



Appeal Decision

Site visit made on 30 November 2022

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 January 2023

Appeal Ref: APP/G5180/X/21/3267896

Land adj South Eden Park Road, Beckenham BR3 3LZ

- 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 J Dayani of Clery Property Holdings Ltd against the Council of the London Borough of Bromley.
 - The application (Ref. DC/20/04446/ELUD) is dated 30 October 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 of the land for the storage of cars or for the parking of cars or as a car park in association with car dealerships.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Preliminary Matter

2. Planning Practice Guidance (PPG) is clear that planning merits are not relevant at any stage in the application or appeal process for an LDC application¹, and, views expressed by third parties on the planning merits of the case are irrelevant when determining the application². So I have not taken any planning merits into account in this case. Planning merits include visual effects and affordable housing contributions. My decision rests entirely on the facts involved in this case and the relevant planning law.

Main Issue

3. The main issue is, if the Council had refused the application, whether the refusal would have been well-founded or not.

Reasons

4. 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.

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

² Lawful development certificates, Paragraph 008 Reference ID: 17c-008-20140306

5. Section 191(2) of the same 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.
6. 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.
7. The PPG states that the applicant is responsible for providing sufficient information to support an application³. In the case of applications for existing use, it 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.
8. 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.
9. So based on the evidence provided, I must consider whether the land identified by the appellant changed use to that described by the appellant 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.
10. From the information provided, the Council has already granted an LDC⁴ at the same address for the same description of development applied for in this application. The evidence submitted in support of the original application is the same as that now submitted in respect of this current appeal and there is no dispute as to the evidence.
11. The difference between the LDC granted and the LDC application now before me is the land identified. The previous application sought an LDC for all of the land within the red line site plan, ie the whole site. But the Council amended that application by reducing the area of land to be covered by the LDC, such that it just included areas which, broadly speaking, consisted of hard surfaces. The current application seeks that an LDC is granted for the whole site, ie all of the land within the red line, which includes the grassed area shown on the plans.
12. The dispute in this case is focused on what the planning unit is, for the purposes of the unauthorised material change of use which has occurred on the land. In this respect, a legal opinion has been provided by the appellant and I have had regard to this in reaching my decision.

³ Lawful development certificates, Paragraph: 006 Reference ID: 17c-006-20140306

⁴ Ref DC/18/00103/ELUD, dated 26 February 2020

13. The leading case law for determining the planning unit is *Burdle*⁵. In *Burdle*, it was held that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes; the concept of physical and functional separation is key. This has been referred to as the *Burdle* 'working rule'.
14. Both functional and physical separation are required before a smaller unit can be identified, since without functional separation the ancillary link remains; and without physical separation there is no smaller physical area which can be identified as a separate unit.
15. In *Burdle*, Bridge J suggested three broad categories of distinction:
 - (a) A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary;
 - (b) A single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and
 - (c) The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.
16. The Council considers that the evidence in this case is inconclusive and does not support the conclusion that the whole of the red line area has been used consistently or more often than not for the storage/parking of motor vehicles.
17. The Council's report for the previous LDC concluded that the third category in *Burdle* (ie category (c), from the list above) was relevant, the open grassed area being in a substantially different and unrelated use. The Council does not accept that the use has extended across the entirety of the site. Be this as it may, this does not recognise the *Burdle* working rule, noted above.
18. The Council states that while the land as a whole may be in terms of ownership a single unit of occupation, on the basis of all the information provided it is considered that there was during the relevant period physical separation resulting from the ground surface between the component areas and functional separation in terms of actual uses within the site.
19. At my site visit I saw that there are no physical barriers on the land. This is consistent with the plans and photographs submitted in evidence and I have no reason to believe this arrangement has changed in any material way during the relevant period or since.
20. For *Burdle* purposes, the Council draws on a change in ground surface as providing physical separation on the site. But I am not satisfied that a mere change in ground surface to grass from tarmac, road planings or gravel, poses any practical barrier to use of the whole site for the use described. Indeed the Council accepts that from time to time there may have been some degree of 'overspill' from the hardstanding area to the grassed area.

⁵ *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207

21. To my mind, this demonstrates that there has not been any physically separate and distinct areas on the site. Moreover, there is no evidence in this case that a car cannot be parked or stored on grass.
22. In terms of functional separation, there is no evidence of any different and unrelated uses occurring on the parts of the site not already covered by the previous LDC. The Council's concern in this regard is unexplained.
23. I note references in the evidence to miscellaneous activities, including use as a Thames Water compound, the storage of building rubbish, the dumping of waste and for bonfires. But from the information provided, I have no reason to believe any of the miscellaneous activities have constituted a material change of use for different and unrelated purposes, for the purposes of *Burdle*, during the relevant period.
24. Taking all of the above into account, I am satisfied in this case that the planning unit is the unit of occupation and that there is no smaller area which can be identified which, as a matter of fact and degree, is physically separate and distinct and occupied for different and unrelated purposes. Nothing has been provided to lead me to a different conclusion and the appropriate category in *Burdle* is therefore (a), from the list above.

Conclusion

25. For the reasons given above I conclude, on the evidence now available, that the Council's deemed refusal to grant a certificate of lawful use or development in respect of: 'Use of the land for the storage of cars or for the parking of cars or as a car park in association with car dealerships', was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

L Perkins

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 30 October 2020 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red 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:

On the balance of probabilities, the land identified has been used for the storage of cars or for the parking of cars or as a car park in association with car dealerships, for 10 years continuously, prior to the date of the application.

Signed:

L Perkins
INSPECTOR

Date: 30 January 2023
Reference: APP/G5180/X/21/3267896

First Schedule

Use of the land for the storage of cars or for the parking of cars or as a car park in association with car dealerships.

Second Schedule

Land adj South Eden Park Road, Beckenham BR3 3LZ

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: 30 January 2023

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Scale: Not to scale

