The Planning Inspectorate

Appeal Decision

Site visit made on 7 May 2013

by Brian Cook BA(Hons) DipTP MRTPI

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

Decision date: 16 May 2013

Appeal Ref: APP/N1215/X/12/2185102
Field at Hosey Bridge, Sturminster Newton, Dorset

- 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 William Summers against the decision of North Dorset District Council.
- The application Ref 2/2012/0779/PLNG, dated 26 June 2012, was refused by notice dated 13 September 2012.
- The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought has not been described by the appellant.

Decision

1. The appeal is dismissed.

Procedural matter

2. Where an application is submitted under s192 of the Act it is for the applicant to describe in precise terms the development for which the certificate is sought. In this case the appellant has ticked each of the 'no' boxes in section 8 of the application form indicating that he does not consider the proposal to be either a building or other operation or a change in the use of the land. In the relevant section of the appeal form he confirms that both the existing and the proposed use of the land would be agriculture and that all he wishes to do is to 'add a bio-diversity pond 12m x 8m.'

3. It is not open to the local planning authority or the Secretary of State on appeal to alter the proposed description supplied by the applicant/appellant unless s/he agrees. In this case the appellant has not specifically disagreed with the Council's description on the refusal notice of the proposal as 'to construct a 12 metre x 8 metre pond' and I have determined the appeal on that basis.

Main Issue

4. The main issue for me to determine is whether or not at the date the application was made the development proposed would have required express planning permission. This is a matter of interpretation of the law and the planning merits of the proposal are not for me to consider.

Reasons

5. The appeal site is beside and accessed from the B3091 which runs between Shaftsbury and Sturminster Newton. It is adjacent to Chivrick Brook (or 'Chivrick's Brook' according to the Council) and is currently used as a smallholding with some poultry, bee hives and areas given over to vegetables and some fruit. The hives and other structures are raised above ground level indicating that the site floods. However, my site inspection followed a considerable spell with little rain; the ground was quite dry and the level of the Brook relatively low. The proposal is to construct a roughly rectangular pond along part of the western boundary of the site. It would vary in depth with the deepest part (about 2 metres) being nearest to the Brook. Both long and cross-sections show variations in the steepness of the banks.

6. My understanding of the appellant's first line of argument is that there would be no change at all in the agricultural use of the land; it is not that any change of use would not be a material change. While the current use of the whole site would appear to fall within the definition of the term 'agriculture' given in s336(1) of the Act, the purpose for which the pond is intended would not. The area for the proposed pond would be separated from the agricultural part of the site by a fence and would also have a separate access. As a matter of fact and degree I believe a separate planning unit in use as a bio-diversity pond would therefore be created. Contrary to the assertion of the appellant on the appeal form the proposal would constitute a change in the use of the land such that the pond part of it would no longer be in agricultural use. The proposal cannot therefore be considered not to involve development by virtue of s55(2)(e) of the Act.

7. A second strand of the appellant's case is, I believe, that the development proposed would be development permitted by Schedule 2, Part 6 of the Town and Country Planning (General Permitted Development) Order 1995 as amended (GPDO). I say this because an application for prior notification of agricultural development (ref: 2/2012/0414/PLNG) was made on 12 April 2012 for the same development. The area of the agricultural holding is slightly less than 0.30 ha and there is no evidence from the appellant that it forms part of a larger holding. It is therefore too small in size for any of the permitted development rights available under Schedule 2, Part 6 of the GPDO to apply. This was the gist of the Council's response on 15 May 2012 to the prior notification application in which the opinion was also expressed that the development proposed was an engineering operation on a scale too large to be considered *de minimis*.

8. The final and I believe most important strand of the appellant's case is that this is wrong on two counts. First, the appellant argues that the term 'engineering operation' does not exist in planning law; it is engineering 'works' meaning something like a dam, road or bridge that is relevant. Second, the proposal is *de minimis* and the Council is criticised for refusing to answer the appellant's request for guidance on the thresholds applied by the Council when making such a judgement. I now deal with these in turn.

9. The meaning of development for the purposes of the Act is set out in s55 of it. Included within this meaning is 'engineering operations'. The term is not defined in the statute but the judgement of the court which established that it could be an operation which would generally be supervised by an engineer but

that it was unnecessary that it should actually have been so supervised is quoted in the appeal decision appended to the Council's appeal statement.

10. I accept that an experienced machine operator would probably be able to fashion an excavation to the profiles shown on the application drawings. However, these and the intended use by frogs, newts and, especially, fish also indicate that the pond is to be permanently wet with a useable depth of water at all times. In my experience, simply digging to or below the water table will not be sufficient to achieve this. Some form of lining (an artificial membrane or natural material such as suitably impervious clay) would be required. In my view, either would need to be laid to drawings prepared in advance by someone with the necessary expertise, typically an engineer. As a fact and degree judgement therefore I consider the proposal amounts to an engineering operation and thus development within the meaning of the term in s55 of the Act.

11. I turn now to the second point, that the development is nevertheless *de minimis.* This term derives from the Latin *de minimus non curat lex* meaning the law does not concern itself about very small matters[1]. Applying the term in the planning field requires judgment on the circumstances of the individual case. Here, an excavation of some size would be undertaken which would be likely to require a mechanical digger. The excavated material would need either to be disposed of off-site by lorry or utilised in some way on the site. Although during my site inspection the latter was implied, this is not part of the appeal proposal. Depending on how the appellant intended to ensure water was retained, either natural or synthetic materials would need to be delivered to and stored for a period at the site.

12. All this would involve some considerable activity over a period of time on what is a prominent site where traffic frequently has to slow or stop since two vehicles cannot pass across the narrow bridge over the Brook. It is inconceivable in my view that those observing the operations would consider them agricultural in nature. It is likely therefore that enquiries would be made of the Council as to what was happening. All of this in my judgement would be indicative of an operation that could not be considered *de minimus.*

13. Although the appellant has also referred in passing to the proposal being a landscaping scheme no further details are provided and I have not considered this further. I therefore conclude that the proposal would amount to development within the meaning of s55 of the Act for which planning permission would be required by s57.

Conclusions

14. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of 'to construct a 12 metre x 8 metre pond' was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Brian Cook

Inspector

[1] The Chambers Dictionary Ninth Edition