



Appeal Decision

Site visit made on 1 August 2023

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14th September 2023

Appeal Ref: APP/D0650/X/22/3313760

Land at Liverpool John Lennon Airport , Speke, Liverpool L24 1YD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Liverpool Airport Limited against the decision of Halton Borough Council.
 - The application ref 22/00019/PLD, dated 24 December 2021, was refused by notice dated 29 June 2022.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is the construction of a solar farm.
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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 proposed operation which is found to be lawful.

Preliminary Matters

2. The application form relies on the planning statement submitted alongside the application to describe the proposed development. The planning statement describes the application for a Lawful Development Certificate (LDC) for proposed development comprising the construction of a solar farm. I shall therefore use this as the description of development.
3. The main thrust of the appellant's case is that the appeal scheme is development which is permitted under The Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(the GPDO). Article 3(1) of the GPDO grants planning permission for the classes of development described as permitted development in Schedule 2 subject to regulations 75 to 78 of the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations).
4. The application site is within 366m of a number of internationally and nationally designated sites. In accordance with Regulation 76(1) of the Habitats Regulations, the appellant submitted a request for an opinion from Natural England for its opinion as to whether the development is likely to have a relevant effect. Natural England wrote to the appellant on 3 November 2021, confirming on the basis of the information provided, it considers the proposed works would not result in any likely significant effect or a "relevant effect".
5. Regulation 76(6) of the Habitats Regulations states that the opinion of the appropriate nature conservation body, notified in accordance with paragraph (4), that the development is not likely to have a relevant effect is conclusive of that question for the purpose of reliance on the planning permission granted by

a general development order. The implication of this is that the provisions of Article 3(1) and the Habitat Regulations have been complied with.

6. The proposed scheme also comprises development which falls within Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations). Where development is determined to be Environmental Impact Assessment (EIA) development, permitted development rights do not apply. Schedule 2 developments do not constitute permitted development unless a screening opening/direction has been given to the effect that EIA is not required.
7. The appellant submitted a request for an EIA Screening Opinion and the local planning authority issued a Screening Opinion on 23 December 2021 stating that it considers the proposals are not likely to give rise to significant environmental effects from an EIA perspective, and that EIA is therefore not required in this case. The Secretary of State has also directed that the proposed development is not EIA development.
8. A number of interested parties have raised matters concerning the planning merits of the proposed solar farm, such as Green Belt and the effect on flora and fauna. However, planning merits form no part of the assessment of an application for a LDC which must be considered in the light of the facts and the law.

Main Issue

9. The main issue of the appeal is whether the Council's decision to refuse the certificate of lawfulness was well-founded.

Reasons

10. An application under section 192(1)(b) of the Act¹ seeks to establish whether any operations proposed to be carried out in, on, over or under land would be lawful. Section 191(2) sets out that uses and operations 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.
11. In an application for a LDC, the onus is firmly on the applicant to demonstrate, on the balance of probabilities, that the development is lawful. An appellant's evidence should not be rejected simply because it is not corroborated. As established in *Gabbitts v SSE & Newham LBC* [1985] JPL 630, if there is no evidence to contradict their version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted.
12. It is proposed to construct a solar farm with a generation capacity of 3MW to supply Liverpool Airport. A series of solar panels would be constructed in rows, with each panel measuring around 1.1m by 2.3m, raised on metal struts to a maximum height of 2.3m, with approximately 6.5m between rows. A sub-station² would also be constructed, which would measure 6m by 3m and 3m in

¹ Town and Country Planning Act 1990 (as amended)

² Also referred to as a delivery station

height. An internal access road and site entrance onto Dungeon Lane would also be constructed.

13. The main thrust of the appellant's case is that the proposed solar farm is development which is granted planning permission by Part 8, Class F of Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(the GPDO). Part 8, Class F of Schedule 2 of the GPDO permits the carrying out on operational land by a relevant airport operator or its agent of development (including the erection or alteration of an operational building) in connection with the provision of services and facilities at a relevant airport.
14. Given the matters in dispute, I consider this appeal will turn on whether the appeal site comprises operational land and if so, whether the solar panels and sub-station would be operational buildings.

Whether operational land

15. Whether land falls within the category of operational land will be a question of fact in each case: *R. v Minister of Fuel and Power Ex p. Warwickshire County Council* [1957] 1 W.L.R. 861 at 865. The appeal site is stated to have originally been a piece of agricultural land to the east of the airport runway and to the west of Hale village. The appeal site is bound by fencing and is predominantly covered with vegetation, with Hale Road to the north, Dungeon Lane to the west. The appeal site is held by the appellant as part of a long lease from Liverpool City Council.
16. Section 263 of the Act sets out the meaning of operational land. Section 263(1) states that, subject to the provisions of section 263 and to section 264, operational land means, in relation to statutory undertakers (a) land which is used for the purposes of carrying on their undertaking; and land in which an interest is held for that purpose. It is not disputed that the appellant, Liverpool Airport Limited (LAL) is a statutory undertaker for the purposes of the Act.
17. Section 264 of the Act sets out cases in which land is to be treated as not being operational land. Since the appeal site was acquired by the appellant after 6th December 1968, this paragraph applies. Section 264(2) states that where this section applies in respect of any land then, notwithstanding the provisions of section 263, the land shall not be treated as operational land for the purposes of this Act unless it falls within subsection (3) or (4). Land falls within subsection (3) if (a) there is, or at some time has been, in force with respect to it a specific planning permission for its development; and (b) that development, if carried out, would involve or have involved its use for the purpose of the carrying on of the statutory undertakers' undertaking.

Whether there is a specific planning permission for its development

18. In 2012, the appellant applied for planning permission to extend the airport's runway safety area ('the RESA'), the stopping up of Dungeon Lane and diversion of Ashtons Lane and the erection of a new boundary in order to rectify a security deficiency that had been identified by the Civil Aviation Authority (the CAA) and the Department for Transport (the DfT). Permission was granted in 2015 ('the 2015 permission'). The appeal site comprises part of the application site for the 2015 permission.

19. The proposals included the removal of the “spotters mound”, removal of hardstanding and trees along Dungeon Lane, the provision of new access controls to Baileys Lane, the provision of a secure fence enclosure around the site, stopping up Dungeon Lane, stopping up an informal right of way, the provision of a new bridleway, the provision of a new Instrument Landing System (ILS) Localiser to the east of the runway end to provide for the future replacement of the ILS which serves Runway 09.
20. An interested party suggests the application was misleading and advises that planning permission for 12/00282/FUL expired on 30 June 2018, with a single fence panel established several days before this date. However, I have no evidence to show that the lawfulness of the resultant planning permission has been successfully challenged. The Council does not dispute that the planning permission has been lawfully implemented and, from the interested party’s own evidence, it appears likely that development was begun before the expiration of three years from the date of the permission. Thus, I find that there is in force with respect to it a specific planning permission for development of the appeal site.

Whether that development would involve/involved its use for the purpose of the statutory undertaker’s undertaking

21. The Council suggests that there is no evidence that the 2015 permission authorised any development (whether operational development or a material change of use) of the land comprised within the application site and suggests that it would have difficulty in resisting an appeal against an enforcement notice alleging that the application site had undergone an authorised [sic] material change of use to use for security/safety purposes. However, the Council appears to be considering the appeal site in isolation, rather than as part of the wider site for which planning permission was granted in 2015.
22. The 2015 planning permission is described as being ‘to extend the airport’s runway safety area (‘RESA’). While the 2015 planning application may not have explicitly stated that there was a proposed material change of use of the land, a RESA is not an agricultural use of land. Furthermore, the agricultural use of the land would directly conflict with the use of the land as a RESA. It should therefore have been clear to the local planning authority during its determination of the application that the application site, which included the appeal site, would no longer be used for agricultural purposes and that the land would be used as part of the operation of the airport.
23. The Council goes on to suggest that the appellant has not shown that the 2015 permission was a “specific planning permission” which involved use of the application site for the purpose of the appellant’s undertaking, even if it formed part of a “scheme” of development which involved use of other parts of the land for such purposes. This suggests that the 2015 permission granted permission for the use of some parts of the permission site and not others. However, the planning permission does not restrict the use of the site in this way.
24. Furthermore, within its 2012 planning statement, the appellant identified the need for a public safety zone (PSZ), which is an area at the end of airport runways where development is restricted in order to control the number of people on the ground at risk of harm in the event of an aircraft accident occurring during take-off or landing. Security is an important part of an airport,

with significant infrastructure provided to ensure security is maintained. An effective perimeter fence is an important component of this.

25. As a result of the implementation of the 2015 permission, access to the appeal site is now restricted. In order to access the appeal site itself, it was necessary for me to go through airport security. The fencing authorised by the 2015 permission therefore has a clear function, in preventing members of the public from accessing the land beyond and the land itself acts as a safety buffer between the public domain and the runway end. The fact that the land appears overgrown does not diminish its function in this respect.
26. The Council has sought to draw comparison between the appeal site and the owner of a large house who acquires an adjacent field to prevent paparazzi from taking photographs of them. However, the purchase of adjacent land, without any physical change or change to the way in which it is used, is not, in my view, comparable to the use of land in the interests of airport security.
27. The carrying out of the development authorised by the 2015 permission involves the use of the land, including the appeal site, for airport security and safety, which in my view is for the purpose of the carrying on of the statutory undertaker's undertaking. The land therefore falls within subsection 264(3) of the Act.

Whether comparable with land in general

28. Section 263(2) of the Act states that paragraphs (a) and (b) of subsection (1) do not include land which, in respect of its nature and situation, is comparable rather with land in general than with land which is used, or in which interests are held, for the purpose of the carrying on of statutory undertakings.
29. Although the appeal site itself comprises a section of land which has been fenced off the RESA, this is for practical, and cost saving reasons and does not appear to have been a requirement of the 2015 planning permission. Moreover, the role of the appeal site in providing adequate security for the site and ensuring public safety remains. This is a function which is necessary due to its position relative to the public domain and the runway.
30. The land is therefore not comparable to land in general, but by virtue of its nature and situation, it is used for the purpose of the carrying on of statutory undertakings. Section 263(2) of the Act does not therefore apply.

Other Matters raised regarding operational land

31. My attention has been drawn to the (then) adopted local plan and emerging local plan, which are asserted to both indicate that the appeal site is not operational land. However, the (then) adopted policy maps referred to were adopted on 7 April 2005, pre-dating the 2015 planning permission and cannot therefore provide an up-to-date position on the status of the land. Furthermore, while the (then) emerging policy CS(R) 17 is stated to say development will only be permitted where it is directly related to: a runway extension, including relocation of physical infrastructure including the perimeter access road; b. aircraft and operational site safety requirements; or c. extension or enhancement of the Speke Garston Coastal Reserve, the policy is intended to control development which requires a planning permission, not to inform the application of permitted development rights. Such documents are

therefore not determinative of whether the appeal site comprises operational land.

32. I note an interested party raises concern regarding the Runway End Safety Area (the RESA) and suggests the solar farm would, under RESA regulations, be defined as an obstruction. However, lawfulness for the purposes of this appeal does not depend upon compliance with the RESA regulations.
33. Although the appellant has previously applied for planning permission for a solar farm at the site, such a submission is not relevant when considering whether the appeal site benefits from permitted development rights, which as set out above, must be considered in light of the facts and the law.
34. For the reasons given above, I find, on the balance of probabilities, that the land comprises operational land.

Whether the solar panels and sub-station would be operational buildings

35. Development is not permitted by Class F if it would consist of or include...(d) the erection of a building other than an operational building. Operational building means, for the purposes of Class F, a building, other than a hotel, required in connection with the movement or maintenance of aircraft, or with the embarking, disembarking, loading, discharge or transport of passengers, livestock or goods at a relevant airport.
36. Although the Council does not dispute that the solar panels would be operational buildings, a number of interested parties have questioned whether the appeal scheme would meet this definition. It is not disputed that the solar panels would be buildings, and so I consider there is no need to recite the various case law referred to me by the Parish Council in this regard³, rather it is disputed that they would be *operational* buildings, as it is asserted they are not *necessary* to the operation of the airport.
37. Given the size and quality of permanence that the solar panels would have, I agree that they would be considered buildings for the purposes of the Act. Operational building means, for the purposes of Class F, a building, other than a hotel, *required* (my emphasis) in connection with the movement or maintenance of aircraft, or with the embarking, disembarking, loading, discharge or transport of passengers, livestock or goods at a relevant airport.
38. It is not disputed that the airport has a demand for electricity and this demand will include, for example, runway lighting and the lighting and heating of the passenger terminal. The airport's electricity consumption is substantial, annually consuming over 11 million kWh's. The airport currently draws its energy requirements from the national grid. The proposed solar farm would have a generation capacity of 3MW and is intended to meet part of the airport's energy requirements. Energy would not be exported back to the national grid.
39. Although it would be possible for the airport to continue to meet all of its energy needs from the national grid, in my view, 'required' means reasonably required. It is not necessary to show that there is no other alternative. Since the electricity generated by the solar panels would be utilised by the airport, I find, as a matter of fact and degree that the proposed buildings, which would generate at least some of the airport's energy requirements, are reasonably

³ Such as *Skerritts of Nottingham Ltd v SSETR* (No.2) [2000] 2 PLR 102

required in connection with the movement of aircraft, the embarking, disembarking, loading, discharge and transport of passengers and would therefore constitute operational buildings for the purposes of the GPDO.

40. Thus, for the reasons given above, I find on the balance of probabilities, that the appeal site comprises operational land and the proposed solar panels and sub-station would comprise operational buildings, Consequently, the appeal scheme is development which is permitted by Part 8, Class F, Schedule 2 of the GPDO.

Conclusion

41. I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the construction of a solar farm 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.

M Savage

INSPECTOR



The Planning Inspectorate

Plan

This is the plan referred to in the Lawful Development Certificate dated: 14th September 2023

by M Savage BSc (Hons) MCD MRTPI

Land at: Liverpool John Lennon Airport , Speak , Liverpool L24 1YD

Reference: APP/D0650/X/22/3313760

Scale: Not to Scale





The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(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 24 December 2021 the operations 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, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The proposed solar farm would be permitted development within the terms of Schedule 2, Part 8, Class F of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended).

Signed

M Savage

INSPECTOR

Date: 14th September 2023

Reference: APP/D0650/X/22/3313760

First Schedule

The construction of a solar farm, in accordance with the following drawings:
Project Boundary, Ref No: 13/21-007/002 REV A, General Layout, Ref No: 13-21-007-001.

Second Schedule

Land at Liverpool John Lennon Airport, Speke, Liverpool L24 1YD

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 192 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 would have been 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.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.