The Planning Inspectorate

Appeal Decision

Hearing held on 30 May 2018

Site visits made on 19 December 2017 and 30 May 2018

by Simon Hand MA

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

Decision date: 5 June 2018

Appeal Ref: APP/K3605/X/17/3178361
Lian Yard, Redhill Road, Cobham, Surrey, KT11 1EG

- 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 Mr A Stewart-Clark against the decision of Elmbridge Borough Council.
- The application Ref 2017/0471, dated 9 February 2017, was refused by notice dated 24 May 2017.
- The application was made under section 191(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 provision of a hard surface within the curtilage of the industrial/warehouse building A to be used for the purpose of the undertaking concerned; and/or the replacement in whole or part of such a surface.

Decision

1. The appeal is dismissed.

Reasons

2. The site is roughly 'L' shaped. The northern section is grassed, the central section contains building 'A', surrounded by a concrete hardstanding and the south-western section has two concrete strips leading to separate accesses in the northern and southern corners of this part of the site, with the land in between being unmade ground. The northern access is now the main access to the site; the southern access is shared with a builder's yard and is currently not used by the appellant. The LDC application relates to all the hardstanding and access strips but not the rest of the site, that is the unmade ground and the grass. The hardstanding is clearly shown on the plan attached to the application. The site is the whole area shown on the plan, hardstanding, building A, unmade ground and grassed area.

History of the site and current lawful use

3. The history of the site is important to understanding the case. In 1997 an enforcement notice was issued which required the removal of hardstanding on the site along with other development. Although there is some dispute as to whether this notice was enforceable or not, or how much hardstanding there was, it seems to be agreed that the notice was complied with. It remains the

case therefore, that any future grant of planning permission would override the requirements of the notice.

4. Apart from this, what the site has been used for is somewhat contentious. The appellant's statutory declaration provided with the Hearing statement says the previous owner rented it out to a company called Leadsome who carried out groundworks. This company continued to rent the site from the appellant (who purchased the site in 2007) until 2009, when the appellant began to use it as overflow storage for Challenge Fencing. Building A was used for storage of high value items, fork lift trucks (and their maintenance), and offices and rest room for staff. The then existing area of hardstanding outside building A was used for storage of fencing and wood products. Building A was in a poor state of repair and from 2013-15 was completely refurbished, and following the completion of those works the hardstanding was replaced. At the Hearing the appellant confirmed that it was during the hardstanding works the Council visited and claimed the works exceeded the permitted development limits. The appellant finished the concreting and applied for planning permission to retain it, which was refused. He then made the LDC application the subject of this appeal. Because of this uncertainty, the refurbished building and hardstanding have not been used for their intended purposes by Challenge Fencing, which is why at both the site visits I have undertaken, there has been little or no activity at the site and the hardstanding has been used for the parking of a number of HGVs and trailers.

5. Given this history of continuous use it seems a little odd that in 2013 the appellant made an application for a LDC for the use of building A for B1 and B8 purposes. However, at the hearing local residents explained there had been a previous LDC application in 2012 for a similar use, which they had vociferously opposed. They say the site had been abandoned and derelict for many years. This application was withdrawn and the 2013 one made without the knowledge of locals who were outraged when the Council granted the LDC. The planning history of the site also paints a different picture. While a lawful use for timber storage and milling seems to have been established in 1972, since then it seems that apart from the 2013 LDC, every application has been refused. This includes in 2000 a change of use from timber storage to B1 and in 2006 a LDC for the use of the land and buildings for B1, B2 and B8 uses. It seems therefore that a lawful use of the site as a whole for B1 and B8 purposes may not have been established.

6. The 2013 LDC itself is unusual as it refers only to buildings A and D and their continued use for B1 and B8 purposes. Building D has since been removed, leaving only building A. During the application process the Council advised that the application ought to be revised as to determine the use of the building with no reference to the surrounding land would be of little benefit. A new plan was submitted, labelled "Proposed Block Plan" showing building A and an area, called the 'teardrop' in front of the building and extending down to the access in the southern corner of the site, which is shared with the builder's yard. This area was outlined in red and labelled "*site boundary specific to application buildings and associated circulation space*", and "*access and circulation spaces shown shaded*". The certificate issued makes no reference to this plan other than to confirm it is the plan attached to identify the land.

7. It is difficult to understand what the purpose of this plan was except to denote an area of land associated with buildings A and D for which an LDC was being

sought to confirm their use for B1 and B8 purposes. The appellant suggested that it would be unreasonable to read the LDC in any other way and I have some sympathy with this view. But it does suggest there was uncertainty as to what the lawful use of the land as a whole was. However, setting aside what everybody thinks the site has been or not been used for, the only evidence before me is the 2013 LDC and the plan. Therefore the starting point for this appeal is that building A and the teardrop area of land shown on the plan attached to the certificate can be lawfully used for the purposes of B1 and B8. I do not know what the lawful use of the rest of the site is and make no further comment on it.

8. All of this is by way of introduction to the appeal itself which concerns the question of whether the hardstanding is permitted development or not. The appellant relies on Class J of Part 7 of Schedule 2 of the General Permitted Development (England) Order 2015, which grants planning permission for hardstanding within the curtilage of an industrial or warehouse building. Building A has a lawful B1 and B8 use and it is common ground that any hardstanding on the site that is within the curtilage of building A and is "*to be used for the purpose of the undertaking concerned*" is permitted development. The issue therefore is to define the curtilage of Building A and determine what use is made of it.

Curtilage issue

9. I do not need to rehearse all the various matters the courts have held which help to define a curtilage as they are well known to the parties. It remains the case that the definition of a curtilage is a matter of fact and degree that should be made on a case by case basis. In this case the appellant argues the entire site forms the curtilage of building A. Whereas the Council says it is, at best, the smaller teardrop shaped area of land that was defined in an LDC application in 2013.

10. The site is large and building is modest in size. The site has a complex planning history part of which is described above, but which also stretches back to the Second World War when it was part of a larger complex used for military construction and apparently is where Barnes Wallis invented and tested the bouncing bomb of 'Dambusters' fame. The site itself has had a number of different buildings on it over the years and possibly a number of different uses. With the 2013 LDC application another plan was provided showing buildings A, B, C and D and a further plan submitted with the application to retain the hardstanding shows a different, larger building C. The appellant suggests these were all movable or temporary buildings that were taken down to allow the hardstanding to be laid, with the intention of returning some of them once the yard began work again. They were thus all ancillary to building A and stood within its curtilage. I have no real evidence about these buildings, but building C could have had its own curtilage, and other buildings on the site before that could too. I say this only to suggest that the curtilage of buildings on the site could have grown and shrunk over time depending on the buildings themselves and the uses they were put to. It does not follow that because building A is the only one left its curtilage automatically covers the entire site. Indeed I have considerable difficulty accepting this proposition.

11. The courts have held in Skerritts[1] that the concept of smallness is not relevant in determining the size of the curtilage. In that case it was held that a substantial listed building could have a substantial curtilage. In Lowe[2] the court held that the concept of curtilage is not restricted in size, but must be fairly described as being part of the enclosure of the house to which it refers. In that case, another listed building appeal, the court held "*it might include accommodation land such as a small paddock close to the house. But it cannot possibly include the whole of the parkland setting in which Alresford Hall lies, nor the driveway along which the fence was erected*". In my view while size and smallness are not part of the definition of curtilage the courts are suggesting that proportionality can be. Curtilage is not necessarily the same as the planning unit or all the land in the ownership of one person. In this case it would be excessive to consider that the whole of Lian Yard formed the curtilage of the modest building A, by virtue of it being the only building left on the site. Although there are no boundaries within the site, much of it is not being used in conjunction with the building and has no functional link to it. In my view therefore the curtilage of building A is not the whole site.

12. The 2013 LDC does not mention curtilage, and I accept that the curtilage of a building need not be on land that is lawfully in the same use as the building, but I consider the plan attached to the LDC is helpful in setting out the area of land that the applicant at that time thought was connected to the use of building A. There is quite clearly a functional link between the teardrop shape and building A and I have no doubt therefore this area of land is within the curtilage of building A. The appellant argues this was never demarcated on the site which may well be true. However, he also says the existing hardstanding (ie that on site when he took it over in 2009) covered more or less the same area. Another plan put forward with the LDC application is labelled "*Historical Block Plan – all previously existing, and existing buildings and associated circulation space*". This shows buildings A-D, the "circulation space", which I take to be hardstanding covering the teardrop area and extending around buildings C1 and C2 to the north and linking to both accesses. The appellant has said that when he took over the site the hardstanding was in poor shape, hence his desire to improve it. All this leads me to conclude that the teardrop shape shown on the Proposed Block Plan was all that was left of the hardstanding that was usable, hence its incorporation into the LDC as circulation space associated with building A and that it could, at the time, have been readily discernible on the site and was separate from the land around which was not hardstanding. Otherwise it would not have made sense to provide 2 plans with what would have been randomly drawn areas of circulation space. That was clearly not the intention of either plan. Thus, it seems to me reasonable to assume the teardrop shape and access link shown on the Proposed Block Plan form the curtilage of building A.

13. I think it might well have been quite reasonable for the appellant to have squared off the edges of the curtilage when laying the hardstanding, but he has done much more than this, extending the hardstanding to the north beyond where building D stood and to where building C stood and to the south where building B stood, as well as to the northern access. Even if I were to take a different view, and accept the historical block plan as showing the curtilage of building A, the hardstanding has still been extended significantly to the north,

[1] Skerritts of Nottingham v SSETR [2001] QB 59
[2] Lowe v Secretary of State [2003] EWHC 537

and the northern access track is significantly larger. In both cases the hardstanding lies without the curtilage of building A and so is not permitted development according to Class J.

Purpose of the undertaking issue

14. The second issue is that any hardstanding on the site that is within the curtilage of building A has "*to be used for the purpose of the undertaking concerned*" in order to benefit from the permitted development rights granted by Class J. Here the local residents, and to some extent the Council were of the view that the current use of the site is an HGV depot. The lorries are parked on the hardstanding which has no link at all to building A. This current alleged use is clearly locally controversial and raises a number of issues, such as what the lawful use of the whole site is, whether HGV parking is a B8 use or has it become sui generis etc. None of these issues are before me as the appeal relates to what was happening in 2016 when the concrete was laid and the permitted development rights exercised. However, the spectre of the alleged use does hover over this issue because the intentions of the appellant are important. He readily admits that building A was not fit for purpose and required substantial refurbishment from 2013-15. The hardstanding was also unsafe and needed to be replaced. Thus when the hardstanding works began there was no undertaking in building A as the site was not at that time being actively used by challenge fencing because of the safety issues. This does not necessarily matter because it was, according to the appellant, always his intention to carry out all the works to building A and the hardstanding, re-open the northern access and use the site for his fencing business. I was shown the main yard in Cobham and how it operated to demonstrate what the appellant had in mind for Lian Yard. The hardstanding was therefore "*to be used*" for the undertaking in building A. This begs the question as to whether or not that was ever the appellant's intention. Despite the statement in his statutory declaration that the site has been used ever since in relation to building A for B1 and B8 purposes it seems this was not the case. Mr Graham Scott says in his statutory declaration that because of the complaints by the Council it was decided not to relocate to Lian Yard, and the appellant confirmed at the Hearing that the fencing use had not recommenced at the site. The only evidence I have for any use at the site is for the parking of HGVs.

15. However, setting that aside, the Council make the point that the hardstanding is massively in excess of what is necessary for an undertaking in the modest building A. They say the hardstanding should be ancillary to the building and it is clearly not. Class J is headed "*hard surfaces for industrial and warehouse premises*". J.(a) says "*the provision of a hard surface within the curtilage of an industrial building or warehouse to be used for the purpose of the undertaking concerned*". I can see why the Council consider the hardstanding is ancillary to the building, but there is no mention of it being ancillary in the Class. However, it seems clear to me that there must be an undertaking going on in an industrial or warehouse building that requires a hardstanding. In this case it seems to me the hardstanding is the prime requirement and the building an optional extra. Storage for a forklift, staff facilities and secure storage could all be provided in any number of ways and do not require building A, but the fencing business could not operate without a substantial and solid concrete hardstanding. This is what I think the Council meant by idea of the hardstanding being ancillary to the building. In that sense I agree, there was no undertaking in building A that required a hardstanding. There was a large

site that required a hardstanding to operate as a base for a fencing company, a by-product of which was that a building would be useful. Consequently I do not think the second limb of Class J is met and so the hardstanding is not permitted development.

16. I was also asked to consider whether I could grant a certificate for a lesser area, being that of the teardrop shape. Given that I do not think the hardstanding is required for an undertaking in building A then I do not think that a lesser area would meet that test either. However, even had I not reached that conclusion, I agree with the Council that the hardstanding was a single act of development that, because it exceeded the curtilage of building A, was not permitted development. Therefore the whole hardstanding is not permitted development and part of it cannot be made lawful by changing the description or attaching a more restrictive plan.

Conclusion

17. I find that the hardstanding as constructed is not permitted development allowed by Class J of the GPDO because it is neither within the curtilage of a building nor is it related to the purposes of the undertaking concerned. I shall dismiss the appeal.

Simon Hand

Inspector

APPEARANCES

FOR THE APPELLANT:

John Clay – of Counsel
Chris White - WRG
Andy Stallan - WRG
Alex Stewart-Clarke

FOR THE LOCAL PLANNING AUTHORITY:

Robin Green – of Counsel
Edward Chetwynd-Stapleton - Elmbridge BC
Georgina Healy – Elmbridge BC
Katie Baldwin – Elmbridge BC

INTERESTED PERSONS:

Ben Ruddock – SEG
Hayley Hancock
Kenneth Spragg
Councillor Ian Donaldson

DOCUMENTS

1 Photographs provided by the Council
2 Paginated folder of the evidence provided by the appellant
3 LDC issued by Elmbridge BC involving HGV parking
4 Transcript of Adrian Burford v SSCLG [2017] EWHC 1493