



Appeal Decision

Hearing Held on 9 December 2020.

by Stephen Brown MA(Cantab) DipArch RIBA

an Inspector appointed by the Secretary of State

Decision date: 01 February 2021

Appeal Ref: APP/K2610/X/18/3219915

Merryhill House, Telegraph Hill, Honingham NR9 5AT

- 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 by Mr R Bull - Royale Parks Ltd - against the decision of Broadland District Council.
 - The application ref. 20180869, dated 23 May 2018, was refused by notice dated 13 December 2018.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - A certificate of lawful use or development is sought for the occupation of the existing dwellinghouse as a Class C3 dwelling without restriction of occupation since there is no enforceable condition controlling such occupation.
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Decision

1. The appeal is dismissed.

Background

2. The appeal site lies in the open countryside some 15 kilometres to the west of Norwich. In 1984 planning permission was granted for the erection of a house at Merryhill Farm, Telegraph Hill, Honingham¹. The house stands in a large garden on the southern side of what is now Merryhill Country Park, which adjoins the house site to the north and west.
3. At the time it was built the house was subject to an agricultural occupancy condition. In 1991 a further planning permission was granted under the Town and Country Planning Act 1971 (the 1971 Act) to continue the development without compliance with the agricultural occupancy condition, but with a variation of that condition².
4. The application in this case sought occupation of Merryhill House without compliance with the condition as varied by the 1991 permission – that is an unrestricted use within Use Class C3.

¹ Decision notice ref. 84.0386, dated 21 May 1984.

² Decision notice ref. 902110, dated 15 February 1991

Reasons

5. The main issue in an LDC appeal is whether the Council's decision was well-founded. In that regard the principal question in this case is whether on the 23rd May 2018 the proposed use of Merryhill House would be lawful in the light of planning permission refs. 840386 (the 1984 permission), and 902110 (the 1991 permission) and the status of conditions attached to those permissions.
6. In a s.195 appeal against the refusal to grant a LDC the burden of proof is on the appellant to show that on the balance of probabilities the proposed use would be lawful. For the avoidance of doubt, I should also explain that in the context of a s.195 appeal the planning merits of the proposed development are not relevant, and they are not therefore an issue for me to consider. My decision rests on the facts of the case, and on relevant planning law and judicial authority.
7. The 1984 planning permission was subject to 2 conditions – Condition 1, a standard time limit, and Condition 2 that:
'The occupation of the development hereby permitted shall be limited to a person employed or last employed before retirement locally full time in agriculture as defined in s.390(1) of the Town and country Planning Act 1971, or in forestry and any dependents of such a person residing with him or her including a widow or widower'.
8. In 1991 permission was granted to:
'Vary Condition number 2 of planning permission ref. 84.0386 to limit occupancy to a person operating leisure use of the site' at Merryhill Farm Telegraph Hill, Honingham'.
9. It was confirmed at the Hearing that the 'site' referred to in the 1991 permission was to all intents and purposes the same site as what is now Merryhill Country Park, which then traded as 'Merryhill Leisure'. That part of the site is now operated as a caravan park used primarily for holiday accommodation.
10. The appellant argues that because the section of the 1991 decision notice headed *'In accordance and subject to the following conditions'* is left blank and followed by nothing other than an informative note about Building Regulations, this planning permission is subject to no conditions at all.
11. In the Supreme Court case of *Lambeth*³ the judge, examining the content of a decision notice on a s.73 application found that it set out what was approved – 'the variation of condition set out below' followed by a precise and accurate description of the relevant development, the condition to be varied, and the permission under which it was imposed. This was followed by statements of the wording of the original condition and that of the proposed condition. The judge goes on to say that the obvious and only natural interpretation of those parts of the document was that the Council had approved what was applied for – the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. He added that there was certainly nothing to indicate an intention to discharge the condition altogether, or in particular to remove the restriction expressed in the previous condition.

³ *London Borough of Lambeth v SoSHCLG and Others* [2019] UKSC 33.

12. This appears to me remarkably similar to the situation in this case where the 1991 decision notice sets out that the Council have approved what was applied for – to ‘*vary condition number 2 of planning permission 84.0386*’ – followed by and described what that variation is – that is, ‘*to limit occupancy to a person operating leisure use of the site*’. This in turn followed by the address of the site referred to.
13. While there is no formal statement of the wording of the original and proposed conditions, there can be no significant doubt as to the wording of Condition 2 of the 1984 permission, and the wording of the varied condition is included in the statement of what is permitted. In the light of this I consider the decision notice presents an explicit and unambiguous statement of the condition as varied.
14. The appellant questioned the form in which the 1991 decision notice was cast, in that it does not follow the good practice and format that can be expected in a s.73 determination, which would most likely set out any new condition as well as any other conditions that still had effect. The Council could not provide any record of the practice they adopted in 1991 as to how documents such as these would have been drafted. Their view was that the formality and comprehensive nature of s.73 applications has greatly increased over the years but was not so stringent in 1991.
15. It is almost certain the 1991 determination was made under s.31A of the 1971 Act as amended, introduced into that Act in 1987⁴. The provisions s.31A and s.73 are very much the same – that is, they consider development of land without compliance with conditions subject to which a previous planning permission was granted. These provisions are commonly referred to as being for amendment or variation of a condition.
16. Government advice at the time s.31A was introduced was that, if the authority decide that some variation of conditions is acceptable, a new alternative permission will be created and it is open for the applicant to choose whether to implement the new permission or the one originally granted⁵. Current PPG advice is that in granting permission under s.73 the local planning authority may also impose new conditions⁶. It appears to me there is a difference in emphasis between the idea of ‘variation of conditions’ as expressed in the 1986 advice, and that of ‘imposing new conditions’ in the current advice. The former implying that the original condition still exists but in alternative forms, the latter that there is an entirely new condition.
17. In the light of this it is understandable why such differences exist between what is now expected in a s.73 decision notice, and the content of a decision notice under s.31A drafted some 30 years ago. The 1991 permission granted under the 1971 Act does not set out the condition in what is now the more or less conventional way – that is, it does not recite the new condition under the heading of ‘Conditions’. Nevertheless, I consider the 1991 decision notice clearly and concisely sets out which condition on the 1984 permission is to be varied, and what that variation is.

⁴ By the Housing and Planning Act 1986.

⁵ DoE Circular 19/86 – ‘Housing and Planning Act 1986: Planning Provisions’ – Paragraph 13.

⁶ Planning Practice Guidance: ‘Use of planning conditions’ Paragraph: 040 Reference ID: 21a-040-20190723.

18. There was discussion about whether the most recent case law should be considered at appeal stage, or whether it is only the law pertaining at the LDC application date and at the time of the Council's decision that may be taken onto account. In my experience it is frequently the case that additional evidence is put in at appeal stage that was not before a Council when they took their decision. I can see no reason why this should not include the most recent relevant court cases. Indeed, s.195 refers to whether or not the Council's 'refusal' was well-founded, not their reason for refusal. I am entitled to consider all the facts before me in coming to a decision, and it would be counterintuitive to grant a certificate if it were clear that current law indicates otherwise.
19. The appellant argues that without an explicit condition the word 'operator' in the 1991 permission is vague and could mean a wide range of people, including for instance a night-watchman, security guard, or receptionist. The Council say that the operator is someone who controls the leisure use of the caravan site and is responsible for such things as management and maintenance of the swimming pool, tennis courts and open spaces.
20. I consider an operator in this context is a person who has overall control of an operation. As for instance the operator of a machine or of a company would have overall control over that particular entity. I see no reason why the operator of the leisure use of Merryhill Country Park should be seen otherwise. While the other occupations mentioned may be necessary in the general running of a business, they are not what can reasonably be understood as the operators of that business.
21. It is also argued that the condition is unclear in that it does not make any reference to dependants, those last employed, or other residents who might lawfully occupy the house – as did the agricultural occupancy condition on the 1984 planning permission. It is also suggested that the approved variation could have incorporated the words 'or to a person operating leisure use of the site' into the 1984 agricultural occupancy condition so that it would still include those other people.
22. I accept that the original Condition 2 could have been varied in numerous ways and included others amongst those permitted to occupy the house. However, I do not consider the condition is unclear in this respect, but that it is in fact a remarkably restrictive condition. This may well have been intended by the then owners to ensure that occupation was limited to someone in control of the larger Merryhill site at all times and that this would not continue when he or she ceased to be in that role.
23. However, as the Council say Merryhill House is clearly a family house within Use Class C3. It could be occupied by the operator and family, and no enforcement action could be taken against such use whatever else was not included in the condition. Furthermore, I have come to the view that Condition 2 continues to exist in its varied form, and it follows that the appellant could make a s.73 application to replace this with another condition that might legitimise other occupants. Alternatively he could make a planning application for an unrestricted C3 use.

24. Overall, I consider a new and alternative condition was imposed by the 1991 decision, and that the meaning of the condition is clear. While the use of Merryhill House is without doubt as a Use Class C3 dwellinghouse, its permitted use is quite tightly restricted and a change to this would need to be considered in the light of national guidance and local planning policy - particularly in relation to development of individual dwellings in the countryside.
25. I conclude that on the balance of probabilities on the 23rd May 2018 the proposed use of Merryhill House as a Class C3 dwelling without restriction of occupation would not have been lawful in the light of planning permission refs. 840386 (the 1984 permission), and 912910 (the 1991 permission) and the status of conditions attached to those permissions.

Conclusions

26. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of occupation of the existing dwellinghouse as a Class C3 dwelling without restriction of occupation at Merryhill House, Telegraph Hill, Honingham NR9 5AT 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.

Stephen Brown

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Ben Eiser	Eiser Planning and Development Consultancy Ltd.
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FOR THE LOCAL PLANNING AUTHORITY:

Jodie Cunningham-Brock	Solicitor, Norfolk County Council.
Matthew Rooke	Area Team Manager, Broadland District Council.

DOCUMENTS

- 1 Attendance list.
- 2 Statement of Common Ground.