the fence and gate, such that it is defined. However, there is no clearly defined boundary with yard A. It is not clear precisely where the boundary should be located as limited information has been supplied as to whether the boundary has been consistent, or storage has gradually encroached onto this area over time. I do not feel able to define a precise boundary on a plan for that reason.

13. At the time of my site visit, yard B contained a caravan, trailers and dumper as well as building materials such as sleepers, concrete posts and paving within the yard. The building was constructed as stables, but the stables contain a variety of personal storage including motorcycles with spares and equipment, boxes of action figures, toys, games and jigsaws, and business storage including fencing, racking, trailer and office storage relating to the business.

The use

14. The mixed use described comprises two parts. One is use relating to the residential occupation of September Cottage. The other relates to the appellant's business as a ground works contractor. I note that they both operate across the two yards and within the buildings, for example the storage of motorcycles and equipment relating to the operation of the ground works business within one of the former stables in building 4.
15. In the Statutory Declarations of the appellant and his partner, they state that the site was purchased in May 2007 and they occupied September Cottage from May 2008, once it had been constructed. He is a self-employed Civil Engineer/Ground Worker. He stores tools, plant and building supplies on the land opposite September Cottage and states that he has done that for the 13 years prior to signing his Statutory Declaration on 8 July 2020. This indicates that he may have been operating his business from this location since purchasing the house and field opposite in May 2007. He states that plant, machinery and building supplies were kept in the yards when not in use for the whole of that period.
16. However, the earliest reference to ground work shown on the supporting documentation, within the document listing work carried out, is dated 6 April 2009. That document includes a breakdown of his work by year, listing the plant and machinery used and number of vehicle movements. This shows work taking place during the period from 6 April 2009 to 20 March 2020. It is unclear why this did not include evidence prior to that date. In referring to this document, the appellant's Statutory Declaration states that this was his principal form of employment throughout the 10 year period. Based on that evidence and on the balance of probability, this indicates that the storage of materials and equipment relating to the business use commenced on 6 April 2009.
17. In his Statutory Declaration, the appellant states that a number of machines have been stored on the land, including 1.5, 3 and 7 tonne machines. In addition, smaller tools, plant and building supplies were stored on the land. He transported the required plant, machinery and supplies to where he was working either each day or for each job. He left those materials and equipment where he was working when it was safe to do so overnight and over weekends. Where there were potential issues with security, he brought the materials and

equipment back to the land. The scale of activity described and evident on the land during my visit suggests that, even when leaving materials and equipment where he was working, some would remain on the land.

18. This evidence is supported with a number of Statutory Declarations signed by associates of the appellant. These are consistent with the evidence provided by the appellant.
19. The Council investigated the use of the land in 2018 following report of a digger being on site. They provide a file note from a Senior Enforcement Officer dated 21 September 2018 following a visit to the land at which time they met the landowner. The closure report dated 1 October 2018 suggests that there were other visits during which no vehicles had been seen on the land. The evidence supplied by the Council relating to their investigations in 2018 found that the land was only used for parking one van associated with the business. They concluded that no material change of use of the land had occurred at that time. This indicates that any business use was minimal and, on the balance of probability, the land was not used for purposes associated with the ground works business at this time. Consequently, the Council's evidence relating to their investigation in 2018 appears to conflict with the evidence set out above.
20. I have been provided with recollections of that visit in a Statutory Declaration provided by an advisor to the appellant who was present at the time. They suggest that the Council Officer did not inspect the site, although it was then visible from the kitchen window of the house, where the meeting took place. It appears it was suggested that there wasn't an issue with the storage of machinery at the site. However, they don't describe what machinery or other storage may have been visible on the site at that time, i.e. whether there was more than one van on the site as mentioned by the Council.
21. There is limited evidence submitted by the appellant that specifically addresses what was stored on the land at this time. The reasons for that are unclear but, taking account of all the evidence provided, does suggest that the use was not taking place at the time of the Council's investigation in 2018. On the basis of the evidence presented and on the balance of probability, I consider that it would not have been possible for the Council to take enforcement action on the use at that time. That was within 10 years of the date I have concluded the use commenced, so would constitute a significant interruption in the use.
22. The appellant also states that during the period he has owned the land, the buildings and land have also been used for personal storage, including vehicles, motorcycles, spares and equipment. I noted on my site visit that there was a workshop in building 1 that appears to be used for the repair and maintenance of motorcycles. Various other personal items are stored in the buildings by the appellant and his partner.
23. The Council state that the evidence suggests domestic items including vehicles have been stored on the land for a period exceeding 10 years. I see no reason to disagree with their conclusion in this regard. However, they suggest that the location of this storage has not been clearly set out. Whilst it is currently spread through a number of buildings over the site, it is unclear whether that has always been the case. In addition, I note that there is some evidence of repair and maintenance of motorcycles that is not referred to in the description of development.

Conclusion

24. Taking all the above into account and on the balance of probability, I consider that the evidence is not sufficiently precise and unambiguous to conclude that, on the date of application, the use of land for the storage of plant, machinery and building materials and private storage of motor vehicles and associated tools had taken place for a period of ten years beginning with the date on which the use started. In particular, the buildings and areas of the site in the uses are unclear, especially the grassed area between the yards, and the evidence suggests that there was a significant interruption in the ground works business element of the mixed use during 2018.
25. I have considered whether I could modify the terms of the application and issue an LDC in different terms or issue a certificate for part of the land specified in the application. However, it is unclear how the description of the use or area over which it has occurred could be modified in this case.
26. 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 the storage of plant, machinery and building materials and private storage of motor vehicle and associated tools (Sui Generis) 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.

Decision

27. The appeal is dismissed.

AJ Steen

INSPECTOR