
Appeal Decision

Site visit made on 4 January 2017

by Wendy McKay LLB Solicitor (Non-practising)

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

Decision date: 7 February 2017

Appeal Ref: APP/L2630/X/16/3155461

Playscape, Playscape Workshop, The Street, Surlingham, NR14 7AJ

- 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 T & S Property Developments Ltd against the decision of South Norfolk District Council.
- The application Ref 2011/0631/LE, dated 19 April 2011, was refused in part by notice dated 5 July 2011.
- 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 dual use involving: (1) Builders Yard Storage (B8) and (2) Manufacturing of play equipment (B1).

Summary of Decision: The appeal is dismissed.

Main Issue

1. The main issue is whether the Council's refusal to grant in part a certificate of lawful use or development (LDC) was well-founded.

Reasons

2. Neither the identity of the Appellant, nor the planning merits of the operation, use or activity are relevant to the purely legal issues which are involved in determining an LDC appeal. The onus of proof in an LDC appeal is on the Appellant and the relevant test is "*the balance of probability*".
3. The Council's decision on the LDC application dated 5 July 2011 identifies as lawful: "*(1) Use of that part of the land (including part of a building) as shown edged with blue but unhatched on the said plan as and for a builders yard/store. (2) Use of that part of the land and buildings as shown edged with blue and hatched in red for the manufacture of play equipment pursuant to and in accordance with planning permission ref 1995/0647 issued on 27 June 1995.*"
4. The Appellant complains that the Council failed to identify the relevant Use Classes for the lawful activities in accordance with s.191(5)(b) and has thereby caused confusion. In particular, the Appellant asserts that the LDC issued by the Council fails: (a) to correctly identify the different land uses in the accompanying plans; (b) to identify all the different uses of the land; and (c) to identify the uses falling within the classes specified in an order under

s.55(2)(f)¹. For the purposes of this appeal, the relevant order is the Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO). The Appellant also draws attention to permitted development rights granted under various General Development Orders and General Permitted Development Orders which permit changes from one use class to another.

5. The original LDC application sought the certification of use as builder's yard (B8) and for the manufacture of playground equipment (B1). That is the description of the use sought as set out in section 7 of the application form and the supporting statement. The description of the existing use in section 8 of the application form is as a dual use involving: (1) builder's yard storage (B1) and (2) manufacture of play equipment (B8). The latter use class descriptions would appear to be in error given the earlier information provided in section 7 of the use sought and the supporting information. The Supporting Statement to the original application at paragraph 1.3 submits that: *"The land in question has a history of use as a builder's yard for many years and between 1993 and 2006 (and beyond) the site benefitted from dual use involving both the Builders Yard and the manufacture of play equipment."*
6. The Appellant states that the LDC application was made based on records, advice and certifications supplied by the Council to the applicant's solicitors and planning agent. It contends that the application accordingly failed to identify that the owner of 'Playscape' had lived in the industrial unit for over 10 years. It submits that an industrial unit with living accommodation had been established for over 4 years at the time of the application. The land should therefore be identified as having a lawful use for B1, B2, B8 and C3 purposes and the actual application would have been for a mixed use on those terms had it not been for the actions of the Council. This appeal is pursued as a means of correcting the LDC by way of adding use classes to the certificate granted. The Appellant states that the application was not seeking a use class for the builder's store; it was seeking a use class for the light industrial use. Furthermore, the Appellant submits that the manufacture of play equipment is not different to many other industrial processes and uses similar machinery.
7. The Council has provided details of the planning history of the site. In 1979, permission was granted for a builder's workshop/store². This permission was subject to condition 4 which restricted the use of the building to *"...a builders store with ancillary use as a builders workshop"*. In 1993, temporary permission was granted for the removal of condition 4 to allow the manufacture of playground equipment³. A permanent permission to that effect was granted in 1995. Both the 1993 and 1995 permissions have similar restrictive conditions excluding the operation of certain provisions of the UCO, and the Town and Country Planning General Development Order 1988 or the Town and Country Planning (General Permitted Development) Order 1995 and limiting the use of the premises to manufacturing playground equipment and for no other purpose.
8. The Council submits that at the time of the application the lawful use was as a builder's yard/store which is a sui generis use and not a B8 use. In addition,

¹ S.55(2)(f) provides that the following use shall not be taken to involved development - in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or other land, for any purpose of the same class.

² Ref 07/79/0628/F

³ Ref E07/93/0253/F

since the use of part of the site for the manufacture of play equipment was restricted by planning condition to that particular activity it would also not be appropriate to identify a use class for that use.

9. The evidence provided in support of the 2011 LDC application did not question the validity of the relevant planning permissions. However, the Appellant in pursuing this appeal makes numerous complaints and allegations as regards various actions of the Council. The Appellant's evidence in support of this appeal is that the land was used as a builder's yard between the 1950s and the 1970s. It accepts that the 1979 permission was granted subject to condition 4 but submits that the 1993 and 1995 permissions were not valid as the Council destroyed all plans associated with them. It contends that, as the 1995 planning permission has no plans recorded in the planning register, it is a nullity and there are therefore no applicable planning conditions restricting the use of the land. The Appellant also asserts that the land was used between 1993 and 2010 for both light industry and a builder's yard/store without any enforceable conditions. There has, in consequence, been a longstanding breach of condition 4 of the 1979 permission for nearly 40 years. It is claimed that residential accommodation was established in the building in about 2000 and the dwellinghouse use formed a mixed use with the industrial use of the land.
10. The Council rejects the claim that the planning permissions should be regarded as invalid. It has submitted copies of the 1979, 1993 and 1995 planning permission decision notices. For the 1979 permission, an amended location plan dated stamped 17 April 1979 has also been provided. Condition 2 of that permission states: "*The permission hereby granted shall be in accordance with the amended plan received on 17 April 1979.*" The Council states that as the 1993 and 1995 applications were for the removal of a planning condition attached to the 1979 permission, the approved red line for the application sites was the same as for the 1979 permission.
11. In support of its case, the Appellant makes reference to "*...acts of maladministration by the Council that has caused injustice.*" The Appellant has submitted a Local Government Ombudsman report relating to an investigation into complaints numbered 09 014 399 and 09 014 406 made against Warrington Borough Council. The Ombudsman found that a senior planning officer who had since left Warrington Borough Council had arranged to destroy records forming part of the statutory planning register. As a result, that Council had no record of the plans and applications approved in its area before 1996. Only the decision notices had been retained but without the plans and applications these did not record what had been approved. In that case, outline planning permission had been granted in 1993 for a single house with access. The Council approved a reserved matters planning application in 1994 but it was impossible to know precisely what was approved because the statutory records had been destroyed. The Ombudsman found maladministration on the part of that Council on a number of grounds.
12. The Appellant's allegation of maladministration on the part of the Council is not a matter that falls for me to determine in the context of this LDC appeal. However, it is necessary to seek to interpret the permissions referred to in order to assess the existing lawful uses of the land as at the date of the application. In this case, the 1993 application was to develop the land without compliance with condition 4 of the 1979 permission. Such an application only

confers power to amend or remove the relevant conditions, even though a new permission is ultimately granted. In the case of the 1993 and 1995 permissions, unlike the Warrington situation, I consider that it is possible to determine what the Council approved from the copies of the decision notices provided. What was granted by those permissions and the new conditions imposed is quite clear on the face of the decision notices and it is apparent that no unrestricted light industrial use of the site has at any time been permitted. It is not necessary to have regard to an application plan to determine that matter. Taking the documentary evidence as a whole I find, on the balance of probabilities, that those planning permissions represent valid consents which have been implemented. They each imposed new conditions restricting the use of the building permitted in 1979.

13. The 2011 LDC application Supporting Statement includes the draft statutory declarations of Steven Riley and the statutory declaration of Robert George Ellis. The Supporting Statement indicates that Steven Riley was employed by Playscape Ltd between 1993 and 2001 and subsequently gained control of the play equipment use and operated from the site as "Playscape Playground Equipment Ltd" from 2001 until 2010. The 2010 draft statutory declaration of Steven Riley confirms that throughout his period of occupation as tenant, the entire site had a dual use for the manufacture of play equipment and as a builder's yard. He makes no reference to the existence of any residential use. The statutory declaration of Robert George Ellis confirms that throughout his period of ownership and occupation of the site there was a dual use as a builder's yard and for the manufacture of play equipment. The Appellant acknowledges in its Final Comments that the level of evidence required to show that there has been a residential use of the land is not available.
14. In making this appeal, the Appellant is openly critical of the original application and supporting evidence that was considered by the Council in 2011. S.191(4) allows the local planning authority to modify the terms of the application, giving a certificate in somewhat different terms so as to accord with the facts and evidence, rather than an outright refusal. The Secretary of State or Inspector can exercise the same power in s.191(4), on appeal, as the LPA has on the application. Nevertheless, the available evidence in this case does not lead me to reach a different conclusion from that reached by the Council in 2011. That evidence does not support a finding that the land should be identified as having a lawful use for Class B1, B2, B8 and C3 purposes. On the contrary, the evidence before me overwhelmingly supports the view that the lawful uses of the land as at the date of the application were as set out in the decision notice. Furthermore, even now the Appellant puts forward those alternative uses on the basis that there was a mixed use of the site which, in any event, would comprise a sui generis use that would fall outside any use class.
15. Turning to s.191(5)(a), the LDC clearly specifies the land to which it relates by reference both to a written description and a plan. The LDC also describes the use in question in accordance with s.191(5)(b). The latter only requires the use to be identified by class where it falls within one of the classes specified in an order made under s.55(2)(f). A builder's yard is a sui generis use which falls outside any use class and, as such, it would be inappropriate to identify it as a B8 (or B1) use. As indicated above, the 'Playscape' activities were restricted by condition to the manufacture of play equipment and the application of the General Development Order was excluded. Since the uses

identified are sui generis uses which do not fall within any use class, no such use class can be specified in this case. The LDC also sets out reasons for determining the use to be lawful and specifies the date of the application in accordance with s.191(5)(c) and (d).

Formal Conclusions

16. For the reasons given above, I conclude that the Council's refusal in part to grant a certificate of lawful use or development in respect of a dual use involving: (1) builder's yard storage (B8) and (2) manufacturing of play equipment (B1) was 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.

Formal Decision

17. The appeal is dismissed.

Wendy McKay

INSPECTOR