



Appeal Decision

by Jessica Graham BA(Hons) PgDipL

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

Decision date: 6 October 2020

Appeal Ref: APP/W1145/X/20/3250364

Highford Farm, Higher Clovelly, Bideford, Devon EX39 5SA

- 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 and Mrs B and S Kelly against the decision of Torridge District Council.
 - The application Ref 1/0609/2019/CPL, dated 4 July 2019, was refused by an undated notice issued on or about 29 August 2019.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a LDC is sought is "use for donkey rides being ancillary to a mixed use for agriculture and the keeping of donkeys".
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Decision

1. The appeal is dismissed.

Procedural matters

2. No site visit was made in this case as it was not necessary for me to inspect the property in order to determine the appeal.
3. An application for costs was made by the Appellants against the Council. That application is the subject of a separate Decision Letter of even date.
4. In order for a LDC to be granted under s.192 of the 1990 Act it is necessary for the Applicant to show, on the balance of probabilities, that the development would be lawful on the date of the application. In other words, the burden of proof rests with the Appellants.

Main issue

5. It is common ground that the planning unit here under consideration is the Appellants' land at Highford Farm ("the appeal site"),¹ and that the existing lawful use of this land is a mixed use of agriculture and the keeping of donkeys.² The disagreement between the Council and the Appellants, and the main issue for this appeal, is whether the proposed use of the land for donkey rides would be ancillary to the existing lawful use, in which case it could be carried out without the need for any further grant of planning permission; or whether it would constitute a material change to the existing use, in which case it would amount to development, and could not lawfully be carried out unless a grant of planning permission were first obtained.

¹ As is shown edged red on the plan that accompanied the application

² As is certified by the LDC issued by the Council on 28 September 2018

Assessment

6. The type and scale of activity which may ordinarily be regarded as ancillary to a particular primary use will be a matter of fact and degree. Similarly, the concept of "material change of use" is not defined in statute or statutory instrument; it is a question of fact and degree in each case. It is worth noting that the whole doctrine of primary and ancillary use has been developed by the courts as a response to the practical realities of planning control on the ground: by concentrating on the primary use, planning control permits fluctuation in the level and type of ancillary activity without the need to apply for permission. But the protection of ancillary uses remains only so long as the ancillary link is maintained. If an ancillary use alters or expands to a point where it is no longer subsidiary to the primary use of the planning unit, or where it brings about a significant difference in the character of the lawful use, then this is likely to amount to a material change of use.
7. The Appellants have confirmed that to date, donkey riding at the appeal site has been limited to friends on a non-paying basis. I am satisfied that using donkeys stabled at the appeal site to provide rides on the premises to friends, on a non-paying basis, constitutes an ancillary use to "keeping donkeys". Riding your donkeys, and allowing your friends to ride them, can reasonably be regarded as incidental to keeping them.
8. The use proposed in the LDC application is the commercial provision of donkey rides at the appeal site, to individuals over the age of two, weighing a maximum of 60 kg. Rides of around 10 minute duration would be provided from 12 noon to 6pm, between 1 April and 30 September. The Appellants have explained that in order to give donkey rides to the paying public they would need to have a minimum of two donkeys available for rides and a maximum of six at peak times, although only four would be giving rides at any one time; the donkeys work a two-hour shift, then swap over to allow a rest period.
9. In my judgment, this proposed use would clearly involve a change in the type and scale of existing donkey-riding activity at the appeal site. The question is whether the extent and nature of that change would amount to a change in the overall character of the existing use of the appeal site.
10. One of the impacts of the proposed use would be an increase in the number of vehicles visiting the appeal site. There is no indication that the appeal site is readily accessible by public transport, so members of the public wishing to ride the donkeys would generally need to travel there by private car. The Statement of Case submitted by the Appellants provided information as to the number of visitors to the stables at Clovelly over the previous ten years, and on the basis of that information, concluded that the highest number of cars to be expected would be eight per hour.
11. The Appellants anticipate that (a) lower numbers of visitors would visit the appeal site than visit Clovelly, and (b) those who do will "stop off" at the appeal site after visiting Clovelly, rather than make single purpose trips to the site. On the basis that Clovelly is a long-established and internationally renowned tourist attraction, I consider the first assumption a fair one. There is not, however, any evidence to support the second assumption. There is, for example, no information as to how visitors to Clovelly would be informed that donkey rides would be available at the appeal site, or whether they would be provided with any incentive to stop off there upon leaving Clovelly. Nor is there

any suggestion that donkey rides would be limited to visitors to Clovelly, rather than being available, and marketed as such, to the public at large.

12. The evidence of the Appellants is that they could have four donkeys at a time providing rides of a maximum duration of 10 minutes. Allowing a few minutes for the change of riders, at busy periods this could equate to 16-20 rides per hour. I appreciate that some of the riders may be siblings or friends travelling in the same car, but there is clearly potential for considerably more vehicle movements to and from the appeal site than the maximum of eight cars per hour suggested by the Appellants.
13. Further, it appears to be the case that the donkeys which would be used to provide rides at the appeal site would not be stabled there, but would be brought to and from the premises each day. The evidence on this is somewhat contradictory. The Appellants have explained that they currently have 14 animals (two donkey stallions, ten donkeys and two mules) of which seven are licensed to provide rides to the public, and have been doing so at Clovelly. The statement submitted in support of the LDC application advised that "the donkeys are already being lawfully kept on the land", and the Statement of Case submitted with the appeal advised that "at present, the donkeys are "kept" at the appeal site, but spend most of their days at the stables owned by the Clovelly Estate in the village close to the Visitor Centre."
14. However, in their comments on the statements made by the Council and interested parties, the Appellants advise that "At present, two donkey stallions are kept at the site... The proposal is to bring donkeys from Clovelly to the site to facilitate the donkey rides but they will continue to be stabled at Clovelly. The stallions can not be stabled with the others and there is... no proposal to build additional stables at the site." It therefore seems to be the case that the proposal would involve transporting donkeys from Clovelly to the appeal site and back on each day that rides were to be provided, but no information has been submitted as to how (and how often) such movements currently take place, or whether the proposal would increase their frequency.
15. There is, then, insufficient evidence to establish a robust estimate of how many additional vehicle movements would be generated by the proposed use, above and beyond those already taking place in connection with the current lawful use of the site; but on the basis of the Appellant's own evidence, the increase is likely to be considerable.
16. The donkey rides would be available to children and young adults, so it is likely that the riders would need to be driven to and from the appeal site by a parent or carer, who would then need to wait on site for the ride to finish. There is no indication that a shelter or other designated waiting area would be provided, so some of those waiting may choose to sit in their cars, possibly with heating / air conditioning running and the radio on; others may choose to wait outside in the yard, possibly talking and laughing among themselves.
17. The Appellants have provided a plan showing 15 car parking spaces within the appeal site, but the layout is such that a considerable number of these spaces would not be accessible if cars were already parked in other nearby spaces. At busy times, then, parking on site would be likely to involve a great deal of manoeuvring, with potential for conflict between other visitors waiting on foot in the yard, or arriving and leaving in their vehicles.

18. In the absence of any detailed information as to how the rides, and the movements of visitors and their cars, would be managed it is not possible to draw any firm conclusions as to the full extent of their impacts. Nevertheless it is evident that the presence of a substantial number of paying visitors on the appeal site, either riding donkeys, or standing around or sitting in cars waiting for rides to finish, would constitute a marked change from the current private nature of the land's primary use for agriculture and the keeping of donkeys.
19. Drawing all of this together, I find that such evidence as has been provided by the Appellants does not demonstrate that the proposed use would remain ancillary to the lawful use of keeping donkeys on the land. I appreciate that the commercial provision of donkey rides would only be undertaken for six months of the year. Nevertheless, on the basis of the information provided, during those six months it would generate a considerable increase in vehicle movements to and from the site, and the activities that would take place at the appeal site would be significantly different in character to those that currently take place in connection with the existing lawful primary and ancillary uses; this would, in my judgment, change the overall character of the use of the land.
20. I conclude that the commercial provision of donkey rides at the appeal site on the basis described in the LDC application could not reasonably be regarded as ordinarily incidental to the keeping of donkeys, and would not be ancillary to the primary use of the appeal site. Rather, the proposal would amount to a material change of use, and so would require a grant of planning permission.
21. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the proposed "use for donkey rides ancillary to a mixed use for agriculture and the keeping of donkeys" 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.

Jessica Graham

INSPECTOR