



Appeal Decision

Site visit made on 1 May 2013

by David Murray BA (Hons) DMS MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 May 2013

Appeal Ref: APP/G1630/X/12/2182078

Land at Lower Shetcombe Farm, Evesham Road, Toddington, GL54 5BZ.

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Cotswold Quarries Ltd. against Tewkesbury Borough Council.
 - The application (Ref. 12/00476) is dated 2 May 2012.
 - The application was made under 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is the erection of a replacement warehouse building.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Main Issue

3. The main issue is whether the erection of the replacement warehousing building requires express planning permission or is development generally permitted by the Town and Country Planning (General Permitted Development) Order 1995, as amended.

Reasons

Background

4. The site is a rectangular area of land which lies in an undulating area of open countryside. The site is enclosed by a metal security fence and at the time of my visit contained two modest buildings of single storey form; a large metal container; a tipper truck and digger, various small piles of timber, bricks and other building equipment; and other debris. The building that it is proposed to replace is constructed in corrugated metal sheeting. It was locked at the time of my visit and I was not able to see into the interior.

The lawful use

5. In terms of the lawful use of the site, the Council issued a Certificate of Lawful Use (CLEUD) in 2004 under ref. 04/11110/0112/CLE as follows:

"The evidence demonstrates, on the balance of probabilities, that the use of the land edged RED on the attached plan for the storage of building materials, timber, builder's plant and equipment. [sic] and scaffolding in connection with a business of General Builder, the use of the building edged GREEN on the attached plan for the storage of domestic furniture and the building edged BLUE on the attached plan for use as stables have subsisted continuously for a period in excess of 10 years."

6. The existing building that is proposed to be replaced is coloured green on the plan attached to the certificate. Further, it lies within the red line of the wider area defined in 2004.

Whether the provisions of the GPDO apply

7. Class A of Part 8 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (GPDO), as amended, allows some industrial and warehousing development to be undertaken in England without the need for express planning permission. This includes the erection of a warehouse but this is subject to the conditions in A.2, inter alia, that the development must be within the curtilage of an existing industrial building or warehouse. Warehouse' is defined in paragraph A.3(e) as a building used for any purpose within Class B8 (storage and distribution)¹ (other than that occupied with a mine).
8. The Council say that the lawful use of the 'green' building is for the storage of domestic furniture and not for a general storage Class B8 use, as the CLEUD did not identify a specific use class. Further the Council and an agent acting on behalf of some local residents, submit that the main lawful use of the site is not a Class B8 use but a *sui generis* one, i.e. a use in its own right.
9. Class B8 of the UCO is entitled "storage and distribution" and the description of the use it encompasses is "use for storage or as a distribution centre". The UCO does not qualify the type of items that can be stored (other than in relation to the storage and distribution of minerals). Therefore, any use of land where the principal activity is the storage or distribution of any type of commodity, regardless of its nature, would normally fall within Class B8.
10. Although the CLEUD did not make reference to Class B8, the principal use accepted at that time within the red line was storage use and not use as a 'builders yard' itself, even though that may have been the general description of the use that was applied for. I agree with the submissions made on behalf of the appellant that the elements said to be lawful did not include some form of office or workshop premises as a base for the business on the site, which would normally be associated with use as a 'builders yard'. The use that was accepted within the red line of the site was for the storage of materials and the other items specified. The CLEUD makes it quite clear that such storage use was in connection with the business of a general builder, not use as a builder's yard. Although the CLEUD was issued in 2004 I have not been provided with evidence to demonstrate that the use of the site is now materially different.
11. I find that the storage use recognised to be lawful within the overall site, together with the use of the green building for the storage of domestic furniture, represent a singular planning unit, as they are physically and functionally related, although the nature of goods stored is different. Further the use of the 'blue' building as stables is not of such a scale or character that it makes the use of the overall planning unit materially different in character

¹ As defined in the Town and Country Planning (Use Classes Order) 1987, as amended (UCO).

from the principal storage use identified. In response to the costs application, the Council seek to distinguish between the storage of domestic furniture within a building and open storage and treat them as separate planning units. However given the overall extent of the site and the nature and juxtaposition of buildings, I find that the basic principle storage use is the same within a single planning unit. The UCO makes clear that where a building or land is used for any class specified in the Schedule to the Order, the use of that building or land for any other purpose of the same class shall not be taken to involve the development of land.

12. I therefore conclude that the lawful primary use of the planning unit is for storage purposes and it is not a different mixed use or *sui generis* use. This primary use for storage falls within Class B8 of the Town and Country Planning (Use Classes) Order 1987, as amended.

Is the proposed building within the curtilage of an existing warehouse?

13. Part 8, Class A of the GPDO sets out that 'the erection, extension or other alteration of a building or a warehouse' is permitted development. This provision is subject to the limitations set out in A.1 which define development not permitted, and various conditions to be applied to the development permitted are listed under A.2, where (a) says that the proposed development must be within the curtilage of an existing warehouse.
14. The appellant says that the proposed building would be within the curtilage as this should relate to all of the premises (a term used elsewhere in Part 8, Class A) which extends to the whole site and need not be limited to just the curtilage of the building being replaced.
15. However, the term 'curtilage' is not the same as the use of land nor the concept of a 'planning unit', although they may equate to the same area. 'Curtilage' has been defined in case law as land that serves the purpose of the building in some reasonably necessary or useful manner. It has the characteristic of 'intimate association'.
16. The uses shown to be lawful relate to open storage on the overall site, and the use of the green building itself for the storage of domestic furniture. However, the evidence submitted does not paint a clear picture of how the land proposed for a replacement building has a clear and intimate association directly with any of the buildings and particularly not with the green building.
17. Further, I observed at my site visit, that much of the land to the east of the building to be demolished is flat and hard surfaced. Part of it is shown on the 'existing block plan' apparently as circulation space. Whilst this land could be used for parking or manoeuvring space in association with a building, the evidence submitted does not show that it has been. Further, in relation to the building to be demolished, the main double door access to this building is in the north elevation rather than towards the circulation space. Given that the main access to the site is to the west, the physical juxtaposition of the building and the access does not establish that the open area to the east of the building is bound to have been used as part of the purpose of the building. Whereas, in relation to the other building on the overall site this is some distance away and there are other ad hoc spaces and structures in between.
18. On the basis of the evidence presented, I cannot be sure that all of the land on which the replacement warehouse would be sited has a necessary and close association with any of the existing buildings on the site.

19. As matter of fact and degree, I conclude that the evidence before me does not clearly show that all of the land on which it is proposed to erect the new warehouse clearly falls within the curtilage of an existing warehouse building. The appellant has therefore not discharged the burden of proof upon him to establish, on the balance of probability, that the proposal accords with the provisions of Part 8, Class A of the GPDO. As such I have to conclude that the erection of the replacement warehouse building requires express planning permission.

Conclusions

20. For the reasons given above I conclude that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

David Murray

INSPECTOR



Costs Decision

Site visit made on 1 May 2013

by David Murray BA (Hons) DMS MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 May 2013

**Costs application in relation to Appeal Ref: APP/G1630/X/12/2182078
Land at Lower Shetcombe Farm, Evesham Road, Toddington, GL54 5BZ.**

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
 - The application is made by Cotswold Quarries Ltd. for a full award of costs against Tewkesbury Borough Council.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for a certificate of lawful use or development for the erection of a replacement warehouse building.
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Decision

1. The application for an award of costs is refused.

The submissions for the appellant

2. In summary, the appellant says that the Council have not explained why it failed to make a decision on the application within the prescribed time limits nor sought an extension of time and the appellant has been forced to lodge an appeal. Further, the Council has not been able to put forward a good case based on well established case law to substantiate any possible objection on legal grounds. This constitutes unreasonable behaviour and the appellant has had to bear the costs of the appeal.

The response by the Council

3. The Council say that the LDC application raised complicated legal issues related to an interpretation of the lawful use; the curtilage of the property and the relationship with the GPDO¹. The Council has explained why the uses found to be lawful in 2004 did not amount to a general storage use that fell within Class B8, but were considered to be *Sui Generis*. The Council has been able to substantiate its view about the term curtilage and distinguish between two different types of storage – that within a building for the storage of domestic furniture and open storage. Such a view is not an unreasonable one as it is based on evidence of actual use. The Council's actions therefore do not constitute unreasonable behaviour and the appellant's costs are normal ones arising from the exercise of the right of appeal.

Reasons

4. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

¹ The Town and Country Planning (General Permitted Development) Order 1995 as amended.

5. By way of background, the application for a certificate of lawfulness was made on the 2 May 2012 and the appellant lodged the appeal against non-determination on the 16 August 2012. In the appeal, the Council do not provide any reasonable explanation as to why it was not possible to make a decision on the application within the prescribed 8 week period. This runs contrary to the guidance in paragraphs B10 and B11 of the Circular.
6. Nevertheless, in the appeal, the Council say that the proposed development does not benefit from 'permitted development' rights in the GPDO because of the nature of the specific uses previously accepted as being lawful and because the proposal does not meet all the GPDO requirements including that the new building would not be sited within the curtilage of the existing building.
7. While I have not agreed with the Council on some of the legal submissions made, I concluded that, as a separate matter to the use of the land, the evidence did not demonstrate, on the balance of probabilities that the site of the proposed warehouse would be within the curtilage of an existing warehouse building, when applying established criteria regarding the meaning of 'curtilage'.
8. Given my decision on the certificate of lawfulness application, I conclude that the Council's stance on the appeal is, overall, not an unreasonable one. Further, in these circumstances I find that the appellant has not been put to additional or wasted costs as the same outcome would have been likely if the Council had decided the application within the prescribed period.

Conclusion

9. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Circular 03/2009, has not been demonstrated.

David Murray

INSPECTOR