

Planning Committee

7 January 2020

Waste Planning Application (County Matter)

Certificate of Lawful Development for an existing use or operation or activity: the importation, deposit, re-use and recycling of waste material and use of land for storage purposes

Land at Bolney Park Farm, Broxmead Lane, Bolney RH17 5RJ

Application No: WSCC/070/19

Report by Head of Planning Services

Local Member: Joy Dennis

District: Mid Sussex

Executive Summary

An application for a Certificate of Lawful Development has been submitted under Section 191 of the Town and Country Planning Act 1990 (the TCPA 1990) to determine the lawfulness of an existing use of land at Bolney Park Farm, east of the A23 in Bolney, Mid Sussex.

The Certificate is sought for the importation, deposit, re-use and recycling of waste material and the use of the land for storage purposes. The applicant contends the use has become lawful through the passage of time; that is it has taken place for a continuous period in excess of ten years and, therefore, it is immune from enforcement.

In considering the application, the existing and potential impacts of the development cannot be taken into account. Similarly, national and local planning policy and guidance is not material and it must not be considered in assessing the application. The only matter under consideration is whether or not development is lawful.

Although there is no statutory requirement to consult, interested parties were notified about the application. In response, details of the site history were received from the Environment Agency, Mid Sussex District Council and neighbouring residents.

Consideration of Key Issue

The only issue in determining this application is whether the applicant has demonstrated that the use of the site for the importation, deposit, re-use and recycling of waste material and storage has been undertaken for a continuous period of ten years, and is thereby lawful due to the passage of time.

If the County Council has no evidence to contradict the applicant's version of events, and provided the evidence provided by the applicant is sufficiently precise and unambiguous, the application must be approved.

There is no definitive information to indicate what the site was used for between 2009 (the beginning of the ten year period) and 2012. Based on aerial photographs and information from the applicant, parts of the site appear to have been in use as a depot from 2007, although this is not conclusive. From 2012, the site appears, from aerial photographs, to have been in storage use but not in use for waste processing. When officers visited the site in 2014, it was in use as a construction compound, albeit with an ancillary waste use through the creation of bunds and storage of road planings and bricks. When officers visited the site in 2018, it had clearly changed to primarily being in waste use, with recycled construction material stockpiled on the site, and new bunds having been created.

On this basis, it is considered that the site has not been in any continual use for a period of ten years. Evidence from 2012 confirms that the site was in storage use, with ancillary waste use, with part of the site remaining in agricultural use. Evidence from 2018 confirms that the site is now in waste use, with some elements of ancillary storage.

Further, none of the aerial photographs, until 2018, indicate that the entire site is in non-agricultural use. The aerial photographs from 2007, 2012, and 2015 all show land to the north, east, and south of the site retained as part of the surrounding agricultural landholding. Therefore, it cannot be concluded that the application site has been in a single use for a period of ten years because it has, in part, also remained in agricultural use.

Overall Conclusion

The applicant has failed to prove, on the balance of probability, that the use of the application site for the importation, deposit, re-use and recycling of waste material and use of the land for storage purposes, is lawful due to the passage of time. Evidence from the past ten years confirms that the site was in storage use, with ancillary waste use, with part of the site remaining in agricultural use. This has recently changed to a waste use, with some elements of ancillary storage.

Accordingly, a Certificate of Lawful Development should not be granted.

Recommendation

It is recommended that a Certificate of Lawful Development be refused on the basis that the applicant has not demonstrated, on the balance of probability, that the importation, deposit, reuse and recycling of waste material and the use of the land for storage purposes has taken place on land at Bolney Park Farm, Broxmead Lane, Bolney, for a period exceeding ten years (as set out in Appendix 1 of this report).

1. Introduction

- 1.1 An application for a Certificate of Lawful Development (CLD) has been submitted under Section 191 of the Town and Country Planning Act 1990

(the TCPA 1990) to determine the lawfulness of an existing use of land at Bolney Park Farm, east of the A23 in Bolney, Mid Sussex.

- 1.2 The Certificate is sought for the importation, deposit, re-use and recycling of waste material and the use of the land for storage purposes. The applicant contends that the use has become lawful through the passage of time, that is, it has taken place for a continuous period in excess of ten years (and so is immune from enforcement).

2. Site and Description

- 2.1 The application site comprises a 5.3 hectares parcel of land located on former farmland to the rear (east) of a permitted dwelling at Dan Tree Farm (see **Appendix 2: Site Location Plan**; and **Appendix 3: Site Boundary Plan**). The site shares an access directly to/from the A23 with Dan Tree Farm, although this is excluded from the site boundary. The site is some 220m east of the A23 near the Bolney junction.
- 2.2 The site falls entirely within the High Weald Area of Outstanding Natural Beauty (AONB). It is not within an area at increased risk of flooding, and is not subject to any ecological or historic designations.
- 2.3 To the north of the site is mature, semi-natural ancient woodland (Seven Acre Hanger), which is also a Site of Nature Conservation Interest (SNCI).
- 2.4 To the south and east is farmland forming part of Park Farm, which includes an equine operation to the south-west.

3. Relevant Planning History

- 3.1 There is no planning history relating to the application site. However, the access used to link the site to the A23 and the adjacent sites have planning permissions and history that are relevant considerations.
- 3.2 On land immediately south of the site, planning permission was granted in 2012 allowing the importation of some 76,500 cubic metres of inert waste to create a bund along the A23 (ref. WSC/077/11/BK). The access used for that development is the access to the application site. The construction of the bunds has been completed, with only their landscaping remaining outstanding.
- 3.3 The site access and land immediately west of the site has planning permission for a dwelling (Mid Sussex District Council (MSDC) ref. DM/15/1971). Although this permission has been implemented, the dwelling has not yet been constructed.
- 3.4 More recently, planning permission was refused by the County Council for bunds to be created around the dwelling through the importation of some 45,000 tonnes of inert waste (ref. WSCC/050/18/BK).

4. **The Proposal**

- 4.1 Although the historic use of the land is agriculture, the applicant is seeking a CLD for an existing use, namely the *"importation, deposit, re-use and recycling of waste material, and the use of land for storage purposes"*. Accordingly, the applicant has to demonstrate that the site has been used for this purpose for a continuous period in excess of ten years.
- 4.2 A covering letter submitted with the application states that the site has been in continuous waste use since 2007, although the applicants have had an interest in the land since 2006 and operated from the site prior to that, from at least 2004.
- 4.3 Aerial photographs from various years have been provided with the application (see **Appendix 4: Aerial Photographs from Applicant**), which the applicant states show:
- 2007: container, general storage and material piles;
 - 2012: material storage;
 - 2018: material storage.
- 4.4 The applicant states that the material shown was screened and reused in their operations.
- 4.5 Other documents have also been provided namely:
- Documents from Finning UK & Ireland Ltd.: Six 'daily service reports' relating to field repairs at Bolney dated 2004; and an email stating that since 2006, they have *"carried out warranty and general repairs to their concrete crushing and screening equipment and repairs to their excavators, loading shovels and dozers."*
 - A letter from Pirtek confirming that they *"have been continuously carrying out onsite repairs for plant and auxiliary equipment for the past 10 years"*, with works orders confirming plant repairs, albeit with records only dating from 2014.
 - An invoice from Bolney Park Farm dated 2 May 2007 relating to *"storage advance payment"* and *"planings aggregate and machinery"*.

5. **Legal Context**

- 5.1 The purpose of a CLD under Section 191 of the TCPA 1990 is to establish whether the use or development described in it, on the land it describes, is lawful in planning terms and thereby immune from enforcement action. Development is lawful if, or to the extent that, any of the following apply:
- (a) the activity does not constitute 'development' subject to planning control; or
 - (b) the development has been granted express planning permission; or
 - (c) the development is lawful through the passage of time (due to the four or ten year rule) and it is not subject to an extant enforcement notice.

- 5.2 In this case, the CLD is sought under criterion (c) on the basis that the time for enforcement action has expired. Under Section 171B of the TCPA 1990, no enforcement action may be taken, in relation to the change of use of land, after the end of a period of ten years beginning with the date of the breach.
- 5.3 Therefore, consideration of the application is entirely based on the length of time over which the use has taken place. The existing and potential impacts of the development cannot be taken into account. Similarly, national and local planning policy and guidance is not material and it must not be considered in assessing the application. The only matter under consideration is whether or not development is lawful.
- 5.4 For the CLD to be issued, the onus is on the applicant to supply sufficient evidence to show that, on the balance of probability, the identified use has been continuous for a period of ten years.
- 5.5 Planning Practice Guidance (PPG): 'Lawful Development Certificates' states:
- "In the case of applications for existing use, 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, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability."*
- 5.6 If granted, a CLD must precisely set out what is permitted and any limitations. Without precision, there is a risk of further disagreement as to the scope of the lawful development. The PPG states that any certificate must be precise *"so there is no room for doubt about what was lawful at a particular date, as any subsequent change may be assessed against it."*
- 5.7 A CLD remains effective in respect of the use or development described in it on the land it describes, as long as there is no subsequent material change in the circumstances.

6. Environmental Impact Assessment (EIA)

- 6.1 The nature of a Certificate of Lawfulness application is that it seeks to establish what development can lawfully take place. Therefore, the use does not constitute EIA development as defined by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

7. County Council Evidence

- 7.1 County Council officers have evidence about the use of the site based on visits to the site since 2014.
- 7.2 Officers first visited the application site on 18 February 2014 because it was being used as a construction compound by the applicant in relation to

creating the bund being created on land to the south (at Park Farm under planning permission ref. WSCC/77/11/BK). The site is referred to in officer notes from 2014 as a 'hardcore area' enclosed with trees to the west and an earth bund to the east.

- 7.3 Officer notes state that the site is "*littered with old portable office accommodation, drainage pipes, fuel containers, and approximately 30 6 yard skips. At the far point of the site there is a considerable pile of construction and demolition waste which appear [sic] to be part bladed into the ground extending the area out into the field. I asked NP [Nick Page, PJ Brown Ltd.] the reason for the waste pile, which he said was for constructing tracks within the planning permission area*" [i.e. the Park Farm bund site]. (see **Appendix 5: WSCC Site Photographs from 18 February 2014**).
- 7.4 Therefore, this suggests that the site was being used in early 2014 as a construction compound for works being undertaken to the south, namely creating the bund west of Park Farm and associated tracks. Some waste deposit was likely taking place for the purpose of extending the compound into surrounding land.
- 7.5 Photographs of the site from 4 March 2014 (see **Appendix 6: WSCC Site Photographs from 4 March 2014**) show similar, with stacks of skips and heras fencing, with other material such as tyres, drainage pipes, sheets of metal and storage containers.
- 7.6 Notes and photographs from a visit on 22 January 2015 confirm that the site was now unsealed, and that it contained road planings and broken bricks which the operator confirmed were to be used for the creation of tracks within the site. The site contained several storage containers and drainage pipes, as well as stockpiles of material (see **Appendix 7: WSCC Site Photographs from 22 January 2015**).
- 7.7 The application site was again visited on 17 July 2015 when notes refer to the site containing portacabins, new palletted bricks/blocks and other building materials; skips (several containing road salt); pieces of plant; a power screener and shovel; and stockpiles of inert, screened material (see **Appendix 8: WSCC Site Photographs from 17 July 2015**). The photographs suggest that the site remained in storage use, with no evidence of waste being processed.
- 7.8 Officer notes from a site visit on 8 October 2018 quote a representative of the applicant stating that "*the crusher and screener observed previously had been moved to another site, and that previously they were in this location for storage purposes*". During that visit, the site contained plant, skips, storage containers and stockpiles of crushed brick and aggregate (see **Appendix 9: WSCC Site Photographs from 8 October 2018**). It was also noted that there was a pair of new soil bunds along the north of the compound, which the representative confirmed had been created from imported, screened material (southern bund) and site-derived material (northern bund).

- 7.9 Officer notes from a site visit on 3 January 2019 state that a wheelwash had been installed, and that the site contained stockpiles of construction waste, skips with waste metal and wood waste, and various containers, as well as two screeners, although they were in such close proximity that they could not be used for processing waste (see **Appendix 10: WSCC Site Photographs from 3 January 2019**).

8. Consultations

- 7.1 There is no statutory or third party consultation in relation to Certificate of Lawfulness applications, as planning considerations and the impacts of development are not a relevant consideration.
- 7.2 However, PPG: Lawful Development Certificates advises that it may be reasonable for a local planning authority to seek evidence from these sources if there is good reason to believe they may possess relevant information about the content of the specific application - while stressing that views expressed by third parties on the planning merits of the case are irrelevant when determining the application.
- 7.3 The following organisations were notified about the application and invited to submit evidence.
- 7.4 **Environment Agency:** note observations from visiting the site between 2013 and 2018 that it has been in use as a construction storage area, in their opinion an 'overflow' for the applicant. Large quantities of material imported in 2014 but subsequently removed. Rarely witnessed anyone working in the storage area, or any waste activity other than the temporary and occasional storage of materials.
- 7.5 **Mid Sussex District Council Planning:** note several residential permissions relating to land at Dan Tree Farm to west; as well as:

01/01232/AGRDET Agricultural determination application for the infilling of the old bomb crater, levelling and re-seeding of area; easing of the slope of the field, and banking and planting of the lower slope. Approved July 2001. [relates to land to the north of the application site]"

Enforcement cases were also listed:

EF/88/0308 - Material change of use of land to a mixed use for the purpose of agriculture and the storage and manufacture/alteration of window frames ("the Development"). - Appeared a Notice was issued and then complied with. Closed in 1989.

EF/14/0238 - Change of use to construction compound with the crushing of waste. Was referred to WSCC as a waste matter.

Site notes from 4 March 2014 state Bob Penticost from PJ Brown Ltd.'s confirmed area was used for "contracting equipment, materials storage, generators and portable officers which come and go as the

business requires. None of the activities constituted waste development."

EF/18/0446 – COU to waste transfer – Was also referred to WSCC as a waste matter and it's this complaint which has led to the LDC you're now considering."

7.6 Mid Sussex District Council Environmental Health:

"In August 2002 we received a complaint that 60 to 100 lorries per day were visiting the site (Bolney Park Farm) causing noise and dust issues. Database entries state that a contractor, SE Tipping Ltd, were tipping spoil at the site of Browns Ltd. We checked with J Charlton of the EA who advised site was registered as exempt from waste licensing as only inert earth being tipped.

In December 2002 we received a similar complaint and our officer visited and saw several lorries visiting the site from SE Tipping Ltd.

In May 2004 there was a further complaint. Complainant was advised to contact WSCC Planning re enforcement of conditions. EA had visited site and were happy with the conditions.

There was another complaint in 2005, but no further complaints after this."

7.7 Bolney Parish Council: verbally advised they have no information to add.

7.8 WSCC Local Member Cllr Joy Dennis: no comment received.

8. Representations

8.1 Although there is no statutory requirement to undertake any consultation on this type of applications, neighbours in close proximity to the site were notified about the application and asked for any evidence they had relating to the use. In response, the following comments were received:

- Acknowledge the site has been in use for a number of years, but recent change and additional activity of waste handling, treatment, burning of non-aggregate by-products and onward distribution of aggregates (i.e. building waste treatment).
- Noted moved to area in July 2012; in recent years, they have noticed noise, smells and deterioration in the clean air as a result of site operations.
- Note activity not in operation in February 2013 (based on noise and smoke emissions more recently experienced).

9. Consideration of Key Issues

9.1 The only issue in determining this application is whether the applicant has demonstrated that the use of the site for the importation, deposit, re-use and recycling of waste material and storage has been undertaken for a

continuous period of ten years, and is thereby lawful due to the passage of time.

- 9.2 If the County Council has no evidence to contradict the applicant's version of events, and provided the evidence provided by the applicant is sufficiently precise and unambiguous, the application must be approved.
- 9.3 As noted above, it is the applicant's contention that the site has been used for a number of operations (namely waste importation, deposit, re-use and recycling, as well as storage) for a period of ten years (i.e. from at least October 2009 to October 2019). Effectively, the applicant needs to show that the site has been in this specific mix of uses for more than ten years.
- 9.4 The following considers the evidence provided by the applicant, and the Council's own evidence, to establish whether this is likely, on the balance of probability, to be the case.
- 9.5 There is no definitive information to indicate what the site was used for between 2009 (the beginning of the ten year period) and 2012. The applicant has submitted evidence from a business confirming that they carried out repairs of plant on the site since 2006, and an aerial photograph from 2007 (see **Appendix 4: Aerial Photographs from Applicant**) shows a small area along the western boundary of the site containing containers.
- 9.6 It is not considered that this is conclusive evidence that the site was in waste use at this time (2007). Although plant repair may have been undertaken on site, this could relate to the use of the site as a depot for the storage of plant by the operator, and is not necessarily conclusive proof that the site was used for waste importation/deposit/reuse/recycling.
- 9.7 The submitted invoice from Bolney Park Farm from 2007 relating to storage of 'planings, aggregate and machinery' is evident from later site visits where material and plant was seen to be stored on site. However, this does not necessarily lead to the conclusion that the site was in a waste processing use. Furthermore, the 2007 aerial photograph does not support the applicant's contention.
- 9.8 The 2012 aerial photograph is the first evidence that shows the site in use for storage of some nature, with stacks of blocks or similar evident along the western and eastern boundary, and portacabins or containers in the eastern part of the site (see **Appendix 12: Aerial Photographs 2005 - 2018**). However, it is not clear from these photographs that any sort of waste processing is taking place. No waste processing or screening equipment can be seen, and no open stockpiles of material are visible, as would usually be the case with such sites, and is the case today. Even if the material was sorted or screened by hand, there would be an area for depositing waste brought to the site, and a pile of sorted material.
- 9.9 From 2014 onwards, WSCC officers visited the site, taking notes and photographs of the site. It is considered that these details, particularly when combined with aerial photographs, provide conclusive evidence that the site has not been in a single use for the period from 2014 to 2019.

- 9.10 When officers visited the site in February and March 2014, they considered that it was in use as a construction compound used for the storage of plant and materials used by the site to the south, rather than a waste site. This view is borne out in photographs of the site from that time, and was confirmed verbally on site by the operator, adding weight to that conclusion.
- 9.11 Therefore, although it is likely that waste was being imported to the site in 2014, and that the site was in use for storage, there is no evidence that the waste was being re-used or recycled on the site at that time. Therefore, it is concluded that the site was in use for the storage of plant and materials, with an ancillary waste use including deposit and management.
- 9.12 It is evident that the use of the site had changed by 2018, by which time there were stockpiles of sorted aggregate and recycled construction material on the site, indicating that a waste importation and sorting activity was taking place, and waste had been deposited to create new bunds on the site. By 2019, a wheel wash had been installed, and separated piles of construction waste were evident, with skips containing non-inert waste on site.
- 9.13 On this basis, it is concluded that the site is now in waste use, involving the re-use and recycling of waste material, with an ancillary use for the storage of plant and equipment, albeit related to the waste operation. However, it is not considered that the site has been in a single, uninterrupted use for a period of ten years.
- 9.14 Further, none of the aerial photographs, until 2018, indicate that the entire site is in non-agricultural use. The aerial photographs from 2007, 2012, and 2015 all show land to the north, east, and south of the site retained as part of the surrounding agricultural landholding. Therefore, it cannot be concluded that the application site (see **Appendix 3: Site Boundary**) has been in a single use for a period of ten years because it has, in part, also remained in agricultural use.

10. **Overall Conclusion and Recommendation**

- 10.1 The applicant has failed to prove, on the balance of probability, that the use of the application site for the importation, deposit, re-use and recycling of waste material and use of the land for storage purposes, is lawful due to the passage of time. Based on aerial photographs and information from the applicant, parts of the site appear to have been in use as a depot from 2007, although this is not conclusive.
- 10.2 From 2012, the site appears, from aerial photographs, to have been in storage use but not in use for waste processing. When officers visited the site in 2014, it was in use as a construction compound, albeit with an ancillary waste use through the creation of bunds and storage of road planings and bricks. When officers visited the site in 2018, it had clearly changed to primarily being in waste use, with recycled construction material stockpiled on the site, and new bunds having been created.

- 10.3 Further, none of the aerial photographs, until 2018, indicate that the entire site is in non-agricultural use. The aerial photographs from 2007, 2012, and 2015 all show land to the north, east, and south of the site retained as part of the surrounding agricultural landholding. On this basis, it cannot be concluded that the application site has been in a single use for a period of ten years because it has, in part, also remained in agricultural use
- 10.4 On this basis, it is considered that the site has not been in any continual use for a period of ten years. Evidence from 2012 confirms that the site was in storage use, with ancillary waste use, with part of the site remaining in agricultural use. Evidence from 2018 confirms that the site is now in waste use, with some elements of ancillary storage.
- 10.5 Accordingly, a Certificate of Lawful Development should not be granted for the importation, deposit, re-use and recycling of waste material and use of land for storage purposes.
- 10.6 It is **recommended**, therefore, that a Certificate of Lawful Development be refused for the reasons set out in Appendix 1 of this report.

11 **Equality Duty**

- 11.1 The County Council has a duty to have regard to the impact of any proposal on those people with characteristics protected by the Equality Act 2010. Officers considered the information provided by the applicant, together with the responses from consultees and other parties, and determined that the proposal would have no material impact on individuals or identifiable groups with protected characteristics.

12 **Risk Management Implications**

- 12.1 The statutory framework covering 'lawfulness' for lawful development certificates is set out in the 1990 Act. Any decision that is not taken in accordance with the statutory requirements could be susceptible to an application for Judicial Review.

13 **Crime and Disorder Act Implications**

- 13.1 This decision has no implications in relation to crime and disorder.

14 **Human Rights Act Implications**

- 14.1 The Human Rights Act requires the County Council to take into account the rights of the public under the European Convention on Human Rights and prevents the Council from acting in a manner which is incompatible with those rights. Article 8 of the Convention provides that there shall be respect for an individual's private life and home save for that interference which is in accordance with the law and necessary in a democratic society in the interests of (inter alia) public safety and the economic wellbeing of the country. Article 1 of protocol 1 provides that an individual's peaceful enjoyment of their property shall not be interfered with save as is necessary in the public interest.

- 14.2 For an interference with these rights to be justifiable the interference (and the means employed) needs to be proportionate to the aims sought to be realised. The main body of this report identifies the extent to which there is any identifiable interference with these rights. The Planning Considerations identified are also relevant in deciding whether any interference is proportionate. Case law has been decided which indicates that certain development does interfere with an individual's rights under Human Rights legislation. This application has been considered in the light of statute and case law and the interference is not considered to be disproportionate.
- 14.3 The Committee should also be aware of Article 6, the focus of which (for the purpose of this committee) is the determination of an individual's civil rights and obligations. Article 6 provides that in the determination of these rights, an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a great deal of case law. It has been decided that for planning matters the decision making process as a whole, which includes the right of review by the High Court, complied with Article 6.

Michael Elkington
Head of Planning Services

Background Papers

As set out in Section 5.

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Appendix 12: Aerial Photographs 2005 - 2018

Contact: Jane Moseley, ext. 26948

Appendix 1 – Draft Refusal of Certificate of Lawful Development

West Sussex County Council is not satisfied that on 30 September 2019 the use described in the First Schedule in respect of the land specified in the Second Schedule to this certificate and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended) for the following reason:

- 1) On the basis of the evidence submitted with the application, the Council is not satisfied, on the balance of probabilities, that the use has taken place for ten (10) years prior to the County Council receiving application reference WSCC/070/19.

First Schedule

The importation, deposit, re-use and recycling of waste material and use of land for storage purposes for a period exceeding 10 years.

Second Schedule

Land at Bolney Park Farm, Broxmead Lane, Bolney RH17 5RJ