



Appeal Decision

Site visit made on 18 October 2021

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 9 November 2021

Appeal Ref: APP/D1265/X/21/3278549

Land at Spence Farm, Wootton Fitzpaine, Bridport DT6 6DF

- 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 Grape Vibes Ltd against the decision of Dorset Council.
 - The application Ref WD/D/20/002320, dated 21 September 2020, was refused by notice dated 1 April 2021.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described as 'Continued use of land for the stationing of mobile residential accommodation including use of land for ancillary residential purposes. – Please see Cover Letter dated 21st September 2020 for further information'.
-

Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is whether the Council's refusal to grant a lawful development certificate (LDC) was well founded. This will turn on whether the existing use stated in my banner heading above was lawful as at the date of the application.

Reasons

Preliminary matters

3. Where a LDC is sought, the onus of proof is on the appellant to make their case on the balance of probabilities. If there is no evidence to contradict or make the appellant's version of events less than probable, and their evidence is sufficiently precise and unambiguous, a LDC should be granted. Planning merits are not relevant; the question is one of lawfulness.
4. The appellant's case is that the use as described is lawful because the time for taking enforcement action has expired. Section 171B of the Town and Country Planning Act 1990 (1990 Act) sets out time limits for the taking of enforcement action. Section 171B(1) states a time limit of four years for operational development. Under s171B(2), where the breach consists of a change of use of a building to use as a single dwellinghouse, the time limit is four years starting with the date of breach. Section 171B(3) then states that in the case of any other breach of planning control, the time limit is ten years.

5. Although the use claimed by the appellant is residential, since the application is not in respect of a change of use of a building to use as a single dwellinghouse, the applicable period for immunity is ten years.
6. As regards the nature of the application, the Council has altered the description of the proposal and submits that it is entitled to do so under s191(4) of the 1990 Act. This subsection states that, if on an application for a LDC in respect of an existing use, the Council is provided with information satisfying it of the lawfulness of the development as described, or that description *as modified or substituted* by the Council [my emphasis], they shall issue a certificate to that effect; in all other cases, they are to refuse the application.
7. My reading of this subsection is that it only permits the Council to modify the description of the development applied for in order to enable it to grant a certificate for that amended/substituted description of development; the Council is not permitted to amend/substitute a description in circumstances where they are refusing the application. My determination is therefore based upon the description of development stated on the application form.
8. There appears to be no dispute that the existing use as described represented a material change of use, and I have no reason to disagree with that stance. The matter to be determined therefore is whether the use was continuous over the immunity period claimed.

Available evidence

9. In brief, the appellant's evidence is that the appeal site was first occupied for residential use from June 2008 with the then occupant placing a yurt on the land, along with establishing a small garden area with a firepit and outside toilet.
10. The original occupier vacated the site on 12 December 2014, leaving the yurt in place on site until 21st January 2015. The wooden platform and wooden posts upon which the yurt was positioned were concreted in place until 9th March 2015. The fruit and vegetable patch, firepit, and willow structure in which the outside toilet was located all remained in situ during the intervening period of vacancy. On 9 March 2015, a new occupant then started to occupy the site in a caravan. In July 2019, a second caravan was apparently placed 'at the site' as sleeping accommodation for the then occupant.
11. In support of its case, the appellant has submitted signed statements from both of the occupiers of the appeal site, along with statements from the previous owners of the wider site at Spence Farm. Aerial photographs are also submitted in evidence, along with photographs of the site in use by the first and second occupants.
12. The Council does not offer any substantive evidence to counter the residential use of the site for the periods June 2008 – 12 December 2014 and 9 March 2015 to the date of the application. Rather, the Council's position is that the admission by the appellant that the site was not occupied from 13 December 2014 – 8 March 2015 means that the appellant has not shown on the balance of probability that the use was continuous over that period. The Council's position is that it would not have been able to take enforcement action during the period of vacancy.

Case law

13. I turn then to case law applicable to the question of continuous use. The leading case of *Thurrock*¹ related to a change of use from use for domestic purposes and agriculture, to use for domestic purposes and as an airfield/storage of aircraft. It was held in this case that a use can only become lawful if it continues throughout the relevant immunity period, such that the Council could have taken enforcement action at any time.
14. The Court commented that there is no presumption of continuance for a use commenced by a material change of use but which ceased to be in active use before an accrued right arose, and that it would be a 'nonsense' to require a local planning authority to serve an enforcement notice in respect of a use which had ceased to be active before immunity had accrued. Reference was made also to 'borderline cases' which would come down to planning judgment.
15. It was held in this case also that an enforcement notice can lawfully be issued even if at the moment of issue the objectionable activity is not going on. An example was given of a notice issued at a weekend or during a factory summer holiday when the use in question would still properly be described as ongoing.
16. The case of *Swale*² applied the *Thurrock* judgment and concerned the intermittent residential use of a barn which had originally been used for agricultural purposes. In *Swale*, it was held that if the use in question is not an established use, it has to be 'affirmatively established' not only at the start of the relevant immunity period, but over the whole period, and that logically discontinuous residential use is not continuous residential use.
17. It was emphasised that the use must actually continue throughout the relevant period and that the existence of an intention to resume use alone would not entitle the Council to take enforcement action. Thus it is necessary to consider not availability or suitability for use, but whether there is actual use.

Analysis

18. As noted above, the Council does not offer any substantive evidence to contradict that of the appellant related to the continuous use of the appeal site for the periods June 2008 to 12 December 2014, and 9 March 2015 to 21 September 2020. The appellant's evidence as to the residential use over these periods is set out in some detail within the written statements provided. However, some ambiguities exist in respect of this evidence in that the statements purport to relate to the red line area which is the subject of the LDC application, but items are referred to in the statements (such as the second occupant's second caravan being placed 'at the site') which appear from photographic evidence submitted to be outside of the LDC red line area.
19. Aerial photographs and photographs of the site apparently in use by the two occupants are supportive of the statements given but are only evidence of the use of the site at particular snapshots in time. These are therefore of limited utility in establishing continuous use.
20. Further, as regards the intervening period between 13 December 2014 to 8 March 2015, I do not consider that the site was in active residential use over

¹ *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226

² *Swale BC v FSS & Lee* [2005] EWCA Civ 1568

this period, but rather was only available for use. It may well be that the residential use was intended to resume after 12 December 2014, however, it would not have been open for the Council to take enforcement action in respect of an intention only. I find as a matter of fact and degree that the length of the period of vacancy was significant and not a de minimis interruption bearing in mind that it comprised almost a quarter of a year. The fact that the site did not revert to agricultural use during the period of vacancy does not mean that the residential use was affirmatively established.

21. I do not consider that an enforcement notice could have been issued during the gap between the two periods of occupation in the same way that a notice could be issued in respect of a use which does not occur over weekends or during a factory summer break. The latter both represent predictable fallow periods in respect of which the Council could have some sense of assurance at the time of issuing a notice that the use had not permanently ceased. In the present case, the intervening gap would not have been predictable by the Council and the Council could not realistically have known that this gap did not represent permanent cessation of the use. For the Council to have taken enforcement action during that gap would have been tantamount to it being required to take action against a use which had ceased to be active.
22. While I appreciate that the matter of continuous use was not the question to be determined in the appeal decision cited by the Council³, nonetheless, the Inspector did assess the position related to continuity and I have essentially shared the approach taken in that case. I note that the *Thurrock* and *Swale* cases did not concern the same factual scenario as the present case. However, I consider that both of these have laid down principles related to continuous use which are of general applicability. Thus, I find as a matter of fact and degree on the available evidence that the use was not continuous over the whole ten year period in question.

Conclusion

23. Concerns as to the Council's handling of the application are not for me in dealing with this appeal and for the reasons given above, I find that the existing use stated in my banner heading above was not lawful as at the date of the application. I thus conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use described in my banner heading above 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.

V Bond
INSPECTOR

³ Ref: APP/X0360/X/11/2163839