Planning Inspectorate

Appeal Decisions

Site visit made on 10 December 2024

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17th December 2024

Appeal A Ref: APP/M3835/X/24/3340940
Land South East Corner Of Amberley Drive, Marine Drive, Worthing, West Sussex

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) (the 1990 Act) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Christopher Dixon (Landmore Property Services Ltd) against the decision of Worthing Borough Council.
- The application ref AWDM/0099/24, dated 22 January 2024, was refused by notice dated 18 March 2024.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The temporary use for which a certificate of lawful use or development is sought is described as "Proposed construction of a large sand pit for children, with a large gazebo for shade over, installation of boundary fence. Placement of three further gazebo's around the main sandpit, selling cold and hot drinks, snacks, with additional other concessions on the site to offer food services. Installation of bin area. Installation of security CCTV to enable children to view wildlife online. Area set aside for parking. Clear rubbish, earth, roots and debris to enter land through existing established entrances. Retain existing gate posts and gates. Insert sunken posts inside the land. Place a flower pot boat on the edge of the land and decorate with flowers and other items. A fenced boules sandpit. A flagpole- no more than 4.6 metres with a flag of either country or town colours."

Appeal B Ref: APP/M3835/X/24/3341674
Land South East Corner Of Amberley Drive, Marine Drive, Worthing, West Sussex

- 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 Christopher Dixon, (Landmore Property Services Ltd) against the decision of Worthing Borough Council.
- The application ref AWDM/0394/24, dated 20 March 2024, was refused by notice dated 28 March 2024.
- The application was made under section 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 described as the temporary siting of a "40 foot x 8 foot x 9 foot 5 inches storage container for storing own equipment used to run own land on a commercial basis".

Decisions

Appeal A

1. The appeal is dismissed.

Appeal B

2. The appeal is dismissed.

Preliminary Matters

3. The evidence before the Council at the time of the first application is stated as being a location plan, a Land Registry Ordnance Survey plan and a designated parking plan. Additional information has been submitted with the appeal and the Council have had an opportunity to make comments on this information.

4. If only evidence from the time of the application was to be considered as part of the appeal, it denies the purpose of the LDC procedure. This is to arrive at an objective decision based on the best facts and evidence available at the time the decision is taken. In any event, it would always be open to the applicant to re-apply and it would serve no useful purpose to refuse an LDC on the basis only of the evidence submitted with the application, if subsequent evidence had come to light proving the applicant's case.

5. The appellant makes submissions such as the lack of no objection from the police and there being no evidence of nesting birds. These are arguments to do with planning merits and they are not relevant to these appeals. They are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act, which relates to applications for lawful development certificates. My decisions rest on the facts of the case, relevant planning law and judicial authority.

Main Issue for Both Appeals

6. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development for the proposals was well-founded.

Reasons

Description of the site

7. The appeal site comprises a level rectangular field situated on the corner of Marine Drive and Amberley Drive on the outskirts of Worthing, close to the beach. It has two access points marked by field gates, one on each road frontage and is bounded by a post and wire fence.

The appellant's case

8. The appellant has provided a lengthy description for the proposed use set out in the application form and added to by email dated 1 March 2024. In effect, the proposal amounts to a leisure use, as shown with more details on the later drawing. This shows there would be a gazebo covering a new children's sandpit, a boules area, picnic and play areas as well as three more gazebos covering drinks sales areas. A strip of grass along the northern boundary would be used by cars to access the refreshments area and the area of grass to be used as a car park. The drawing also shows the erection of a 2m high wall along the length of the northern boundary and the erection of various fences, for example, separating the parking from the play area.

9. With regard to the second proposal, the application form states this is for a building operation, namely the siting of a storage container "for storing own equipment used to run own land on a commercial basis". This would be sited in the south east corner of the site.

10. The appellant states in respect of both applications that the developments would be temporary but he does not provide a period. In answer to the

question "If Temporary please give details", he states in respect of the use, "The overall aim is to seek planning permission for the land to build up to 10 houses under the self-build and custom housebuilding scheme". In respect of the storage container he states, "We will use the container storage facility while the land is used for commercial purposes".

11. The previous use of the land is described by the appellant as "unused derelict land" and "Our land currently has no use and has been like this for many years". The appellant however does state that between 1933-1936 planning permission was granted for the residential development of the former Goring Hall Estate of which the appeal site formed part. It appears sewer pipes were laid along Marine Drive and Amberley Drive bordering the appeal site. Details of the planning permission are not provided though, only copies of estate agent details, which appear to show the sale of the Goring Hall Estate lands at auction, and a Land Registry extract, which lists various covenants. Given the appeal site is now allocated in the Council's recently adopted local plan as a Local Green Gap, to prevent settlement coalescence, it would appear that this permission, if it ever applied to the appeal site, has long been abandoned.

12. The reason given for why the leisure use would be lawful was stated as "The use of the land while we await planning permission, will bring a lot of pleasure and happiness to young children and their parents. We will offer a selection of free drinks to single parents on welfare benefits. The land is currently unused and serves no purpose and has been neglected and overgrown for years. The proposal will bring a lot of fun and happiness to many young children, especially those children in society most in need."

13. The reason given for why the siting of the storage container would be lawful was stated as "The land is far from any accessible residential/storage area. In order to maintain our land we will need to bring in equipment to maintain and work the land. We therefore require secure storage on site, of a temporary nature, while the land is used for commercial purposes. There have been previous examples where this has been granted, for example, Planning inspector appeal reference APP/Y3940/X/21/3270607, 114 Downs View, Bradford-on-Avon BA15 1PW."

The Council's case

14. With regard to Appeal A, the Council were not satisfied that the appellant had provided sufficient information to describe the proposal. Notwithstanding the lack of details for the operational development associated with the proposed use, the use itself would be a material change of use amounting to development, for which planning permission would be required. This would be the case even though the leisure use would be temporary and the use would not benefit from any permitted development provided by the Town and Country Planning (General Permitted Development)(England) Order 2015 (the GPDO).

15. With regard to Appeal B, the Council determined that the proposal would amount to a material change of use and therefore would constitute development within the meaning of section 55 of the 1990 Act. Planning permission would be required even though the development would be temporary. In addition, the development would not be lawful as it would not benefit from any permitted development provided by the GPDO.

Assessment

16. With regard to Appeal A, the principle point at issue is whether the proposed use would amount to development within the meaning of section 55 of the 1990 Act. The meaning of development includes the making of any material change of use of any land but this is not defined as such in the 1990 Act. Whether a material change of use amounts to development is therefore a question of fact and degree in each case.

17. For there to be a material change of use there needs to be some significant difference in the character of the activities from what has gone on previously. The assessment is usually carried out by making use of the concept of the planning unit as set out in *Burdle*[1]. It is first necessary to ascertain the correct planning unit and the present and previous primary uses of that unit. The tests laid down in *Burdle* start with the unit of occupation and turn on the concept of physical and functional separation.

18. In this case it is considered that the unit of occupation would be the field. There is no evidence before me that the field has been used for agriculture and the Council confirm that Google Street View images show that the access points have not been used for some years. In the absence of any other information, such as the existence of relevant planning history, it would appear that there is no actual use of the field that is lawful. In this situation, to carry out the proposed leisure use would result in a significant difference in character as it would introduce a degree of activity that has not occurred previously. The proposed use would therefore amount to development requiring planning permission within the meaning of section 55. Meeting the needs of children has no bearing on the lawfulness or otherwise of the use.

19. Schedule 2, Part 4 Temporary buildings and uses, Class B of the GPDO permits the temporary use of land, subject to various caveats. It states it is permitted development to use any land for any purpose for not more than 28 days in total in any calendar year, of which not more than 14 days in total may be for the purposes of (a) the holding of a market; (b) motor car and motorcycle racing, and the provision on the land of any moveable structure for the purposes of the permitted use.

20. At first glance, it would appear that the appellant's leisure use could benefit from permitted development for not more than 28 days in total in any calendar year. However, this is on the basis that the appellant's proposed provisions on the land were moveable structures. Whilst the proposed gazebos in theory could be moveable structures, the appellant has not provided any details, such as from a manufacturer, to demonstrate that this would be the case. The proposed fencing throughout the site could be another moveable structure, but again there are no details to indicate for example, height, design or method of fixing to the ground to assess whether this would be the case. The proposed northern boundary wall with solar panels would not of course be a moveable structure but this aspect of the development could be separated from the use in any finding of lawfulness.

21. Although the appellant considers it "a dark day for the planning industry if placing a sandpit on land for children to play in will…be classed as operational development", from his written submissions, it is difficult to decide otherwise.

[1] Burdle v SoSE [1972] 1 WLR 1207

This is because there is no mention in his submissions that it is proposed to place an unknown number of railway sleepers on the land to form a square and to fill the space in between with sand, as he said at the site visit. The sandpit for boules is similarly lacking in detail. Likewise, there are no details provided for the Close Circuit Television Cameras, of which there would be 4 spaced across the site, such as their height and method of fixing to the ground.

22. The appellant has offered no substantive case to demonstrate why the use would be lawful. As the Council have already pointed out to him, the Planning Practice Guidance states an LDC application:

"needs to describe precisely what is being applied for",

"the applicant is responsible for providing sufficient information to support an application" and

"an applicant needs to describe the proposal with sufficient clarity and precision to enable a local planning authority to understand exactly what is involved".

For the reasons given I find the proposed use would amount to a material change of use requiring planning permission and that there are insufficient details to enable me to assess whether it could benefit from permitted development. It would therefore be unlawful. I shall now turn to consider the siting of the storage container.

23. The appellant applied for the certificate on the grounds that the container was operational development, for the secure storage of tools needed to maintain the land during the operation of a commercial use. The Council though concluded placing it on the land amounted to a material change of use.

24. The unit of occupation remains the field. To use a portion of it for storage purposes, for the reasons set out above, would amount to a material change of use. Although it would be used to store equipment to maintain the land, this would not make it an incidental use as there is no lawful use of the land for it to be incidental to. Furthermore, maintenance does not amount to a use of land.

25. I have also considered whether the proposal would amount to operational development. Section 55 includes in the definition of the word "development" the carrying out of "building, engineering, mining or other operations in, on, over or under land". Section 57(1) says that, subject to the provisions of this section, planning permission is required for the carrying out of any development of land. Section 336(1) includes in the definition of the word "building" any structure or erection. Section 55(1)(a) says that for the purposes of the 1990 Act "building operations includes other operations normally undertaken by a person carrying on business as a builder".

26. Relevant case law reveals that there is no single conclusive answer as to what constitutes a building operation. In *Barvis*[2] three tests are set out, the size of the building or structure, the degree of permanence, and the degree of physical attachment to the land. No one factor is decisive. The *Woolley*[3] case

[2] Barvis v SSE [1971] 22 P and CR 710
[3] R (Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council [2012] EWHC 2161 (Admin)

concerned poultry units mounted on skids so that they could be pulled around the field by a tractor when required.

27. The High Court in *Woolley* held that the Council had erred in law in taking too narrow an approach to the meaning of development. The term building in section 336 of the 1990 Act has a wide definition which includes "any structure or erection". This description has been interpreted by the Courts to include structures which would not ordinarily be described as buildings.

28. Additionally, the Council did not direct itself correctly in law on the issue of permanence. This has to be construed in terms of significance in the planning context. The poultry units were permanently in their field and there was no limit on the length of time that they would remain there. The ability to move them around the field did not remove the significance of their presence in planning terms. The visual and landscape impact of the unit was not affected to any material extent by any periodic changes to their position in the field.

29. The appellant's proposed storage container is of a noticeable size and, when placed in the open field, its size will be significant in the planning context. This is due to its height and length. It would have a permanent character even though the appellant states it is not intended for it to be permanent and whilst it would not be physically attached to the land, I find, as a matter of fact and degree, that it would be a building. The siting of the storage container as a matter of fact and degree would therefore amount to development for which express planning permission would be required.

30. The appellant refers to the GPDO, Schedule 2, Part 4, Class A Temporary buildings and structures. This permits movable structures on land required temporarily in connection with and for the duration of operations being or to be carried out on land or on land adjoining that land. However, development is not permitted if planning permission is required for those operations but is not granted or deemed to be granted. The proposed storage container would not benefit from these permitted development rights because if it was to be placed there in connection with the leisure use, then planning permission is needed for that use.

31. In addition, the Bradford-on Avon appeal decision can be distinguished from the current appeal in that it concerned placing a storage container within a domestic garden for a use that was considered to be incidental to the use of the dwelling house. It was found to be lawful as it benefitted from a different set of permitted rights set out in the GPDO.

32. The appellant refers to other storage containers in the area but these have no bearing on whether his proposal would be lawful or not. I am not aware of their history and they rely on their own particular circumstances.

Conclusion

33. For the reasons given above I conclude that the Council's refusal to grant certificates of lawful use or development for a leisure use and the siting of a storage container were well-founded and that the appeals should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act.

D Fleming INSPECTOR