



Appeal Decision

by K Stephens BSc (Hons) MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 June 2021

Appeal Ref: APP/X2220/X/21/3266722

Kestrels Fen, Ash Road, Woodnesborough, Sandwich CT3 2BZ

- 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 Mrs C Wetherall against the decision of Dover District Council.
 - The application Ref 20/01157, dated 10 October 2020, was refused by notice dated 4 December 2020.
 - The application was made under section 192(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 described as 'use of land for importation of topsoil raising land level by approx 300mm to reinstate original land level prior to its use for turf stripping.'
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The description in the heading is taken from the application form and refers to the 'use of land'. However, on the application form the appellant has clearly indicated that the proposal is for carrying out 'building and other operations' and is not for the change of use of the land. The LDC application is clearly for any operations proposed under section 191(1)(b) of the Act, and not the 'use'. Having sought the views of the parties, the appellant has confirmed that the description can be amended to delete 'use of land for' to read '*Importation of topsoil raising land level by approx. 300 mm to reinstate original land level prior to its use for turf stripping.*' I shall proceed on this basis, notwithstanding the description in the heading.
3. It has not been necessary to do a site visit, as I am able to proceed to a decision based on the submitted evidence from both parties.
4. The purpose of an LDC application made under section 192 of the Act is to find out whether a future development, as described, would be lawful on the date the application was made. The onus is on the applicant to provide all the relevant information and evidence to support his case. The case must be considered solely on the facts of the case, the relevant planning law and judicial authority.
5. Consequently, planning merits are of no relevance. There is no dispute between the parties that the 2.5 hectare parcel of land has been subject to turf stripping over the years resulting in some lowering of ground levels, and that soil would need to be brought onto the land to raise ground levels to those

before turfing began. Hence the planning history and the facts referred to in the witness statements provided by the appellant are not in dispute.

6. From the evidence before me, the site is not within a Conservation Area and there are no Article 4 Directions in place or conditions attached to the site which would restrict the use of permitted development rights.

Main Issue

7. The main issue is whether the Council's decision to refuse the LDC application was well-founded.
8. The appeal turns on (i) whether the proposed importation of topsoil, to replace that which has been stripped over the years, spreading it and the resulting raising of the ground level across the land by approximately 300mm amounts to development, and if so (ii) whether that development would constitute agricultural permitted development and would be granted planning permission and hence be lawful on the day the LDC application was made.

Reasons

9. In section 55(1) of the Act 'development' means "*the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land.*"
10. Section 336 of the Act describes 'engineering operations' as 'includes the formation or laying out of a means of access to highways' but this does not offer much assistance here and there is no definition of 'other operations'. Engineering operations would normally involve works with some element of pre-planning and would generally, but not necessarily, be supervised by a person with engineering knowledge. However, this would not require the appellant or person carrying out the works to be an engineer themselves. Other operations can include works such as the formation of earth banks and tipping to raise land levels – these works generally do not require the same degree of pre-planning and skill as engineering operations.
11. Calculating the amount of topsoil needed and bringing that quantity to site would require some degree of pre-planning. The work to import topsoil and spread it on the land would not require a particular engineering skill. Furthermore, the courts have held that operational development comprises activities which result in some physical alteration to the land, which has some degree of permanence¹.
12. Despite the turf stripping history of the site, soil levels were not restored after each turf strip, and ground levels have been reduced by approximately 500mm. This is not an insignificant reduction and the amount of topsoil required to restore levels, even by 300 mm, would result, in my view, in a physical alteration of the land with some degree of permanence for the continued agricultural use of the land, constituting an 'operation'. Whilst the land may retain its agricultural use, I find the nature of the proposed works would amount to 'other operations' under section 55(1) of the Act.
13. However, section 55(2) of the Act sets out a number of operations or uses that do not involve development. Sub-section (e) excludes "*the use of any land for*

¹ *Parkes v Secretary of State for the Environment* [1979] 1 All E.R. 211

the purposes of agriculture or forestry...and the use for any of those purposes of any *building* occupied together with land so used" [my emphasises]. Whilst agricultural use of land is not development, it does not mean that all other activities or operations carried out on agricultural land are also excluded from the definition of development. For the reasons above, I find the proposed works are not excluded and hence would involve development. By definition, under section 57(1) of the Act, planning permission is required to carry out any 'development' of land. Hence the importation of topsoil to raise land levels is development that requires planning permission.

14. Having established that the proposed works would be development, section 58 of the Act grants planning permission for certain developments by various means and Orders. The Town and Country (General Permitted Development) (England) Order 2015 (as amended) (the 'GPDO') is one such Order that grants planning permission for certain types of development, described as "permitted development".
15. Article 3 and Schedule 2, Part 6 of the GPDO makes provision for some agricultural and forestry permitted development, depending on the size of the unit. Class A deals with agricultural development on units of 5 hectares or more. From the evidence before me, there is nothing to indicate that the 2.5 hectare appeal site forms part of a larger unit and so does not fall to be considered under Class A.
16. For units of less than 5 hectares, such as the appeal site, Class B allows the carrying out of specific types of development listed in limitations B.(a) - (g) which I summarise as an agricultural building, plant or machinery, sewers, pipes or cables, a private way, a hard surface, deposit of waste, or various operations in connection with fish farming. The proposed tipping of topsoil to raise ground levels is not one of the types of development listed. Therefore, the proposed works are not permitted development under Part 6 of the GPDO and would not be granted planning permission.

Conclusion

17. 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 importation of topsoil to raise the ground levels 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.

K. Stephens
INSPECTOR