



Appeal Decision

by P N Jarratt BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 April 2026

Appeal Ref: APP/K1128/X/24/3348574

Alston Gate, Malborough, KINGSBRIDGE, TQ7 3BT

- 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 Simon Gotch against the decision of South Hams District Council.
 - The application ref 4253/23/CLE, dated 22 December 2023, was refused by notice dated 11 March 2024.
 - The application was made under section 191(1)(a) the Town and Country Planning Act 1990 (as amended).
 - The use for which a certificate of lawful use or development is sought is an existing use as commercial horticultural nursery and garden centre (Use Class E) – formerly known as Alston Nursery.
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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

2. As this appeal relates largely to historical evidence relating to the continuity of use of the site, a site inspection was not necessary.
3. For the avoidance of doubt, the planning merits of the proposed development are not relevant and they are not therefore an issue for me to consider, in the context of an appeal under s195 of the Town and Country Planning Act 1990 as amended, which relates to an application for a lawful development certificate. My decision rests on the facts of the case, and on relevant planning law and judicial authority.
4. The onus of proof rests with the appellant and the standard of proof is on the balance of probabilities.
5. The main issue in this appeal is whether or not the Council's decision to refuse to grant an LDC was well-founded.

The site and relevant planning history

6. The appeal site of about 0.54 ha and forms the northern part of a former horticultural/nursery enterprise granted planning permission in 1993 (33/0083/93/3) for the expansion of the nursery enterprise, a new vehicular access, the erection of polytunnels and greenhouse extension. The appeal site is identified as parking area, growing area and nursery shown in the 1993 permission. A 1996 permission (33/0115/96/3) agreed a variation of condition regarding the goods sold.
7. Various residential permissions from 2012 onwards were granted for two areas on that part of the nursery site to the south of the appeal site (for 17 dwellings in 2012 and 16 dwellings in 2014, respectively. Both have been implemented, effectively

removing about two thirds of the land comprising the planning unit that made up the nursery.

8. An LDC for the use of the site was refused in 2023 (2883/23/CLE) and the current appeal application is a resubmission of this with further evidence and a legal opinion submitted. The Local Planning Authority concluded that on the balance of probabilities the use of the site as a Nursery/Garden Centre had been abandoned and that a continuation of such a use was not lawful.

Reasons

9. The Council's refusal is based on the appeal site having been part of a much wider site having permissions for nursery use but the erosion of the planning unit, which the Council considers is the redline area of the 1993 permission, is such that there no longer exists a permission under which the nursery use can lawfully operate in compliance with the approved drawings.
10. In respect of the planning unit, the Council rely on the principles established in *Burdle*¹ regarding occupation and any physical or functional separation of primary uses as a matter of fact and degree.
11. The planning unit is a concept that has evolved as a means of determining the most appropriate area against which to assess the materiality of change. It is readily apparent that due to the residential development and changes in occupation, the planning unit for the nursery area established in 1993 has reduced considerably and now reflects the area of the appeal site. However the area covered by a planning permission is not necessarily determinative of the planning unit.
12. It was held in *Stone & Stone*² that an existing lawful use of land authorised by planning permission was capable of being extinguished by the creation of a new planning unit. However in that case, a material change of use had occurred to the land in question and that the right to use the land in accordance with the permission had therefore been lost. In contrast to this appeal, whilst the planning unit may have reverted back to its pre-1993 area, no material change of use has occurred. I am also mindful that the Council's rationale would mean that any change in a planning unit would jeopardise the lawfulness of what remains.
13. The Council states that due to the reduction in the size of the planning unit, the lawful operation of the nursery cannot take place in compliance with the approved drawings but they fail to indicate how this conclusion has been reached. Condition (b) of the 1993 permission is an implementation condition which controls how the development is to be carried out and refers to revised drawings relating to a greenhouse, a planting schedule and a site plan. There is no indication that these conditions were not adhered to or that there was any continuing requirement for retention. There were no conditions requiring the cessation of the nursery use attached to the permissions for the residential development.
14. The appellant has submitted a Statutory Declaration of Roy Francis Littlejohns dated 13 January 2025 and supported by a number of exhibits. It is declared that Mr Littlejohns owned Alston Nursery between 1987 and 2012 and refutes the Council's claim that the nursery business was intentionally abandoned. The original business operated from the appeal site from 1987-1994 and expanded onto the adjoining land. He did not own

¹ *Burdle & Williams v SoSE & New Forest DC* [1972] 1WLR1207

² *Stone & Stone v SSCLG & Cornwall Council* [2014] EWHC 1456 (Admin)

the southern part of the site developed for housing and objected to the planning application adjacent to the appeal site which he owned in part but failed in the High Court to prevent an option being exercised for his interest to be transferred back to the applicant for planning permission. Because of the disruption caused by the implementation of the housing permissions there has been no realistic opportunity to resume the nursery business. It is declared that the appeal site has been intentionally and continually used or retained solely for commercial use from 1987 until Mr Littlejohns sold the land and cottage in 2020.

15. The appellant contends that the Council has erroneously applied the concept of abandonment which cannot be supported by present judicial authority. Whilst the parties accept that a planning permission once implemented cannot be abandoned³, the Council argue that it is not the permission that has been abandoned but that of its use. In support reference is made to Panton and Farmer⁴ where it was found that a lawful use could only be lost by evidence of abandonment; by the formation of a new planning unit; or being superseded by a further change of use. A use which was merely dormant or inactive could still be considered as 'existing,' so long as it had already become lawful and not been extinguished in one of those three ways. Additionally, reference is made to Hartley⁵ where it was found that if a building or land remains unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned, it may be found to be abandoned.
16. Reference is made to the four criteria established in Trustees of Castell-y-Mynach⁶ and Hughes⁷ for assessing whether a use has been abandoned, these being the physical condition of the land/buildings, the period of non-use, other uses and the intentions of the owner. In relying on evidence provided in the previous LDC application, the Council concluded that after the sole nursery use of the site ceased in 2012, it was used as a machinery contracting business. Although the Council accept that the new use did not achieve lawfulness, they consider the test for 'other uses' relies not on it becoming lawful but that another use has occurred. This is regarded as an intention of the owner not to continue the lawful use of the site. However, it is unclear how the Council has reached the conclusion regarding the 'other uses' test or how an express planning permission can be abandoned simply by another use being made of the site. There is no prohibition on the resumption of a use permitted under a planning permission and that a use that is not lawful cannot interrupt the planning permission. Furthermore, the use of the site between 2020 and 2022 is consistent with the planning permission and as it is in the same use class, no material change of use occurred. More recent use for storage and maintenance of machinery and tools are ancillary to the commercial operations on the site and do not constitute a class B8 use, which is confirmed by the Council.
17. It is the intention of the owner in respect of the site that the Council's refusal of an LDC primarily relies upon. They refer to Mr Littlejohns indicating that in 2012 he closed his business due to the adjacent development and access difficulties. The Council makes an assumption about Mr Littlejohns' interest in the housing development land which they regard as representing a clear intent to pursue an

³ Pioneer Aggregates (UK) LTD v SSE[1984] 2 All ER 358

⁴ Panton & Farmer v SSETR & Vale of White Horse DC [1999]

⁵ Hartley v MHLG [1970]

⁶ Trustees of Castell-y-Mynach Estate v Taff-Ely BC [1985]

⁷ Hughes v SSETR & South Holland DC [2000] JPL

alternative use of the site. However this was a false assumption as Mr Littlejohns has indicated in his statutory declaration.

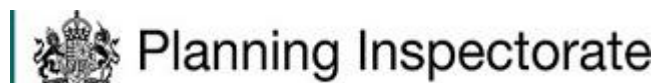
18. The Council also considers that the means of access to the appeal site through the housing development is not what a successful nursery business would require and believe that a full standard access would have been negotiated and this represents another indicator of the intention not to pursue the business. However, this is largely irrelevant to an LDC application. In any event, the retained vehicular access and the adjacent residential development do not prevent a nursery business from operating on the site upon which are a commercial greenhouse, polytunnels and an outbuilding.
19. The Council also indicate that since the closure of the site, there have been two pre-application consultations for commercial and housing development. Whilst it may be the wish of the owner to explore the development opportunities for the site, this is not an indicator of abandonment of an existing use. Similarly, the Council's reference to the viability of the nursery business is not relevant.
20. The Council have placed a great deal of weight on Mr Littlejohns' closure of the business but this does not indicate an intention to abandon the use of the site which existed for many years and benefitted from planning permission for the use being claimed. At best, the nursery use is dormant or inactive.
21. Interestingly, paragraph 3.11 of the Council's statement states "Whilst the concept of abandonment *may well not apply in the strictest sense* (my italics), the effect of the recent planning history is largely the same - the operator of the nursery gave up the nursery use in favour of residential development. Whilst in the planning sense 'abandoned' has forceful meaning, synonyms include neglected, ended, discarded and forsook which are more reflective of what has occurred here." Be that as it may, the facts indicate that the site has a lawful planning permission as a nursery which I do not consider has been abandoned as a consequence of the change in the planning unit or through the intentions of the operator. It may well be the case that the Council has reached its conclusions partially on their misunderstanding of land ownership.
22. I am satisfied on the evidence submitted and on the balance of probability, that use of the appeal site as a commercial horticultural nursery and garden centre (Use Class E) benefits from planning permission granted in 1993 and 1996, the use has not subsequently been abandoned and is therefore lawful.

Conclusion

23. For the reasons given above, I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development for an existing use as commercial horticultural nursery and garden centre (Use Class E) is not well-founded and that the appeal should succeed. I will exercise accordingly the powers transferred to me in section 195(2) of the 1990 Act (as amended).

P N Jarratt

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 22 December 2023 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in 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 site benefits from planning permission LPA reference 33/0083/93/3 and planning permission LPA reference 33/0115/96/3.

P N Jarratt

Inspector

Date: []

Reference: APP/K1128/X/24/3348574

First Schedule

Use as a commercial horticultural nursery and garden centre (Use Class E)

Second Schedule

Land at Alston Gate, KINGSBRIDGE, TQ7 3BT

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 /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were 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 /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation 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: []

by P N Jarratt

Land at: Alston Gate, KINGSBRIDGE, TQ7 3BT

Reference: APP/K1128/X/24/3348574

Scale: Not to Scale

