



Appeal Decision

Site visit made on 11 February 2025

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 April 2025

Appeal Ref: APP/P1805/X/24/3348680

Sugarbrook Nurseries, Sugarbrook Lane, Stoke Pound, Worcestershire B60 3AU

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) (the Act) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Mark Banham against the decision of Bromsgrove District Council.
 - The application ref 24/00399/CPE, dated 12 April 2024, was refused by notice dated 26 June 2024.
 - 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 'business storage, equestrian, residential amenity land and embankment as shown on the submitted plan and described in the evidence'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The Council has raised concern that the appellant has submitted information and evidence which was not available to it during its determination of the application. However, section 195 of the Act refers to the 'refusal' being well-founded, meaning the local planning authority's decision, not the reasons for the decision. Section 195 appeals are therefore invariably treated as *de novo*¹ appeals, meaning that the parties and interested persons may submit additional evidence which was not before the authority at the time of its decision. The Council has had the opportunity to comment on the information provided and so I shall take it into account in reaching my decision.
3. The appellant describes the use as 'Business storage, equestrian, residential amenity land and embankment' on their application form. The Council refers to the use as 'Business storage, equestrian, stationing of caravan and associated residential amenity land and agricultural land (embankments) and the appellant uses this description in their appeal form. While I have used the appellant's description in the banner heading above, I shall therefore also consider the description used by the Council in determination of the appeal.
4. It is suggested that commercial storage use has been investigated previously and no action taken and that the remaining uses are low key and obvious from 15 Council inspections. However, it is a fundamental principle that a local planning authority may not fetter its discretion to issue an enforcement notice by any form of agreement. Even if officers of the Council have visited the site previously and taken no action, the Council is not prevented from taking enforcement action.

¹ A Latin phrase meaning "anew" or "from the beginning".

5. It is suggested that residential uses are already certified under reference 21/01024/CPL and 21/00425/CPE. A lawful development certificate was granted, on appeal, reference APP/P1805/X/23/3321060 for the use of timber building and land surrounding the cabin and the timber building for incidental domestic purposes. The red line on the certificate is drawn around the buildings and land identified as '1' and '2' on the aerial photographs submitted by the appellant. The decision letter referred to a separate LDC which has been granted for the use of the cabin as a dwelling, reference 21/01292/CPE. The 'lawful residential' and 'polytunnel'² are not included in the description on the application form, and they are 'cut out' on the plan submitted alongside the application. They do not, therefore, form part of my consideration of this appeal.

Main Issue

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

Reasons

7. Section 191(1) of the Act provides that if any person wishes to ascertain whether (a) any existing use of buildings or other land is lawful; (b) any operations which have been carried out in, on, over or under land are lawful; or (c) any other matter constituting a failure to comply with any condition or limitation subject to which Planning Permission has been granted is lawful – they may make an application for the purpose to the LPA, specifying the land and describing the use, operations or other matter.
8. In an LDC, the burden of proof is firmly on the appellant to make their case, to the civil standard, which is the 'balance of probabilities'. An appellant's evidence should not be rejected simply because it is not corroborated. 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.
9. The date of the LDC application was 12 April 2024, so the appellant would need to show, on the balance of probabilities, that the use/s began on or before 12 April 2014 and continued without significant interruption for a period of at least 10 years thereafter. Planning merits form no part of the assessment of an application for a lawful development certificate (LDC) which must be considered in the light of the facts and the law.
10. The appeal site comprises a substantial area, which is bound by fencing, mature vegetation and secure gates. Although there is some fencing within the site³, the land appears generally open. The owner states that they purchased the site in 2013 and lets out the different parts of the site to multiple different tenants.

The planning unit

11. When considering whether a material change of use has occurred, it is first necessary to ascertain the correct planning unit, and the present and previous primary uses of that unit. The general rule is that the materiality of change should be assessed in terms of the whole site concerned. In *Burdle & Williams v SSE &*

² Identified as '1', '2', '4' and '5' on drawing no. 00-01 Rev P3.

³ For example, Heras fencing was used to delineate two different areas during my visit and close boarded fencing was used to delineate land around the wooden cabin.

New Forest DC [1972] 1 WLR 1207, 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. Three broad categories of distinction have been suggested when considering the planning unit:

- A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary;
 - 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
 - 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.
12. The appellant suggests the land is in use for a variety of separate purposes unconnected to each other and that they are separate planning units in law, referring to *Burdle*. The appellant has provided a plan showing an area identified as 'use of the land for commercial/business storage', an area identified as 'use of land for grass land/DIY equestrian', an area identified as 'use of the land for personal amenity use' and an area identified as 'use of the land for equestrian storage/DIY livery' and areas identified as 'embankment'.
13. In deciding whether there is one planning unit in mixed use or several planning units, relevant factors may include:
- The form of tenancy and the legal relationship between the landlord and tenants, including the degree of control exercised by the owner;
 - The ease with which tenants may switch sites or expand or contract their areas of occupation;
 - The extent to which individual sites are physically defined or have changing boundaries;
 - The proportion of the site given to communal areas such as access, parking, landscaping etc, and the rights of use by the occupiers over them.
14. There are a number of buildings within the site, including Nissen Hut style structures. These buildings were locked, and I was unable to access them during my visit. There is clearly physical delineation between some of the buildings (they are lockable, self-contained units), and they are occupied by different tenants, suggesting there is both physical and functional separation (whether the uses fall within the same use class or not). For example, from the evidence, it seems a number of these buildings (identified as '6' on the 'Sugarbrook Aerial View' documents) were occupied by a single tenant between 2013 and 2017 but have since been occupied by multiple tenants.
15. However, there is limited information to show how individuals use these buildings, or indeed the rest of the site. The appellant states that there are no formalities at the site and that there is considerable flexibility. The appellant states that they do not control the number of vehicles parked or stored and so it seems that tenants are likely to be able to switch sites or expand or contract their areas of occupation with relative ease.

16. Although I would agree that the residential units⁴ are likely to be separate planning units as there is both physical and functional delineation between the residential use of the structures and the remainder of the site, such physical and functional separation is less evident elsewhere within the site. For example, there is no delineation between the embankment and the rest of the site, and whilst I saw that fencing has been erected around the areas identified as 'equestrian', the fencing used appeared to comprise lightweight tape, which is electrified to keep horses in a particular area.
17. Such fencing is relatively easy to move and in my experience, can be moved with some regularity to modify where a particular horse/s graze. Such delineation is not evident in the aerial photographs dated 8 April 2017 and is unlikely to have been present as the grassed areas appear to have been accessed by vehicles (as evidenced by the presence of two vehicles in the aerial photograph, as well as patches of bare earth).
18. From the evidence before me and from my inspection of the site⁵, apart from the residential uses (which as set out above, I consider comprise their own planning units) I consider it unlikely that the different areas comprise separate planning units. I consider it more likely that the appeal site (not including the residential units) is the planning unit, and it is in mixed use, because the land is put to two or more activities, and it is not possible to say that one is incidental to the other.
19. It is necessary to establish when the breach of planning control began and to consider whether the use continued for a ten-year period without significant interruption. An interruption in the ten-year period can take the form of some cessation in activity, including in the composition of the mixed use, or change to the character of the use or size of the planning unit. I accept that mere intensification, if it fell short of changing the character of the use, would not constitute a material change of use⁶.
20. In support of their case, the appellant has submitted a series of aerial photographs, dated 2013, 2016, 2019, 2021 and 2022, which are annotated, with accompanying notes. The aerial photograph dated 2010/2013 (the date is handwritten) shows a number of buildings within the site which have since been removed. Various buildings and areas are numbered 1 to 14, with 'Equestrian' and 'Amenity Land' also handwritten, the latter descriptor is surrounded by arrows. The extent of the land used by each of the individuals/activities is not clear from the aerial photograph, and it is not shown separately on the plan submitted alongside the application.
21. The notes accompanying the aerial photographs use the term 'user of storage' rather than describing how a particular part of the site has actually been used. The term 'user of storage' does not explain to me how the land has been used, nor is there any detail as to how each of the individual units or areas operates. Whilst what is of relevance is how the land and buildings have been used rather than the identity of a particular tenant, it is important that the appellant's evidence can be understood and is sufficiently clear. I do not find it to be so.

⁴ Identified as 'Lawful Residential', numbered '1', '2' and '4' on drawing no. 00-01 Rev P3.

⁵ Notwithstanding my site visit was carried out some time after the LDC application was made.

⁶ *Hertfordshire County Council v Secretary of State for Communities and Local Government & Anor* [2012] EWCA Civ 1473

22. The appellant suggests that the commercial storage use is considered to fall within use class B8⁷. The previous owner of the site, whom I shall refer to as GW, states they purchased the site in 2009/2010 and that it was previously a commercial garden centre. They state they used it for the purposes of storing all types of building materials and that it was also used by subcontractors. However, this seems to describe a builder's yard, which may not be a B8 use. This individual is stated to have been the user of the reclamation yard and associated hard standing prior to the appellant's ownership of the site and between February 2013 to June 2016.
23. The subsequent user of the reclamation yard and associated hard standing are stated to have occupied the site between July 2016 and January 2018. However, within an aerial photograph dated 20 April 2016, the area identified as the 'reclamation yard' appears grassed over, with remnants of what appear to be polytunnels, suggesting it was not used at that time. While this is just a snapshot in time, it undermines the appellant's suggestion that the reclamation yard and associated hardstanding was occupied at that time.
24. Furthermore, although the appellant suggests the use is B8, it is not clear from the evidence that this is the case. While an LDC can be issued whether the use is B8 or a mixed use (so long as the applicant describes precisely what is being applied for), this will depend upon whether the appellant can show that the use has continued without significant interruption for at least 10 years. A 'reclamation yard', in my experience is more likely to be a B2 use or *sui generis*. This matters because the character of the use is likely to be different to the character of a storage use.
25. An interruption in the ten-year period can take the form of some cessation in activity, including in the composition of the mixed use. Given the likely difference between a storage use and a reclamation yard use (which may involve sorting of materials, as well as individuals going to a site to purchase items/materials), cessation of this activity may have resulted in changes to the mix of uses at the site.
26. The appellant states that commercial vehicles have always been parked at the site, and some stored at the site in the open or more usually under polytunnels, or in buildings. However, while parking of vehicles may be incidental to a storage use, as held in *Crawley BC v Hickmet Ltd 1998 [JPL] 210*, parking of vehicles may be a primary use in its own right. It is not clear from the evidence provided whether vehicles have been parked or stored, and if they have been parked, whether such parking is incidental to a primary use or is itself a primary use.
27. The appellant suggests that the area identified as '8' on the aerial photographs was used for 'storage, storing machinery, HGV's, low loader and skips which varied [sic] (February 2013 to present day). However, HGVs, low loaders and skips are not evident in the aerial photograph dated 2010/2013 and by the 2016 photograph, the area is largely grassed over, suggesting limited activity within this part of the site.
28. In its refusal, the Council makes reference to an agricultural prior notification application, reference 13/0326. The case officer report is stated to have advised the site was vacant on 30 May 2013. While this is over 10 years prior to the

⁷ Storage or distribution.

submission of the LDC application, this conflicts with the statements made by the appellant and other witnesses, which state that the site was occupied at this time.

29. The dates within the notes accompanying the aerial photographs are given by month, rather than day, with occupancy ceasing on one month and then resuming with a different user on the following month. This, in my experience is very unusual. While a landlord is likely to want to limit the time a site/building or land is vacant, there is often a period of vacancy between different tenants, while that site/building or land is advertised for rent. Even if vacancy of a plot is limited (because there is significant demand, for example), I would expect periods between occupiers of plots to vary as factors outside the landlord or a tenant's control may affect their ability to move.
30. I also have concerns regarding the accuracy of the documents. For example, Unit 11, which is a lockable building, is identified as being used by an individual between April 2018 to June 2020 and thereafter, another individual between April 2020 to present day. Unit 12, which is also a lockable building, is identified as being used by an individual between June 2015 to July 2020, with a different user identified as the user between March 2020 to present day. These may well be typographical errors, however, in the absence of evidence to the contrary, it undermines the accuracy of the documents provided.
31. An individual, whom I shall refer to as AL, has provided a witness statement which states, to their knowledge, the site has been 'in continuous use as a storage yard since (the appellant) purchased it'. The witness suggests the land falls within use class B8. The witness states their business is tiling and general maintenance. A witness statement provided by another individual, whom I shall refer to as GM, is markedly similar to the statement provided by AL, though they describe their business as plumbing, heating and general maintenance. Neither witness suggests they are a planning professional. Furthermore, neither witness refers to residential, equestrian or agricultural uses. This significantly limits the weight I afford to their suggestion the land use is storage with parking.

Amenity land

32. The appellant and their wife have submitted statutory declarations which state that they have used the 'purple hatched land as amenity land for their enjoyment of the waterside location since they purchased the land in February 2013.' The land straddles the brook which runs through the site. During my visit I saw that some seats have been placed on the land to the south of the brook. However, it is not clear exactly what is meant by 'amenity land', nor is it clear how they have used it, or how they have used the caravan/s⁸. I find the appellant's evidence is not sufficiently precise and unambiguous with respect to the amenity land and caravan/s.

Equestrian

33. The appellant describes the equestrian land use and storage as a 'DIY livery' that has been continuous since purchase. In my experience, a livery is generally held to mean a place where horses are housed and cared for in return for payment. The appellant identifies a user of 'equestrian area/storage' as an individual whom I

⁸ I saw a static caravan and a touring caravan during my site visit.

shall refer to as SB between February/March 2013 to July 2017 and an individual whom I shall refer to as SW between August 2017 and present day [sic].

34. However, there is no detail as to how these tenants have used the land. Although I saw horses grazing during my visit, I would expect more detail as to exactly how the land has been used, whether horses have been continuously sited on the land and whether it has been used without significant interruption. Horses grazing, for example, can be an agricultural use. The appellant suggests that the use does not harm green belt openness, however, as set out above, planning merits are not relevant to the determination of an LDC.
35. Within the aerial photograph dated 2010/2013⁹, the land appears to comprise concrete or some form of hardstanding, which is unlikely to be suitable for the keeping of horses. Within the aerial photograph dated 8 April 2017, although grassed, the areas appear to have been accessed by vehicles (evidence by the presence of two vehicles in the aerial photograph, as well as patches of bare earth), with fencing not evident. Given the different activities and occupiers within the site appeal site, someone keeping their horse at the site is likely to want to ensure that it cannot roam to other parts of the site and so I would expect fencing to be evident.
36. I accept that aerial photography provides a snapshot in time and that vegetation cover may limit what can be seen in an aerial image. Furthermore, it is not clear exactly when the appellant's photographs were taken. Nevertheless, in my view, the aerial photography referred to above undermines the appellant's suggestion that the land was used for the keeping of horses at those times.

Embankment

37. The appellant ticked 'an existing use' on their application form. With respect to the embankment, it is not clear what the appellant is expecting me to certify. The Council refers to agricultural land in its decision and I note the appellant does the same in their appeal form. However, the appellant has not explained how the embankment has been used. The use of land for the purposes of agriculture or forestry is not development for the purposes of the Act. However, the appellant is seeking a determination under section 191 of the Act rather than section 192.
38. Furthermore, even if the embankments have been used for the purposes of agriculture, given the open nature of the site and the lack of physical delineation, it seems likely that the site is in mixed use (as set out above). As such, the appellant would need to demonstrate that the mixed use was immune from enforcement action.
39. While activities within a mixed use may fluctuate without there necessarily being a material change of use of the planning unit, it is not clear from the evidence what the mix of uses has been, or that the mix of uses has continued for a period of at least 10 years without significant interruption. I find the appellant's evidence to be contradictory and ambiguous and whilst an LDC can be granted where 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, this is provided the appellant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

⁹ Sugarbrook Aerial View 2013: The date, 2010/2013, is handwritten.

40. For the reasons given above, I find the appellant's evidence is not sufficiently precise and unambiguous and does not show, on the balance of probabilities, that the use of the land commenced on or before 12 April 2014 and continued without significant interruption for a period of at least 10 years thereafter. Consequently, the appeal must fail.

Conclusion

41. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development for business storage, equestrian, residential amenity land and embankment is 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).

M Savage

INSPECTOR