



Appeal Decision

Site visit made on 29 April 2024

by Jessica Graham BA (Hons) PgDipL

an Inspector appointed by the Secretary of State

Decision date: 13 May 2024

Appeal Ref: APP/D0840/X/22/3313430

Tinners Walk Car Park, Port Pendennis, Falmouth, Cornwall, TR11 3XZ

- 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 Mr Michael Webb against the decision of Cornwall Council.
 - The application ref PA22/03428, dated 6 April 2022, was refused by notice dated 14 November 2022.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is two 20ft containers placed on the car park.
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Decision

1. The appeal is dismissed.

Preliminary matter

2. It is important to be clear that the subject of this appeal is an application for a LDC (Certificate of Lawfulness), not an application for planning permission. If it were an application for planning permission, my decision-making process would involve an assessment of the planning merits of the proposal (such as, to use an example raised by local residents, the effect upon the character and appearance of the area) and its compliance with national and local planning policies. However, since it is an application for a LDC, none of those considerations are before me: rather, my assessment is confined to the narrow issue of determining whether the use described in the application was lawful at the date of the application.

Reasons

3. S.191 of the 1990 Act (as amended) provides that uses and operations are lawful at any time if (a) no enforcement action may then be taken in respect of them, and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force. It is common ground that there is no enforcement notice currently in force in respect of the Appeal Site. The Appellant's case is that no enforcement action may be taken against the containers, since by the date of the application they had been in place for longer than the ten year time limit for enforcement action prescribed by s.171B of the 1990 Act. The Council disputes this, and contends that the containers had been present for less than ten years. It also contends that the containers are in breach of a condition attached to a Planning Permission granted in 2020, and the ten year period for taking enforcement action against that breach has not yet expired.

The alleged breach of condition

4. It is helpful to start with the Planning Permission granted in 2017 for "Rebuilding of existing storage unit in new location on same site".¹ The plans submitted with the application show an "existing store" on the western boundary of the Appeal Site, of roughly the same dimensions as the proposed new store, with access on to the adjoining land at Trelawney Court. On drg. no. SW 1734 3 AC SK 21 C this building is labelled "Existing Store to be demolished". No containers are shown on any of the drawings.
5. I have been provided with a copy of the Officer's delegated report on that application, and contemporaneous photographs. The photographs show that the "existing store" was no longer there, and that two shipping containers were present alongside the western boundary. It is therefore perhaps understandable that the Officer's report mis-identifies these containers as "the existing storage facility" to be replaced. The report notes that "the trees that neighbour the existing facility would benefit from the removal of the storage containers which are in situ" and that "given the proposal is for a replacement storage a condition should be imposed on the decision notice requiring the removal of the existing storage containers within three months".
6. It is reasonably clear, then, that the Permission was granted on the basis of a misunderstanding that the proposed new storage building was to be a replacement for the two storage containers, rather than for the former storage building. The important point, for current purposes, is that the wording of the condition intended to require the removal of the containers does not in fact achieve that end. It states "Within three months of the substantial completion of the storage facility hereby permitted, the existing storage facility sited adjacent to the western boundary of the site *as shown on submitted plans SW 1734 3 AC SK 21 C and SW 1734 3 AC SK 20 B* [my emphasis] shall be permanently removed from the site and the said area restored to its natural state." The "existing storage facility" identified by these plans is not the two storage containers but rather the previous storage building.
7. This misunderstanding appears to have been perpetuated in approving the subsequent application, some two years later, for permission to erect an alternative replacement storage shed to that allowed in 2017.² The Officer's report again notes that "given the proposal is for a replacement storage a condition should be imposed on the decision notice requiring the removal of the existing storage containers", and the condition attached to the 2020 Permission adopts the same wording as was used for the 2016 Permission, by reference to the "existing storage facility shown on submitted plans [sic] PPM.01." Like the plans approved by the 2016 Permission, plan PPM.01 does not show the storage containers: it only shows the former storage building, which is labelled "Existing Store demolished".
8. The upshot of all this is that there is no condition which requires the removal of the two storage containers. I appreciate that is not what the Council intended, but the relevant condition of the 2020 Permission requires the removal of the former storage facility on the western boundary of the site, as shown on the approved plan: that condition has been complied with. It follows that there is no breach of condition in respect of which enforcement action could be taken.

¹ Ref PA16/11022 dated 24 January 2017

² Ref PA19/09133 dated 27 January 2020

The length of time for which the containers have been present

9. Siting the shipping containers on the car park, to provide storage space, was a material change of use for which planning permission was required but not obtained. In order to establish that the ten year period for taking enforcement action against this breach of planning control has expired, the Appellant would need to demonstrate that the containers were present and in use by 6 April 2012 (that is, ten years prior to the date of the LDC application).
10. The Appellant states that the second of the two containers was purchased on 1 June 2007 and craned on to the Appeal Site on 8 June 2007, by which date the first container was already there. No evidence has been provided in respect of the acquisition and installation of that first container. In respect of the second container, the Appellant has submitted an extract from a SAGE spreadsheet and an extract from an EXCEL spreadsheet. The extract from SAGE shows the sum paid on 1 June 2007 for an item described as "Container" under reference "Dainton Ltd". The extract from EXCEL shows a number of entries for items such as "Crane", "Crane hire" and "Pontoons". An item listed as "Craning" on 8 June 2007 has been highlighted.
11. There is nothing in either of these extracts which identifies the Appellant or his business, and no supporting declaration confirming what the documents are, and where and how they have been obtained. I share the Council's concern that there is therefore no means of establishing that the "container" listed in the SAGE extract is one of those placed on the Appeal Site, and no means of confirming what was moved where by the "craning" listed in the EXCEL extract.
12. The Appellant has provided screenshots of two sales invoices said to relate to the hiring out of the storage containers, and a copy of a document headed "Port Pendennis Marina Berthing Licence", which relates to "Blue Too (Container Only)". But since these documents are dated 2015 and 2018, they do not assist in establishing whether or not the containers were in use on the Appeal Site prior to the relevant date of 6 April 2012.
13. The Council has provided a number of photographs of the Appeal Site. These include photographs taken by Council Officers visiting adjoining land on 6 January 2012 and 18 December 2014; Google Streetview images showing views from Bar Road dated May 2011, June 2014 and May 2017; Google Streetview images showing views from Tinnars Walk dated June 2009 and May 2011; and Google Earth aerial images dated November 2009 and August 2015. The Appellant has also provided a photograph of the former storage building on the southwestern boundary of the site, dated 28 April 2014.
14. The containers can be seen, occupying their current position, in the aerial image dated August 2015 but they are not visible in any of the earlier photographs. The Appellant contends that in the photograph of the former storage building dated 28 April 2014, a corner of a container can be seen to the left and behind the shed. I am not able to discern any part of any container in this image. The Appellant also contends that in the Council's photographs taken on 6 January 2012 the containers "can be faintly made out located further back where the new shed is now located", but again I am not able to discern any container, or anything that might feasibly be a partially visible container, in these images.

15. The Appellant has explained that the containers have not always been located in their present position. But if it were the case that both containers were sited somewhere on the Appeal Site by June 2007, it would be reasonable to expect them to be visible in (for instance) the two Google Streetview images dated May 2011, which were taken from Bar Road and Tinnars Walk, and so between them provide views of most of the Appeal Site. No containers are visible in either image.
16. I understand the Appellant's point that it is hard to prove that the containers were on site before 2012 because they did not anticipate being challenged ten years later. But in applying for a LDC to establish that what began as a breach of planning control can no longer be enforced against, the burden of proof is on the applicant. In such cases it is not unusual for applicants and/or others with first-hand knowledge of the matter to provide formally witnessed Statutory Declarations, setting out what happened when, by reference to supporting information such as bills, marketing material, correspondence etc. No evidence of that weight and significance has been provided here.
17. In summary, I conclude that the documents that have been provided by the Appellant are not sufficiently precise and unambiguous to demonstrate that the second container was bought and placed on the Appeal site in June 2007, by which time the first container was already there. Rather, the photographs provided by the Council indicate that the containers were placed on the Appeal Site at some point between June 2014 and August 2015, so a minimum of at least two years after the relevant date for present purposes. The Appellant has not, therefore, discharged the evidential burden of demonstrating that on the balance of probabilities, the material change of use had taken place by 6 April 2012.

Conclusion

18. For the reasons given above I conclude that the Council's refusal to grant a LDC in respect of two 20ft containers placed on the car park 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.

Jessica Graham

INSPECTOR