The Planning Inspectorate

Appeal Decision

Site visit made on 14 December 2016

by Melissa Hall BA(Hons), BTP, MSc, MRTPI

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

Decision date: 20 March 2017

Appeal Ref: APP/D3315/X/16/3150659
Kedget Barton Farm, Churchstanton, Taunton, Somerset TA3 7RN

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Tony Reynolds against the decision of Taunton Deane Borough Council.
- The application Ref 10/14/0034/LE, dated 24 October 2014, was refused by notice dated 18 February 2015.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is the construction of a dwelling with unrestricted occupancy.

Decision

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

Application for costs

2. An application for costs has been made by the appellant against Taunton Deane Borough Council. This application is the subject of a separate Decision.

Procedural Matters

3. Although the description of the development for which an LDC is sought refers to the 'construction of a dwelling with unrestricted occupancy', the submissions relate to whether the dwelling was constructed and substantially completed in breach of Planning Permission Ref 10/2004/028 and for a period of time so as to be immune from enforcement action; it is thus not just a question of whether the occupancy condition imposed therein has any effect. It is on this basis that the LDC was considered by the Council and upon which I determine the appeal.

Preliminary Matters

4. Planning permission was granted for the construction of a dwelling on 25 January 2005 under Planning Permission Ref 10/2004/028 ("the 2005 permission"). Condition 2 of that permission states that:

'*The occupation of the dwelling shall be limited to a person solely or mainly employed, or last employed, in the locality in agriculture, as defined in Section 336(1) of the Town and Country Planning Act 1990, or in forestry or a*

dependent of such a person residing with him or her or a widow or widower of such a person.'

5. A subsequent application was made under Section 73 of the Act ("s73 application") for the variation of Condition 2 of Planning Permission Ref 10/04/028 to allow the applicant to occupy the dwelling in association with the proposed use of the land and associated buildings for agricultural and equine business[1]. Permission was granted in September 2012 subject to Condition 1 which reads:

'*The occupation of the dwelling shall be limited to a person running the equine business on the site or to someone solely or mainly working, or last working in the locality in agriculture or in forestry, or a widow or widower of such a person, and to any resident dependent*'.

6. The appellant states that the construction of the dwelling commenced in 2005/06 with completion in 2007/08, without complying with the pre-commencement conditions attached to the 2005 permission. He therefore considers that, as the conditions were not complied with, the development was not lawfully implemented.

7. Furthermore, I am told that the dwelling and associated driveway are not in the same location as that approved and that there are differences in the design and detail of the dwelling as constructed. No subsequent amendments have been approved by the Council. Consequently, it is the appellant's view that significant differences exist between the approved and the 'as built' scheme, such that the development was unlawful at the time it was substantially completed.

8. The appellant draws the conclusion that, as the dwelling was completed prior to January 2008, more than four years before the submission of the LDC, it is beyond the time limit for the Council to take enforcement action and it is not subject to any restrictive occupancy condition.

9. The Council maintains that although the as-built dwelling differs in its location and detailing to that shown on the approved plans, the differences are not material and the 'substantial usability' of the property is, and has been, in the manner permitted by the 2005 permission.

Main Issue

10. The main issue is whether the appeal dwelling was constructed and substantially completed in breach of the planning permission granted under Planning Permission Ref 10/2004/028, for such a period as to be immune from enforcement action.

Reasons

11. In granting planning permission for the erection of an agricultural dwelling under the 2005 permission, the Council imposed two pre-commencement conditions. Condition 3 reads:

'*Before the commencement of any works hereby permitted, details or samples of the materials to be used for all the external surfaces of the building(s) shall be submitted to and be approved in writing by the local planning authority, and*

[1] Permission Ref 10/12/0023 refers.

no other materials shall be used without the written consent of the local planning authority.'

12. Condition 4 reads:

'(i) Notwithstanding the proposed new hedges, before any part of the permitted development is commenced, a landscaping scheme, which shall include details of the species, siting and numbers to be planted, shall be submitted to and approved in writing by the local planning authority…..'

13. The appellant states that the construction of the dwelling commenced at some time between January 2005 and June 2006 with completion between September 2007 and January 2008. I have had sight of handwritten notes on a letter from the Council to the appellant dated 4 March 2005; the first note dated 7 March 2005 confirms that the appellant contacted the Council and advised that no works had started whilst the second note dated 21 September 2005 states that work had commenced on the footings. I have also been provided with a subsequent letter of 19 June 2006 from the Council to the appellant stating its understanding that work has commenced. The appellant's Google Earth image from June 2006 shows the development underway whilst a second image from September 2007 shows the dwelling in situ with the roof and ridge tiles complete. An extract from the Valuation Office's Online records show that Council Tax was applied to the dwelling with effect from 1 January 2008. In the absence of any substantive evidence to the contrary, it is reasonable to conclude that works commenced in or around September 2005 and were substantially completed by January 2008 at the latest.

14. The only submissions in relation to external finishes were included in a letter from the appellant to the Council dated 14 March 2006[2]. In its response dated 15 March 2006, the Council approved the external finish in relation to the walls and 'discharged' part of Condition 3, but did not accept the roof material, instead insisting on the use of natural slate.

15. In the same letter, the appellant was also advised that the Council was awaiting details of landscaping (pursuant to Condition 4). As I understand it, no further submissions were made by the appellant in respect of this pre-commencement condition.

16. The Council wrote to the appellant again in June 2006, advising that it was aware that work had commenced but that it held no record of Conditions 3 (External Finishes) and Condition 4 (Landscaping) having been complied with, despite its agreement, in part, of the external finishes in March 2006. The Council also stated that these conditions should have been agreed before work commenced on site.

17. In a subsequent letter dated 28 July 2006, the Council approved the use of 'Redland 50 Concrete double roman roofing tiles', despite its earlier insistence that slate should be used. I do not know what brought about this change.

18. Notwithstanding the agreed details, at the time of my visit, I observed that the majority of the external walls are rendered and the roof is covered in slate, which was not agreed by the Council in its letter of 15 March 2006 or its subsequent letter of 28 July 2006.

[2] The letter proposes the use of double Roman tile, colour Farmhouse Red by Redland and brick, colour Cassandra by Terka, albeit does not specify the application and extent of their use.

19. I am also not certain why the Council did not invite the submission of a s73 application to vary the conditions since it was aware that development had commenced but that the pre-commencement conditions had not been fully agreed. Neither did the materials being used in the construction of the dwelling match that which had been approved in part. To my knowledge, the Council took no enforcement action to rectify the breach of planning control that had occurred.

20. It is common ground between the parties that both conditions are true conditions precedent. Having regard to the principles established by the judgement in *F.G Whitley & Sons v Secretary of State for Wales [1992]* and subsequent legal authorities, I agree that Condition 3 (External Finishes) goes to the heart of the permission insofar as the dwelling is located in an open countryside location and an Area of Outstanding Natural Beauty (AONB) and its external appearance would inevitably affect the character and appearance of the area. It is thus not a minor aspect associated with the development that could reasonably be agreed after development has commenced.

21. Turning to Condition 4 (Landscaping), however, I consider that the requirements of this condition could conceivably be addressed post-commencement of development. Be that as it may, for the reasons I have given, Condition 3 is true conditions precedent. Given the failure to comply with conditions precedent, I am of the view that the whole development is unlawful.

22. I note the Council's reference to the case of *Hammerton v London Underground Ltd [2002]* in which it was established that even if the commencement of development is potentially unlawful due to a failure to comply with conditions precedent, the development in question will not be unlawful if enforcement action against the development as a whole cannot be taken either because to do so would be unreasonable or because the development has become lawful under the 4-year rule.

23. However, I do not consider that the Council would have acted unreasonably if it had taken enforcement action in respect of matters associated with the appearance of the dwelling and the resultant effect on the character and appearance of the AONB. In any event, there are other distinct differences between the *Hammerton* case and the appeal before me, not least as the latter also involves the question of whether the dwelling was completed in accordance with the approved plans.

24. That brings me to the question of the significance of the differences between the as-built dwelling and that shown on the approved plans for the 2005 permission. As I understand it, the dwelling and driveway as constructed are not in the position shown on the approved drawings; in my opinion, the difference is considerable and not immaterial. There are also differences in terms of the design and detailing of the dwelling; this includes the length of the dwelling, the size and detailing of the fenestration, finishes of the dormer, a larger chimney and the omission of another and alternative positioning of roof lights.

25. Sage v Secretary of State for the Environment, Transport and the Regions and Others [2003] established that if a building operation is not carried out in accordance with the permission, the whole operation is unlawful. The

judgement in *Barnett v Secretary of State for Communities and Local Government [2008]* subsequently established that a planning permission is inherently linked to the approved drawings. Taking these factors into account, and notwithstanding that there was no specific condition on the 2005 permission requiring the development to be carried out in accordance with the approved plans, cumulatively the changes have resulted in a building that is materially different to that shown on the approved plans which form part of the planning permission. I do not share the Council's view that the changes are immaterial in the sense of *Lever (Finance) Ltd v Westminster City Council [1971].*

26. Put another way, in applying the principles established in *Commercial Land Ltd / Imperial Resources SA v Secretary of State for Transport Local Government and the Regions [2003]* the differences between the approved plans and the development that was carried out is fatal to the capability of the operations to be effective in commencing the development.

27. Having regard to *Copeland Borough Council v Secretary of State for the Environment and Ross [1976]*, as the development was not carried out in accordance with the permission as a whole, the whole operation was carried out without the benefit of planning permission. It therefore constituted a breach of planning control.

28. Given this position, it follows that as the 2005 planning permission was not implemented, the appellant cannot be bound by the conditions on the permission. Of particular relevance here is Condition 2 which restricts occupancy to a person employed or last employed in agriculture or forestry.

29. Whilst I acknowledge that the Council determined a subsequent s73 application to extend the occupation restriction to include '…a person running the equine business on the site', it has no effect since the 2005 permission was not implemented.

30. Under s171B(2) of the 1990 Act (as amended), no enforcement action may be taken at the end of the period of four years beginning with the date of a breach of planning control.

31. There is no evidence before me to contradict the appellant's claim that the construction of the dwelling was completed, at the latest, in January 2008. During this period, the Council did not pursue enforcement action. Consequently, the dwelling has been substantially complete for a continuous period in excess of 4 years prior to the date of the LDC application, so as to be immune from enforcement action.

32. The Council has cited the case of *Aerlink Leisure Limited v First Secretary of State and another [2004]* insofar as the property has been used in the manner permitted by the planning permission; that is, it was used as an agricultural workers dwelling until a change of use application in 2012 permitted the development to be occupied for agriculture and equine purposes.

33. However, the Aerlink case relates to works which were partially completed and whether or not those works represented implementation of a planning permission that would allow works to continue. The case before me differs in that the building works were completed more than 4 years from the date of the LDC application and, for the reasons that I have given, were not in accordance

with the planning permission representing a breach of planning control. Whether or not the dwelling was used in accordance with the agricultural occupancy condition is immaterial since the conditions on a planning permission that has not been lawfully implemented cannot have effect.

34. In reaching my decision I have had regard to the other case law referred to by both parties, but to which I have not specifically referred. However, they do not lead me to any other conclusions.

Conclusion

35. I conclude that, as a matter of fact and degree and on the basis of probabilities, the dwelling is likely to have been substantially completed in breach of the planning permission granted under Ref 10/2004/028, for a period in excess of four years prior to the date of the LDC application and so as to be immune from enforcement action. It cannot therefore be bound by the conditions contained therein.

36. The Council's decision to refuse to grant a LDC was not well-founded. The appeal should succeed and I will exercise accordingly the powers transferred to me under s195(2) of the 1990 Act as amended.

Melissa Hall

Inspector

The Planning Inspectorate

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 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 24 October 2014 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red 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 dwelling is likely to have been substantially completed in breach of the planning permission granted under Ref 10/2004/028, for a period in excess of four years prior to the date of the LDC application and so as to be immune from enforcement action.

Signed

Melissa Hall

Inspector

Dated 20 March 2017:

First Schedule

The construction of the dwelling in breach of planning permission granted under Ref 10/2004/028.

Second Schedule

Kedget Barton Farm, Churchstanton, Taunton, Somerset TA3 7RN

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 /operations 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 /were 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 /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation 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.

The Planning Inspectorate

Plan

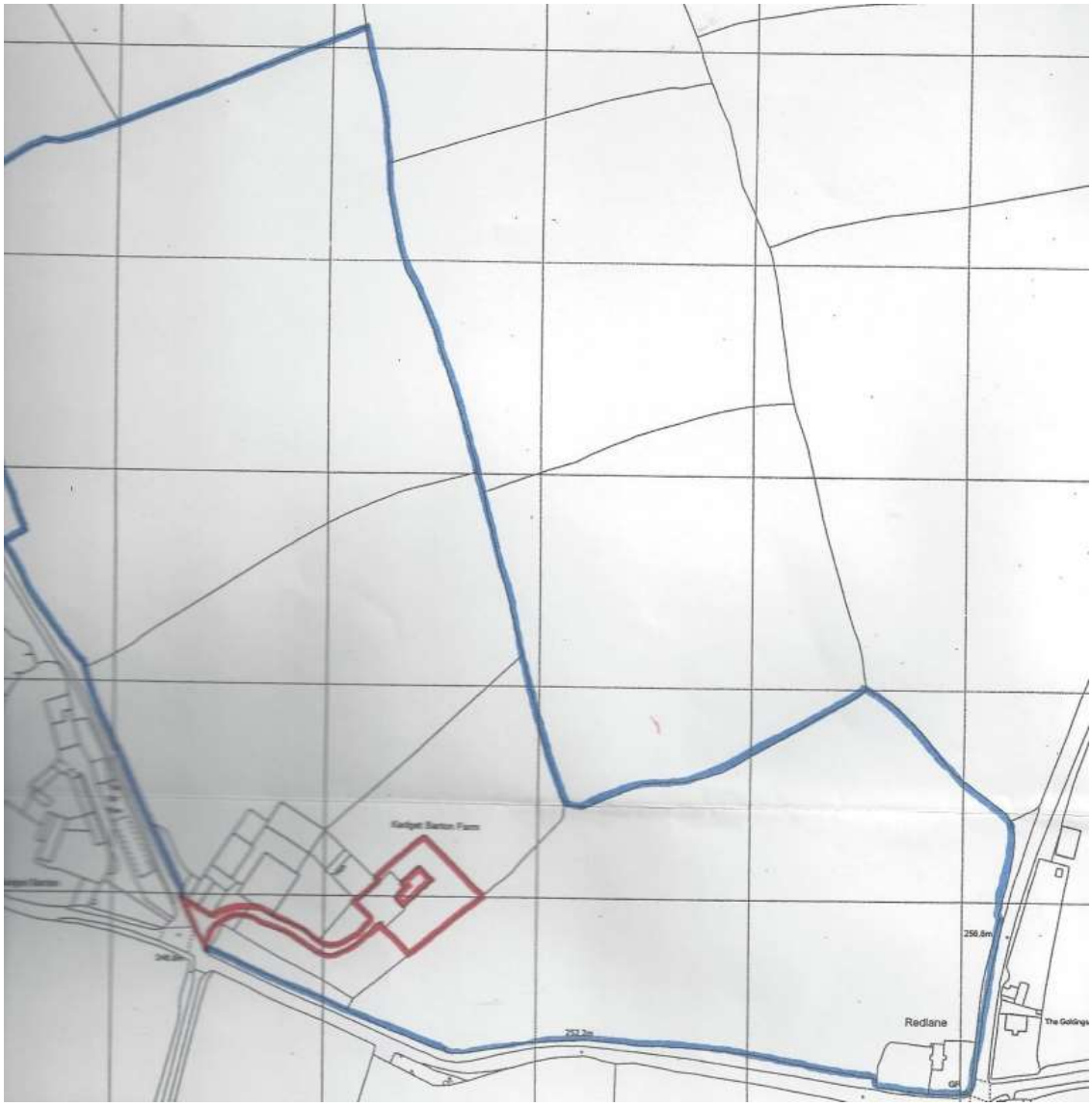
This is the plan referred to in the Lawful Development Certificate dated 20 March 2017 .

By Melissa Hall

Land at: Kedget Barton Farm, Churchstanton, Taunton, Somerset TA3 7RN

Reference: APP/D3315/X/16/3150659

Scale: NTS


Redlane