



Appeal Decision

Site visit made on 5 December 2023

by Chris Preston BA(Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 February 2024

Appeal Ref: APP/M1595/X/22/3307308

Greenwise Nurseries, Vange Park Road, Vange, Essex SS16 5LA

- 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 1st Containers Ltd. against the decision of Thurrock Borough Council.
 - The application Ref 22/00420/CLOPUD, dated 29 March 2022, was refused by notice dated 26 August 2022.
 - The application was made under section 192(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: The use of the land for growing plants and retail sale thereof together with the importation of plants and retail sale of plants. The use of land for storage and display for sale of garden material and garden equipment predominantly in the open. Use of land for storage and display for sale of storage containers, building materials and other general materials unrelated to garden, predominantly in the open. Use of land for general storage of building and other materials predominantly in the open together with associated buildings.
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Decision

1. The appeal is dismissed.

Main Issue

2. An application for a Certificate of Lawfulness for a Proposed Use or Development (CLOPUD) is not a planning application and the planning merits of any proposal are not relevant to my decision.
3. The decision turns on the facts of the case and any relevant judicial authority. The main issue in the determination of the appeal is whether the Council's decision to refuse to grant a CLOPUD was well-founded.

Reasons

4. In s192 cases, the question is whether the proposed use or operation would be lawful if 'instituted or begun' on the date of the application. The burden of proof rests with an appellant to make his case in relation to such appeals and the relevant test is the balance of probability.
5. There appears to be little dispute between the parties that the existing lawful use of the site was that described in the Certificate of Lawfulness of Existing Use or Development (CLUED) granted by the Council in 2010 under application reference 10/00470/LDC (the 2010 CLUED). The decision notice/ certificate described the lawful use as:

The use of the land for growing plants and retail sale thereof together with the importation of plants and retail sale of plants. The use of land for storage and display for sale of garden material and garden equipment predominantly in the open. Use of land for storage and display for sale of building materials and other general materials un-related to garden, predominantly in the open. Use of land for general storage of building and other materials predominantly in the open together with associated buildings.

6. The history of the site and the name – Greenwise Nurseries – would indicate that the use developed in relation to the plant nursery business but also grew to include other elements, including the storage and sale of the various elements as described. Thus, the use described within the 2010 CLUED was a mixed or composite use across a single planning unit. The 2010 CLUED did not set any parameters in terms of the level of activity, the split between different uses and activities, nor did it describe the extent to which different parts of the site were occupied by the various component elements.
7. The question posed by the appellants is whether the storage and display for sale of storage containers would be lawful, if undertaken as part of a mixed use also comprising the other uses/ activities described in the 2010 CLUED. The description of the proposed use on the application form is exactly as described in the 2010 CLUED apart from the introduction of the reference to storage containers:

*The use of the land for growing plants and retail sale thereof together with the importation of plants and retail sale of plants. The use of land for storage and display for sale of garden material and garden equipment predominantly in the open. Use of land for storage and display for sale of **storage containers**, building materials and other general materials un-related to garden, predominantly in the open. Use of land for general storage of building and other materials predominantly in the open together with associated buildings.*

8. It is worth noting that the use of the site, at the time of my accompanied site visit, did not appear to reflect the existing use as considered lawful by the 2010 CLUED. Instead of being a single planning unit in a mixed use, the land was segregated into what appeared to be a number of unrelated uses. The front section, including buildings and the open yard, was occupied by a company called Drainfast, a skip hire business was operating to the left-hand side of that, with palisade fencing separating the front from the rear section of the land.
9. A number of shipping containers were placed on the land behind the skip hire business and significant engineering works, including retaining walls had been carried out across the rear section of the site to create a terraced effect, with evidence that underground services had been installed, presumably with the aim of providing utilities to some future development. Those works looked to have been undertaken quite recently.
10. It is not clear if any of the development benefits from planning permission or precisely when the changes on site took place. However, there is no mention of the work in any reports relating to the CLOPUD application and it seems likely that work commenced after the application was determined by the Council. The delegated officer report refers to a planning application for the use of the site as a shipping container storage facility, with associated operational

development, including reprofiling of the land¹. That application was pending at the time the CLOPUD application was determined and was subsequently refused.

11. Given that no planning permission appears to have existed at the time the CLOPUD application was submitted the lawful use, at that point in time, would still have been the use described in the 2010 CLUED. There would be a right to revert to that lawful use if an enforcement notice was served in relation to any unauthorised activity, having regard to s57(4) of the Town and Country Planning Act 1990 (the Act).
12. There is no suggestion that the use described as lawful within the 2010 CLUED had been abandoned at that point in time and the Council accepted the continued existence of the lawful use as a fall-back position when considering planning applications in 2018 and 2020². Thus, notwithstanding what was on site at the time of my visit, the starting point for my assessment is that the use described in the 2010 CLUED was the lawful use of the land at the time the application was made.
13. Information in relation to the precise nature of the storage container element of the proposed use is limited. The proposed description refers to the "use of land for the storage and display for sale of storage containers" in addition to the currently lawful range of uses. The supporting letter submitted with the application states that the containers would be stored and displayed on part of the site, although no specific part is defined. It then goes on to say that the containers would be stored on the site for sale, for purposes unrelated to gardening. Beyond that the letter states that no operational development is involved, that the containers would not be fixed to the ground or used as 'buildings' and that no groundworks or engineering works are involved.
14. There is no detail on the likely numbers of containers or indication of how high they may be stacked. Whilst the description refers to storage and display for sale it is not clear if there would be any split between those two elements. In other words, would every container stored on the site also be for sale or would some be stored simply for the sake of storage? If so, what would the break-down of that mix be?
15. In 2018 a legal opinion of Mr Charles Banner, now Lord Banner KC, advised the appellant that there was no reason, in his view, that storage containers could not be brought onto site and used for storage, "provided that this is done in such a way as to ensure that the containers do not amount to 'buildings' in planning law which would require permission themselves"³. It is important to note that the advice in that respect was clearly referring to containers being used to provide storage, as opposed to being stored for their own sake, the two things being quite different, as recognised in the later legal opinion of Robert Walton QC⁴. Mr Banner, as was, does not appear to have contemplated or advised on the present scenario of containers being stored/ displayed for sale of themselves.
16. The letter accompanying the present application is silent on whether anything would be stored within the containers whilst they were on site. However, the

¹ LPA reference 22/00998/FUL

² 18/00450/OUT & 20/01662/OUT

³ Legal Opinion dated 10 August 2018

⁴ Paragraph 5 of the legal opinion of Robert Walton QC, dated 20 July 2022

legal opinion of Robert Walton QC, which was given at the time the CLOPUD application was under consideration, does indicate that what was being proposed was the storage and sale of containers in and of themselves. On the balance of the limited information before me it seems that is the nature of the proposal.

17. It is important to make that distinction because if the containers were placed on land for the purposes of storing other materials or goods the use would be different but it could also affect any assessment of whether the containers amounted to buildings. There is significant caselaw relating to the issue of whether something amounts to a building in planning terms. It is not simply a case of whether a structure is physically attached to the ground. The size and degree of permanence are also relevant considerations. A sizeable container, held under its own weight that remained on site for a lengthy period, and used to store other items could well fall under the definition of a building for the purposes of s55(1) of the Act, notwithstanding that it wasn't fixed to the ground.
18. It could then follow that planning permission would be required for operational development and no such permission exists. Therefore, if the containers were used 'for storage' as opposed to simply being stored for their own sake, I could not rule out the possibility that they would amount to buildings requiring planning permission.
19. However, whilst the level of information is limited it does seem likely that the proposal is to store and display containers for sale in their empty state. As such, the degree of permanence is unlikely to be the same as would be the case if a container was used to house or store items in relation to the wider use of the site. In that scenario, I agree with the legal advice presented that containers being stored and/or sold for their own sake are unlikely to amount to buildings that would require planning permission.
20. Notwithstanding that, I still have reservations as to whether the proposed use would be lawful. Whilst the 2010 CLUED does not define any parameters with regard to the scale or relative proportion of the various elements within the mixed use, it is prescriptive in terms of the make-up of those component parts.
21. Storage containers would not fall easily into any of those elements in my view, purely in terms of the ordinary meaning of the words used. They would not amount to garden material or equipment and could not be described as building materials or other general materials. The word 'materials' would usually imply a substance or matter that would be used to form part of something else, be that building materials that would be used in construction, garden materials, textiles in clothing etc. Thus, the word 'materials' does not seem apt to describe the storage of pre-constructed containers. Such items are effectively modular structures in themselves, even if not operational development in the planning sense, and not something one would generally consider as a material.
22. The 2010 CLUED does not describe a general storage use but refers to the storage and/or display for sale of specific things as part of the mixed use across the site. Purely looking at the wording of the 2010 CLUED, the storage and/ or display for sale of storage containers does not fall readily within the description of what was considered lawful.

23. That said, it does not necessarily follow that the introduction of containers, as part of a mixed use, would not be lawful. The key question, as noted by Robert Walton QC⁵, is whether it would result in a material change of use.
24. Given that the 2010 CLUED does not set any parameters in terms of the balance between the various component elements there would be little to control any fluctuation in the intensity of the various permitted activities across the planning unit. As noted in the opinion of Heather Sargent:
- By way of example only, there is no limit to the volume or scale of building or other materials that may be stored on the site having regard to the terms of the Certificate, providing that at least some of the other component activities identified in the Certificate continue to be undertaken on the site to a sufficient extent that, as a question of fact and degree, there is no material change of use (i.e. the Site remains in the single composite use that is identified in the Certificate).*
25. The same would apply to the proposed use given that no specific restrictions are set out within the application or the proposed description. I must consider the application as submitted and it is not for me to seek to amend the description or to consider the imposition of any restrictions where none are sought by the appellant. Accordingly, it is reasonable to assume that a considerable proportion of the site could be given over to container storage and/or the display of containers for sale if I were to grant a certificate in the terms expressed.
26. In my view that scenario would significantly change the nature of the use taking place on the site when compared to the current lawful activity. I recognise that there is presently no restriction on the scale of storage that may take place and that could lead to bulky items, for example, building materials being stored across a substantial part of the site. The aerial photographs provided from May 2015 and June 2016 show a significant quantity of what I believe were insulation panels stacked in the front half of the land. There is no suggestion that was outside the terms of the lawful use.
27. Notwithstanding that 'materials' of the various kinds described within the 2010 CLUED may be bulky, the characteristics are quite different to the storage of containers in my view. A storage container is a pre-fabricated modular structure designed to be stacked and organised to make the most efficient use of space and for ease of loading in the context of shipping or other cargo. Given how robust shipping containers are, they can be stacked to great height, as one may witness at shipping ports or even at sea when aboard freight ships.
28. That is quite a different operation than the storage of garden materials, building materials or general materials in the open, as is currently lawful. Without some form of associated operational development, such as the racks that are common in builder's merchants or wood yards, I find it difficult to envisage how such materials could be stored or stacked to anything like the height or intensity of modular containers.
29. A substantial part of the site could be turned into something akin to a container port with multiple containers, stacked very close together to great height. It seems to me that a container operation of that nature would be notably

⁵ Paras 7 & 8 of his Legal Opinion, dated 20 July 2022

different from the present use in terms of its outward impact in a visual sense. The operations required to deliver and stack the containers on site could also be different in terms of the lorries needed to deliver the containers and cranes or other equipment required to stack them on site.

30. The nature of sales is also likely to be different in my view. Little information is provided in that respect. However, given the nature of storage containers it would appear to be a specialised area of business and not akin to a yard selling gardening or building materials where local tradesmen would go to pick up necessary supplies. It is not clear if the sales operation would be on a nationwide basis, what the intended market would be or the likely level of trade but a shipping or storage container isn't something that one drops in to buy off spec. Consequently, on the limited information before me, it is not clear that the nature of any deliveries or vehicular movements would be similar to those relating to the current range of uses.
31. It may be that the appellant envisages a much smaller operation than that described above. However, it is for an appellant to make his case and little information has been presented as to the precise nature of any proposed operations. In the absence of such information, I must consider the impact based on what is described in the proposed certificate which does not include any restriction in scale. Accordingly, in my view, the storage and display for sale of containers has the clear potential to be materially different to the presently lawful range of uses having regard to the effect on the external environment and character of the area.
32. A useful extract from the now superseded Circular 10/97 *Enforcing Planning Control: Legislative Provisions and Procedural Requirements* was provided in the legal opinion of Heather Sargent⁶:
- 8.21 It is generally accepted that any 'sui generis' use which is not in a 'use class' in the UCO, such as a builder's yard or many haulage depots, can be materially different in planning terms from another use which generally falls within the same description. In other words, there can be a 'material' change of use requiring planning permission between, for example, one builder's yard use, or a particular use as a haulage depot, and another.*
33. That situation seems apt to describe the present proposal. Whilst the wording of the 2010 CLUED and the proposed CLOPUD may appear similar, the characteristics would be materially different. For the reasons set out above the storage and display for sale of storage containers does not fall within the description of the type of things that may be stored and/or sold from the site within the 2010 CLUED. On the balance of probability, on the information before me, the introduction of that element into the overall range of composite uses would result in a material change in the character of the use, in the absence of any restriction in the scale of storage and/or sales that may take place.
34. Given that no planning permission exists for that material change of use it follows that I am not satisfied that the proposed use would be lawful within the meaning of the Act.

⁶ Full extract provided at paragraph 12 of the legal opinion

35. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the proposed use 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.

Chris Preston

INSPECTOR