

Item Number: 13
Application No: 13/01242/CLEUD
Parish: Pickering Town Council
Appn. Type: Cert Lawful exist use or develop
Applicant: Hopkinson And Sons Ltd
Proposal: Certificate of Lawfulness in respect of the retail sales of goods in breach of condition 06 of approval 00/00400/OUT dated 04.08.2000 for more than 10 years before the date of this application
Location: Steam And Moorland Garden Centre Malton Road Pickering North Yorkshire YO18 7HG

Registration Date:
8/13 Wk Expiry Date: 25 December 2013
Overall Expiry Date: 26 November 2013
Case Officer: Shaun Robson **Ext:** 319

CONSULTATIONS:

Highways North Yorkshire No objection
Parish Council No views received to date

Neighbour responses: None

1.0 PURPOSE OF REPORT

1.1 To consider an application for a Certificate of Lawfulness for an existing use or development.

2.0 INTRODUCTION

2.1 Section 191 of the Town & Country Planning Act 1990 provides for anyone to apply to the Local Planning Authority for a Lawful Development Certificate (LDC). A Certificate is a statutory document certifying in the case of an application under Section 191, the lawfulness of existing operations on, or use of land.

3.0 TIME LIMITATION PERIODS FOR TAKING ENFORCEMENT ACTION

3.1 Section 171B(3) provides that where there has been any breach of planning control, except those relating to operational development and change of use to a single dwelling house, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach.

4.0 SITE

4.1 The application site is part of the Steam and Moorland Centre complex and is located outside the defined development limits for Pickering.

4.2 Outline planning permission was granted, closely followed by the reserved matters submission, for the erection of a garden centre which was approved on 3 October 2000. The main building, the subject of the CLEUD application, consists of a floor space of around 850-900m². This has been described as the Garden Centre building. Building control records show that this building was completed on 7 September 2001.

- 4.3 The second building on the Steam and Moorland complex falling outside the CLEUD application site has been described as the Machinery Centre. Building control records show that this building was completed on the 3rd January 2008.
- 4.4 Planning permission has been granted for a link building between the above two buildings comprising a proposed entrance and first floor café. Planning permission for this was approved on 10 August 2010. The planning permission was the subject of a variation application which was granted on 9 December 2011. The time condition expires on 8 December 2014. A further variation application was received on Friday 20 June 2014. This planning permission has not been implemented. The site of the link building is part of the CLEUD application site.

5.0 PROPOSAL

- 5.1 A Certificate of Lawfulness (CLEUD) is sought for the continued sale of a number of items restricted by condition 6 imposed on application 00/00400/OUT. Condition 6 states:-

The building(s) hereby approved shall only be used as a garden centre for the display and sale of the following categories of goods:

(i) Pot and bare rooted plants, ornamental fruit bushes and trees, seeds/bulbs, vegetable and bedding plants, ornamental and fruit trees, cut flowers;

(ii) Garden requisites such as composts, fertilisers, weed killers/disinfectants, spray equipment, netting, cloches, plant supports;

(iii) Gardening and greenhouse tools and equipment;

(iv) Gardening protective clothing and footwear;

(v) Garden pond liners, pumps and equipment, pebbles, aquatic plants, fish and fish food;

(vi) Fencing, path and patio construction materials such as gravel, paving slabs, edging materials;

(vii) Garden furniture and ornaments such as seating, umbrellas, barbecue and barbecue fuel, bird tables, feeders and bird feed;

(viii) Incidentals such as gardening books and videos, cards, artificial flowers, small animal feed (e.g. rabbit food); and

(ix) Natural and artificial Christmas trees, Christmas decorations, table decorations, Christmas cards.

The building(s) and land shall not be used for any other purpose (including any other purpose in Use Class A1 of the Schedule of the Town & Country Planning (Use Classes) Order 1987, or in any provision equivalent to that Class in any statutory instrument re-voking or re-enacting that Order with or without modification).

Reason:- The site is in open countryside where current planning policy would not normally permit general retail uses.

- 5.2 The application is made on the basis that goods have been sold from the premise for a period of ten years beginning with the date of breach - section 171 B (3).

- 5.3 The application is required to demonstrate that the goods listed have been sold for a period of at least 10 years. The time period dates from the validation date of the application (**30th October 2013 - 30th October 2003**).

6.0 HISTORY

14/00692/73A: Variation of condition 05 of approval 11/00749/FUL to apply condition restricting retail sales to building singular as opposed to building(s) plural.
Application received on Friday 20 June 2014.

13/00560/73A: Variation of condition 06 of approval 00/00400/OUT dated 04.08.2000 to allow the sale and display of additional goods as listed within the submitted supporting documentation dated 13th May 2013 - WITHDRAWN

11/00749/73A: Variation of condition 16 of approval 10/00114/FUL dated 10.08.2010 to change reference to approved plans and substitution of some plans - APPROVED - 9 December 2011. Time condition expires on 8 December 2014.

11/00622/73A: Variation of Condition No. 06 of approval 00/00400/OUT dated 04.08.2000 to allow the display and sale of additional goods as listed within the submitted supporting documentation dated 17 June 2011 - REFUSED 19/07/2012

10/00114/FUL: Erection of a two-storey, link extension between two existing buildings to form covered display and sales area to ground floor and cafe, offices, storage and staff room to first floor - APPROVED 10/08/2010

02/00880/FUL: Erection of building for use as garden and agricultural machinery centre and associated parking - APPROVED 13/09/2004

00/00917/REM: Erection of garden centre with associated parking and access - APPROVED 03/10/2000

00/00400/OUT: Erection of Garden Centre - APPROVED 04/08/2000

7.0 PLANNING STATUS OF THE USE

- 7.1 The relevant issues in considering this application in this part of the report would appear to be as follows:-

- (i) What is the relevant planning unit?
- (ii) What is the primary use of the planning unit, and if more than one use is involved was the use a mixed or composite use?
- (iii) Does Part 3 of the GPDO 1995 apply?

- 7.2 Turning now to each of the above questions:-

- (i) WHAT IS THE RELEVANT PLANNING UNIT?

- 7.3 The following three propositions identified in the case of *Burdle v SSE* (1972) are helpful in identifying the planning unit:-

- (a) the whole unit of occupation should be considered if it is possible to recognise the single main purpose of the occupier's use of land to which secondary activities are incidental.

- (b) the entire unit of occupation should be considered even when an occupier carries on a variety of activities which may not be confined to distinct areas of land.
- (c) within a single unit of occupation two or more physically separate and distinct areas may be occupied for substantially different and unrelated purposes. In such cases each area ought to be considered as a separate area.
- 7.4 The Judge in the Burdle case did indicate that it is a useful working rule to assume the unit of occupation to be the planning unit unless and until some smaller unit of the site can be seen where a use can be identified as being both physically and functionally separate.
- 7.5 The facts in the above case from the file appear to be as follows:-
- (1) The CLEUD application site is shown edged red on the attached Plan 1 .The whole Steam and Moorland complex is shown edged red and edged blue on Plan 1;
 - (2) In broad terms the following three predominant uses appear to have operated from the site:-
 - (a) Garden Centre (Open) - Sui generis.
 - (b) Garden Centre (Shop) in building – A1 with sales limited by condition.
 - (c) Machinery Centre and Workshop (Garden and Agricultural) - Sui generis.
 - (3) It should be noted that the applicants current application for a CLEUD has been made in respect of part only of the site identified as the planning unit. The use identified in paragraph 7.5(2) (c) above has been excluded from the CLEUD application. However for the reasons given below the Machinery Sales use which is a sui generis use together with the other uses within the planning unit are considered to comprise a mixed use.
 - (4) the planning history of the above site has been summarised above .
- 7.6 From this history it appears that the planning unit site has been historically a Garden Centre (Open), Garden Centre (Shop) in the building on the area shown edged red on Plan 1 and Garden and Agricultural Machinery Sales - Sui generis in the building on the area shown edged blue on Plan 1. Unless one can detect a smaller unit of the whole site which has been put to a use which is both physically and functionally separate, there would appear to be historically one planning unit.
- (ii) WHAT IS THE PRIMARY USE OF THE PLANNING UNIT AND IF MORE THAN ONE USE IS INVOLVED WAS THE USE A MIXED OR COMPOSITE USE?
- 7.7 Large complexes used for business purposes often comprise a multiplicity of uses, some of which are ancillary to the predominant or main uses.
- 7.8 This case involves a situation where two or more uses were carried on within a single planning unit. In this context it is helpful to be aware of the definition of terminology used by planners regarding dual, mixed and composite uses.
- 7.9 A dual use is two distinct uses of one unit, a mixed use is two or more uses. Finally a composite use covers both dual and mixed uses.
- 7.10 The three uses which have operated from the site have been summarised above. These would appear to comprise a mixed use.

(iii) DOES PART 3 OF THE GPDO 1995 APPLY?
MIXED USES, COMPOSITE USES AND THE TOWN & COUNTRY PLANNING
(USE CLASSES) ORDER

7.11 In general, mixed or composite uses fall outside the Use Classes Order. An exception is to be found in Article 3 (4) of the Use Classes Order 1987.

7.12 The Secretary of State in a Ministerial Planning Decision reported in [1991] JPL 282 made the following observation:

“Even if each of the uses comprised in the mixed or composite use is in the Use Class, the use will also be sui generis except in the circumstances described in Article 3 (4) of the 1987 Use Classes Order.”

7.13 If a Certificate is granted in terms of a mixed use, the Town & Country Planning (Use Classes) Order 1987 does not apply. Planning Permission would be needed for any material change in use.

8.0 APPRAISAL

8.1 The key question in this part of the report is whether or not sufficient evidence has been provided to prove on the balance of probabilities that there has been a breach of the restricted sales condition for a period of ten years ? The onus of proof lies with the applicant. The relevant standard of proof is the ‘balance of probability’ i.e. the applicant must prove in this case that it is more likely than not to be true.

8.2 It must be demonstrated that the ‘sales’ have been carried out from the building through the production of statements, bills, statutory declarations etc.

8.3 The submission was accompanied by a Statutory Declaration from the owner (Mr Hopkinson) and a range of receipts for a variety of goods ranging from 2007 - 2013 (6 years).

8.4 The extensive series of receipts cover 13 areas, namely:-

8.4.1 Books (non-gardening): cookery books, leisure maps, crosswords, short walk guides, images of North Yorkshire;

8.4.2 Indoor toys and games: pillows, plush toys, board games, jigsaws, die-cast farm toys, dominoes, playing cards;

8.4.3 Outdoor toys & games: lawn swing, kite(s), paddling pool, small trampoline, rounder sets, lawn darts;

8.4.4 Food (for consumption off the premises): jams, biscuits, preserves, cans of drink, ice creams (seasonal);

8.4.5 Non-gardening clothing: travel jacket, ladies fleece, ladies jackets, men’s gilet and fleeces, shirts, shooting waist coats, jeans, wax jackets, walking boots, tweed caps and wellies;

8.4.6 Non-gardening footwear: wellies, winter boots, safety boots;

8.4.7 Hardware and Electrical (small) products: electrical cable, caulking guns, switches, cable ties, clips, junior hacksaws, screw drivers, drill bits, spirit levels, metalcote paint, washer bolts, saw blades, hand drill (small amounts);

- 8.4.8 Homeware: coasters, mugs, trays, table mats, tea towels, oven gloves;
- 8.4.9 Gift ornaments: rugs (small amounts), decorative signs, wind chimes, wicker baskets, vases (various designs);
- 8.4.10 Gas, coal, logs and winter accessories: logs, hot max, coal, gas bottles.
- 8.5 In a letter dated 27 December 2010, Mrs Anne Hopkinson, a Director of the Steam and Moorland Garden Centre indicated in relation to an enforcement investigation with regard to the sale of DIY goods, that those products were at one point only sold from a separate building to the Garden Centre.
- 8.6 Following an assessment of the above information it transpired that a gap appeared with regard to the D.I.Y sales and the location on the site. It appeared as if the items were sold from building to the rear of the garden centre building which was only completed, as per building control records, on the 3rd January 2008.
- 8.6 By a letter dated 13 December 2013, the applicants agent was requested to supply the following further evidence

In order to address the above matters it may be appropriate to provide the following:-

- *Additional statutory declarations from suppliers or former/current employees;*
- *Provide additional receipts for the remaining 3 years in order to support the current 7 years of records;*

- 8.7 A further Statutory Declaration from the owner and current employee (Mr Peter Turnbull) was submitted that re-affirmed the case for the items listed above and clarified the area from which the D.I.Y equipment was sold. The statutory Declaration covered the full 10 year period.
- 8.8 The applicant has not as recommended submitted any evidence from suppliers or other independent witnesses for the time period 2003-2006. There is no documentary evidence for the time period 2003 - 2006 because there records have not been kept by the applicant.

9.0 CONCLUSION

- 9.1 It is considered that in seeking a Certificate of Lawfulness for an unrestricted Use Class A 1 retail use on the CLEUD application site, the CLEUD application does not accurately and properly reflect the extent of the planning unit on the Steam and Moorland complex and the mixed uses that currently exists on the whole Steam and Moorland complex as described in the report .
- 9.2 It is further considered that there is insufficient evidence in terms of documentary evidence and evidence from suppliers or other independent witnesses for the time period 2003 -2006. There has also been a conflict of evidence in that it appears that D.I.Y items were sold outside the CLEUD application site from a building to the rear of the garden centre building which was only completed according to building control records on the 3rd January 2008. An appeal decision indicates that in circumstances where there is a conflict of evidence provided within a Statutory Declaration this should be treated with care due to the fact that 'memories can be imperfect'.
- 9.3 Against this background it is considered that the evidence submitted on behalf of the applicant is not sufficiently precise and unambiguous to justify the grant of a Certificate "on the balance of probability".

10.0 RECOMMENDATION

That the application be refused as not proven on the present evidence

RECOMMENDATION: **Refusal**

Background Papers:

Adopted Ryedale Local Plan 2002
Local Plan Strategy 2013
National Planning Policy Framework
Responses from consultees and interested parties