



Appeal Decision

by Gareth Symons BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 February 2022

Appeal Ref: APP/E2205/X/21/3273900

Lossenham Farm, Lossenham Lane, Newenden, Cranbrook, Kent TN18 5QQ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Thorson Farms Ltd against the decision of Ashford Borough Council.
 - The application ref 20/01731/AS, dated 11 December 2020, was refused by notice dated 9 February 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 'Use of on farm water bodies for Angling, use of farmyard for Anglers' parking and shared use of farm WC facility'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The outcome of the appeal turns on looking back at the use of the land for at least ten years from the date of the LDC application, which in this case was 11 December 2020. It is also a legal determination based on facts and evidence. Furthermore, both sides have submitted sufficient evidence on which to determine the appeal. Against this background, there would have been nothing to gain by visiting the site to see what the land looks like now. I have therefore proceeded to determine the appeal without a site visit. Neither appeal party has been prejudiced by this course of action.

Main Issue

3. Under s191(2)(a) of the 1990 Act, uses are lawful at any time if no enforcement action may then be taken against them, whether because they did not involve development or require planning permission or because the time for taking enforcement action has expired or for any other reason. On the application form submitted to the Council it appears that in part the application may have been made based on the claim that the angling activities were lawful due to them having planning permission by virtue of the Town and Country Planning (General Permitted Development) Order 2015.
4. However, in later correspondence with the Council when there was a query about the basis on which the LDC had been applied for, the agent clearly confirmed that it was for the established use of the water bodies on the farmland as a material change of use which had occurred in excess of ten years, and it was therefore immune from enforcement action. Although in the appeal evidence it is suggested that some of the angling use has fallen within 'permitted development rights' it is claimed that the level of angling fluctuates

beyond that scope. Against this background, I shall consider the appeal based on the angling use being development that comprises a material change of use.

5. The relevant time limit in this appeal under s171B(3) of the 1990 Act is the period of ten years beginning with the date of the breach. Based on the date of the application, the appellant needs to show that the use of the land for angling started at least no later than 11 December 2010. Moreover, the use must have continued substantially uninterrupted over the ten years period. An application for a LDC does not involve considering any matters of planning merit. It is restricted to considering whether, in this case, a specific use is lawful based on facts. The burden to make out the case rests firmly with the appellant and the test of the evidence is the balance of probability.

Reasons

6. To establish that development has occurred by a material change of use, there must be some significant difference in the character of the use of the land from what has gone on previously as a matter of fact and degree.
7. The current owner purchased Lossenham Farm as one block in May 2019. Although they say the previous owner had allowed angling to occur over about the previous 25 years, in emails it is confirmed that the angling went back a lot further. From 1965 to 2005 it is stated that the fishing rights were held by the Cranbrook and District Angling Club for an annual remuneration of £1700. This was entered into the farm accounts as part of farm income. The angling club arrangement ended because by then there were not enough people using the farm for this purpose. Although from 1965 to 2005 is more than ten years, there are no accounts available to establish the extent of the recreational angling use compared to the farm use to assess what may have been differences in the character of the use of the farm.
8. From 2006 to May 2019 friends and anyone who asked from adjacent villages were allowed to fish at the farm and the 'payment' was thanks by way of a bottle of wine for example. Various persons have given accounts of fishing visits and comments about the quality of the fish caught from about 2010. However, these give only scant details that do not substantiate anything meaningful about the levels of angling use such as numbers of anglers or the frequency of the use. These accounts appear to fit with the loose and probably intermittent 'ask/favour' arrangement from 2006 to 2019. Consequently, a material change of use cannot be established over this time as well.
9. More recently, since a water bailiff has been employed, there are some more details for the first three months of 2020 until the covid pandemic hit, but this is well short of the required ten years. Submitted photographs may show standing areas and footholds for anglers and some signs refer to fishing activities. Nevertheless, these do not substantiate the regularity or intensity of angling use. Nor does anglers use of the farm WC or the use of mobile welfare facilities. I have read the other evidence covering how the land owned by Thorsen Estates Ltd is managed from water environment and biodiversity points of view. However, this adds very little to the assessment about establishing a material change of use.
10. Even if angling has occurred on more days per year than those granted planning permission by the GPDO, that does not necessarily substantiate a

finding that there has been a material change of use. For the reasons already given, the evidence does not support such a conclusion anyway.

11. All in all, there is evidence about angling on the water bodies at Lossenham Farm, but the appellant has, as a matter of fact and degree, fallen well short of showing on the balance of probability that there has been a material change of use of the land to constitute development that is now immune from enforcement action and thus become lawful.

Conclusion

12. 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 use described in the 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.

Gareth Symons

INSPECTOR