

Appeal Decision

Planning Appeals Commission
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Appeal Reference:	2020/E0057
Appeal by:	Mr Brian Sands
Appeal against:	Refusal to certify a Certificate of Lawfulness for an Existing Use or Development.
Development:	The storage, processing and distribution of minerals (soil and stones) and use of an existing access onto Scarva Road.
Location:	Lands opposite (30m southeast) of No. 161 Scarva Road, Banbridge.
Planning Authority:	Armagh City, Banbridge and Craigavon Borough Council.
Application Reference:	LA08/2020/0213/LDC
Procedure:	Informal Hearing on 29 th June 2022
Decision by:	Commissioner Jacqueline McParland, dated 7 th March 2023.

Decision

1. The appeal is dismissed.

Reasons

2. This appeal was subject of a conjoined hearing with appeal 2021/E0011 which relates to an appeal against an Enforcement Notice on the same site.
3. The main issue in this case is whether the use of the appeal site and the use of the access onto Scarva Road is lawful.
4. An application for a Certificate of Lawfulness for an Existing Use or Development (CLEUD) was received by the Council on 14th February 2020, in accordance with Section 169 of the Planning Act (Northern Ireland) 2011 (the Act).
5. Section 169 of the Act makes provision for the issue of a CLEUD. Section 169 (2) indicates that for the purposes of this Act uses and operations are lawful at any time if: (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
6. Section 169 (4) of the Act states that 'if, on an application under this section, the Council is provided with information satisfying it of the lawfulness at the time of the application of the use, operations or other matters described in the application, or that description as modified by the Council or a description substituted by it, the

Council must issue a certificate to that effect; and in any other case it must refuse the application’.

7. Section 132 of the Act refers to time limits for taking enforcement action against breaches of planning control. Section 132 (1) of the Act states that where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of 5 years beginning with the date on which the operations were substantially completed. Section 132 (2) of the Act states that where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling-house, no enforcement action may be taken after the end of the period of 5 years beginning with the date of the breach. Section 132 (3) of the Act states that in the case of any other breach of planning control, no enforcement action may be taken after the end of the period of 5 years beginning with the date of the breach.
8. There are two elements set out in the application for the Certificate. The first is the use of the appeal site for the storage, processing and distribution of aggregate and soil. The second is the use of the access onto the Scarva Road. The issue in this case therefore is whether the submitted evidence is sufficient to demonstrate these two elements have been in use for a period of 5 years or more at the time of application on 14th February 2020. For both elements the critical date is 14th February 2015, some five years from the date the application for the Certificate was made to the Council. In the case of an application for a CLEUD, the onus is on the applicant to provide evidence of the lawfulness of the use or development cited in the application forms.
9. At the hearing, the appellant stated that the use of the appeal site at the time the application was submitted comprised of the storage and processing of construction waste. The appellant stated the waste is brought onto the site via the access onto Scarva Road and stored on the west of the appeal site. It is then put through a screener and recycled into aggregate and topsoil which is stored on the east of the appeal site. The aggregate and soil are then distributed from the site via the access onto Scarva Road. At the hearing, the appellant stated that this was now the primary use of the appeal site. The appellant stated that prior to 31st May 2018, the site was mainly used as an additional storage facility for the storage, processing and distribution of minerals (stones and soil) in conjunction with his business which is located at 131 Scarva Road. The appellant considers that the use of the appeal site prior to May 2018 and its use at the time of the application involved the storage and processing of aggregate for distribution. The appellant therefore considers that a material change of use did not occur on the appeal site from 31st May 2018.
10. In support of the appellant’s arguments a number of aerial photographs of the site were provided. These include:
 - An aerial photograph dated 1st January 2010 illustrates a small accumulation of aggregate (covering approximately one thirtieth of the site) along the southern boundary of the appeal site and an access is evident onto the Scarva Road, directly opposite No. 161 Scarva Road. A field gate is apparent in this photo, located opposite No. 157, however there is scrub

vegetation surrounding it immediately inside the site, which indicates that it was not in use at that time.

- An aerial photograph dated 15th February 2011 shows the majority of the site laid in hardcore, with a minor increase in the accumulations of aggregate present to the northwest of the appeal site. A vehicular access is present directly opposite No. 161 Scarva Road. The field gate is apparent opposite No. 157; however, it appears that scrub vegetation remains present immediately inside this gate, which indicates that this access was not in use at that time.
- An aerial photograph dated 9th June 2013 demonstrates a similar amount of the material to that evident in the photograph of 15th February 2011 remained on site and the access opposite No. 161 is still evident. However, the vegetation on the land directly behind the field gate opposite No. 157 has significantly increased with what appears to be gorse shrubs, indicating that it was not in use at that time.
- The aerial photograph dated 15th April 2014, illustrates that vegetation had been cleared along the northern area of the appeal site. A small accumulation of aggregate is still present along the southern boundary and along the north-western boundary, covering around one twentieth of the site. Two field gates are evident. One opposite No. 161 and one opposite No. 157. As the vegetation has been cleared along the northern boundary where these field gates are situated, and in the balance of probabilities it is possible that both accesses were in use at this time.
- A further aerial photograph dated 24th July 2014 shows similar amounts of aggregate to the west of the site to that which appeared in the photograph of 15th April 2014, with the two field gates and accesses remaining evident.
- The aerial photograph dated 22nd September 2014 demonstrates that similar amounts of aggregate remain along the southern boundary, with three small mounds of aggregate and a mound of soil present to the southwest of the site. The two field gates remain evident, however the access opposite No. 157 has re-vegetated indicating a lack of use.
- Aerial photographs taken on 20th and 23rd June 2015 illustrate that there are two accumulations of aggregate, and one mound of soil present along the southern boundary. Both access points are evident and appear to be in use to access the appeal site.
- The aerial photograph dated 17th May 2018, illustrates significant levels of topsoil spread across the site, with two larger areas of aggregate located on the south and southwest of the site. Then majority of the site is now in use for the storage of material and accessing those areas of storage. The access opposite No. 161 appears to have been closed up and planted with vegetation. The access opposite No. 157 has been widened slightly and is now the primary access to the appeal site.
- In the aerial photographs from 24th May 2018 and 29th June 2018 it is evident that the use of the site remains significantly intensified. The quantities of material stored on the site have increased. The majority of the western half of the site is occupied by construction waste, with a large mound of soil present along the northern boundary. The whole site is now in use. The access opposite No. 161 remains closed up and planted with vegetation. The access opposite No. 157 remains the primary access to the appeal site.
- Two further aerial photographs dated 15th October 2018 and 30th January 2019 were provided by the appellant. They illustrate significant quantities of

material on the west of the site, with a large quantity of what appears to be soil stored on the east of the appeal site. The access opposite No. 157 provides the primary access to the site, whilst the access point opposite No. 161 remains closed off.

11. Having considered the photographic evidence I can ascertain that the appeal site has had aggregate stored on it throughout the period of 2010 to 2019, with the exception of 2012. However, for this period there is no evidence of a screener or crusher in any of the aerial photographs to demonstrate that the site has been used for processing of materials.
12. The aerial photographs indicate that there were two field gates providing access to the site from 2010. It is evident that the access opposite No. 157 remains vegetated in the majority of the aerial photographs indicating a lack of continuous use up until 20th and 23rd June 2015. Following these photographs there is an almost three-year gap in the aerial photographs from 23rd June 2015 to 17th May 2018. The appellant did not provide me with any persuasive evidence to demonstrate when the access opposite No. 161 was closed up and planted out with vegetation. Consequently, I am not persuaded that the aerial photographs demonstrate on the balance of probabilities that the access was in use from 14th February 2015 continuously until the application was made on 14th February 2020.
13. In addition to the aerial photographs the appellant provided invoices and receipts to demonstrate the lawfulness of the use of the site in support of his application. I note the majority of these relate to the appellant's other business address at 131 Scarva Road or they are not site specific. Therefore, these are not determining in the consideration of this appeal.
14. However, site specific invoices for the loan of a screener from Colon Brothers have been provided. These invoices state that a screener was on loan at the yard opposite 157 Scarva Road on the following dates:
 - 07/03/2014 to 29/03/2014
 - 13/08/2014 to 22/08/2014
 - 11/04/2015 to 25/04/2015
 - 11/05/2015 to 01/08/2015
 - 27/02/2016 to 08/07/2016
 - 05/09/2016 to 23/09/2016
 - 11/02/2017 to 24/02/2017
 - 08/07/2017 to 07/08/2017
 - 08/03/2018 to 07/04/2018
 - 11/09/2018 to 28/09/2018The appellant also submitted a receipt for the purchase of a screener dated January 2019. Further site-specific invoices from King Bro's Quarry were provided for the delivery and loan of a crusher and screener at the yard opposite 157 Scarva Road on the following dates:
 - 01/08/2015 to 15/08/2015
 - 23/06/2016 to 25/06/2016
 - 20/07/2018 to 11/08/2018 (screener only)

15. The third parties raised concerns relating to the veracity of the invoices given the absence of a screener in the aerial photography dated 20th June 2015. At the hearing, the appellant clarified that in periods when the screener wasn't in use, it

was moved to the appellant's yard at 131 Scarva Road. Notwithstanding this, given that invoices were submitted which covers each calendar year from 2014 to 2020 I am satisfied in the balance of probabilities that the screener was present for short periods on the appeal site to carry out the processing of aggregate. In the Council's site photographs dated 4th September 2018, 2nd July 2020 and 24th July 2020 submitted in evidence for appeal 2021/E0011, a screener and mounds of aggregate and soil remained present on site. Consequently, in the evidential context, I am satisfied in the balance of probabilities that there has been an element of processing of aggregate on the appeal site from March 2014 to July 2020. However, given the limited periods indicated in the invoices from March 2014 to September 2018, the use of a screener for processing was clearly ancillary to the storage use indicated within the aerial photographs from March 2014 to September 2018.

16. Six affidavits in support of the application were also submitted by the appellant. These are all dated and sworn on 4th August 2020 and are accompanied by a map which outlined the appeal site in red and the access onto the Scarva Road indicated. The appellant and his brother Aaron Sands both submitted affidavits. They state that they are both the part-owners of the subject site. They confirmed that they rented the appeal site from early 2010 until 2nd March 2017 when they both purchased it from Mr Kirby McGovern of Blue Road, Banbridge. They stated that the subject lands have been used for the importation, screening/crushing and stockpiling of materials to produce a recycled aggregate product for exportation and re-sale. They further stated that the materials are delivered to the subject site in raw format via Sands Plant Hire, which is a haulage company operated by both of them. The materials are then processed as outlined above, re-sold, and transported or collected from the site. They state that the intensity of materials on site can vary and is dependant, on the company's volume of work, but the use of the site did not cease and has continued without significant change or interruption to the present day. Whilst both affidavits include information about processes and use of the appeal site, neither Mr Brian Sands or Mr Aaron Sands provided any dates or timelines for these activities to demonstrate the use has been continuous for five years at the time the application was submitted. As they were sworn on 4th August 2020, they cover the time frame to 4th August 2015, leaving a 5-month gap in the evidential context. Furthermore, no evidence is provided to differentiate between the change of material stored on the appeal site which occurred on 31st May 2018 and the use of the land prior to that date. Therefore, these affidavits do not demonstrate alone that the existing use of the appeal site at the time the CLEUD application was submitted was immune from enforcement action for the required 5-year period.
17. Four further affidavits were submitted by Declan McGovern, Derek Copeland, William Fletcher and Martin Mooney. These affidavits are all sworn and dated on 4th August 2020. These are as follows:
 - Declan McGovern's affidavit states that he is a director of McGovern Builders Ltd of 10 Lisnavarragh Road, Scarva and as a Company they have used Sands Plant Hire for 40 years. Mr McGovern confirmed that he visited the subject site on several occasions since 2010 as a customer to collect screened topsoil and sand. The frequency of visits would average one visit per calendar month. He further stated that he accessed the site via the entrance denoted with an "X" on exhibit DMcG1, which is the access now primarily in use opposite No. 157 Scarva Road. The materials were already

processed and stockpiled on the subject site in approximate areas shown on the accompanying map exhibit DMcG1.

- Derek Copeland's affidavit states that he has been employed full-time by Sands Plant Hire of 131 Scarva Road, Banbridge, for approximately 5 years from 4th August 2020. He confirms that he has drawn materials to and from the subject lands on many occasions over the last 5 years and that he accessed the site via the direct access from the Scarva Road denoted with an "X" on exhibit DC1 which is opposite No. 157 Scarva Road. He also stated that he has operated plant and machinery on subject lands to screen/process materials consisting of stone and topsoil, which were located approximately as shown on exhibit DC1.
 - William Fletcher in his affidavit dated 4th August 2020 states that he has been employed full-time by Sands Plant Hire of 131 Scarva Road Banbridge, for approximately 5 years. He confirms that he has drawn materials to and from the appeal site on many occasions over the last 5 years and that he accessed the site via the direct access opposite No. 157 Scarva Road denoted with an "X" on exhibit WF1. He also states that he has operated plant and machinery on the appeal site to screen/process materials consisting of stone and topsoil, which were located approximately on the area indicated as "X" as shown on exhibit WF1.
 - Martin Mooney in his affidavit dated 4th August 2020 states that he is employed by Brookefield Fuels, located at 21 Lisnaiffy Road, Gilford. He confirms that he has supplied fuel to the appeal site on several occasions over the last 5 years and that he accessed the site via the direct access opposite No. 157 Scarva Road denoted with an "X" on exhibit MM1. The fuel supplied was used in a mobile screener and associated plant from Sands Plant Hire. He states that this machinery was already on the appeal site was being used to screen/process materials consisting of stone and topsoil.
18. Declan McGovern's affidavit indicates that the site and access has been in use from 2010. However, the third parties have submitted a google street view photo indicating that a large gorse shrub was present directly behind the field gate opposite No. 157. At the hearing they advised me that the google street view image was taken in May 2011. I also note that in the aerial photograph of 9th June 2013 this area behind the field gate remains heavily vegetated with what appears to be gorse vegetation. Given the size and proximity of the gorse vegetation to the field gate in these images I consider on the balance of probabilities it is unlikely that this access was used for commercial deliveries or collections during this time frame. In all the affidavits it is stated that from their significant knowledge of the site and the appellant's business, that the subject lands have been used for the storage and processing of materials for re-sale for more than 5 years from 4th August 2020 and that these uses have continued to the present day. Three of these affidavits also state that they have used the access to the site for 5 years prior to 4th August 2020. Therefore, on the balance of probabilities, as collaborated by the aerial photographs, there remains a gap of around 4 to 5 months (from 14th February 2015 to 20th June 2015) in the evidence from demonstrating that the access to the appeal site has been in use from the critical date of 14th February 2015.
19. A Certificate of Exemption from NIEA was also submitted by the appellant. This allowed 'the manufacture from waste concrete, bricks, tiles and ceramics, soil, and

stone, and bituminous materials which arises from demolition or construction, of aggregate' on the appeal site during the period 31st May 2018 to 30th May 2021. This demonstrates that the site was exempt from requiring a licence to store and recycle construction waste. The Council also submitted a copy of a Planning Contravention Notice (PCN) completed by the appellant within their evidence for appeal 2021/E0011. In this PCN the appellant stated that the use of the appeal site for the storage and recycling of construction waste commenced on 31st May 2018.

20. In response to question 7 of the LDC 1 form submitted which was amended before a decision on the application was made by the Council, the appellant stated that the use of the appeal site at the time the application was submitted on 14th February 2020 comprised of a Sui Generis use class in accordance with paragraph 3 (4) (j) of the Use Classes Order (Northern Ireland) 2015 (UCO). However, the uses described at paragraph 3 (4) (j) of the UCO are "as a scrapyards, or a yard for the storage or distribution of minerals or the breaking of motor vehicles". Whilst I agree with the appellant that this use would adequately cover the storage and distribution of minerals; it does not refer to the treatment or recycling of construction waste. Therefore, the appellant's reliance on paragraph 3 (4) (j) of the UCO as the appropriate use class at the time the application was made is not well founded.
20. The appellant submitted a site layout, Drawing No. 03 Rev A, (1:500) date stamped 28th July 2020 as part of the certificate application. This drawing illustrates that the aggregate is stored on the west of the site with the topsoil stored on the east of the site. However, at the hearing the appellant stated that the primary use of the appeal site at the time the application was made was the storage and processing of construction waste material which commenced on site on 31st May 2018. The appellant indicated that the construction waste was stored on the west of the site and the recycled aggregate and soil was stored on the east. This concurs with the Council's site photographs dated 4th September 2018, 2nd July 2020 and 24th July 2020 and what I observed on site on 27th June 2022 and 3rd February 2023. It is also reinforced by the appellant demonstrating that the appropriate permissions from Northern Ireland Environment Agency (NIEA) were sought in May 2018. Therefore, limited reliance can be placed on Drawing No. 03 Rev A as it is not an accurate reflection of what was occurring on the appeal site at the time the certificate application was made.
21. At the hearing, the third parties stated that there was a notable increase in noise emanating from the appeal site which started in the summer of 2018 and continued, as a result of processing the waste material. I also note that an invoice was submitted by the appellant which demonstrates that a screener was purchased and has been situated on the appeal site since January 2019. At the hearing, the appellant stated that recycling of the waste material required an increased use of the screener, and it was more financially prudent to purchase one for the appeal site. This evidence correlates with the third parties' evidence in respect of an increase in noise. This demonstrates that there was an increase in processing on the appeal site from the summer of 2018.
22. It is also evident from the aerial photographs of 24th May 2018, 29th June 2018, 15th October 2018 and 30th January 2019 that the use of the site has significantly intensified and that the access indicated on Drawing No. 03 Rev A, (1:500) date

stamped 28th July 2020 had become the primary site access and had been widened slightly to accommodate that increased use. The appellant also stated that the aggregate stored on the site was predominantly that produced from the recycling of the construction waste. I consider that the storage of this aggregate is an ancillary process which is inextricably linked to the recycling and processing of the waste material. As such, given the storage of waste material and increase in processing of that material, I consider that the existing use is of a different nature and operation to that which existed prior to 31st May 2018 which has resulted in a materially different situation in planning terms. The evidence provided indicates, as a matter of fact and degree, that the change from the storage and distribution of aggregate to the recycling of construction waste into aggregate and soil which is stored and distributed from the appeal site does, in this specific context, constitute a material change of use. Accordingly, the existing use of the appeal site at the time the application was made comprised primarily of a waste management facility which recycles construction waste into aggregate and soil for distribution. This use falls within Paragraph 3 (4) (o) of the UCO. This is a different use to that which existed on site prior to 31st May 2018, which would have constituted a 3 (4) (j) Sui Generis use class. Therefore, the commencement of the importation of construction waste onto the appeal site, its recycling into aggregate and the storage and distribution of that aggregate introduced a new Sui Generis use onto the appeal site on 31st May 2018.

23. No persuasive evidence was submitted to demonstrate that the storage, processing and distribution of aggregate in association with the appellants other business at 131 Scarva Road took place alongside the processing and recycling of the waste material. Whilst both uses which have occurred on the appeal site since 2010 are Sui Generis, the change from one Sui Generis use to another on 31st May 2018 represents a material change of use of the land. Section 169 (1) states that 'if any person wishes to ascertain whether - (a) any existing use (*my emphasis*) of buildings or other land is lawful; (b) any operations which have been carried out in, on, over or under land are lawful... that person may make an application for the purpose to the appropriate council specifying the land and describing the use, operations or other matter'. Therefore, a CLEUD application can only relate to an existing use. Consequently, on the balance of probabilities there has been a material change of use of the appeal site on 31st May 2018 to a waste management facility. In this evidential context the previous use for the storage and distribution of minerals was superseded in May 2018.
24. All in all, the evidence demonstrates that the appeal site was used to store a small amount of aggregate from 2010 to 2018. From May 2018, the evidence indicates that the use of the site significantly increased. The submitted evidence including affidavits, aerial photographs and invoices do not differentiate between the use which occurred on the site prior to 31st May 2018 which was the storage and distribution of minerals and that which was existing on site at the time the application was made. I have already concluded that there is an evidential gap of four to five months of demonstrating the continuous use of the access. Therefore, in the evidential context, the appellant has not demonstrated on the balance of probabilities that the existing access and use of the appeal site for the storage and processing of aggregate and soil was immune from enforcement action for the 5-year period required by Section 132 of the Act. Accordingly, it has not been demonstrated that the existing use and use of the access is lawful. I therefore

conclude that the Appellant is not entitled to a CLEUD for the existing use applied for.

This decision is based on the following drawings: - Site Location Plan at 1:1250 (Drawing 01, Rev A) date stamped by the Council 28th July 2020 and Site Layout at 1:500 (Drawing 03, Rev A) date stamped by the Council 28th July 2020.

COMMISSIONER JACQUELINE MCPARLAND

List of Appearances

- Planning Authority:- Mr Liam McCrum (Armagh City, Banbridge and Craigavon Borough Council)
Mrs Oonagh Starrs (Armagh City, Banbridge and Craigavon Borough Council).
Mrs Elaine Quinn (Armagh City, Banbridge and Craigavon Borough Council).
- Appellant:- Mr Andy Stephens (Matrix Planning Consultancy)
Mr Brian Sands (Snr)
Mr Brian Sands (Jnr)
Mr Aaron Sands
Mr William Fletcher
Mr Declan McGovern
- Third Parties:- Mr Gerarde McArdle & Mrs Sonja McArdle (157 Scarva Road).

List of Documents

- Planning Authority:- "B1" Statement of Case, Armagh City, Banbridge and Craigavon Borough Council.
"B2" Rebuttal, Armagh City, Banbridge and Craigavon Borough Council.
- Appellant:- "A1" Statement of Case by Matrix Planning Consultancy
"A2" Rebuttal by Matrix Planning Consultancy.
- Third Parties:- "C1" Statement of Case Mr Gerarde McArdle & Mrs Sonja McArdle
"C2" Rebuttal Mr Gerarde McArdle & Mrs Sonja McArdle
"D1" Statement of Case, Gerard and Stacey Fullerton
"D2" Rebuttal, Gerard and Stacey Fullerton
"E1" Statement of Case, Winifred Fullerton
"E2" Rebuttal, Winifred Fullerton
"F1" Statement of Case, Mervyn and Felicity Colgan