
Appeal Decision

Site visit made on 13 October 2020

by Roy Curnow MA BSc(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 November 2020

Appeal Ref: APP/F0114/X/20/3249016

Kestrels, Pensford, Bristol BS39 4JL

- 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 Nick Langdon against the decision of Bath & North East Somerset Council.
 - The application Ref 19/05236/CLEU, dated 4 December 2019, was refused by notice dated 28 January 2020.
 - The application was made under section 191(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 is the erection of two wooden buildings connected by a poly tunnel on a metal frame.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing operation which is found to be lawful.

Application for costs

2. An application for costs was made by Mr Nick Langdon against Bath & North East Somerset Council. This application is the subject of a separate Decision.

Preliminary Matter

3. The site address on the application form differs from that on the Council's decision notice and the appeal form, though all share the same postcode. I have used that from the latter two documents in my decision.

Reasons

4. When a certificate of lawfulness is sought, the burden of proof lies with the appellant. The case needs to be proven on the balance of probability.
5. Kestrels is a dwelling that lies in the open countryside within the Bristol and Bath Green Belt. The dwelling lies adjacent to the intersection of two access drives that run from the public highway to what appears to be a nursery business.
6. Planning permission was granted for the erection of the dwelling in 2010 (Council Reference 10/02095/FUL). This was subject to a number of conditions. These include number 5 that removed permitted development rights¹ to erect

¹ As set out in the Town and Country Planning (General Permitted Development) Order 1995 (as amended)

- garages or other free-standing buildings within the curtilage of the approved dwelling without the express permission of the Council. I have been provided with drawings associated with that permission that show that Kestrels was permitted within a fairly large, and largely square, curtilage that has been formed from the corner of a large field.
7. The buildings that are the subject of the appeal lie to the northeast of the house. They comprise two single-storey timber sheds that face one another across what might be described as a gravelled yard. On the gravel between the two sheds is the polytunnel.
 8. The Council's delegated report states that the "evidence suggests an expansion of the curtilage of Kestrels to provide space for the pair of timber buildings". I take this to mean that it considers the buildings to be outside the curtilage, as defined by the red line on the drawings approved under planning permission 10/02095/FUL. Comparing the 2010 drawings with the location plan for the matter before me, I have no reason to find otherwise. Therefore, the terms of condition 5 of that permission, which relate to development within the curtilage, does not have relevance to the case that is before me.
 9. It is common ground that the timber sheds were erected more than 4 years prior to the application for a certificate of use was made. It is also common ground that they were erected as part of a change of use of the land to a café use and that this use ceased before the application for the certificate was made. I have no compelling reason to find otherwise on these points.
 10. Amongst its terms, S191 states that if any person wishes to ascertain whether any operations which have been carried out in, on, or over land are lawful he may make an application to the local planning authority. S191(2) states that an operation is lawful if (a) no enforcement action may then be taken in respect of it and (b) it does not contravene the requirements of an enforcement order then in force. Amongst the time limits for enforcement action set out in S171B of the Act are: for building operations, 4 years; and for changes of use, other than to a single dwellinghouse, 10 years.
 11. I have no evidence that an enforcement notice had been issued in respect of the matter when the application for a certificate was made. Thus S191(2)(b) is not relevant here. The key to this appeal is whether the development is subject to the 4-year or 10-year time limits set out in S171B of the 1990 Act.
 12. The appellant argues that it is the former. He cites the judgement in *Sumner v SSCLG* [2010] EWHC 372 in support.
 13. The Council's position is that as the development also constitutes a material change of use of the land, S171B(3) of the 1990 Act applies; that is to say, the time period for enforcement action is 10 years. It cites *Murfitt v SSE* [1980] JPL 598 and *Perkins v SSE* [1981] JPL 755 in support.
 14. *Murfitt* and *Perkins*, differ from the case that is before me. Both related to appeals against enforcement notices where the notices were directed against a use and sought removal of operational development associated with the use enforced against. The former established, which was then supported by the latter, the proposition that a notice alleging a material change of use may require the removal of operational development associated with the

- unauthorised use, where the four-year time limit for enforcement against that operational development has passed.
15. *Sumner* also related to an appeal against an enforcement notice directed at the change of use of land. Its relevance to this case is that the judgement draws a distinction between the approach to be taken in enforcing against operational development and use. This position was reinforced in the Supreme Court decision, *Welwyn Hatfield BC v SSCLG and Beesley* [2011] UKSC 15. Its paragraph 17 includes the findings that "*Protection from enforcement in respect of a building and its use are thus potentially very different matters*" and "*The building attracts a four-year period for enforcement under subsection (1), while its use attracts, at any rate in theory, a ten-year period for enforcement under subsection (3)*". The theoretical part of the latter quote relates to a planning authority's ability to undertake future enforcement action. This is not of direct relevance to this appeal, but would be a matter for the Council to decide on the merits of the case.
 16. Therefore, had the case before me been one where the Council had served an enforcement notice against the use of the land, as the buildings were part and parcel of an unauthorised use so they could have been enforced against for up to 10 years from the date the use commenced. However, this is not the case. What is before me is an appeal where the appellant seeks a certificate of lawful development for the erection of the buildings. He does not refer to the use of the land. Therefore, using the distinction in *Sumner* and the findings in *Welwyn*, the 4-year rule applies.
 17. That being the case, and as the parties agree that they have been erected for a period in excess of four years, I find that the erection of two wooden buildings to be lawful development.
 18. This leaves the polytunnel to be assessed. The appellant has provided scant evidence to demonstrate that this constitutes operational development, as defined in S55 of the 1990 Act. Only the frame was present when I visited, its cover having been removed. I could not be sure how the frame was set into the land and this is not set out in the submissions.
 19. Thus, it has not been sufficiently demonstrated that the polytunnel constitutes operational development using the three primary factors of size, permanence and physical attachment set out in established case law, including *Skerritts of Nottingham Ltd v SSETR and Harrow* [2000] JPL 281. Therefore, on the basis of the facts and evidence, and using the powers in S191(4) of the Act, I will modify the terms of the application to omit reference to the polytunnel.

Conclusion

20. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the erection of two wooden buildings connected by a poly tunnel on a metal frame was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Roy Curnow

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 4 December 2019 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and cross-hatched in black on the plan attached to this certificate, were 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 operational development consisting of the erection of the two timber sheds was substantially complete for four years at the date that the application was made.

Signed

Roy Curnow

Inspector

Date: 18 November 2020

Reference: APP/F0114/X/20/3249016

First Schedule

The erection of two wooden buildings

Second Schedule

Land at Kestrels, Pensford, Bristol BS39 4JL

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 /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were 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 /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation 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: 18 November 2020

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Scale: Not to scale

