



Appeal Decision

by Richard E. Jenkins BA (Hons) MSc MRTPI

an Inspector appointed by the Welsh Ministers

Decision date: 03.04.2023

Appeal reference: CAS-01709-W7L4N6

Site address: The Woodyard, Nercwys Road, Nercwys, Mold, CH7 4ED

- 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 J Houghton of L Houghton & Co. Ltd. against the decision of Flintshire County Council.
 - The application Ref: 063661, dated 24 September 2021, was refused by notice dated 15 December 2021.
 - 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 described as the use of land for the storage of loose building material.
 - An Inquiry was held on 7 March 2023.
 - A site visit was made on 13 March 2023.
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Decision

1. The appeal is dismissed.

Main Issue

2. This is whether the Council's decision not to issue a Lawful Development Certificate (LDC) was well-founded.

Reasons

3. The appeal relates to the Council's refusal to issue a Lawful Development Certificate (LDC), under Section 191 of the Act, to confirm that the appeal site can lawfully be used for the storage of loose building materials. The thrust of the appellant's argument is that the use of the land is immune from enforcement action through the passage of time.
4. It is common ground between the main parties that the immunity period is ten years from the date of the application, as prescribed by Section 171B(3) of the Act. It is also worth noting that it is well-established that the burden of proof is on the appellant in such cases and that, for the appeal to be allowed, the change of use alleged needs to be demonstrated to have continued substantially uninterrupted for the material ten year

period. The relevant test is on the balance of probability. It is on the basis of such principles that I shall consider the appeal.

5. The appeal site comprises a modest area of land located adjacent to Nercwys Road, in Nercwys, Mold. At the time of my site visit the site was largely screened from the public highway and, other than the cleared area that includes a hardstanding, was largely overgrown. '*Keepers Cottage*' is located a short distance to the south-west, although I was able to confirm at the time of my site inspection that there is no clear line of sight from that property to the appeal site.
6. The evidence suggests that the Council first became aware of issues at the site in October 2008, when an enforcement query was logged under LPA Ref: 118586. That complaint detailed engineering works taking place on site and resulted in an enforcement officer visiting the site in June 2009. The site visit confirmed that hardcore had been laid and the Council subsequently advised that the material would need to be removed within a three month period. The evidence suggests that this request was actioned, with the case closed following a subsequent site visit in October 2009. I have not seen any robust evidence to counter this information and the Council's records indicate that no further complaints were made in respect of the storage of material on the land until late 2019.
7. Notwithstanding this evidence, the appellant contends that the land has been in use for the storage of loose building material for at least ten years from the date of the application. To support such an assertion, the appellant's evidence includes witness statements from the appellant, the former owner of the site and a former employee of the appellant's company. It also includes a series of invoices that illustrate that the site has been used to store building materials.
8. Nevertheless, the appellant's witness statements are generic in nature and therefore lack sufficient detail to confirm that the storage of loose building material continued substantially uninterrupted for the material period. This was also reflected by the fact that none of the appellant's witnesses wished to expand upon such matters in any great detail in evidence in chief and, similarly, were unable to be more specific under cross-examination. Indeed, when referring to frequency of visits, the witnesses frequently used caveats such as '*probably*' or generic phrases such as '*on numerous occasions*'.
9. Some of the appellant's witnesses' oral evidence was also found to be inconsistent with the corresponding written submissions and the specific date references attributed to the use of four separate piles of materials ('*Pile A*', '*Pile B*', '*Pile C*' and '*Pile D*'), as broadly indicated on the submitted '*Site Plan*', was not borne out by the oral evidence. It was alleged through the witnesses' oral evidence that there were additional people working on the land during the ten year period, although no detailed explanation was given as to why they were not invited to submit any evidence to help facilitate the appellant's case.
10. Whilst the appellant's evidence package includes invoices referring specifically to the storage of building materials at the appeal site, those invoices are limited to four invoices which relate to the years 2011, 2017 and 2021. The appellant submits that no other invoices are available because the jobs were not solely related to the use of the appeal site and did not therefore make explicit reference to the site address. Whilst such arguments are plausible, it remains apparent that there is a lack of objective documentary evidence for the years 2012, 2013, 2014, 2015, 2016 and 2018. The appellant's documentary evidence therefore does little to assist the appellant in discharging the burden of demonstrating that, on the balance of probability, the site has been used continuously over the material period.
11. In contrast, the aerial photography and the history of complaints regarding the use of the site appear to support the LPA's contention that, during the years between 2011 and

2019, the use was at best an ad hoc arrangement. Indeed, I have already set out above that the evidence suggests that the hardcore brought on to the site in 2008/ 2009 was removed by October 2009 and, as I have already noted above, no further complaints were received by the Council until November 2019 when a concrete pad was laid to facilitate the storage use. This is corroborated by the aerial photography that appears to illustrate a stark difference in the appearance of the site between the years following the removal of the hardcore in 2009 and the position in 2019. Indeed, for the intervening period, the images appear to illustrate a re-wilding, with the site largely overgrown and vacant.

12. The evidence submitted by Mr and Mrs Parry was consistent with that of the Council. Indeed, whilst direct views into the site are somewhat limited from both the public highway and 'Keepers Cottage', it is notable that they both indicated under oath that, during the years between enforcement action being pursued in 2009 and the laying of the concrete slab in November 2019, the site was not in continuous use and that it appeared largely overgrown. In giving evidence Mr and Mrs Parry explained that they would have heard frequent deliveries to the site, particularly should heavy plant and large trailers have been used. Mr and Mrs Parry's evidence was credible in this respect and it is notable that it appears to be corroborated by the aerial photography. It is also not inconsistent with the appellant's own documentary evidence which has gaps for the years between 2010 and November 2019.
13. During the Inquiry, much of the appellant's case appeared to focus on the contention that some loose material has been left on site for in excess of the requisite ten years. However, and notwithstanding the lack of any objective evidence to corroborate such assertions, I am not persuaded that the presence of such overgrown material necessarily changes the use of the site. Indeed, having regard to the principles established through *Thurrock BC v SSETR* [2002] EWCA Civ 226 and *Swale BC v First Secretary of State* [2005] EWCA Civ 1568, I concur with the LPA's contention that a modest pile of stone deposited in a wider overgrown site cannot reasonably be sufficient to enable the Council to take enforcement action and could not, therefore, be said to materially change the use of the site.
14. Therefore, on the balance of the available evidence, I find that the use of the site for the storage of loose building materials was, at best, an intermittent arrangement until around November 2019 when works were undertaken to the site to formalise the storage use. The evidence therefore falls significantly short of that necessary to discharge the burden placed upon the appellant. Indeed, the evidence suggests that, on the balance of probabilities, that the use of the land for the storage of building materials did not continue substantially uninterrupted for the immunity period prescribed by Section 171B(3) of the Act. The use of the land for the storage of loose building materials is not therefore lawful and the Council's refusal to issue an LDC was therefore well-founded.
15. On this basis, and having considered all matters raised, I conclude that the appeal should be dismissed. I shall exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act, as amended.

Richard E. Jenkins

INSPECTOR