

Appeal Decision

Site visit made on 30 July 2024

by D Boffin BSc (Hons) DipTP MRTPI DipBldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 11 September 2024

Appeal Ref: APP/X0360/X/23/3314918

**Winnersh Garden Centre, 656 Reading Road, Winnersh, Wokingham
RG41 5HG**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) (the 1990 Act) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr David Lazenby of British Garden Centres (South) LTD against the decision of Wokingham Borough Council.
 - The application ref: 223124, dated 14 October 2022, was refused by a notice dated 14 December 2022.
 - The application was made under section 191(1)(a) of the 1990 Act.
The existing use for which a LDC is sought is the use of land to sell and display goods (sheds).
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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 Matters and Background

2. The description of the existing use for which the LDC is sought is taken from the appeal form which also reflects the description on the Council's decision notice.
3. My decision rests on the facts of the case, on relevant planning law and judicial authority. The test of evidence is made on the balance of probability. The appellant's evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous.
4. The appeal site forms part of the land owned by British Garden Centres (South) Ltd at Winnersh Garden Centre. The main garden centre building and its car park are located approximately south of the appeal site. There is a car wash facility that is served off the access to the garden centre. A previous appeal decision¹ (the 2021 appeal) in relation to the car wash facility has been brought to my attention and I have taken it into account in my reasoning below. I noted that sheds, greenhouses and outbuildings were displayed for

¹ Ref: APP/X0360/C/21/3271474

sale on the appeal site on the day of my site visit. Moreover, a sales office associated with the sale/purchase of those products is located within the appeal site.

5. The appellant's evidence states that the garden centre evolved from a former horticulture business but that it has been a retail operation in its entirety prior to purchase by Wyevale Garden Centres in 2011 from whom the appellant company acquired the site in 2019. The Council has not specifically disputed those facts and there is no reason for me to dispute them. There is no substantiated evidence before me to indicate that the use of the garden centre is unlawful. Moreover, there is no substantiated evidence before me to indicate that there is a planning condition/s in effect on the overall site that restricts the display or sales of any goods from it.

Reasons

6. The main issue is whether the Council's decision to refuse to grant an LDC was well-founded. In order for an LDC to be granted under section 191 of the 1990 Act, the burden of proof is with the appellant and the appropriate test of the evidence is the balance of probabilities. The onus is firmly on the appellant to show that the use of the appeal site to sell and display goods (sheds) was lawful at the time the application was made. A use is lawful under the provisions of section 191(2)(a) of the 1990 Act if no enforcement action may be taken in respect of it whether because it did not involve development or require planning permission or because the time for enforcement action has expired.
7. The appellant contends that the appeal site has a lawful use for retail purposes (Class E(a) of Schedule 2 Part A of the Town and Country Planning (Use Classes) Order 1987 (the UCO) as amended by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020) since it has been used in connection with this use for a period of in excess of ten years. Class E of the UCO relates to commercial, business and service use, or part use, for all or any of the specified purposes. One of the purposes of Class E is (a) for the display or retail sale of goods, other than hot food, principally to visiting members of the public.
8. Article 3(1A) of the UCO states that where a building or other land is situated in England and is used for a purpose of any class specified in(b) Schedule 2 the use of that building or that other land, or if specified, the use of part of that building or the other land ("part use"), for any other purpose of the same class is not to be taken to involve development of the land. This is derived from section 55(2)(f) of the 1990 Act. Its effect is to specify that a change of use from an old use to a new use, which both fall within the same class of the UCO is not development. The concept of the UCO requires that it be applied to a single definable use of land or building and not a composite use, unless there is a single primary use and other use/s are ancillary or incidental to that primary use. Movement from one primary use to another within the same use class is not development.
9. Class E is wide ranging and encompasses uses that previously fell into several different classes such as shops, financial services, business, indoor sports, etc. Class E also provides that "use, or part use" for any of those purposes falls within that class. The Planning Practice Guidance (the PPG) specifies that

Class E provides for use, or part use, for all or any of the purposes set out in the class².

10. Where what use land and buildings have been put to is being considered, it is first necessary to determine whether there is a single planning unit or multiple planning units. In *Burdle*³ 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, and Bridge J suggested 3 broad categories of distinction:
 - i. Where it is possible to recognise a single main purpose of the occupier's use of his land to which activities are incidental or ancillary, the whole unit of occupation should be considered the planning unit.
 - ii. Even though the occupier carries on a variety of activities, and it is not possible to say that one is incidental or ancillary to another, the entire unit of occupation should be considered the planning unit, in mixed use.
 - iii. Where there are 2 or more physically separate and distinct uses, occupied as a single unit but for substantially different and unrelated purposes, each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered a separate planning unit.
11. Two letters were submitted in support of the LDC application one from the regional manager and the other from the property and concessions director (the director) of British Garden Centres. The regional manager states that they have visited and monitored Winnersh Garden Centre since 2011 and that the appeal site *'has always formed part of the garden centre demise and has been used as part of the garden centre retail and operations space'*. The director states that he has been directly related and involved with Winnersh Garden Centre since 2015. He also states *that 'the area where the sheds are currently displayed has always and consistently been used for Garden centre related activities'*. As such, it appears that prior to the appeal site being used for the sale and display of goods (sheds) it was owned and occupied by the appellant company. The sale and display of goods (sheds) is a concession in that Skinners Sheds operate the display and sale of the sheds. However, the appellant company still own the overall site.
12. Numerous aerial photographs were submitted in support of the application, and I acknowledge they only provide a snapshot in time. However, those photographs appear to indicate that in 2010 there were several structures within the appeal site and that items were stored externally on it. The photographs from 2014 are of poor quality and little can be gained from them. Most of the structures are still visible in the 2017 aerial photograph but there is limited external storage visible. Again, in the 2018 photograph the structures are visible and a larger amount of external storage is visible than in 2017. In the 2020 photograph very little external storage is visible

² PPG paragraph: 12 Reference ID: 13-012-20140306

³ *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 (Div Court)

and by the 2021 photograph the structures have been removed and vehicles are parked on the site. The aerial photographs and the google street view images submitted by the Council corroborate that between 2010 and 2019 that the site appears to have been used for storage purposes.

13. The appeal site at those times appears to have been fenced/gated off from the remainder of the site associated with Winnersh Garden Centre. The Council's Officer report refers to comments received from residents stating that the appeal site has not been used for customer facing retail and it has always been hidden behind fencing and trees. However, the appellant's agent has stated that the storage *'was for surplus stock of bags of compost and other bulky out-door appropriate items.'* It is also stated that *'the buildings were used to store out-of-season items such as Christmas displays, bbqs and other items that are not displayed year-round. Since the area contained stock and equipment associated with the running of the garden centre, it was fenced and gated as it was not an area intended to be accessible to the public.'* There is no evidence before me to contradict the appellant's version of events that the storage that occurred on the appeal site was functionally connected to the garden centre.
14. Whilst the appeal site was fenced/gated from the remainder of the site it is more likely than not, that it was used for storage and parking purposes that were functionally related to the use of the garden centre. Prior to the sheds being displayed and sold from the site, on the balance of probabilities, the appeal site was used and occupied as part and parcel of the garden centre. As such, it was within the same planning unit as the garden centre.
15. The primary use of land or a building is, as the term implies, the main use or activity that is carried out by the occupier. The essential characteristic of an ancillary use is that there should be some ordinarily functional relationship between it and the primary use. The Inspector in the 2021 decision stated that *'it is common ground that the planning unit here under consideration is the Garden Centre site in its entirety, and that its primary use is for A1 retail'*. Class A1 has been revoked and is now part of Class E of the UCO. Planning permission was granted for the car wash facility in 2022. In my judgement, based on the evidence before me, that planning permission and the use of that part of the garden centre site for the car wash meant that a smaller planning unit associated with the garden centre use was created at that time.
16. The main use or activity within that smaller garden centre planning unit still appears to be the display or retail sale of goods, other than hot food, principally to visiting members of the public. The primary use of that garden centre planning unit is therefore within Class E of the UCO. The storage and parking within the appeal site was carried out as a direct result of the garden centre use and, as stated previously, it was functionally related to that use. Therefore, in my judgement it can reasonably be considered to be ancillary to the primary use of that planning unit.
17. I acknowledge that the previous Inspector found that *'whether the installation of the car wash and valet service in this self-contained area has resulted in the addition of a new primary use to the existing planning unit, or the creation of a new planning unit in a single primary use, there has as a*

matter of fact and degree been a material change in the use of the land, which requires planning permission'. Nevertheless, in this case even if the use of the appeal site for the display and sale of sheds has created a new planning unit there is no dispute that that use falls within Class E of the UCO. Therefore, the primary use of that planning unit would be in the same class of the UCO as the primary use of the garden centre planning unit. Consequently, on the balance of probability, I consider that at the date of the LDC application the use of the appeal site to sell and display goods (sheds) did not constitute "development" by virtue of Article 3(1A) of the UCO and section 55(2)(f) of the 1990 Act. As such, it is thereby lawful by virtue of section 191(2)(a) of the 1990 Act.

18. I acknowledge that the Council does not consider that the appellant has demonstrated that the existing use of the appeal site to sell and display sheds has been continuous for 10 years prior to the date of the LDC application as that use appears to have commenced about April 2022. As stated previously, a use is lawful under the provisions of section 191(2)(a) of the 1990 Act if no enforcement action may be taken in respect of it whether that is because it did not involve development **or** because the time for enforcement action has expired. In this case I have found the existing use of the appeal site did not involve development. Therefore, even if I concurred with the Council's view, in relation to the time limit for enforcement action as contained within section 171B (3) of the 1990 Act this matter would not alter whether the Council's decision to refuse the grant of an LDC was well-founded.
19. Section 191(5)(b) of the 1990 Act requires that, if a lawful development certificate is granted, it shall include a description of the use in question and where any use falls within a specified use class, that use class shall be referenced. Therefore, I have added the wording '(Class E of Schedule 2 Part A of the Town and Country Planning (Use Classes) Order 1987 as amended by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020)' at the end the description in the LDC certificate annexed to this decision.

Conclusion

20. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant an LDC in respect of the existing use of land to sell and display goods (sheds) 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.

D Boffin

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 14 October 2022 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged 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:

The existing use of the Land to sell and display goods (sheds) does not constitute development by virtue of Article 3(1A) of the Town and Country Planning (Use Classes) Order 1987 (as amended) and section 55(2)(f) of the Town and Country Planning Act 1990 (as amended).

Signed

D Boffin

Inspector

Date: 11 September 2024

Reference: APP/X0360/X/23/3314918

First Schedule

The use of the Land to sell and display goods (sheds) (Class E of Schedule 2 Part A of the Town and Country Planning (Use Classes) Order 1987 as amended by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020).

Second Schedule

Land at Winnersh Garden Centre, 656 Reading Road, Winnersh, Wokingham
RG41 5HG

IMPORTANT NOTES – SEE OVER

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 described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was 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 described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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: 11 September 2024

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Scale: Not to Scale

