



Appeal Decision

Hearing Held on 19 October 2021

Site visit made on 20 October 2021

by Zoë Franks Solicitor

an Inspector appointed by the Secretary of State

Decision date: 15 November 2021

Appeal Ref: APP/U2805/X/21/3266883

Millstone Mushrooms, Corby Road, East Carlton, Market Harborough

- 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 Stonegate Limited against the decision of Corby Borough Council.
 - The application Ref 20/00438/CLE, dated 14 October 2020, was refused by notice dated 30 November 2020.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended ('the 1990 Act').
 - The development for which a certificate of lawful use or development is sought is free-range production/poultry building, associated yard and access road.
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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 proposed operation which is considered to be lawful.

Application for costs

2. At the Hearing an application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Preliminary issues

3. Corby Borough Council is now part of North Northamptonshire Council due to local government reorganisation.
4. The address of Millstone Mushrooms used on the application and the appeal forms is not correct as this is a separate site located on the opposite side of the A427. The plans attached the LDC application identify the site and it is better described as Land South of A427, Corby Road, East Carlton, LE16 8YB.

Main Issue

5. The proposed development is lawful if no enforcement action can be taken in respect of it and provided it does not contravene the requirements of any enforcement notice then in force¹. The Council confirmed that there has not been an enforcement notice served relating to the appeal site. The issue is

¹ Section 191(2) of the 1990 Act

therefore whether enforcement action in respect of the proposed operations could have been taken at the date of the application (14 October 2020) and more specifically whether development had commenced under planning permission reference CO92/C212 ('the 1993 Permission') so that it is still extant.

6. Section 56(2) of the 1990 Act provides that '*development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.*' It is therefore necessary to consider what works have taken place, whether they constitute a material operation and whether they are part of the approved permission.

Facts

7. The 1993 Permission was granted subject to conditions on 5 February 1993 for the '*Layout of land and construction of buildings for poultry rearing and egg production with associated roads and access to the A427*'. Condition 1 provided that development must be begun not later than the expiration of 5 years from that date. (i.e. before 5 February 1998).
8. Condition 4 states:

'Vehicular access to the site shall be via a single entrance/exit road connecting to the A427 at rightangles to the carriageway at a position to be approved by the Planning Authority in consultation with the Highway Authority and laid out and constructed in accordance with details of width, gradient, radii, and visibility splays and incorporating measures for channelisation of traffic all to be submitted to the Planning Authority for approval and to be finished and surfaced to an approved interim standard before any other development commences on site.'
9. The appellant has submitted evidence that part of the access road was built just prior to the expiration of the 1993 Permission. During my site visit I was able to see the physical works as shown on the photos submitted by the appellant. There was a concrete hard surface of between 15 – 20 meters and then a longer loose hardcore track along the route visible on the Googlemap image (also submitted as part of the evidence). The boundary hedge to the A427 is still in place, as shown on the photographs.
10. The appellant provided correspondence from the developer's agent to the Council dated 28 January 1998 confirming that development had commenced on site on 26 January and a local newspaper article dated 4 February 1998 regarding a poultry rearing and egg-production plant on a site off the A427 Market Harborough Road near Middleton with a photograph entitled '*Factory Site – Construction work is already underway on an access road*' (and the Council did not dispute that this was the correct site but could not comment on whether the photograph showed a material operation in accordance with the terms of the permission).
11. In addition, the appellant produced correspondence from the Council (in particular a letter dated 15 June 2000 from the Principal Planner) which acknowledged that the developer appeared to have commenced development. There are several other documents produced by the Council, namely the North Northamptonshire Joint Core Strategy 2016 and committee minutes relating to planning application 17/00180/OUT which both refer to an extant planning

permission for a major egg production farm on the site (and which was treated as a material planning consideration in the outline application).

Reasons

12. At the hearing, the Council argued that conditions 2, 5, 12, 14 and 16 are pre-commencement conditions and there was no evidence that the details submitted pursuant to them had been approved prior to the commencement of development (and therefore no evidence to prove that the 1993 Permission could have been lawfully implemented). The appellant was unhappy that this argument had not been raised in the Council's written submissions but the purpose of the LDC provisions is to enable the making of an objective decision based on the best facts and evidence available when the decision is taken, and it is clearly relevant to this appeal as to whether the permission was lawfully implemented. The appellant also had the opportunity during the hearing to respond to these points.
13. In relation to condition 4, the Council's case was not that the works undertaken would not meet the threshold of operational development under section 56 of the 1990 Act, but that the works had not been carried out in accordance with the 1993 permission. The Council argues that the ordinary reading and reasonable construction of condition 4 provides that not only the submission of details is required but also an approval, and there is insufficient evidence that this happened here. The Council does not accept that the drawings submitted, as referred to by the appellant, fully provided all of the necessary details to construct the road and the works undertaken were therefore not in accordance with condition 4 or the permission as a whole.
14. The appellant's case is that the works on site commenced prior to the expiration of the 1993 permission through the building of part of the access road. They say that condition 4 was not a pre-commencement or Grampian condition as it did not require the details of the road to be approved by the Council prior to the starting of the work, only that the road be finished and surfaced to an approved interim standard before any other development commenced on site. The appellant's case is that the works that were undertaken were part of the 1993 permission and this can be seen from the approved site layout plan and the Chris Evans Associates drawings 2070.01 and 02 (submitted by the developer's agent to the Council in a letter dated 30 December 1997) submitted in relation to condition 4 which show the location and layout of the access road as built.
15. The appellant did not agree that any of the conditions were true Grampian (i.e. negative) conditions as they did not prohibit any development from taking place until details had been formally approved. I agree that condition 4 does require certain matters to be approved but does not expressly prohibit works taking place until that happens, and in addition does not say how any such approval should be given. Condition 4 provides that there would be a breach if any wider works in connection with the permission were to take place prior to the access road being finished and surfaced to an interim agreed standard, but that is not what is being argued happened here.
16. The key features of a true Grampian condition² are that it is negatively worded, to prohibit the commencement or occupation of the development until some

² In accordance with the facts of the case *Grampian Regional Council v City of Aberdeen DC* (1984) 47 P & CR 633

specified action takes place and the required action must be on land not controlled by the appellant. However, the parties in this case were using the term more widely to refer to negative conditions i.e. a condition that prohibits the commencement of development until some specified step has been taken. Where development is commenced in breach of such a Grampian condition, it will be necessary to consider whether it was also a condition precedent.

17. If works are carried out in breach of a condition precedent, the permission will not have been lawfully commenced. A condition precedent is essentially characterised by two criteria: it must prohibit any development authorised by the permission from taking place until the condition is complied with and it must go to the heart of the permission.
18. Taking the above definitions into account, conditions 2, 5, 12, 14 and 16 do not expressly provide a mechanism for the formal approval of the required details, only the submission of those details. It would not be a reasonable or common-sense reading of these conditions based on the natural and ordinary meaning of the words to imply a requirement for a formal approval where one has not been specifically included. The developer submitted details to the Council in relation to each of these conditions with a letter from their agent dated 30 December 1997 i.e. prior to the date on which they say the works commenced. There was no formal statutory mechanism to discharge conditions at this time. In addition, the Council did respond to the submission of these details (and the letter dated 30 December 1997) by letter dated 29 January 1998 and made comments only in relation to conditions 2 and 5. Whilst this is not evidence in itself of the approval of the details submitted it would seem likely that all comments to be made in response to the letter dated 30 December would have been referenced, even if only to say that there would be further correspondence to deal with the other conditions if that were the case. The Council has not produced any additional correspondence itself regarding these conditions to make the appellant's version of events that the details were submitted prior to commencement of works unlikely on balance.
19. For completeness, I note that condition 14 did require that that a noise scheme be agreed with the Local Planning Authority before the commencement of development and it appears from the letter dated 30 December 1997 to have been done (and this was not disputed by the Council).
20. In any event, none of these conditions are true conditions precedent in accordance with caselaw³ as they do not expressly prohibit development until something has been done but rather require that something has to be done before the commencement of development.
21. Turning to condition 4, whilst I am satisfied that it goes to the heart of the permission, the action prohibited by it is not the construction of the road itself (or the commencement of development overall) but rather 'any other development' on site. Condition 4 requires that the approved access scheme must be implemented but does not state that it cannot be started until approval is received, and as set out above, there was no formal statutory mechanism for the discharge of condition at that time. Neither does condition 4 require that it has to be complied with in full in order for the development to be lawfully commenced. In addition, it is clear that details of the proposed scheme were submitted to the Council prior to the works taking place (by letter

³ R. (on the application of Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin)

dated 30 December 1997 as referred to above) so that the appellant had attempted to comply with the condition, and the letter received from the Council in reply did not request any additional details to be submitted in relation to condition 4. For these reasons, I do not find condition 4 to be either a Grampian condition or a true condition precedent.

22. As in all LDC cases, the burden of proof lies with the appellant on a balance of probabilities but the Council were not able to comment on or contradict the evidence provided regarding the date that the works to start the access road were undertaken. I therefore find, on balance, that the works were done prior to 5 February 1998, and indeed that seems to have been the view of various council officers since that time (other than possibly during the course of this appeal).
23. The photographs of the works submitted by the appellant accorded with my observations on site and I am satisfied that these works fall within the definition of 'material operation' under section 56(4) as operations in the course of laying out or constructing a road or part of a road. As it was not disputed that these works are located in the same place as indicated on the layout plan submitted as part of the 1993 Permission, and as I have found that they were not done on breach of condition 4 on that permission (or any other condition precedent or Grampian condition), I find that development had commenced under planning permission reference CO92/C212 ('the 1993 Permission') so that it is still extant.
24. 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 free-range egg production/poultry building, associated yard and access road 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.

Zoë Frank

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

David Manley

Of Queen's Counsel

He called

Alistair Skelton

Steve Abbott Associates Limited

FOR THE LOCAL PLANNING AUTHORITY:

Hanna Virta

Solicitor, Pinsent Masons

She called

Edward Oteng

Development Management Manager

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(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 14 October 2020 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

Planning permission reference CO92/C212 is extant.

Signed

Zoë Frank

Inspector

Date: 15 November 2021

Reference: **APP/U2805/X/21/3266883**

First Schedule

Free-range production/poultry building, associated yard and access road.

Second Schedule

Land South of A427, Corby Road, East Carlton, LE16 8YB

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, 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 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.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 15 November 2021

by Zoë Franks, Solicitor

Land South of A427, Corby Road, East Carlton, LE16 8YB

Reference: APP/U2805/X/21/3266883

Scale: Not to scale

