



Appeal Decision

Site visit made on 16 October 2018

by Wendy McKay LLB Solicitor (Non-practising)

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

Decision date: 13 November 2018

Appeal Ref: APP/Q3115/X/18/3199426

Kings Copse Mobile Home Park, Watlington Road, Garsington, OX44 9BL

- 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 R S Hill & Son Ltd against the decision of South Oxfordshire District Council.
- The application Ref P17/S1780/LDP, dated 23 May 2017, was refused by notice dated 2 November 2017.
- The application was made under section 192(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 the siting of residential park homes.

Summary of Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Decision.

Main Issue

1. The main issue is whether the Council's refusal to grant a certificate of lawful use or development (LDC) was well-founded.

Procedural Matters

2. Neither the identity of the Appellant, nor the planning merits of the operation, use or activity are relevant to the purely legal issues which are involved in determining an LDC appeal. The onus of proof in an LDC appeal is on the Appellant and the relevant test is "*the balance of probability*".
3. The Appellant's description of the proposed development set out in the revised application form is: "*The siting of residential park homes and associated infrastructure*." The Appellant explains that an amended description of the proposed use was provided by e-mail to the Council on 12 September 2017 with the request that the application be considered on the basis of: "*The siting of residential park homes*" only, and excluding the reference to "*associated infrastructure*". The Council responded in the affirmative on 14 September 2017 and confirmed that the description would be amended as specified. The Appellant indicates that the description of the development as set out in the reason for refusal of the LDC, namely, the "*Use of land for siting of residential mobile homes*" has not been agreed. There is no implied power that would allow the Council to unilaterally modify the agreed description of the proposed development for a section 192 application. I shall therefore consider this

appeal on the basis of the revised description as agreed in correspondence between the parties.

4. The application has been put forward and considered by the Council on the basis that the specification of the residential park homes in question would fall within the definition of a 'caravan' as set out in the Caravan Sites and Control of Development Act 1960 and the Caravan Sites Act 1968 (as amended). The LDC sought is therefore for a proposed 'use' of the land rather than 'operational development'. That would be the case whether the caravans proposed to be sited on the land are described as 'residential park homes' or 'residential mobile homes'.
5. The letter that accompanied the LDC application which gave rise to this appeal explains that it seeks to establish the lawful principle of siting static caravans for permanent residential occupation on the application site. That area is shown edged in red on the plan which the Appellant identifies as forming part of the application titled 'Site Location Plan' (RPS Figure 1). The additional plan submitted with the application for information is titled 'Indicative Layout Plan' (RPS Figure 2). The latter shows 27 caravans sited in a herringbone layout. The Appellant confirms that this layout plan was provided by way of an example only and is an illustrative design. It is not the actual development sought but simply an illustration of a potential development which could take place on the site should an LDC be granted. As part of this appeal, a further illustrative plan has been submitted titled 'Alternative Site Layout' (RPS Figure 3). This shows 17 mobile homes sited in a herringbone layout. The Appellant requests that, inasmuch as the layout has an impact on the appeal decision, the amended indicative layout be used and he seeks to withdraw the original layout plan from my consideration.
6. However, given the basis on which these layout plans have been put forward, they fall to be considered solely on the grounds that they have been provided for illustrative or indicative purposes only. The application simply seeks to establish the principle of siting of residential park homes on the land shown on the location plan. It does not propose any specific number of caravans to be accommodated on the land or any specific increase over and above the number that are currently sited on the adjacent caravan park. I shall deal with this appeal on that basis.

Reasons

7. The appeal site comprises a large open grassed area that is positioned immediately to the north-west of the Kings Copse Mobile Home Park. There is a gated vehicular access in the north-west corner which leads to the public highway. A narrow footpath runs from the south-eastern boundary of the site directly into the mobile home park. There are two large gas tanks on the appeal site which serve the adjacent mobile home park. An emergency/service vehicular access for the gas tanks leads directly from the car park that serves the mobile home park. There is a public footpath which crosses the appeal site.
8. The Kings Copse Mobile Home Park currently accommodates 116 caravans following the grant of planning permission in 1989 to increase the number of residential mobile homes on the land from 115 to 116. That permission was granted without any conditions other than the standard five year period for commencement of development. There is no planning condition which restricts

the number of caravans to that level but it is a condition of the 1989 site licence that no more than 116 caravans be stationed on the site at any one time.

9. The Council granted an LDC on 7 October 2009 in respect of the following use of the appeal site: *"The use of the land edged red on the attached plan as a recreation area incidental to the mobile home park was lawful within the meaning of Section 191 of the Town and Country Planning Act 1990 (as amended)." By virtue of section 191(6), the effect of that LDC is that the lawfulness of the use certified is to be conclusively presumed.*

10. The reasons given for granting the 2009 LDC in those terms were: *"That, on the balance of probability and in the absence of evidence to the contrary, it is considered that the area of land outlined in red on the attached plan has been used for informal recreational use by occupiers of the adjacent mobile home park only for a period of at least 10 years. Also, the use of the land edged red as a recreational area incidental to the mobile home park would be lawful, namely that such a use would not involve a material change of use of the mobile home park and the red edged land that requires permission."*

11. The Appellant's position is that the 2009 LDC confirmed that the appeal site was lawfully used for purposes incidental to the primary use of the land as a mobile home park. It established the dependence of the recreational use upon the existence of the adjacent mobile home park. Therefore, the primary use of the land is as a caravan site in the same way as the adjoining existing mobile home park. The planning circumstances have not changed and no material change of use has taken place since the 2009 LDC was granted. The Appellant therefore submits that the proposed siting of residential caravans within that area would be lawful.

12. In contrast, the Council contends that, regardless of whether the appeal site might be considered as falling within the primary caravan park planning unit, stationing further caravans for residential occupation could materially change the character of the land and the use to a degree that would constitute a material change of use. The Council concludes that when the characteristics of the proposed use are compared to the existing use, the former would result in a clear and significant change in the character of the use of the land of such materiality as to amount to a material change in use for which planning permission would be required.

13. The correct approach is to establish the relevant planning unit and its lawful use before assessing the effect of the proposed use on the definable character of that lawful use to determine whether, as a matter of fact and degree, there would be a material change in the use of the land. To determine whether there has been a material change of use it is necessary to consider the whole area occupied and used for a particular purpose, including any part of that area put to incidental uses. A subsequent change from a use incidental to the primary use to a use integral to it would not involve development provided it does not amount to an intensification of that primary use to the extent that a material change in the definable character of the use would occur.

14. It is therefore necessary to first establish the existing lawful use of the relevant planning unit. In the case of *Burdle v Secretary of State for the Environment* [1972] 3AER 240, 244 Bridge J suggested three broad tests for determining the appropriate planning unit. He went on to point out that the assessment was a

matter of fact and degree, and that there might be almost imperceptible change from one category to another. He suggested, as a useful working rule, that it should be assumed that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

15. The Council contends that the 2009 LDC merely confirms that the land had been used for this type of low intensity informal recreation by occupiers of the park for over 10 years at the date of issue not that it forms part of the adjacent caravan park "wider" planning unit such that it might be able to be used in a similar manner without the need for planning permission.
16. The 2009 LDC identified the recreational use of the land as being incidental to the lawful mobile home park use. As indicated above, the reasons given for issuing the 2009 LDC include that it "*would not involve a material change of use of the mobile home park*". As the Appellant points out, the 2009 LDC did not identify that the recreational area was within any use class such as D2 Assembly and Leisure¹ and it would have been required to do so if the use was within a use class². Furthermore, the ancillary use must fall within the same planning unit as the primary use.
17. The 2009 LDC was therefore granted on the basis that the recreational field formed part of the wider planning unit that included the adjacent mobile home park and the primary use of the land was for that purpose. The Appellant has submitted aerial photographs from 2006 to 2016 to support the claim that there has been no apparent material change in planning circumstances since the 2009 LDC was issued and the planning unit and lawful use remain the same.
18. Whether the site presently forms part of the larger planning unit which includes the adjacent mobile home park is a matter in dispute between the parties. The Council asserts that the appeal site is not functionally linked to the wider mobile home park and also refers to the public footpath and its separate use by members of the public. Similar points in relation to the use of the land by others and the appropriate planning unit are also made by third parties. However, those aspects referred to would not appear to have materially changed since the 2009 consideration of the matter and subsequent issue of the LDC. As indicated above, the lawfulness of the use certified at that time is to be conclusively presumed.
19. In any event, applying the *Burdle* test to the current situation, I find no reason to question the original assessment as to the relevant planning unit or the ancillary nature of the recreational use. The appeal site is in the same ownership as the mobile home park and the two areas are adjacent to each other sharing a common boundary. The Council suggests that the landscaping around the mobile home park and on the southern boundary of the appeal site contributes to a distinctive visual separation. However, having seen the site for myself and had regard to the factors mentioned by the Council, I do not find there to be any material physical separation between the two areas.

¹ See Town and Country Planning (Use Classes) Order 1987 (as amended)

² S191(5) Town and Country Planning Act 1990 (as amended)

20. As regards the functional link, there is a footpath that connects the two plots of land allowing pedestrian access between them. This footpath enables easy pedestrian access to and from the two adjacent areas which facilitates the recreational use of the land by the caravan park residents and provides a purposeful connection. There is also the gateway through which vehicular access can be gained into the appeal site from the mobile home site car park. The appeal site also accommodates the gas tanks which serve the mobile homes.
21. I conclude that the appropriate planning unit was correctly identified in 2009 and comprises both the appeal site and the adjacent mobile home park. Furthermore, the balance of the evidence indicates that there has been no material change in planning circumstances since that time and the primary lawful use of the whole planning unit including the appeal site is as a residential mobile home park. The fact that the land is crossed by an unfenced public footpath does not materially change the relevant planning unit or the primary use of the land. The footpath would be subject to other statutory protections and could not be affected by the proposal without the necessary authorisation.
22. The next consideration is therefore whether the proposed use would represent a material change in that existing lawful use of the planning unit. The Council contends that the character and land use of the appeal site appears to be of such low intensity that it almost seems unused. It submits that whilst the appeal site might be used for incidental informal recreation by residents of the mobile home park, the stationing of mobile homes on the appeal site would constitute a change in the character of the use of the land requiring planning permission.
23. However, the change falls to be assessed in terms of the impact upon the definable character of the lawful use of the planning unit as a whole and not just the appeal site. The definable character of that area is as a mobile home park with a proportion of the overall area being used for stationing residential caravans and the remainder used for ancillary purposes including recreation. The existing level of lawful use represents a baseline description of the character of that use against which any proposed development sought by the current application should be assessed.
24. The parties are agreed that use as a caravan or mobile home site is a *sui generis* use. The Council refers to the case of *Brooks and Burton v Secretary of State for the Environment* [1977] JPL 720 which made clear that intensification could indeed trigger a material change of use where the use is *sui generis*. This principle that intensification of a lawful use could amount to a material change of use was reaffirmed in the case of *Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd* [2012] EWCA Civ 1473 that is referred to by the Appellant. That site comprised a long established scrap metal yard which had been operating under an effectively unrestricted planning permission since the 1970s with no conditions attached to control matters such as the number of lorry movements or hours of operation. The Court of Appeal held that the test was whether there had been such a change in the definable character of the use that it amounted to a material change of use.
25. As the Council points out, this means that even though the appeal site falls within the primary caravan park planning unit, stationing additional caravans for residential occupation could materially change the character of the land and

use to a degree that would constitute a material change of use. Furthermore, deciding whether the proposed use would or would not materially change the use of the land requires consideration of the characteristics of the proposed use as compared to the existing use.

26. The Council draws support from other cases where it has been found that, even by increasing the number of caravans by a small amount on a primary caravan site planning unit, there would be a material change of use. The appeal decision relating to Dells Farm, Batemans Lane, Wythall, Birmingham³ concerned an LDC application for the use of ancillary amenity space to accommodate the stationing of an additional 8 caravans for residential purposes.
27. That Inspector referred to the High Court judgment in the case of *R (oao Childs) v First Secretary of State and Test Valley BC [2005] EWHC 2368 Admin* where the court confirmed that "*a mere increase in the number of caravans on the site can constitute a change of use.*" He examined the characteristics of the proposed use, as compared to the existing use, in terms of its potential planning consequences. In assessing whether a material change of use had taken place he had regard to changes in the openness and appearance of the land; increased traffic and the likelihood that additional drainage works would be needed before reaching the conclusion that there would be a change in the character of the use compared to the previous lawful use.
28. The Council also relies upon the appeal decision relating to land at Leckford Hutt, London Road, Leckford, Herts⁴ where an LDC was sought for the proposed increase from 5 to 15 caravans. That Inspector concluded that the proposed use would result in a material change in the definable character of the land and its use when compared to its lawful use. The Council submits that taking such an approach in relation to the Kings Copse Mobile Home Park it is evident that siting 27 caravans on the open field would have a significant and material impact in terms of the character and use of the land.
29. In response, the Appellant makes comparisons between the level of change under consideration in those decisions and the appeal proposal. The Appellant's Appeal Statement assesses the impact on the basis of an addition of 17 mobile homes which would increase the number of units by some 15%. However, as the Inspector in the *Dells Farm* appeal stated: "*I have noted the various appeal decisions referred to by the parties but each depends upon its own facts.*" Those facts and circumstances will inevitably vary from case to case.
30. The Appellant also seeks to distinguish those decisions on the grounds that the sites had been the subject of the grant of LDCs which had previously certified a lawful level of caravan site use in each case. Nevertheless, the setting of a level within an LDC does not provide a restriction on numbers as such, it simply provides a benchmark of the level of use at the date it was issued. Indeed, in the *Leckford Hutt* appeal, the reason given for granting the 8 September 2003 LDC which confirmed the lawfulness of an increase in the number of caravans on the site from 4 to 5 was that the proposed use would not constitute a materially different use to that use described in the earlier 2001 LDC⁵.

³ APP/P1805/X/10/2123027

⁴ APP/C1760/X/10/2125334

⁵ The appeal decision records that the 2001 date is in error and should read 24 April 2003.

31. The Appellant contends that the definable characteristic of the appeal site would remain as a caravan park forming part of the wider planning unit. The proposal would only see a change in the proportion of the planning unit on which caravans would be stationed and a consequential change to the extent of the ancillary areas. The Appellant submits that these changes would not be material; the definable characteristic would remain the same and no effects beyond those already permitted have been identified.
32. Conversely, the Council contends that stationing mobile homes on the appeal site would significantly and materially change the character of the use to an extent that it would amount to a material change in use. It submits that the proposed use would have an entirely different impact compared to what is afforded by the current far less intensive use. The off-site impacts generated by the intensified use that would be experienced by neighbours such as traffic movements, noise and disturbance would amount to a clear and significant change in the character of the use. Local residents also raise such potential off-site impacts including loss of privacy, increased traffic movements, light pollution and noise.
33. In assessing whether there would be a change in the character of the use, the impact of the use on other premises can be a relevant factor. It is necessary, on the particular facts, to consider both what would happen on the land and its likely off-site impacts when deciding whether the character of the use would change. However, the Council has based its assessment upon the introduction of 27 residential mobile homes onto the appeal site.
34. The proposed development is for the siting of an unspecified number of residential park homes on the land. The question for consideration in this appeal is whether, as a matter of principle, the siting of residential park homes on the appeal site could take place as part of the lawful use of the planning unit. That is all that needs to be ascertained for the purposes of this appeal. Furthermore, given the lawful use of the planning unit that question must be answered in the affirmative unless there would be a material change of use by way of intensification of the whole site.
35. The letter which accompanied the application the subject of this appeal states that: "*It would be open to the owners of the planning unit as a whole (i.e. the application site and the adjoining mobile home park) to rearrange units within the site without planning permission. For example, they may want to locate open space in the centre of the wide site and move units onto this land*". Thus, the proposed use sought by the LDC application could potentially encompass no overall increase in caravans on the planning unit whatsoever.
36. An increase in the number of caravans on an existing site can be material where the increase in numbers of caravans brings about a material change in the character of the use. That assessment can include factors such as the impact on the immediate surroundings including visual amenity and traffic. I recognise the particular features and existing characteristics of the appeal site and that off-site effects of an intensified use are a material factor. However, I do not believe that it could reasonably be claimed that no caravans whatsoever could be sited on the land without the likely generation of such on and off-site impacts that a material change in the definable character of the use would occur.

37. Thus, as a matter of principle, the grant of an LDC on the basis sought cannot be denied. Nevertheless, the intensification of the use from its current level could potentially amount to a material change of use. That would be the case even though there may be no planning conditions restricting the number of caravans on the planning unit and/or no LDC historically recording a particular level of use. Even though there is no planning condition restricting the number of caravans on the residential mobile home park it is not in dispute that the existing level of use is for the siting of 116 mobile homes and that has been the position following the grant of the 1989 planning permission and site licence. Therefore, the LDC to be granted will be qualified to reflect that position and make reference to the existing baseline level of 116 caravans on the whole planning unit.
38. The Appellant also questions whether the site already benefits from 'deemed planning permission' for use of the land as a caravan park. It submits that the site probably benefits from deemed planning permission for use of land as a caravan park without limitation or restriction by virtue of section 17 of the Caravan Sites and Control of Development Act 1960, as it existed in 1989, when read alongside sections 1(4) and 3(3) of the 1960 Act. It contends that this was, in effect, granted by the site licence issued in 1989 and, as there has been no change in the use of the land since then, deemed planning permission for the use of the land as a caravan site remains applicable.
39. The site plan which accompanied the 1989 planning application shows the appeal site as a separate area hatched blue falling outside the red line boundary of the mobile home park site. The block plan submitted with the planning application only covered the area which the Appellant assumes to be the red line boundary. It shows a 'play area' on the mobile home park site but the Appellant complains that this small area does not represent one tenth of the overall site area, as would have been required by the then in force 1986 site licence.
40. The appeal site was not within the scope of the 1989 planning permission which permitted an increase in the number of residential mobile homes on the adjacent park home site. Nonetheless, the 1989 site licence application plan shows the red line area as including the appeal site which is referred to as 'recreation area'. This represents an area of 4 acres with the part of the caravan park hosting the caravans covering an area of 8 acres. To comply with Condition 14 of the 1989 site licence the minimum area of provision for recreation and other purposes would have been 0.8 acres.
41. Be that as it may, I do not consider that it must necessarily follow that the area for which the licence was granted must have included the appeal site to provide the necessary area for recreation. It is not clear from the available evidence where the recreational area was finally located in order to comply with the conditions attached to this site licence. The plan which accompanies the copy of the 1989 site licence at Appendix 9C to the Appellants Statement does have a small recreation area marked on it that falls within the permitted mobile home park site. Looking at the evidence on this topic as a whole, it seems to me that the details and information provided in respect of the site licence application and the licence subsequently granted are incomplete and unclear.
42. The burden of proof is upon the Appellant in this matter. I consider that the position regarding the grant of any deemed permission in 1989 is a matter for

speculation. I am unable to conclude on the basis of the available evidence that, on the balance of probabilities, the appeal site benefits from any deemed planning permission as claimed by the Appellant. However, that does not have any material bearing upon my conclusions in relation to the other arguments raised as set out above.

Formal Conclusion

43. For the reasons given above, I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the proposed siting of residential park homes was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Formal Decision

44. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the proposed use which is considered to be lawful.

Wendy McKay

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 23 May 2017 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and hatched in black on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The Lawful Development Certificate (LDC) granted in 2009 identified the recreational use of the land as being incidental to the lawful use of the adjacent permitted mobile home park. The relevant planning unit was correctly identified by the 2009 LDC and comprises both the land the subject of that LDC and the adjacent residential mobile home park. The lawful primary use of the whole planning unit is therefore as a residential mobile home park. In principle, the use of this part of the planning unit for the siting of residential park homes would not amount to a material change of use provided it did not result in an intensification of the existing lawful use of the whole planning unit to the extent that it would result in a change in the definable character of the use.

Signed

Wendy McKay

Inspector

Date: 13 November 2018

Reference: APP/Q3115/X/18/3199426

First Schedule

The siting of residential park homes⁶ at a level that would not result in a material change in use of the relevant planning unit (which includes both the land described in the Second Schedule and the adjacent Kings Copse Mobile Home Park) from its use as existing on 23 May 2017, namely, use for the siting of 116 residential mobile homes.

Second Schedule

Land at Kings Copse Mobile Home Park, Watlington Road, Garsington, OX44 9BL

⁶ The specification of which would fall within the definition of a 'caravan' as set out in the Caravan Sites and Control of Development Act 1960 and the Caravan Sites Act 1968 (as amended)

CERTIFICATE OF LAWFULNESS FOR PLANNING PURPOSES

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 13 November 2018

by Wendy McKay LLB, Solicitor (Non-practising)

Land at: Kings Copse Mobile Home Park, Watlington Road, Garsington, OX44 9BL

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Scale: 1:1750

