
Appeal Decision

Site visit made on 25 November 2016

by Susan Wraith DipURP MRTPI

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

Decision date: 5 January 2017

Appeal ref: APP/E2001/X/16/3150288
Cherry Tree Farm, Storwood, York YO42 4TG

- The appeal is made under s195 of the Town and Country Planning Act 1990 [hereafter “the Act”] as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development [hereafter “LDC”].
 - The appeal is made by Mr David Barraclough against the decision of the East Riding of Yorkshire Council.
 - The application no: 16/00263/CLP, dated 26 January 2016 was refused by notice dated 3 May 2016.
 - The application was made under s192(1)(b) of the Act.
 - The development for which an LDC is sought is: The erection of an agricultural building for livestock and storage.
-

Decision

1. The appeal is dismissed.

Preliminary matters

2. The relevant date for this determination of lawfulness is the date of the LDC application, i.e. 26 January 2016. The matter to be decided upon is whether the development, if carried out at that date, would have been lawful.
3. The LDC application followed an application for prior notification of agricultural or forestry development for the subject building [hereafter “the prior approval application”]. It is on the basis of the prior approval application that the appellant argues his case for an LDC. There is no separate appeal lodged against the prior approval application decision.
4. In an appeal under s195 of the Act against the refusal of an LDC the planning merits of the matter applied for do not fall to be considered. The decision will be based strictly on the evidential facts and on relevant planning law. The burden of proof is upon the appellant.

Main issue

5. The main issue in this appeal is whether the Council’s decision to refuse the LDC was well founded.
-

Reasons

Whether the Council's notification was in time

6. The appellant has argued that he did not receive notification of the Council's decision on the prior approval application in time. 28 days had passed following the date on which the application had been received by the Council but the applicant had not been notified of the decision and did not receive the decision notice until some three days later. On that basis, it is argued, permitted development rights had accrued under Schedule 2, Part 6 paragraph A.2(2)(a)(iii)(cc) of the Order¹.
7. The Council, on the other hand, argue that there was no requirement under Part 6 for the applicant to be notified within 28 days as paragraph A.2(2)(a)(iii)(cc) requires "either" that the decision is made within 28 days "or" that the decision is notified within 28 days. It does not require both.
8. I have considered paragraph A.2(2)(a)(iii) in its entirety but cannot see that the Council's interpretation is correct. The paragraph prevents the commencement of development before (any) one of a number of listed events has occurred. The making of a decision on the application is not expressly listed as one of those events. Neither is it inferred.
9. Sub paragraph (cc), when read literally, firstly covers the situation where no determination has been made and the 28 day period has expired. Secondly, it covers the situation where a determination has been made but not notified to the applicant within the 28 day period. The use of the word "or" distinguishes between the two scenarios and reinforces that it is only one of the listed events that needs to occur to trigger permitted development rights.
10. If, as the Council suggests, the first part of (cc) means that the making of a determination is sufficient (even though that is not what it says) then there would have been no need for the second part of the provision (concerning notification to the applicant) as permitted development rights would already have arisen. This is a further reason why I do not concur with the Council's interpretation.
11. I shall, therefore, go on to consider whether notification had been effected within the 28 day period.

¹ Schedule 2 Part 6 of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended) sets out permitted development rights for agricultural and forestry development. Class A, which has been cited by the parties, concerns agricultural development on units of 5 hectares or more and provides for (amongst other things) the erection of a building as permitted development which is reasonably necessary for purposes of agriculture within the unit subject to limitations and conditions. One of those conditions (A.2(2)) is that the developer must apply for a determination as to whether prior approval will be required for the siting, design and external appearance of the building and that "development must not begin before the occurrence of one of the following-

(aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

(bb) where the local planning authority give the applicant notice within 28 days following the date of receiving the applicant's application of their determination that such prior approval is required, the giving of such approval; or

(cc) the expiry of 28 days following the date on which the application under subparagraph (2)(ii) was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination."

12. There is general agreement as to the facts of the matter. The prior approval application was received by the Council on 17 December 2015 and validated on 18 December 2015 when the fee was received. The 28 day period, which would have commenced the following day, ran until 15 January 2016.
13. On 14 January 2016 the Council issued a decision which was posted by second class post the same day². According to the appellant this was not received by him until 18 January 2016.
14. Whilst I have not been referred to any specific definition relating to the word "notification", in its common meaning the word indicates the official conveyance of information from one party to another. It is more than simply the sending out of a document.
15. The word "notification" has been used purposefully in the drafting of the Part 6 provisions which intend that, at the end of the 28 day period, the applicant is in a position to know whether or not development can commence. Thus, if the posting out of the document is to be relied upon as the sole method for effecting notification sufficient time must be allowed to include (at least) the period for delivery in the ordinary course of the post.
16. In this case, the posting of the document on 14 January 2016 by second class post would not have provided for sufficient time to effect notification within the 28 day period. The ordinary course of second class post would be two or three days³ whereas the 28 day period expired the following day.
17. The appellant says that the decision was not notified to him by email or any other method except by second class post. There is no contrary evidence.
18. I therefore find that the Council's determination, on balance of probability, was not notified to the applicant in time and that, under sub paragraph (cc) of Part 6, A.2(2)(a)(iii) permitted development rights had accrued.

Whether the building is reasonably necessary for agriculture

19. The appellant argues that, as permitted development rights had accrued, there were then lawful rights to erect the building. However, I do not agree, necessarily, that the building could have been lawfully erected.
20. The requirement for a prior approval application derives from a condition of the permission granted under Part 6, Class A and has the effect of a condition. It cannot change the description of the development to which it attaches or override the pre-requisites for permitted development under this Part.
21. The Part 6, Class A permission to which this condition relates (as set out in paragraph A) describes the permitted development as (amongst other things) the erection of a building "...reasonably necessary for purposes of agriculture within that unit". Thus, if the proposed building was not "reasonably necessary" for agricultural purposes within the unit it would have had no entitlement, in the first place, to benefit from these permitted development provisions.

² Amongst the evidence is a copy of the envelope which, it is said, contained the decision notice which was sent to the appellant. The envelope is postmarked "Second Class" with a postmarked date of "14-01-16".

³ As publicised on their web site, Royal Mail aim to deliver letters and parcels sent by second class post within two or three working days, including Saturdays.

22. The appellant has come to his own conclusion that the proposal qualifies for Part 6, Class A permission⁴. However, this is disputed by the Council and there has been no resolution on the point. Whilst, after 28 days, the Part 6, Class A permission would have taken effect, any works carried out could have been at risk of enforcement action by the Council on the basis that it considered the building to fall outside of the permitted development rights of Part 6, Class A and to require an express grant of planning permission.
23. There is little by way of evidence in this appeal on the question of whether the building is "reasonably necessary". The appellant's case for an LDC focuses upon the "notification point" that I have covered above. However, no further evidence has been brought on the purposes for the building and why it is needed.
24. On the prior approval application form the appellant says the building is needed for "storage of feed, bedding and machinery, and livestock housing accommodation for pigs". However, there have been previous appeals⁵ in which (it appears) the need for a building has been examined but found not to be "reasonably necessary"⁶.
25. The previous Inspector, nonetheless, acknowledged that different pieces of evidence indicated certain needs. I note that the LDC proposal is for a smaller building than was considered previously. Even so the Council, when having regard to the dimensions of the building and the previous appeal decision, do not consider that the building passes the "reasonably necessary" pre-requisite.
26. There is little information before me as to the various agricultural activities taking place on the land for which a building is said to be needed. Neither is there any explanation of how the proposal seeks to address the concerns raised by the previous Inspector when considering the previous proposal and those of the Council in respect of this building. From the limited evidence I have in this LDC appeal I am unable to conclude that the building would have been reasonably necessary for agriculture and, thus, able to benefit from the permitted development permission.
27. I find that there remains doubt that the development could have been lawfully carried out at the application date. The burden of proof which is upon the appellant to demonstrate that the building would have been "reasonably necessary" for agricultural purposes within the unit has not been satisfactorily discharged.

Other matters

28. There is another matter which concerns the terms of the decision notice issued pursuant to the prior approval application. It appears the Council decided that the proposed development was not permitted development because the building was not considered to be reasonably necessary for purposes of agriculture within the unit. However, a determination that the development required express planning permission was not one of the

⁴ On the prior approval application form, "Yes" is answered to the question "Is the proposed development reasonably necessary for the purposes of agriculture?"

⁵ APP/E2001/A/14/2227863 and APP/E2001/A/12/2173959

⁶ In those cases the term "reasonably necessary" was considered in the context of a planning policy rather than under permitted development provisions.

options listed under Part 6, Class A. This raises the question of whether the prior approval application had been determined at all or whether, in fact, this was a case of non determination within the 28 day period. Had I found in the Council's favour on the matter of notification I would have sought the views of both parties on this point. However, as notification was not effected in time the 28 day period would have expired in either eventuality. Therefore, this is not a matter which I need to take further.

29. I have had regard to the Council's acknowledgement letter⁷ which indicated that development may proceed if no communication from the Council had been received by 15 January 2016. However, the letter was advisory and, whilst the Council accepts its wording was unfortunate, it has no bearing upon the matter of lawfulness.

30. Concerns have been raised about effects upon biodiversity and nature conservation. Natural England have commented that, with regard to the "prior approval" application, the development is not likely to have a significant effect on the interest features for which the Lower Derwent Valley Special Protection Area, a Special Area of Conservation, has been designated and that there is no requirement on the Authority to undertake an "appropriate assessment". Insofar as relevant to this LDC determination, I am satisfied that effects upon biodiversity and nature conservation are not decisive issues.

Conclusion

31. For the reasons given above I conclude that the case for an LDC is not made out. I find that the Council's refusal to grant an LDC in respect of the erection of an agricultural building for livestock and storage was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me under s195(3) of the Act.

Susan Wraith

INSPECTOR

⁷ The Council sent a letter to the agent acknowledging receipt of the prior approval application which advised that development may proceed if there was no further communication from the Council by 15 January 2016. It also advised that the proposals would be checked to establish whether formal planning permission would be required.