

Appeal Decision

Site visit made on 12 December 2016

by K R Saward Solicitor

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

Decision date: 5 January 2017

Appeal Ref: APP/J0405/X/16/3150189

Dunton Road, Stewkley, Buckinghamshire LU7 0LU

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr William Doherty against Aylesbury Vale District Council.
 - The application (Ref. 15/04234/COUAR) is dated 9 March 2016.
 - The application was made under section 192 of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is proposed conversion of an agricultural building to 3 residential dwellings.
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Decision

1. The appeal is dismissed and the application for a LDC is refused.

Application for costs

2. An application for costs was made by Mr William Doherty against the Council. This application is the subject of a separate Decision.

Main Issue

3. The main issue is whether the proposed conversion of an agricultural building to 3 residential dwellings benefits from deemed consent.

Reasons

4. The appeal concerns a large portal framed building. An application was made for a determination as to whether the prior approval of the Council would be required for the change of use of the building to 3 residential dwellings. Details submitted with the application indicate that it included building operations to facilitate the conversion and the application was considered by the Council on that basis. The application was made with reference to Class Q of Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015. It was validated by the Council on 16 December 2015.
 5. Class Q permits development consisting of (a) a change of use of a building and any land within its curtilage from a use as an agricultural building to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order; and (b) building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within Class C3 of that Schedule.
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6. The procedure is set out within paragraph W. The Council had 56 days following the date on which it received the application to give notification as to whether prior approval was given or refused in relation to any of the matters in paragraph Q.2., namely transport and highways impacts, noise, contamination risks, flooding, siting and design or external appearance. The Council notified the appellant in writing that the expiration date was 10 February 2016. One day after the expiry date, the Council purported to 'refuse prior approval' under paragraph W(3) on the grounds that the proposal does not comply with various limitations and restrictions in paragraph Q.1. The Council acknowledges that its decision was issued out of time, but contends there is no deemed consent for the development to proceed due to non-compliance with criteria in Q.1.
7. This prompted the appellant to apply for a LDC. The Council failed to determine the application within the prescribed period. This appeal is made against that non-determination. In order for an LDC to be granted under section 192 of the 1990 Act, the onus is firmly on the appellant to show, on the balance of probabilities, that the development would be lawful.
8. The appellant relies upon paragraph W(11) which stipulates that development must not begin before the occurrence of one of the following (a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required; (b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or (c) the expiry of 56 days following the date on which the application was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused.
9. The consequences of an application not being determined by the Council within the prescribed 56 day period is that the Council can no longer control the matters covered by the prior approval procedure. That being so, a development proposal that otherwise falls within the class limitations can lawfully proceed, subject to compliance with the conditions, as the Council is deemed to have granted prior approval.
10. The Council wrote to the appellant on 18 December 2015 confirming that development could proceed if no reply had been received by 10 February 2016. What that letter did not make clear is that in order for the development to proceed with the benefit of deemed consent, the proposal must be within the scope of permitted development i.e. it must comply with all the restrictions set out in Q.1. This is evident from Article 3(2) of the GPDO which provides that any permission granted by Article 3(1) is subject to any relevant exception, limitation or condition specified in Schedule 2.
11. Applications for prior approval are akin to a pre-commencement condition and a proposal must always comply with all the relevant conditions, limitations and restrictions. Nothing in the national Planning Practice Guidance (PPG) indicates to the contrary. There is no exception for the prior notification procedure under Class Q. In relation to Class Q, the PPG states, "a local planning authority should start from the premise that the permitted development right grants planning permission, subject to the prior approval requirements." This includes compliance with the limitations etc. in Q.1. The procedure does not wholly depend on the Council filtering out excluded development within the requisite 56 days to prevent its development. If the restrictions in Q.1. are not met then a proposal cannot be permitted development whether or not the Council has responded and, if implemented, the development will be liable to be enforced against. Whilst the appellant may consider that scenario to be

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unjust, the lawfulness of his proposal does depend on it falling within the remit of Class Q development.

12. My conclusion that there must be compliance with the restrictions regardless of the Council's response being made out-of-time is consistent with the Inspector's decision in Appeal Ref: *APP/K1128/W/15/3003172* dated 19 June 2015 which has been drawn to my attention by the Council. The fact the decision is untested by the Court, does not make it wrong. The appellant says that in other appeal decisions Inspectors have applied the law to endorse deemed consent after 56 days. That would be anticipated to be so where the restrictions, limitations and conditions are met. No examples have been cited where that has occurred despite non-compliance with paragraph Q.1.
13. The Council advises that on the occasions where it has acknowledged schemes can proceed after 56 days, the requirements in Q.1. were fulfilled. I have no reason to query this, but what may have happened before is not relevant in an LDC appeal which must be decided on the application of the law to the facts in the given circumstances. The other remedy available to the appellant would have been an appeal against the refusal of the prior approval application (a section 78 appeal). In both cases, I would still need to consider the same things, that is the limitations in paragraph Q.1.
14. Those limitations set out various circumstances in which development is not permitted by Class Q. The Council has identified 4 grounds.
15. Firstly, pursuant to paragraph Q.1.(a) the site must be used solely for an agricultural use as part of an established agricultural unit on 20 March 2013. The agricultural use must be a lawful use. No substantive evidence has been submitted to demonstrate an agricultural use or even evidence of an established agricultural unit.
16. Planning permission was granted in April 2012 for stables, tack room and hay store to be constructed on land adjacent to the building. That application had been supported by the Parish Council subject to an existing stable block being removed. The Council refers to the stable building still being in existence thereby suggesting that an equestrian use exists. I take this to be a reference to the pre-2012 stable block rather than the Council mistakenly believing the new stables to have been built, as intimated by the appellant. At my site visit I was able to see that only part of the foundations have been dug for the 2012 approved stables. Apart from the appeal building, the only other building was a small open-fronted timber barn next to the access.
17. The Council goes on to say that when officers conducted a site visit in November 2012 it was noted that concrete waste was being deposited on the site. Apparently, the Council was advised that the material was required in connection with the construction of the stable building. Given that it has not been built, the material cannot have been used for that purpose. The evidence points to the site being used to store concrete waste only a matter of months before the relevant date of 20 March 2013.
18. The Parish Council's response refers to some horses being kept on part of the land with hay and straw occasionally stored but that the site has been operating principally for storage of building materials and building waste. A local council is usually in a good position to know what is happening in their parish. The use of land for the grazing of horses would not necessarily result in a mixed use, but the use for storage purposes is described in a way that does suggest a mixed use. The period over which such use has been observed has

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not been specified, but the comments appear to correspond with the Council reporting the deposit of waste materials back in November 2012.

19. The appellant has not given comment on these particular points made by the two councils. They provide separate sources of information with both indicating at least some level of non-agricultural storage use. Without evidence to demonstrate otherwise, I am not persuaded that the site was used solely for an agricultural use as part of an established agricultural unit on 20 March 2013. From the information before me I cannot be satisfied that the requirement in paragraph Q.1.(a) is fulfilled.
20. Secondly, the Council calculates the cumulative floor space of the existing building to exceed the 450sqm limit in Q.1.(b). The Council's delegated officer's report is somewhat confusing on this point because its comments and calculations in relation to Q.1.(b) are transposed with those for Q.1.(h). When read as a whole it is apparent that reference to Q.1.(b) should be Q.1.(h) and vice versa.
21. Drawing no. RBF.PLAN 1, scale 1:100 is the existing floor plan. The Council has measured the floor space externally including the thickness of the walls to arrive at a figure of 459.18sqm whereas the appellant has measured internally to produce the figure of 428.56sqm. "Floor space" is defined in Article 2(1) of the GPDO to mean the total floor area in a building or buildings. Use of the word "in" a building leads me to conclude that the calculation should be taken from inside by measuring to the interior face of the external walls. As a result, the floor space in the building is shown to be within the 450sqm limit.
22. Therefore, I find compliance with Q.1.(b).
23. Thirdly, the Council maintains that the dwellings would have more than 450sqm of floor space as prescribed in Q.1.(h). As part of the conversion, a first floor would be added. The appellant argues that the combined floor space would be just within the floor space limit at 449.99sqm. The proposed ground and first floor plans show new elevations for the dwellings being constructed well inside the existing structure so that each plot has a wide, 'open area' within the structure at the front and rear. The existing external walls of the barn would be removed at the front and rear leaving the steel frame in place supporting the roof. The dwellings have been designed in this way specifically to bring the proposal within the limits of Class Q.
24. As set out above, "floor space" means the total floor area in a building or buildings. With some exceptions not applicable in this case, "building" is defined in the same Article to include any structure or erection and includes any part of a building. There is no requirement that the floor area must be an internal room as long as they are "in" a building or part thereof. Here, the open areas would still be "in" part of a building changing to residential use. Indeed, the sides of those areas are shown partially enclosed by the existing brick plinth and covered by the existing main roof supported by the vertical steel joists at the outer edges of the open areas. Therefore, the 'open areas' are within the overall structure and form a part of the buildings. As such, the floor area should be taken into account in calculation of floor space. The whole floor space over both floors of the proposed development would result in buildings with more than 450sqm of floor space having a use falling within Class C3 of the Use Classes Order.
25. Therefore, the requirements in paragraph Q.1.(h) are not met.

26. Fourthly, it is the Council's contention that the proposed development would consist of building operations other than those listed in Q.1.(i) by reason of the new external walls being constructed within the shell of the building.
27. Q.1.(i) restricts operations to the installation or replacement of windows, doors, roofs or exterior walls, or water, drainage, electricity, gas or other services to the extent reasonably necessary for the building to function as a dwellinghouse. Plus, partial demolition works reasonably necessary for those purposes.
28. The PPG makes clear that the permitted development right under Class Q assumes that the agricultural building is capable of functioning as a dwelling. Against that backdrop, the PPG states that it "is not the intention of the permitted development right to include the construction of new structural elements for the building. Therefore it is only where the existing building is structurally strong enough to take the loading which comes with the external works to provide for residential use that the building would be considered to have the permitted development right."
29. The appellant states that the new external walls to be installed at the front and rear would be supported by the existing steel structure and reinforced concrete floor. The appellant points to the lack of any contrary evidence from the Council to disprove the structural integrity of the existing building, but the burden of proof is on the appellant to demonstrate that the proposal would be lawful. I have no reason to believe that the original steel frame is incapable of providing the structural support needed for the external works of a dwelling/s. However, the additional floor in each dwelling would be supported at the front and rear by new exterior walls set in some way from the existing structural supports. Whilst those walls may be attached to the steel structure and concrete floor, they would clearly provide structural support to the first floor as it would only be attached to the existing frame at either end of the building. This is not a case of building around the frame, but within it and introducing new structural elements that would not be in accordance with Q.1(i).
30. Moreover, the building operations can only be undertaken to the extent reasonably necessary for the building to function as a dwellinghouse. Similarly, partial demolition can only be to the extent reasonably necessary to carry out the building operations allowed within Q.1.(h). It seems to me that the building could function as a dwellinghouse without moving the exterior walls particularly if the existing outer steel frame is to provide the structural support.
31. The appellant argues that following the outer walls would have excluded light to the centre parts of the building. I do not find that argument persuasive when reasonable levels of light could be achieved through the installation of windows. There may be other reasons why the conversion has been designed in this way in the interests of maximising efficiency and providing covered areas. Even so, that does not mean the works are reasonably necessary for the building to function as a dwellinghouse. I am not satisfied that new exterior walls built well within the structural frame are reasonably necessary for that purpose. It follows that demolition of the existing walls is also not reasonably necessary.
32. Therefore, as a matter of fact and degree the nature of the works would take the development outside the scope of the limitations in Q.1.(i).
33. To sum up, on the information before me the proposal would not comply with paragraphs Q.1.(a),(h) and (i) of Class Q of Part 3 of Schedule 2 of the GPDO.

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Therefore, notwithstanding the Council's failure to issue its decision within the prescribed 56 day period, not all the restrictions within Q.1. are met and the proposed conversion does not therefore benefit from deemed consent.

Conclusion

34. For the reasons given above I conclude that the application for a certificate of lawful use or development in respect of the proposed conversion of an agricultural building to 3 residential dwellings should be refused 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.

KR Seward

INSPECTOR