



Appeal Decision

Site visit made on 18 February 2025

by Timothy C King BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 May 2025

Appeal Ref: APP/E2205/X/24/3349328

Land adj to Oakdene, Tenterden Road, Biddenden, Kent TN27 8BL

- 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 Ms Michelle Arnold against the decision of Ashford Borough Council.
 - The application Ref PA/2024/0291, dated 9 February 2024, was refused by notice dated 15 May 2024.
 - 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 described as *'Independent residential occupation of Land adj to Oakdene and part change of use of the land and buildings for storage use and personal workshop.'*
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Decision

1. The appeal is dismissed.

Application for Costs

2. An application for an award of costs was made by Michelle Arnold against Ashford Borough Council. This application is the subject of a separate decision.

Preliminary Matters

3. In an appeal under s195 of the Act against the refusal of a LDC the burden of proof is upon the appellant. The test of the evidence would need to show that the use, as described on the application form, had continued on an uninterrupted basis since at least 9 February 2014 – otherwise known as the 'material date' - being ten years prior to the date of the application made.
4. The onus of proof is on the appellant to demonstrate, on the balance of probability, that the outbuilding and the land surrounding it has been used for such, thereby confirming that the planning position is as claimed. Accordingly, the key is that the evidence should be precise and unambiguous to show immunity from planning control.
5. The key is whether, at any time between the material date and the date of the LDC application, there was no point when the Council could not have taken enforcement action. In other words the use(s) claimed were unauthorised at the outset, and remained unauthorised, and subject to potential enforcement action throughout.

6. Where LDCs are involved the planning merits of the development applied for do not fall to be considered. Instead, the decision will be based strictly on the evidential facts, planning legislation and relevant case law.

Background

7. It is understood that the red-ringed appeal site identified, which incorporates a side driveway, once formed part of the curtilage of Oakdene, the adjacent residential dwelling and its rear garden. The appeal site accommodated a lengthy, narrow building which had previously been used for horticultural purposes. It stood in its entirety until September 2017 when the building was badly damaged by fire. Prior to the fire the building had been used by the appellant as a workshop, store and also, it is understood, accommodation and facilities for habitable purposes. In other words, in planning terms, the building functioned for mixed use purposes.
8. Following the fire the majority of the building was badly damaged and this section was subsequently removed, leaving only a relatively small section standing. At my site visit I noted that the remaining section that remains was used as a store for a variety of paraphernalia. The area surrounding the building is used extensively for the haphazard open storage of vehicles, machinery, related panels and parts, wooden pallets and various other items.
9. There is also a caravan stationed on the land which I understand the appellant has lived in since the fire damage, and two small structures described as 'temporary storage buildings' positioned along the site's eastern boundary. However, the representations do not concentrate on these structures.

Main Issue

10. The main issue in this appeal is whether, on the balance of probability, the use was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990.

Reasons

11. S191(2) says that uses and operations are lawful at any time if no enforcement action may then be taken in respect of them because the time for enforcement action has expired, and they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
12. The description of the development on the original application form for which the LDC is sought is curiously worded. Given that the appeal site was severed from Oakdene over twenty years ago, it is not clear what is meant by the term '*independent residential use*'. I can only take it to mean independent of the Oakdene dwelling. Also, the wording '*part change of use of the land and buildings for storage use and personal workshop*' is similarly less than specific, and, given the circumstances, I consider this somewhat vague or nebulous. Indeed, the annotated block plan attached to the appellant's statutory declaration makes no mention of the open storage nor does it indicate its location within the appeal site.
13. On the application form the appellant claims the uses described on the application form commenced on 1 October 2001, and this is consistent with the

evidence produced by way of nine separate statutory declarations provided. These have been sworn by Michelle Arnold, the appellant, her relatives, friends and persons who have had contact with her since her marriage broke up in 2001, when she moved out of Oakdene. All would tend to corroborate the appellant's claims, and Kevin Arnold, Michelle's younger brother, in referring to his sister's occupation, mentions that the building contained a kitchen, bathroom and sleeping accommodation.

14. It is not reasonably possible to determine whether or not a material change of use of the land has taken place without the actual planning unit being identified. It is held in law that once a planning unit has been established any significant change thereto may result in, or be associated with, a material change of use. In this instance I would suggest that the planning unit is correctly identified as the area confined within the red-ringed appeal site. However, since the fire, and from that which can be discerned from the aerial photographs provided by the appellant, it would seem that the character of the site has changed with the intensified open storage of vehicles and machinery etc.
15. The judgement in *Gravesham BC v SSE & O'Brien* [1982] sets out the distinctive characteristic of a dwelling, being its ability to afford to those who use it the facilities required for day to day private domestic existence. Self-contained units are usually characterised by having exclusive use of all facilities within their own physical envelope. However, there is no compelling evidence to show that this was the case with the residential element within the building at that time. Instead, from the general tenor of the evidence produced I would consider that the residential use was not formalised, and the building would be best described as having been functioning as a live/work unit prior to the fire damage.
16. Such a use involves a sufficiently substantial element of business use so as to take it outside the limits of what might legitimately be regarded as being ancillary to a residential use such as would be the case when someone might work from home. Although, on the face of it, some might consider live/work units being in a mixed use as per the relevant categories within the Use Classes Order, it is in fact a sui generis use, so that any significant change of use such as, for example, becoming a wholly residential (C3) use, would amount to development requiring the benefit of planning permission.
17. So, notwithstanding that each of the elements of a sui generis use would, in themselves, be uses that would come within the Use Classes Order, the use of the planning unit for a mixed use falling within more than one of the classes in the Use Classes Order constitutes a sui generis use. Only if one or any other element in the use is purely ancillary to the other(s) would the primary use – the appellant appears to be claiming that the residential element has been the primary use in this particular case – fall within a single use class ie C3. Changing from a mixed use property to one of a single use would generally therefore represent a material change of use, often requiring planning permission. Accordingly, this must be a matter of fact and degree in each individual case.

18. In its case report the Council makes reference to a previous planning application for the site (ref PA/2023/0288) which proposed the reconstruction of the previous workshop and provision of a live-work unit. Planning permission was refused in September 2023 and, presumably, following on from the intended rebuild, the Council saw fit to highlight the case of *Jennings Motors Ltd v SSE* [1982] JPL 181. In this judgement it was held that if a building is erected without planning permission, this would bring about a material change of use of the land on which the building stands if the use of the building is so radically different from the previous use as to, in effect, open a new chapter in the planning history of the site. However, if the new building simply replaces an existing building used for the same purpose and does not significantly alter the use of the planning unit of which it forms part, then there is no new chapter in the planning history, and so the existing use rights applying to the site apply also to the new building. Accordingly, where operational development is unauthorised, the lawfulness of its subsequent use must be judged on its own facts, and that must necessarily be a matter of fact and degree in each case.
19. That said, the Council erroneously applied the *Jennings Motors* judgement to the current appeal case as no operational development is involved. It only formed part of an application for development at the site which was refused planning permission in 2003. However, I would imagine that this approach was taken due to the apparent intention to reconstruct the lost building, confirmed by the said planning application. Instead, I would consider that the judgement of *Iddenden v SSE* [1972] WLR 1433 is more applicable here as this established that where a building on which a use of land relied had been demolished, its previous lawful use did not confer any right to continue that use. Given that the majority of the building was lost in the fire I would consider that the building's use rights which might have accrued were then similarly lost.
20. From my findings I would suggest that the site is now likely used on a composite basis. In other words, the land accommodates various activities, none of which are properly incidental or ancillary to the others, and the activities are not all confined within distinct areas. This is especially true of the external storage, the degree of which I consider to be substantial, and which I observed has encroached onto the remaining concrete base area of the building lost.
21. By way of the Court of Appeal judgement in *Barton Park Estates Ltd v SSCLG and Dartmouth National Park Authority* [2022] EWCA Civ 833 it was held that the intensification of an existing use can amount to a material change of use, and that the issue was whether the extent and nature of the change would amount to a change in the character of the existing use. In this instance I am of the view that the open storage element, although evident to some extent before the fire, has significantly increased and intensified since 2017 to the point where it now represents the predominant use of the land.
22. The cessation of one element of a composite use may not in itself amount to a material change of use. There must be evidence that the remaining use has intensified such as to amount to a material change in character over the whole or part of the planning unit. This is the case where the change significantly

alters the character, function, and maybe the appearance of the property. Indeed, it would seem from the aerial photographs provided that the current appeal development is a case in point.

23. The appellant, in her representations, has made specific reference to case law; *R (Alpha Plus Group Ltd) v Kensington and Chelsea RLBC* [2007] EWHC 2840 (Admin) where it was held that for an existing use to be extinguished there had to be a break in the planning history, a change in the planning landscape or the creation of a new planning unit. Whilst I am satisfied here that the planning unit has not changed since the land was severed from Oakdene in approximately 2001, the fire damage and consequent cessation of the building's mixed use represented the ending of the previous chapter and the beginning of a new one in planning terms.
24. I have had regard to previous appeal decision letters provided by the appellant in an attempt to support the appeal. However, appeal decisions are site sensitive and, to highlight this, two refer to the use of a dwelling as two self-contained flats and another relates to a change of use to studio accommodation, which the assigned Inspector found to be lawful. Whilst some similarities or principles might be apparent, direct parallels are not easily drawn. As such, these decisions have not affected my conclusions. Besides, I have referred to, applied, and set out the details of case law relevant to the current appeal in this decision letter.
25. Weighing up all the evidence before me, to summarise, I am firmly of the view that the actual planning position 'radically changed' – terminology used in the Jennings Motors case – when, following the extensive fire damage, the previous mixed use contained within the building was lost with the building being largely dismantled. The discontinuation was then replaced by the predominance of the storage use, most obviously the degree to which it is openly strewn across the site, thereby changing the land's character, function and appearance. The residential use of the caravan also represents a change in the character and the manner of the residential use of the land, and it cannot be assumed that the residential element of the building's previous mixed use would transpose itself to the habitable use of the caravan.
26. Accordingly, it would appear that a new chapter in the appeal site's planning history commenced in 2017.
27. I accept that the remaining section of the building is in use as a store – I witnessed as such – and the statutory declaration from Kevin Arnold refers to a 'makeshift office' having been created in the building and also the maintenance of tools and equipment within, but no evidence has been advanced to detail the extent or significance of any such element.

Conclusions

28. The residential use of the stationed caravan is subject to the ten year immunity bar and, having only commenced in 2017, it was not immune from planning control at the date the LDC application was made. I am also convinced that a significant intensification of the open storage element has changed the land's character, function and appearance. In the circumstances, the use of the land as described by the appellant has not acquired immunity and it was open to the

Council, in the years following the fire, to have taken enforcement action, but it chose not to.

29. I must conclude, from the limitations of the appellant's evidence and, moreover, its apparent imprecision and ambiguity, that the burden of proof has not been discharged. Accordingly, for the reasons given above I conclude, on the evidence available, that the use was not lawful on 9 February 2024, within the meaning of section 191(2) of the Town and Country Planning Act 1990.

30. I will, therefore, exercise my powers under section 195(3) of the Act.

Timothy C King

INSPECTOR