Midlothian

PLANNING COMMITTEE
TUESDAY 12 MARCH 2024
ITEM NO 5.3

CERTIFICATE OF LAWFUL USE APPEAL DECISION WITH REGARD THE USE OF LAND FOR THE STORAGE OF GOODS AND MATERIALS (EXCLUDING HAZARDOUS GOODS AND MATERIALS) AT LAND AT THE FORMER FILLING STATION, BIGGAR ROAD, HILLEND.

Report by Chief Officer Place

1 PURPOSE OF REPORT

1.1 The purpose of this report is to advise the Committee of a certificate of lawful use development (CLUD) appeal decision with regard the use of land for storage of goods and materials (excluding hazardous goods and materials) at land at the former filling station, Biggard Road, Hillend.

2 BACKGROUND

2.1 Section 150(2)(a) of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) provides that an existing use or operation is lawful if no enforcement action may be taken in respect of it. This may be because no development was involved; or the development did not require planning permission; or because the time for enforcement action has expired, or for any other reason. Section 124(3) of the 1997 Act provides that, with regard to a breach of planning control consisting in a change of use other than to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach.

2.2 A means of demonstrating a land use is immune from enforcement without applying for planning permission is a certificate of lawful use development – the applicants submitted such an application in May 2023, and it was refused 21 September 2023. It was then the subject to an appeal and a Scottish Government Reporter appointed to determine the appeal dismissed it 8 February 2024. A copy of the appeal decision is attached to this report as Appendix A. As a consequence of the appeal the Planning Service will investigate the current use of the site with a view of taking enforcement action.

3 THE DECISION

3.1 In considering the appeal the Reporter reached the following conclusion:

"… I find that the use of the site has not been for storage purposes over a continuous period of 10 years up to the date of the appeal application. That is what the appellant must prove, to demonstrate that the claimed use is lawful so as to give rise to an entitlement to a certificate. Indeed, the appellant's own material provides substantial contrary evidence, including its acknowledgement of use for car wash purposes during the relevant time. It follows therefore that the appellant has not discharged the onus on it to demonstrate, on the balance of probability, that use of the land for "general storage of goods and materials (excluding hazardous goods and materials)" is lawful for the purposes section 150(1) of the Town and Country Planning (Scotland) Act 1997."

"… I conclude that the appellant has not demonstrated that the claimed use for "general storage of goods and materials (excluding hazardous goods and materials)" is immune from enforcement action by operation of time, or for any other reason. I am therefore not able to conclude that a certificate can be issued to the effect that storage use of the land (or part of it) is lawful for the purposes of s150 of the 1997 Act. Consequently, I find that the authority's refusal to issue a certificate in this case was well-founded. This appeal is therefore dismissed."

3.2 Furthermore, the Reporter concluded that the appeal had no reasonable likelihood of success and as such awarded the Council costs. This claim for an award of expenses decision is attached as Appendix B.

4 RECOMMENDATION

4.1 It is recommended that the Committee notes the certificate of lawful use development appeal decision with regard the use of land for storage of goods and materials (excluding hazardous goods and materials) at land at the former filling station, Biggard Road, Hillend.

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Appeal Decision Notice

Decision by Rob Huntley, a Reporter appointed by the Scottish Ministers

- Certificate of Lawful Use appeal reference: CLUD-290-2002
- Site address: Land at former filling station, Biggar Road, Hillend EH10 7DU
- Appeal by C M Roofing Limited against the decision by Midlothian Council
- Application for certificate of lawful existing use 23/00296/CL dated 3 May 2023 refused by notice dated 21 September 2023
- The subject of the application: general storage of goods and materials (excluding hazardous goods and materials)
- Date of site visit by Reporter: 25 January 2024

Date of appeal decision: 8 February 2024

Decision

I dismiss the appeal.

Preliminary matters

1. The description of the use of the land in respect of which a certificate of lawfulness is sought, as used on the council's decision notice, is repeated on the appeal form. However, that description differs from that set out on the application form initially submitted to the council. For consistency and clarity I have, in the 5th bullet point above, retained the wording from the application form. In the 4th bullet point above I have also retained the application date of 3 May 2023 from the application form, rather than the later June 2023 date on which the council states that it registered the application.

2. An application for an award of its expenses in this appeal has been made by the council against the appellant. My decision on that expenses application is the subject of a separate decision notice.

Reasoning

3. Section 150(2)(a) of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) provides that an existing use or operation is lawful if no enforcement action may be taken in respect of it. This may be because no development was involved; or the development did not require planning permission; or because the time for enforcement action has expired, or for any other reason. Section 124(3) of the 1997 Act provides that, with regard to a breach of planning control consisting in a change of use other than to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach.

4. The appellant has drawn attention to aspects of the planning history of the site, including referring to several planning applications and permissions. However, none of these relate to or authorise the use of the land for storage. The appeal application was therefore made on the basis of the applicant's claim that storage use had, at the date of the application, become immune from enforcement action by the passage of time.

5. Section 150(4) of the 1997 Act provides that "If … the planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use … described in the application … they shall issue a certificate to that effect; and in any other case they shall refuse the application." Against this background, and as provided for by section 154(3) of the 1997 Act, the central issue before me in this appeal is whether the council's decision to refuse to issue a certificate of lawfulness, was well founded.

6. Paragraphs 23 to 26 of Annex F to Scottish Government Circular 10/2009 (Planning Enforcement) explain what must be contained in an application for a certificate under section 150 of the 1997 Act. The circular makes clear that the applicant is responsible for providing sufficient information to support the application and that the onus is on the applicant to make out their case. The relevant test of the evidence presented in support of an application for a certificate of lawfulness is the balance of probability. Although the form of evidence to be provided is not prescribed, and it is not necessary for the applicant's evidence to be independently corroborated, such evidence must be sufficiently precise and unambiguous to prove, on the balance of probability, entitlement to the certificate sought.

7. To succeed in its claim, that use of the land for "general storage of goods and materials" was lawful at the date of the application, the applicant is required to provide evidence that such storage use commenced more than 10 years before the date of the application and that this use has continued since then. The relevant period for my consideration is therefore the period of 10 years commencing on 3 May 2013.

8. The appellant has provided a series of aerial photographs in support of the application and appeal. These are apparently from the years 2012, 2013, 2015, 2016 (2 images), 2018, 2020, 2021 and 2022, but the images do not bear specific dates. The appellant asserts that these demonstrate that the site has been in use as a storage yard for a period of more than 10 years prior to the date of the application. However, by their nature photographs are only capable of providing a "snapshot" of any features visible on the site at the time they were taken. I accept that images of such visible features might, if supported by documentary or other evidence, help to clarify the existence of features over a period of time, and that this could be suggestive of a particular use of the land. However, the majority of the aerial photographs provided are of such low resolution that they do not enable me to gain any clear appreciation of what is represented by the blurry images, nor what use of the site this may imply.

9. To the extent that I am able, from the images, to gain an impression of the characteristics of the site, this is of a largely open site with one or more broadly rectangular features or structures centrally located within it. Some of the shapes appear on several images and suggest that these same, or similar, features have been present on the site over an extended period. However, I find that the photographs put before me do not provide clear evidence that the site was in use for storage purposes, either at the times when the images were taken or during the intervening periods.

10. The appellant has asserted that storage use of the land has continued throughout the relevant 10-year period. However no substantial evidence has been provided to support this assertion. Indeed, other statements made in the appellant's case are directly contradictory of continued use for storage purposes.

11. Planning permissions have been granted by the council authorising the operation of a car wash use at the site. The appellant acknowledges that the land has been put to such use and says that the appeal site has "oscillated between storage facility and carwash on several occasions". It also comments that "At no point did the appellant claim that the entire terraced site was continuously used for this [storage] purpose". The reference to car wash use is consistent with the large sign I observed on the side of the portacabin office listing prices for City Auto Spa services apparently previously provided at the site. The appellant has also provided updated information from Lothian Valuation Joint Board which records,

for rating purposes, that the land is described and valued as a carwash from 1st April 2014 to 1st April 2023, reverting to a “yard” with effect from the latter date. I have no information to clarify what the term “yard” may mean in terms of a use for planning purposes.

12. Use as a car wash is materially different from use for storage purposes. The appellant acknowledges that the land had been in use for the purposes of a car wash for at least part of the time during the 10-year period relevant to my consideration (from 3 May 2013 to 3 May 2023). Although the appellant comments that the car wash planning permissions were for temporary periods, that does not detract from the fact that any periods of car wash use cannot count towards the duration of any storage use within the 10-year period. I appreciate that s28(2) of the 1997 Act provides that planning permission is not required for the resumption, at the end of any period of temporary permission, of what was the “normal” use of land before the temporary permission was granted. However, that does not assist the appellant’s case here, as there is no suggestion that storage use had become lawful prior to the initiation of the permitted time-limited car wash (reference 11/00168/DPP).

13. Although the appellant had indicated an intention to leave the gate to the site open on the day of my site inspection, this was not done. I was therefore unable to enter onto the site itself. However, I was able to conduct my mid-day inspection of the site from the footway and verge along the site’s frontage to Biggar Road (A702) and from the sloping treed land to the north and south of the site. From these viewpoints I was able to view all that I needed to see at the site in order fully to understand the material I have been provided with in this appeal. Viewing the site at one point in time could not, in any event, provide substantial evidence of the use of the land over the 10-year period I am concerned with in this appeal. I am satisfied that not being able to enter the site itself has not prevented me from properly considering this appeal.

14. At the time of my site inspection, I was able to observe several broadly rectangular features in the upper part of the site. These included a portacabin type office building (with the price-list sign referred to above), a caravan, and a metal shipping container fitted with a door. These appeared to be similar in dimensions and position to some of the features visible on several of the submitted aerial photographs. Present on the site were also a mobile concrete mixer, a small quantity of what appeared to be scaffolding material, as well as fencing around and within the land. The presence of these items on the site did not lead me to conclude that the site was being used for storage at the time of my inspection.

15. I also observed a quantity of Christmas trees in one corner of the site, with others in a small trailer on the land. This would appear to be consistent with the appellant’s acknowledgement that seasonal sales of Christmas trees has been a recurring activity at the site, apparently over many years.

16. From the evidence before me in this appeal I find that the use of the site has not been for storage purposes over a continuous period of 10 years up to the date of the appeal application. That is what the appellant must prove, to demonstrate that the claimed use is lawful so as to give rise to an entitlement to a certificate. Indeed, the appellant’s own material provides substantial contrary evidence, including its acknowledgement of use for car wash purposes during the relevant time. It follows therefore that the appellant has not discharged the onus on it to demonstrate, on the balance of probability, that use of the land for “general storage of goods and materials (excluding hazardous goods and materials)” is lawful for the purposes section 150(1) of the Town and Country Planning (Scotland) Act 1997.

Other matters

17. The appellant has confirmed that the upper part of the site, closer to the road, has been put to uses other than storage during the relevant period of my consideration. It suggests that there has, however, been continuity of storage use of the lower part of the

site which is less visible from public viewpoints. I have therefore considered whether I would be able to issue a certificate confirming the lawfulness of storage use of that smaller part of the application site. However, I find that the paucity and imprecision of evidence of continued storage at the site use put before me, which I have referred to above, applies to the application site as a whole, including the lower terrace. Nor I have been presented with clear evidence to lead me to consider that the site should reasonably be regarded as comprising more than one planning unit. It has not therefore been necessary for me to give detailed consideration to the guidance contained in the Burdle[1] case referred to by the council. I therefore conclude that it is not appropriate for me to use the powers granted by s152(4)(a) of the 1997 Act to issue any certificate in respect of part of the land specified in the application.

18. I am familiar with the various further judicial authorities which the council has referred to in its response to the appeal. However, those judgements rely on their own facts and I have not found it necessary in my consideration of this appeal to address the detail of these.

19. I note that the appellant's comments imply criticism of what it regards as an apparent reluctance on the part of the council to deal positively with successive proposals seeking a viable future for the site. However, in this appeal I am concerned solely with whether the appellant has discharged the burden laid on it so as to enable a certificate of lawfulness to be issued. Any dealings between the appellant and the council on other matters are therefore not relevant to my consideration of the appeal.

Conclusion

20. Section 154(3)(a) of the 1997 Act requires a certificate to be issued on appeal if I am satisfied that the authority's reason for refusal was not well-founded. For the above reasons, I conclude that the appellant has not demonstrated that the claimed use for "general storage of goods and materials (excluding hazardous goods and materials)" is immune from enforcement action by operation of time, or for any other reason. I am therefore not able to conclude that a certificate can be issued to the effect that storage use of the land (or part of it) is lawful for the purposes of s150 of the 1997 Act. Consequently, I find that the authority's refusal to issue a certificate in this case was well-founded. This appeal is therefore dismissed.

Rob Huntley

Reporter

[1] Burdle and another v Secretary of State for the Environment and another [1972] 3 All ER 240

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Claim for an Award of Expenses
Decision Notice

Decision by Rob Huntley, a Reporter appointed by the Scottish Ministers

- Appeal reference: CLUD-290-2002
- Site address: Land at former filling station, Biggar Road, Hillend EH10 7DU
- Claim for expenses by Midlothian Council against the Appellant, C M Roofing Limited
- Date of site visit by reporter: 25 January 2024

Date of decision: 8 February 2024

Decision

I find that the appellant has acted in an unreasonable manner resulting in liability for expenses. Accordingly, in exercise of the powers delegated to me and conferred by section 265(9) as read with section 266(2) of the Town and Country Planning (Scotland) Act 1997, I find the appellant liable to the council in respect of the expenses of the appeal. Normally parties are expected to agree expenses between themselves. However, if this is unsuccessful, I remit the account of expenses to the Auditor of the Court of Session to decide on a party/party basis.

Reasoning

1. The claim by the council was made at the appropriate stage of the proceedings, namely at the time it provided its written response to the appeal.

2. Paragraph 4 of Scottish Government Circular 6/1990 (Awards of Expenses in Appeals and Other Planning Proceedings) explains that the parties to an appeal are normally expected to meet their own expenses. Expenses are only awarded where there has been unreasonable behaviour. Paragraph 5.3 of the circular makes clear that, for an award of expenses to be made, any such unreasonable behaviour must have caused the claimant to incur unnecessary expense.

3. In my decision notice on the substantive appeal, I concluded that the appellant has not provided clear evidence to support its case that storage use of the site had become lawful through continued use for the relevant 10-year period. Scottish Government Circular 10/2009 (Planning Enforcement) explains, especially in paragraphs 23 to 26 of Annex F, the factual nature of evidence necessary to support a successful claim for an application for a certificate under section 150 of the 1997 Act. The evidence in this case falls far short of discharging the onus of proof that rests on the appellant in this regard. Indeed, the appellant's acknowledgement that a use materially different from the claimed storage use (use as a car wash) has taken place during the relevant period, has broken any continuity of use for storage.

4. If proper consideration had been given to the provisions of s150 of the 1997 Act and the guidance in Circular 10/2009, it should have been clear to the appellant that neither the

application nor the appeal had any reasonable likelihood of success. Paragraph 8 of Circular 6/1990 explains that pursuing an appeal in such circumstances is an example of where an award of expenses against an appellant may be justified. I conclude that, in the face of the guidance I have referred to, it was unreasonable for the appellant to pursue the appeal without providing clear evidence to support the lawfulness of storage use at the site.

5. The council was required to respond to the appeal once it was made. It therefore had no option but to devote time and resources to doing so. Expenses would undoubtedly have been incurred by the council as a result. It should not have been necessary for the matter to come before the Scottish Ministers on appeal and an award of expenses against the appellant in favour of the council is therefore appropriate.

Rob Huntley

Reporter