



Appeal Decision

Inquiry Held on 12 to 15 March 2024 and 3 April 2024

Site visit made on 21 March 2024

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 7 May 2024

Appeal Ref: APP/W1715/X/23/3331326

Broadway Farm, Broad Oak, Botley, Hampshire SO30 2EU

- 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 Maurice Doe of CCW Services Ltd against the decision of Eastleigh Borough Council.
 - The application Ref LDC/23/95111, dated 25 April 2023, was refused by notice dated 29 August 2023.
 - The application was made under section 191(1) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is building operation by the laying of sub-base hard core (type one crushed concrete) with concrete cellular 'grasscrete', together with the parking of motorised vehicles to include heavy vehicles and trailers.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The Council's decision notice refers erroneously to Section 192 of the Town and Country Planning Act 1990 (as amended) (the Act), but the application was made under section 191 of the Act and relates to an existing operational development and use of land.
3. Proofs of evidence were signed and dated by witnesses during the Inquiry. Scanned copies were subsequently submitted to the Planning Inspectorate.

Appeal Site

4. The site the subject of the appeal lies immediately to the east of a well-established commercial site known as Broadway Farm. It comprises a relatively flat area of tarmac which is currently used for parking HGVs and trailers associated with the operation of CCW Services Ltd which is a haulage company.

Main Issue

5. The main issue is whether the Council's decision to refuse to grant a certificate of lawful use or development was well-founded. In this case, it is agreed that turns on:

- i. whether the appellant has proved on the balance of probabilities that the operational development comprising the laying of sub-base hard core (type one crushed concrete) with concrete cellular 'grasscrete' was substantially completed on or before 25 April 2019;
- ii. whether the appellant has proved on the balance of probabilities that the use of the property changed to use for the parking of motorised vehicles to include heavy vehicles and trailers on or before 25 April 2013 and the use then continued without significant interruption for 10 years after the date of the change; and
- iii. whether or not the subsequent building operation comprising of the laying of the tarmacadam constitutes new engineering works which have commenced a new chapter in the planning history for the appeal site.

Reasons

6. The National Planning Practice Guidance ('PPG') is clear that in the case of applications for existing use or development, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application. This is provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probabilities. The burden of proof rests with the appellant.
7. Appeals relating to the refusal of LDCs are invariably treated as de novo appeals because s185 of the Act refers to the refusal to grant a LDC as being well-founded. Consequently, parties may submit additional evidence to the Secretary of State which was not before the authority at the time of its decision. Indeed, case law¹ has held that the Secretary of State cannot be compelled to issue a certificate when they are of the opinion that one should not be granted and an Inspector should consider any fresh evidence advanced at appeal, including that which was not advanced at the application stage.

Operational development

8. The Council's reason for refusing to grant the LDC with respect to the operational development is that the building operation of the laying of tarmacadam constitutes new engineering works which have commenced a new chapter in the planning history. The Council appears to accept that it does not have evidence which contradicts the appellant's evidence that the grasscrete was laid in 2006, but nonetheless suggests that the evidence on this point is not unambiguous, because the subsequent operational development means that the lawfulness of the grasscrete could not be determined at the time the application was considered.
9. Although their reason focuses on the tarmacadam it does not suggest that the laying of sub-base hardcore (type one crushed concrete) with concrete based cellular 'grasscrete' were not substantially completed on or before 25 April 2019 such that they were immune from enforcement action by the local planning authority. However, it remains for me to determine under s195 of the Act on the balance of probabilities whether the operational development the subject of the application was substantially completed on or before that date.

¹ Cottrell v SSE & Tonbridge and Malling BC [1982] JPL 443

10. The Council relies on their assertion that the boreholes show no evidence of grasscrete, along with aerial photography and the evidence of their former Technical Manager. It is evident that no Council representative visited the site before 2006 or shortly after then to be able to give first hand evidence regarding the condition of the land in question before and after any operational development may have taken place. Therefore, it has had to rely on their allegation of there being a lack of evidence to support the appellant's case.
11. There is no photographic evidence taken by the appellant or one of his witnesses showing grasscrete because there has been no reason for any photographic records to have been kept since 2006. However, it is surprising that grasscrete is not shown on aerial photographs which, although taken from some distance and not entirely clear, do provide an overall impression of the condition of land at specific times before and during the material period. The appellant's case is that once laid, the grasscrete was covered with soil which was then sowed with grass seed no longer than two weeks after the concrete was laid. Submerging grasscrete underneath a layer of soil and grass seed is not a normal procedure but the appellant asserts that this was done because he lives near the site and wanted to keep it tidy.
12. Accounting for the lack of aerial photographic evidence post-installation, the argument is that a good job had been done. After its installation the grasscrete was not visible from above because it was repaired when needed by re-soiling, plastic grass mats laid, rolling the land, re-soiling and then re-seeding. Turf would be used to repair, when available. The Council's witness confirmed that soiling and seeding grasscrete is generally good practice to create the intended natural appearance by letting grass grow through the cellular holes. He also suggested that anything more than a level layer of soil should not or would not be normally laid and indeed that would be my own expectation. However, this decision is based on what happened and not what one would normally expect to have happened.
13. Nonetheless, the Google Earth aerial photograph dated April 2007 shows that within a year of the date the grasscrete being allegedly laid there was an entirely uniform surface across the field, including where significant engineering earthworks and excavation are alleged to have been carried out followed very soon after by HGV movements across freshly laid soil and planted grass seed. Although the operations set out in evidence would have created a grass appearance, it is highly unlikely that a smooth, uniform surface would have resulted as shown in April 2007. I understand that aerial photographs provide only a snapshot at a specific time, but this post-winter 2007 photograph is telling in my judgement and calls into question the accounts given of the operations and activities carried out in 2006 and early 2007.
14. In addition, on closer examination there are inconsistencies in the evidence relating to the grasscrete laying operations, including the time taken to complete the works and the selective details given. Whereas there is detailed evidence of the precise depths of different layers of material laid in 2006, there are no agreed details of when in 2006 the works were carried out (the estimate given by Mr Heathfield is approximately mid-2006), the type of grasscrete that was laid and the method of payment. However, of greater concern in the context of determining a LDC is the distinct lack of evidence as to the boundary to which the grasscrete was laid.

15. The account given is that the appellant just pointed to an area of land which was not marked out with any precision because he did not want to spend money on plans. In my judgement this seems to be an unsatisfactory approach to dealing with such a significant operation.
16. Having read and heard detailed evidence about operational development I still do not know the precise boundary to which the sub-base hardcore with grasscrete surface was laid. In a LDC case, that is a fatal flaw because the LDC is seeking to retain an area of sub-base hard core (type one crushed concrete) with concrete cellular 'grasscrete', the extent of which cannot be determined.
17. The boreholes themselves should provide assistance in showing the grasscrete on the appeal site and in the appellant's written evidence, it is argued that the four boreholes show the depth of hardcore, including the terram membrane with what appears to be grasscrete concrete beneath the tarmacadam. It is further stated in evidence that photographs of the boreholes clearly show tarmacadam on the surface with the concrete grasscrete just below. However, it now seems to be agreed between the main parties that the boreholes do not, in fact, show any evidence of grasscrete. It is incorrect to say that grasscrete is in the boreholes to be seen – it cannot be seen as a matter of fact. There is no actual physical evidence of grasscrete in the boreholes which are within the red edge of the LDC application site and again, that is a matter of fact. Consequently, it can be inferred that no grasscrete is or ever was present on the parts of the application site exposed.
18. The Council's technical expert states in his written evidence that he had inspected the trial holes and could not find grasscrete, concluding that the geotextile, hardcore and tarmac were all laid during the same operation. However, he did also confirm his views on a number of other relevant matters, including the methodology of laying the grasscrete in accordance with the methodology described by the appellant's witness, accepting that grass grows through grasscrete, the overall purpose of laying grasscrete to provide a hard surface and other issues relating to the appearance of crushed concrete hardcore and how repairs can be done. He also accepted that the boreholes may have missed the grasscrete and that they do not tell the story of what is happening at the centre of the appeal site and that the trial holes could indicate two separate processes and he could not say exactly when the process or processes may have taken place. However, none of his evidence detracts from the key concern that there is a lack of physical evidence of the extent of grasscrete on the appeal site.
19. I understand the argument that the only reason why anyone would dig boreholes and then photograph them as evidence would be if they had genuinely carried out the works described, they had not removed the sub-base hardcore and/or grasscrete and it remained in situ. However, given the burden of proof on the appellant it is difficult to understand why such small boreholes were dug at the very periphery of the appeal site where the operational development could have been missed. In a case such as this it is somewhat surprising that having found no evidence of grasscrete in the boreholes, no further steps were taken to identify its presence, including, for example digging larger boreholes in an area known to have been laid with sub-base and grasscrete or scraping away a layer of ground to expose an area of sub-base hardcore with concrete cellular grasscrete, even if it did result in some disruption to haulage activities on the land.

20. An alternative scenario is that the grasscrete has somehow been subsumed by the tarmacadam and that, although it was laid in 2006, it no longer exists. However, evidence suggests that the grasscrete that was allegedly laid in 2006 was not completely broken, but rather that it had been damaged in places, but otherwise intact. Grasscrete is designed to be loaded and therefore compaction would not break it up to the extent that it would disappear.
21. Finally, with respect to the operational development, I find it surprising that the presence of grasscrete is not mentioned in any of the planning applications that were submitted. The appellant chose not to tell Mr Beck about the grasscrete installed in 2006 because he did not see the relevance. This does not mean that he has been untruthful, but it does cast doubt regarding the operational development that may have taken place.
22. Based on the lack of physical evidence and photographic evidence, the appellant has failed to demonstrate the extent of operational development on the appeal site and, consequently, failed to prove on the balance of probabilities that the operational development comprising the laying of sub-base hard core (type one crushed concrete) with concrete cellular 'grasscrete' was substantially completed on or before 25 April 2019.

Use of the site

23. The making of any material change in the use of land falls within the definition of development in accordance with Section 55(1) of the 1990 Act. In determining whether or not a material change of use has occurred the key test is to compare the use for which the certificate is being sought with the previous use, or the use ten years before the certificate was sought and determine whether there has been any material change of use. To be lawful, it must have been possible for the local planning authority to have taken enforcement action at any time during the relevant period for a continuous breach to have occurred. Continuity does not necessarily mean that the land must have been used for the activity in question every hour or even day during the relevant period, but enforcement action may be taken during the applicable time period provided the land can be described as being used for such activity.
24. The Council relies on its assertion that there is uncertainty about the use of the appeal site over the material period and that in earlier years, there was only sporadic use of the site relating to an overspill of activities taking place on the adjacent main commercial site. It is also suggested that there has been a more recent significant expansion in the level of activities taking place on Broadway Farm and that the appellant and his witnesses' evidence is contradicted by a series of aerial photographs submitted. The Council suggests that there was no material change in the use of the appeal site until the tarmacadam surface was installed some time in 2020.
25. Council representatives rely largely on aerial photographs because they simply do not have detailed experience of the site and its use because they have not visited it frequently over the years. Their main contention is that aerial photographs do not confirm what is said in the appellant's and his witnesses' evidence. I understand that aerial photographs provide only a snapshot at a specific time, and that they are only an indication of what was on site and what activities were taking place on site on particular dates and I take the point that Google imagery only goes so far. It should also be understood that aerial photographs are subject to interpretation and different perspectives may lead

to different interpretations of the same image or images. That is where judgement comes into a case such as this where the decision is based on the balance of probabilities. I also appreciate the assertion that Mr and Mrs Doe's evidence is clear with respect to their business activities, the nature of their business and the constant changes on site associated with the movement of vehicles.

26. The appellant asserts that track marks are plainly visible in the field on Google imagery from 2007, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020. However, the clarity, definition and apparent level of use of the field for vehicular movements is not at all consistent and those movements may be associated with a range of activities taking place on the appeal site such as the storage of pallets or cages or indeed for the purposes for which the LDC is being sought. By no means does it prove on the balance of probabilities that the appeal site was being used for the parking of motorised vehicles to include heavy vehicles and trailers on or before 25 April 2013 and the use then continued without significant interruption for 10 years after the date of the change.
27. In 2013 the photographic evidence does not show use of the appeal site consistent with what is being said by the appellant. There are some markings on the field adjacent to Broadway Farm to the south of the appeal site consistent with access onto the field to the south. There is some material visible in the northwest corner, but it is not at all clear what that might be. It is certainly not parked vehicles or trailers.
28. In September 2014 there are some vehicle markings on the field which appear to be associated with vehicles turning within the field, rather than parking. There are some cages stored on the land but according to the evidence provided these are not associated with the haulage and distribution activities and they certainly are not vehicles or trailers.
29. There appears to be even less use of the appeal site in April 2015; but there is some evidence on the ground of where cages were seen, previously. In August 2016 there are some trailers on the appeal site and in 2016 and 2017 photographs show HGVs parked on the appeal site in a manner which may be consistent with overspill from the main Broadway Farm site. From 2018 onwards there are photographs of leased HGVs on the appeal site and in June 2018 the appellant submitted a planning application to regularise and tidy up the main site. At that time the Council was told that the appellant's business had outgrown Broadway Farm and the space available was not being used efficiently.
30. Evidence from September 2019 shows development works taking place on Broadway Farm to ensure it operated more efficiently. It also appears to show that the former entrance into the field from the west has been closed. The same is shown on later photographs from May 2020 when the development previously being carried out appears to have been finished. The May 2020 photograph also shows how the main Broadway Farm site is operating at that time with lorries turning around on site. There are only very faint markings on the appeal site which lead me to conclude that at that time the site may have been used for limited overspill storage, but nothing else.
31. The evidence before me suggests that at the time when the ground conditions on the appeal site were at their worst and most difficult to operate on, the

easier access onto the field was closed and then in wet weather conditions HGVs drove up the field, over the brow and down the gentle slope onto the appeal site to park and manoeuvre. All this activity without leaving any vehicle track marks in sometimes wet and soggy conditions does not make sense.

32. I find it far more likely that the appeal site was not used for parking of vehicles and trailers until at least 2016 as shown by aerial photographs. This was a time when Broadway Farm was very busy and rather cluttered, making vehicle movements more challenging. As reflected in evidence, sporadic overspill of vehicles and trailers onto the appeal site appears to have continued until around 2018 when planning permission was granted to tidy up and consolidate the use of the site. The March 2022 aerial photograph shows vehicles and trailers parked on the tarmac surface on the appeal site consistent with the use for which the LDC is being sought.
33. The Council also argues that the number of vehicles shown in various photographs does not reflect evidence relating to the number of vehicles on operators' licences over the years. This is so even when there are a larger number of vehicles appearing on Mrs Doe's list. I take the point that, for example, there are 7 vehicles shown in August 2016 but none in September 2019 despite the rise in vehicle numbers on the operator's licence. However, I do not agree that the number of operator's licences confirms the number of vehicles on site at any one time or shows any significant increase in its use. This is because the business does not own any vehicles but leases them and operator's licences do not specifically identify how many vehicles are on the road at any one time; but instead show how many you can operate under your own licence. This number does not preclude the company from subcontracting with other businesses operating under their own licence and there is also an operating margin within which a company can operate. Therefore, the evidence before me is that there is little correlation between the number operator's licences and the number of vehicles that could be parked on the site at any one time. Other companies can also use the site for parking. However, the evidence does not prove on the balance of probabilities that the use of the site was continuous for the purposes set out in the LDC application for ten years.
34. There is a great deal of written and oral evidence under oath from those who have detailed knowledge of how the site has operated over the years. I am also aware that the appellant and his wife chose not to be present during the time any of the witnesses gave their first-hand direct evidence. Indeed, I would go further by stating that no one on the Appellant's team sat and listened to the evidence of others on their side apart from Mr. Beck who gave his own specific planning evidence. It has been asserted that it is absolutely clear that their evidence was their own and I do not doubt that this is the case. There were some differences in the accounts given, but overall, they were generally consistent about the site being used for parking from 2006 and how this was done. But consistency does not on its own necessarily mean that the burden of proof is met.
35. One key question with respect to the use of the land is whether during the material period, it has been proved that it was being used for the parking of motorised vehicles to include heavy vehicles and trailers or an alternative use. In his evidence the appellant's planning agent suggested that the use of the site was, in fact, B8 based on its use associated with the remainder of the

Broadway Farm site. What is important is my conclusion with respect to the nature of the use bearing in mind the matter of the planning unit to which the application relates.

36. The planning unit the subject of the application was accessed from the bottom of the site for some time and that access remains in situ. There is now a relatively new access onto the wider Broadway Farm site, but accessibility does not define the extent or otherwise of a planning unit. The appeal site is in the same ownership as the main site, but it is contended by the appellant that it has been used in a functionally distinct way for parking over the relevant period and that any other activities taking place on the land have done so in a way which is ancillary to parking, or even de minimis. In my judgement it does not matter whether the planning unit is the appeal site in isolation or it is part of the wider Broadway Farm operation but it is for me to determine whether or not there is a discreet parking use on part of the wider site for which a certificate may be granted, even if the planning unit is wider than just the appeal site.
37. The appeal site has clearly been used for vehicle maintenance and this is quite normal for a large commercial parking area. The appellant asserts that vehicle maintenance and repairs would not have occurred on the appeal site if it were not already being used for parking, but I do not agree that this is necessarily the case. It may have been convenient to use the land for these purposes because it is located immediately adjacent to the wider Broadway Farm site. Given the relatively busy and congested nature of the wider site with vehicles moving around the relatively constrained site at very regular intervals throughout the day, it may not have been suitable or even safe for carrying out vehicle maintenance without using the appeal site. Mr Hawkhead did not have a yard or anywhere else for him to carry out his work on the appeal site and it is my understanding that he had a container on the main Broadway Farm site and some offsite workshops. Not all his work was done on the appeal site. Consequently, I do not consider that the use of the appeal site for vehicle repair and maintenance is conclusive with respect to the overall use of the site for parking.
38. There is also photographic and other evidence that storage was occurring on the appeal site within the material period. The question is whether it was more than ancillary or de minimis beyond parking. The appellant's witnesses described items being taken off vehicles and then being loaded back onto them and goods were left in vehicles overnight. Where goods are stored in vehicles for short periods of time, ready to be exported off site in a trailer or other vehicle that does not amount to storage. In any case, ancillary or de minimis uses are largely irrelevant to the determination of this case where I have found that parking on the site is unlikely to have started before 2016 and the 10 year continuous use has not been proven.
39. It is surprising that the use of the appeal site is not covered in planning applications that were submitted. The appellant contends that he relied on other professionals and provided only the information he considered to be relevant. That may be so, but he did not tell his planning agent the use of the site for parking before the NHS use of the site in 2020 because he did not see the relevance. This does not mean that he has been untruthful, but it does cast doubt regarding how the site was being used.

40. The appellant's evidence is that the site was continuously used for parking prior to 2020, and for the relevant material period. He contends that the use of the site from 2020 and the installation of the tarmacadam did not change the character of the use and it continued to be used for the same activities before it was installed, irrespective of what the vehicles were used for and who they belonged to. Photographs from April 2021 show a range of vehicles on the site and the same can be said for evidence from site visits in May 2023 and July 2023. A break for operational works completed in 2006 and 2020 would not amount to a break in the continuity of any use to have prevented enforcement action and I do not consider that the pandemic would present a break to interfere with the continuity of use. However, in my judgement, parking vehicles and trailers on the appeal site is unlikely to have started before at least 2016 and therefore ten years continuous use cannot be proved in any case.
41. The Council also contends that they could only take enforcement action when there was an intensification in the use of the land. I find this approach to have been sound for the reasons I have set out above in relation to continuous use. Even if there was some parking of vehicles on the land before the tarmacadam surface was laid in 2020, levels of activity certainly stepped up from 2020 onwards.
42. The assessment of whether a change of use has taken place requires a comparison of the present years with the previous years and the onus is on the appellant to demonstrate that the same activity continued throughout the material ten year as an "enforceable use". In my judgement and for the reasons set out above the evidence before me is insufficient to prove on the balance of probabilities that use of the property changed to use for the parking of motorised vehicles to include heavy vehicles and trailers on or before 25 April 2013 and the use then continued without significant interruption for 10 years after the date of the change.

New Planning Chapter

43. A new planning chapter starts when there is change in the nature of the site so radical that it is a fresh start altogether. The balance of activities on a planning unit can change over time and there is no restriction to the factual circumstances that can be taken account when determining such a definable change in the character of the use.
44. The main issue with respect to this appeal relates to whether the building operation comprising of the laying of the tarmacadam around 2020 constitutes new engineering works which have commenced a new chapter in the planning history for the appeal site. However, that argument should not detract from the fact that the overall purpose of this decision is to determine whether the Council's refusal of the LDC was well-founded. Irrespective of whether or not a new planning chapter commenced when the tarmacadam was laid, I have already concluded that the appellant's case regarding the operational development and use of the site fails because he cannot establish the relevant respective timescales. It is unlikely that the use of the site for parking motor vehicles commenced before 2016 and therefore even a significant increase in levels of activity after the installation of the tarmacadam surface will not help his case. Neither do I need to determine it in the interests of supporting the

Council's decision to refuse to grant the LDC. Therefore, I need go no further in determining this main issue.

Conclusion

45. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of building operation by the laying of sub-base hard core (type one crushed concrete) with concrete cellular 'grasscrete', together with the parking of motorised vehicles to include heavy vehicles and trailers 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.

A A Phillips

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Poonam Pattni of Counsel instructed by Eastleigh Borough Council

She called

Ross Blakemore

John Saunders

Gary Osmond

FOR THE APPELLANT:

Leanne Buckley-Thomson of Counsel instructed by Graham Beck

She called

Maurice Doe

Tony Heathfield

Gavin Boxall

Louisa Doe

Gary Jewell

Jamie Hawkhead

Jon Moore

Mike Walker

Andrew Tracey

Graham Beck

INTERESTED PERSONS:

Dr Colin Mercer