



Appeal Decision

by **Richard S Jones BA (Hons), BTP, MRTPI**

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

Decision date: 26 June 2020

Appeal Ref: APP/B1930/X/18/3202577

Paintball Site, Lye Lane, Bricket Wood, AL2 3TF

- 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.
 - The appeal is made by Mr J K Rudkin against the decision of St Albans City and District Council.
 - The application Ref 5/17/2801, dated 5 October 2017, was refused by notice dated 2 March 2018.
 - The application was made under section 191(1)(a) and (b) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is a paintballing centre with ancillary buildings.
-

Decision

1. The appeal is allowed in part and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.
2. The appeal is dismissed in part and a certificate of lawful use or development is refused for the ancillary buildings.

Application for costs

3. An application for costs was made by Mr J K Rudkin against St Albans City and District Council. This application is the subject of a separate decision.

Preliminary Matters

4. The Planning Inspectorate initially made arrangements for this appeal to be determined following a site visit which was scheduled to take place on 31 March 2020. That event could not take place given the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and related guidance.
5. The file has subsequently been reviewed to consider the optimal procedure for the appeal. It appeared that the appeal could be determined on the papers – that is, without a site visit – without causing prejudice to any party. This is because the case turns on legal points and the parties have submitted sufficient evidence to understand the nature of the site given the points in dispute.

Reasons

Background

6. The application has been made under s191(1) of the Town and Country Planning Act 1990 (the Act) and seeks to establish whether, at the time of the

application, any existing use of buildings or other land and any building operations are lawful. S191(2)(a) states in turn that uses and operations are lawful if no enforcement action may then be taken in respect of them because they did not involve development or require planning permission or because the time for enforcement action has expired. Planning merits form no part of the assessment of an application for a lawful development certificate (LDC), which must be considered in the light of the facts and the law.

7. In this case, the application as made is for a paintballing centre with ancillary buildings. The grounds under which the LDC is sought are that the use began more than ten years before the date of the application and the building works were substantially completed more than four years before that date.
8. Therefore, the main issue is whether the paintballing centre with ancillary buildings has become lawful through the relevant passage of time as set out in s171B of the Act. For operational development this is four years from the date beginning with the date on which the operations were substantially completed. For a change of use, it is ten years, beginning with the date of the breach.
9. The burden of proof lies with the appellant and the relevant test is 'the balance of probabilities' (that it is more probable than not). If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, that is enough.

Use

10. The site essentially comprises two parts. The southern part forms a wooded area whilst the northern part is mainly open, save for some buildings and various props and features.
11. The Council highlight that Class B of Part 4 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 allows any land to be used for war gaming for 28 days in any calendar year without the need for express planning permission. On this basis the Council state that to demonstrate that the activities on the land have been carried out in breach of planning control, the appellant needs to show that the site has been used for paintballing activities in excess of 28 days in each calendar year, for ten or more consecutive years.
12. However, Class B relates to the temporary use of land whilst the appellant refers to a permanent, uninterrupted use of the site. Moreover, the Council do not suggest, even if the land is used for fewer than 28 occasions in each year, that the use is temporary insofar as in between paintballing games it reverts to another use or is cleared of all props and features to leave a vacant site. Indeed, none of the aerial photographs provided by the parties from 2006 onwards show a clear, vacant northern part of the site.
13. In these circumstances, it is not necessary to demonstrate that the land has been used in excess of 28 days in each calendar year. The test is whether the use of the land began more than ten years before the date of the application and continued without material interruption. It follows that the use must have commenced by no later than 5 October 2007 and that is the material date for this appeal.
14. The appellant has submitted little evidence that might normally be expected from a long-running business, such as invoices, receipts, bank statements and

- business plans. However, he has provided a signed written statement which says that the site has been used for paintballing since 2000/2001 but that a higher level of activity has continued since 2005.
15. Two LDC applications for the use of land for paintballing and for buildings on the site were also previously made in 2011. Both were refused by the Council and subsequent appeals withdrawn. The Council explain that the site areas in these applications together broadly correlate with current site area, but not entirely.
 16. The 2011 officer report for the application¹ for the southern site within the woodland describes it as being used for paintball activities and including various structures, mesh green fencing and paraphernalia appearing related to that activity. The report also refers to evidence that suggested that there may have been an intensification, on a possible permanent basis, of the paintballing use of the site in 2005, which, as noted, the appellant confirms agreement to in his signed statement.
 17. The appellant additionally refers to complaints made to the Council from St Stephens Parish Council about paintballing in the woodland, which were followed up by visits from enforcement officers. This is reflected in the evidence referred to by the Council in the 2011 officer report for the period between April 2003 and August 2004.
 18. The applicant has also provided two undated photographs of paintballers which are said to be from March 2012 and November 2013. One is clearly taken in a wooded area, although there is no indication as to where it was taken. The other picture appears to show the wooded area as a backdrop so again is of limited assistance in determining the extent of use over the southern part of the site. Other evidence provided includes a 'Certificate of Excellence' from 2015 awarded to 'Paintball Bricket Wood' and social media reviews from between 2013 to 2017. A *January Specials* picture advert is also provided, which the appellant states is from 2017.
 19. Individually, these items of evidence do not provide any significant assistance but taken together, they do support the appellant's signed statement that the paintballing centre is a well-established facility.
 20. I therefore find the appellant's evidence to be sufficiently precise and unambiguous to demonstrate, on the balance of probability, that the southern part of the site has been used for paintballing activities for a period of more than ten years before the date of the application, without material interruption. Moreover, the Council has provided no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable. In this regard, the tree cover in the aerial photographs is not enough for the appeal to fail.
 21. The Council argue that the aerial photographs provided by the appellant do not include the northern part of the appeal site. This is incorrect. All three photographs clearly show the northern boundary of the site which is marked by a thick hedge, consistent with the alignment and position of the submitted site plan (drawing number 2244-02 Rev A) and that annotated as the northern boundary in Figure 2 of the Council's statement.

¹ Application reference: 5/2011/2460

22. The 2011 officer report for the application² relating to the northern part of the site describes it as being used for paintball activities and consisting of structures with mesh fencing and associated paraphernalia. As per the southern site, the report also refers to evidence that suggest that there may have been an intensification, on a possible permanent basis, of the paintballing use of the site in 2005.
23. The aerial photographs provided by both the appellant and the Council also show that since 2006 the majority of the open area has been organised into distinct zones with an arrangement of props and features consistent with the use of land for a paintballing centre.
24. However, the Council argue that the aerial photographs it has provided show that the northern part of the site adjacent to the boundary does not appear to have been used for paintballing or other activities since 2013. The appellant's explanation is that the lack of significant features on the land is largely due to it being used for occasional overflow parking, testing equipment and occasional competition events for which obstacles are set out for the event only.
25. Be that as it may, this explanation is not corroborated by the Council's aerial photographs from 2013 (x2), 2015, 2016, 2017 and 2018. These photographs show a clear distinction between the largely vacant strip of land at the northern extent of the site and the remainder of the open land to the south of it, which, as stated, is organised into a number of zones with props and features.
26. Nevertheless, the aerial photographs from 2006, 2009, 2011 and 2012 do show that this strip of land was previously used for paintballing activities, with a layout generally consistent with the remainder of the open area, insofar as they appear to include props and features.
27. Since 2013, the photographs clearly show a track running through this strip of land, forming part of a loop around the middle zones of the open area, which the appellant states as being an integral part of the site, There are also a number of structures which appear in the north eastern part of the site.
28. In my view, given the physical and functional relationship of this relatively narrow strip of land to the remainder of the site, it is unlikely to be have been put to a different use. Rather, it is more likely to have been used for purposes incidental to the use of the site as a paintballing centre.
29. I am therefore also satisfied that the northern, open part of the site has, on the balance of probabilities, either been used for paintballing activities or for uses incidental to the paintballing activities for a period of more than ten years before the date of the application, without material interruption.
30. I therefore conclude that given the physical and functional relationship between the northern and southern parts of the site, that the site as a whole is a single planning unit, the use of which has become lawful through the passage of time.

Buildings

31. The Council contends, having regard to *Kestrel Hydro*³ and two appeal decisions⁴, that because the buildings should be considered as being integral to

² Application reference: 5/2011/2459

³ *Kestrel Hydro v Secretary of State for Communities and Local Government & Anor* [2016] EWCA Civ 784

⁴ Appeal References: APP/R3705/C/10/2133801 and APP/L2820/C/09/2117377

- and part and parcel of the use of the land for paintballing, that the time period for taking enforcement action is ten years (s171B(3)). However, this does not reflect its reason for refusal which refers to the four year rule for operational development (s171B(1)). On this basis the material date is 5 October 2013.
32. Moreover, the key issue relating to *Kestrel Hydro* is that it upheld the principle that, where an enforcement notice alleges a material change of use, it may require that the use is ceased and that buildings which facilitated the use are removed. However, this is not an appeal against an enforcement notice. The appellant has applied for an LDC for a paintballing centre (use) with ancillary buildings.
33. Since I have already found that the paintballing use is immune from enforcement action, it follows that any lawful buildings on the site could be lawfully used for purposes incidental to the paintballing use. But the buildings themselves will only be lawful if it is demonstrated that they were substantially completed four years prior to the LDC application (5 October 2013).
34. Site plan (drawing number 2244-02 Rev A) annotates the buildings for which the LDC is sought. These are positioned around the western centre of the site. The appellant refers to these as permanent structures and states that they are shown on both the 2009 and 2017 aerial photographs, indicating that they have been on the site for well in excess of four years. The signed statement from the appellant also states that buildings identified on site by the Council in 2005 remain as they did in 2011.
35. I agree that the buildings annotated in the site plan appear to form part of a number of structures across the centre of the site in the 2017 aerial photograph. I have also noted the rateable value information provided from 2010 and 2017 for a changing room and internal storage, the sizes of which are consistent in both documents. However, I have no information which links the rateable value documents to the annotated buildings.
36. More significantly, the buildings in the 2009 aerial photograph do not appear to be the same as those shown in the 2017 photograph and site plan, in terms of their size, shape and location. Moreover, as pointed out by the Council, the building layout shown in the aerial photographs from 2013 appears similar to that shown in 2009. Whilst it is possible that the buildings were substantially completed between the date of the latest 2013 image of 28 August and the material date of 5 October 2013, I have no evidence to this effect.
37. By way of further clarification, moveable structures are not generally considered as buildings, and in any event the structures to this appeal are described as 'permanent' by the appellant, so the evidence needs to show that the buildings were substantially completed where they are now – not in some other place on the site.
38. Consequently, it has not been demonstrated, on the balance of probabilities, that the buildings annotated on the site plan (2244-02 Rev A) were substantially completed four years prior to the date of the LDC application.

Other matters

39. As part of the previous LDC applications there was disagreement between the parties as to whether paintballing falls within Use Class D2 of the Town and Country Planning (Use Classes) Order 1987, as argued by the appellant, or

whether it is sui generis, as argued by the Council. It is not clear whether the appellant is pursuing this particular argument in this case but even if he is, it is not necessary that I consider it further, having regard to my decision that the use of the land for a paintballing centre is lawful. While an LDC can refer to the relevant use class, that is not necessary, as long as the use which is found to be lawful is specifically described.

Conclusion

40. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant an LDC in respect of the paintballing centre was not well-founded and that the appeal should succeed in part. I will exercise the powers transferred to me under s195(2) of the 1990 Act as amended.
41. For the reasons given above I also conclude that the Council's refusal to grant an LDC in respect of the ancillary buildings was well-founded and that the appeal should fail in part. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Richard S Jones

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 5 October 2017 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

It has been demonstrated, on the balance of probabilities, that the use of land as a paintballing centre had taken place within the site for a period of more than ten years without material interruption by 5 October 2017, and so the time for taking enforcement action under s171B(3) of the Town and Country Planning Act 1990 had expired.

Signed

Richard S Jones
Inspector

Date 26 June 2020

Reference: APP/B1930/X/18/3202577

First Schedule

Paintballing centre.

Second Schedule

Land at Paintball Site, Lye Lane, Bricket Wood, AL2 3TF

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was 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 described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 26 June 2020

by **Richard S Jones BA (Hons), BTP, MRTPI**

Land at: Paintball Site, Lye Lane, Bricket Wood, AL2 3TF

Reference: APP/B1930/X/18/3202577

Scale: NTS

