



Appeal Decision

Site visit made on 18 March 2022

by Anthony J Wharton BArch RIBA RIAS MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 April 2022

Appeal Ref: APP/Y2736/X/21/3284182

Coulton House Farm, Coulton, Hovingham, York YO62 4NE

- 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 decision to partially grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Paul Judson against the decision of Ryedale District Council.
 - The application Ref 21/00729, dated 6 May 2021, was notified by notice dated 20 August 2021.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development was sought is: *'The construction of a building at Coulton House Farm without planning permission'.*
 - **Application for Costs:** An application for costs has been made by Mr Paul Judson against Ryedale District Council. This is the subject of a separate decision.
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Decision

1. The appeal is dismissed. See formal decision below.

Background information

2. The appeal building was erected as a 2-bay extension to a 4-bay agricultural building which was subject to a prior notification approval under reference 11/00195/AGNOT ('the AGNOT' or '*main building*'). The application was made pursuant to Schedule 2, Part 6, Class A of The Town and Country Planning (General Permitted Development) (England) Order 1995 ('Class A of the GDPO'). Article A2 of Class A of the GDPO sets planning conditions to permissions granted under this part of the GDPO. The relevant condition for the building states:

'A.2—(1) Development is permitted by Class A subject to the following conditions—(a) where development is carried out within 400 metres of the curtilage of a protected building, any building, structure, excavation or works resulting from the development shall not be used for the accommodation of livestock except in the circumstances described in paragraph D.3 below or for the storage of slurry or sewage sludge.'

3. The 'AGNOT' building was completed and the approved use was as a Dutch Barn. The details were shown on the approved 'AGNOT' plan and the building was subject to the above Condition A.2-(1). However, confusion has arisen over what building(s) the 'AGNOT' permission applies to. Paragraph 5 of the Appellant's original grounds of appeal dated September 2021 referred to the 'AGNOT' plan. In the absence of a red line, the Council considered that the plan showed that the 'AGNOT' permission related to all buildings shown on the plan. These included the Grain Store, Cart shed, Garage and Dutch Barn.

4. This interpretation was disputed by the Appellant and it is stressed that the 'AGNOT' permission and associated restriction of the keeping of livestock (in this case pigs) only applies to the Dutch Barn. The Council accepts that the permission only related to the Dutch Barn but that this does not alter their case in relation to the use of the appeal extension for the keeping of livestock as being unlawful.

5. Following the construction of the additional bays, a LDC application, (reference 20/000965/CLEUD) was made on the basis that the combined 'AGNOT' building together with the extension was lawful, including for the use of the accommodation of livestock (pigs). This was refused on the basis that the northern element of the building (the 'AGNOT' initial Dutch Barn) was subject to the 'AGNOT' approval and, therefore, Condition A2. The decision was unchallenged.

6. On the application form for this LDC application, the existing development is described as being for *'the construction of a building at Coulton House Farm without planning consent'*. However, in the statement of facts submitted in support of the LDC application, it is indicated that confirmation was being sought that the *'siting and construction of the extension to the agricultural building and for the housing of livestock'* was lawful. On the appeal form at Section E, where a description of what is being sought by the LDC is requested, the answer is *'Works to erect an agricultural building for the housing of livestock'*. By implication, therefore, it is clear that in seeking to establish whether the building of the extension was lawful it was also seeking to establish that the use for the keeping of livestock was also lawful.

7. The LPA granted a LDC but in the following terms:

'In respect of building operations for the erection of an extension to the existing building for agricultural storage (excluding housing livestock, slurry or sewage sludge) as shown outlined in red on the submitted 1:2500 scale site location plan on the basis that they were substantially completed more than four years before the date of this application'.

8. Thus, although the LPA accepted that the operational development carried out was lawful, it considered that its use for the keeping of livestock (namely pigs) was not lawful. This is now challenged by the appellant and I now turn to the gist of the cases made on behalf of the appellant and by the Council.

The gist of the case for the Appellant

9. It is contended that the LDC application sought only a certificate in respect of the building operations for the erection of an agricultural building. As the LDC was granted in terms which included a modification/substitution of the description in the application of the works, including reference to specific use, it is considered that it amounts to a refusal in part of the application giving rise to this right of appeal under section 195(4) of the 1990 Act.

10. The appeal is submitted on the basis that the extension does not have the benefit of any planning permission, whether granted expressly or under permitted development (PD) rights, which has been confirmed by the LPA when determining the Refusal. It has also confirmed that the structure itself has been erected for a period in excess of 4 years and so has become lawful with the passage of time.

11. It is indicated that the LDC sought was limited to the lawfulness of the building as a building operation. It did not make mention of use as there was no need: the structure is an agricultural building erected on agricultural land and so can be used for agricultural purposes. However, the LDC has been granted in terms which restrict

the lawful agricultural use to which the building can be put. It is contended that such lawful use can only be restricted by planning condition but, as the building is unauthorised (no planning permission has been granted for it and it falls outside the scope of the PNA Approval), there can be no condition imposed on it restricting its agricultural use to storage or preventing its use for the keeping of livestock.

12. It is stressed that although the building is an extension to the building authorised by the PNA Approval, internally it is physically separated from it and so can be used independently of the part to which it is attached. It is also indicated that it is designed for the purposes of agriculture and has been erected on land which has a lawful use for the purposes of agriculture. This is not disputed by the LPA. It is, therefore, considered that it can be used for agricultural purposes without restriction and without having to rely on section 75(3) of the Town and Country Planning Act 1990 which provides that a building in respect of which planning permission has been granted can, in the absence of use for a specified purpose, be used for the purpose for which it has been designed.

13. It is stressed that the keeping of pigs, for which the building has been used, is without doubt an agricultural use, as are other uses such as agricultural storage. If a building with a lawful use for the purposes of agriculture is used first for agricultural storage and then for the keeping of pigs, this does not involve a material change of use from agriculture to some other use for which planning permission is required. Both are agricultural uses.

14. However, it is possible to restrict the lawful agricultural use to which an agricultural building is put by way of condition. If the condition were then to be breached, enforcement action could be taken to remedy this breach of planning control (whether by enforcement notice or breach of condition notice).

15. By way of example, if pigs were to be kept in the building to which the PNA Approval applied, which is subject to a condition preventing the keeping of livestock imposed by para A2(1) of Class A, part 6 of the Second Schedule to the Town and Country Planning (General Permitted Development) Order 2015 (as amended), this would involve a use in breach of a condition in respect of which enforcement action could be taken.

16. However, as the building was not subject to the PNA approval, and there is no condition imposed restricting its use for the keeping of livestock, as no planning permission has been granted in respect of it, its use for the keeping of pigs is contended to be lawful. As it is acknowledged that the structure itself is lawful, and because there is no restriction imposed on the agricultural use to which it can be put, then the appeal should be upheld and the LDC should be granted in the terms sought by the application.

The gist of the case for the Council

17. The Council stresses that it has a right to modify the description of the LDC under section 193(4) of the 1990 Act. It is indicated that the confusion relating to the 'AGNOT' plan in no way alters the substance or strength of the Council's case as set out in their Appeal Statement. The Council strongly maintains that the lawful use of the extension is derived from the building which it extends, in this case the Dutch Barn. Therefore, the extension is subject to the same conditions governing the 'AGNOT' permission.

18. It is accepted that there is no dispute that the 'AGNOT' has been implemented and that Condition A2, applied to the Dutch Barn only (*the main building*). The Council also accepts that the built form of the extension itself has become immune from enforcement action due to the passage of time. However, it maintains that the use of the extension can still be enforced against because the keeping of livestock within the extension constitutes an unlawful material change of use.

19. The Council stresses that the starting point for determining whether a material change of use has occurred is to ascertain the correct planning unit, and the present and previous primary uses of that unit. Reference is made the case of *Burdle v Secretary of State for the Environment* [1972] and that the tests begin with the unit of occupation and turn on the concept of physical and functional separation.

20. The Council also refers to the principle held by the courts that if a building has become immune from enforcement through the passage of time, it does not mean the use of that building is to be regarded as being lawful. Therefore, it is argued that the immunity gained by the operational development of the extension itself does nothing to make the use of the building lawful. Instead, it is argued that the question is whether the use of the extension is lawful on its own merits.

21. Reference is made to the Appellant's argument that the land on which the extension sits is in agricultural use, that the keeping of pigs is agricultural use and therefore there has been no material change of use. The Council accepts the keeping of pigs is an agricultural use but maintains that the use of the extension to keep pigs represents a material change of use compared to the lawful permitted use of the extension.

22. Firstly, the Council indicates that the extension did not previously exist and there is no evidence that the land on which the building rests was being used for the purpose to which the building is now being put or any other use for that matter. Secondly, it is argued that the keeping of pigs in the '*main building*' is unlawful based on Condition A2(1)(a) of the GDPO. It is contended that '*the main building*' is a distinct planning unit compared to the wider agricultural planning unit because of the restriction to the types of agricultural use that can occur within it.

23. Thirdly reference is made to the case of *Sumner v Secretary of State for Communities and Local Government* [2010] EWHC 372 (Admin) which confirms that the lawful use of a building which has become immune from enforcement must be a use which is ancillary to the lawful use of the land on which the building sits. Despite the Appellant's argument that this case does not apply in the present case, they are in fact relying on this case to the same extent as the Council. The only issue between the parties is the question of what is the lawful permitted use of the land on which the extension sits and where this derives from, '*the main building*' or the wider agricultural planning unit.

24. The Appellant maintains that the extension is part of the wider planning unit which is in unrestricted agricultural use. Therefore, the keeping of pigs in the extension is lawful because it is ancillary to this use. However, the Council's strong position is that the extension forms part of the planning unit defined by the use of the '*main building*', for which there are restrictions upon its agricultural use.

25. The Council stresses that this is a matter of planning judgment and that the Appellant is wrong to suggest that the LPA has misinterpreted planning legislation or case law. It is a question of application and of fact and degree. The land on which

the extension now sits was part of the curtilage of the '*main building*', and the extension is now part of that building, as a matter of fact and degree.

26. This land is subject to the AGNOT and therefore condition A2. As a result, the extension is adjacent to and has open access to land which has restricted agricultural use. This extension also shares a roof with this land and there is no significant physical or functional separation. In addition, the Dutch Barn is physically separated from the surrounding agricultural planning unit. The extension is therefore part of the planning unit to which the AGNOT applies, that is, the Dutch Barn.

27. The extension clearly relates physically to the '*main building*' rather than the wider agriculture unit. The '*main building*' particularly the southern portion, and extension form a single unit of occupation which is separated from the wider agricultural planning unit. The extension is, therefore, part of the planning unit defined by the Main Building, rather than the wider planning unit.

28. As a result, it is contended that the extension derives its lawful use from the use of the Dutch Barn, the '*main building*', not the surrounding wider agricultural unit. The keeping of pigs in the '*main building*' is unlawful. Therefore, the keeping of pigs in the extension represents an unlawful use that is not ancillary to the use of the '*main building*'. Instead, the keeping of pigs introduces a new use introduced into the planning unit.

29. The keeping of pigs also changes the character of the usage of the '*main building*' and its curtilage from what has gone on previously. This has a material effect as it now involves the keeping of livestock within 400m of a dwelling house, contrary to the conditions laid down by Parliament in Class A of the GDPO. Therefore, the combination of the new uses is materially different from the original use, regardless of whether the original use of the '*main building*' continues unchanged.

30. Overall, there has been a material change of use that requires planning permission. This use has not become immune from enforcement due to the passage of ten years since the extension has not been erected for that long. The Council's decision to refuse the LDC to the extent it relates to use is well founded and the Appellant has produced no evidence to justify why this is not the case.

31. Instead, the Appellant's argument is based on the bare assertion that the extension derives its lawful use from the wider agricultural unit without any analysis of what the correct planning unit is, or appreciation that the '*main building*' and therefore the extension, is distinct in terms of use.

32. Further, the Appellant asserts that Part 6 Class A Schedule 2 of the GDPO 2015 does not apply to the extension but gives no explanation as to why. In the proper course of events, there is no reason why the extension should not have been subject to its own AGNOT application. Had the extension then been constructed and used in accordance with the Permitted Development rights under Class A, its lawful use would not have included the keeping of livestock.

33. The Appellant's suggestion that the land or building would have always been available for unrestricted agricultural use is therefore false. In turn, the keeping of livestock within the extension has been an unlawful use.

34. Reference is made by the Council to Article 3(5) of the GDPO which states:

*'(5) The permission granted by Schedule 2 does not apply if—
(a) in the case of permission granted in connection with an existing*

building, the building operations involved in the construction of that building are unlawful;

(b) in the case of permission granted in connection with an existing use, that use is unlawful.

35. As a result, the unlawful use of the extension leads to a loss of the Appellant's PD rights. Further, the unlawful use for the keeping of livestock has not gained immunity from enforcement under the ten-year rule. Therefore, no matter how the Appellant chooses to present their case, the use of the extension for the keeping of livestock is unlawful and this fact has been properly reflected in the LDC granted by the Council. The Council's refusal of the LDC (as applied for) is, therefore, well founded.

36. In conclusion it is argued that if an individual chooses to erect a building, without planning permission, intended to be used for a purpose which had no planning permission, then he inevitably runs the risk that he must remove the building if enforcement action was taken in time against it, or cease the use if enforcement action was taken against that use.

My assessment

Introduction

37. There is no dispute that, physically, the appeal building (the subject of the LDC application) was initially erected unlawfully as an extension to the 'AGNOT' or '*main building*' and that, at the time it was built, it did not have the benefit of any express planning permission. There is also no dispute that the extension, as operational development, has become lawful on the basis that it was erected in excess of 4 years prior to the appeal LDC application having been made. It is also a matter of fact that Condition A2, applied to the Dutch Barn (*the AGNOT- main building*).

38. It is argued on behalf of the appellant that the LDC application only sought a certificate in respect of the building operations. I have noted that, on the LDC application form, what was sought is described as '*the construction of a building at Coulton House Farm without planning consent*'. However, as referred to above, the statement of facts submitted in support of the application indicated that confirmation was being sought to confirm that the '*siting and construction of the extension to the agricultural building and for the housing of livestock*' was lawful. On the appeal form what was being applied for was described as '*Works to erect an agricultural building for the housing of livestock*'.

39. Thus it is evident that, that although stating that the LDC was sought for operational development only, it was implicit that the appellant wished to establish that the use of the extension to the Dutch Barn to house livestock (pigs) was also lawful. This is also clear from the Appellants detailed arguments in referring to the agricultural use of the extension. It is evident that in granting the LDC in the prescribed format, the Council had to consider whether both the operational development and the use to which the extension was being put were lawful. I consider that this was the correct approach.

40. As a matter of fact, the Council did only grant the LDC for what the Appellant claims to have been applied for. It granted an LDC for the '*siting and construction of the extension*' and in doing so indicated that it '*shall not be used for the accommodation of livestock*'. Thus, it issued the LDC on the basis that, although it

accepted that the operational development was lawful, the existing use of the extension for the keeping of livestock was unlawful.

41. For the reasons set out above, on behalf of the appellant, it is contended that this is not the case and that the keeping of livestock (pigs) is a lawful agricultural use within the overall planning unit of the appellant's agricultural land. I disagree with this contention and set out my reasons below.

The main issue

42. It follows from the above that the main issue in this case is whether or not the keeping of livestock in the extension was a lawful use of the building on the date that the LDC application was made.

Reasons

43. The courts have held that, as a matter of principle, if building operations have become immune from enforcement through the passage of time, it does not mean that the use of that building is also necessarily to be regarded as being lawful. Therefore, I agree with the Council that *'the immunity gained by the operational development of the extension itself does nothing to make the use of the building lawful'*. I also agree that the question is whether or not the use of the extension is lawful on its own merits.

44. Clearly there can be no argument that the land on which the extension sits is in agricultural use and that the keeping of pigs is an agricultural use. However, it does not automatically follow that the use of the extension to the Dutch Barn for the keeping of pigs is a lawful agricultural use.

45. When erected the extension was unlawful and due to it being located within 400m of a protected building and in the proper course of events, if the appellant wished to use the appeal building for the housing of livestock, planning permission would have been required. It is also the case that if another 'AGNOT' application had been made for the extension and had then been constructed and used in accordance with the permitted development rights under Class A, its lawful use would not have included the keeping of livestock. I agree with the Council, therefore that the appellant's contention that the land or building would have always been available for unrestricted agricultural use is, therefore, misguided.

46. Having considered all of the detailed arguments set out in the respective cases I acknowledge the Council's argument that the starting point for determining whether a material change of use has occurred is to normally ascertain the correct planning unit and to establish the present and previous primary uses of that unit. Reference is made to the case of *Burdle* and that the tests begin with the unit of occupation and turn on the concept of physical and functional separation.

47. In this case I consider that, although the Dutch Barn can be said to be part of the larger agricultural holding, there can be parts of that holding which are more restricted in terms of their agricultural use than others. This applies to the Dutch Barn which, because it is located within 400m of a protected building is precluded from being used to house pigs or any livestock for that matter.

48. Having inspected the Dutch Barn and its extension, I noted that there were no full height walls separating the 4 bays of the barn from the 2 bays of the extension. There was a low level partition only and, although built at different times, the Dutch Barn and its extension are perceived as being a single unit. As a matter of fact and

degree, therefore I agree with the Council that the extension forms part and parcel of the Dutch Barn, the original 'AGNOT' building.

49. My conclusion in this respect is reinforced by the Appellant's previous LDC application (20/000965/CLEUD) which sought a LDC for the whole building, the Dutch Barn and the extension. At that time the LDC was applied for on the basis of the whole building. Thus, irrespective of any disagreements regarding what constituted the correct planning unit(s), at that time the Appellant must have applied for the LDC on the basis that the whole building was lawful for the keeping of livestock (namely pigs).

50. Based on my conclusion above, therefore, I can understand the Council's argument that in keeping pigs in the extension, there has, in effect been a material change in use of the building. As a matter of fact and degree there is a significant material difference in the character of usage of the extension for the keeping of pigs than for a typical Dutch Barn or for a simple agricultural storage or garaging use. I accept that both uses are clearly for agricultural purposes but planning regulations relating to agricultural use do not simply allow any agricultural use on any agricultural land.

51. In certain circumstances, where the keeping of livestock is concerned, express planning permission is required and any PD rights (PD) are conditioned. Because the Dutch Barn was within 400m of a protected building (nearby residences) Condition A.2 of Article A2, of Class A of the GDPO was applied. I agree with the Council, therefore, that the keeping of pigs in the extended building, which physically forms part of the Dutch Barn is unlawful based on that condition.

52. However, that is not the only reason, in my view, why the use of the extension cannot be lawful. There is no doubt that the extension did not previously exist and there is no evidence that the land on which the building rests had previously been used for the keeping of livestock. If the Appellant had wished to use any building (or part of a building) for the keeping of livestock within 400m from a protected building (in this case nearby dwellings which do not form part of the agricultural holding) then planning permission would have been required for that use.

53. There is no express planning permission in place for such a use of the extension in this particular location on the Appellant's agricultural holding. Nor are there any PD rights applicable to the use for the keeping of livestock in the extended building. Even if a further 'AGNOT' application had been made, the keeping of livestock would not have been permitted because of its proximity to the nearby dwellings.

54. It follows, therefore, that the appeal building was unlawful when built and used for the keeping of pigs. As is now clear, the building itself became immune from enforcement action and on that basis the Council issued a LDC for the operational development only, as carried out. It had previously refused an LDC for the combined Dutch Barn and the extension on the basis of the 'AGNOT' condition. However, in my view, it could also have refused a LDC for the combined building or extension alone, on the basis that the use for the keeping of pigs has not gained immunity from enforcement action under the 10 year rule.

55. As well as finding that a lawful operational development does not necessarily mean that the use of a building is lawful, the case of *Sumner v Secretary of State for Communities and Local Government* [2010] EWHC 372 (Admin) confirms that the lawful use of a building which has become immune from enforcement must be a use which is ancillary to the lawful use of the land on which the building sits. I consider

that the lawful use of the extension can only be the same as that for the initial Dutch Barn. Although the extension itself has become immune from enforcement action, its use for the keeping of livestock was unlawful when it was constructed and I consider that such a use remains unlawful to-date.

56. In addition I find that the Appellant's assertion that the extension derives its lawful use from the wider agricultural unit to be poor. Even if the planning unit arguments are not determinative in themselves, other than stating that the land is agricultural land and that the keeping of livestock is an agricultural use, the appellant has not put forward any other convincing arguments that the keeping of livestock on this particular part of the Appellant's holding was lawful on the date of the LDC application.

57. I also agree with the Council that if an individual chooses to erect a building, without planning permission, intended to be used for a purpose which also has no planning permission, then inevitably there is a risk that the building should be removed. In this case whilst accepting that the operational development has become lawful through the passage of time, the same cannot be said of the use to which the extension has been unlawfully put; that is for the keeping of pigs.

Conclusion

58. In conclusion I also agree with the Council that the unlawful use of the extension leads to a loss of the Appellant's PD rights and that no matter how the Appellant chooses to present the case, the use of the extension for the keeping of livestock is unlawful and this fact has been properly reflected in the LDC granted by the Council. In my view, the Council's issuing of the LDC on the basis of the operational development only being lawful was, therefore, well founded. It follows that the appeal must fail and that the keeping of livestock in the extension was not a lawful use on the date that the LDC application was made.

59. In reaching my conclusions I have taken into account all of the submissions made on behalf of the Appellant and the Council. These include all of the initial documents; the appeal statements; the legal arguments; the full planning history and the final submissions. However, none of these carries sufficient weight to alter my conclusions on the main point at issue and nor is any other factor of such significance so as to change my decision.

Formal Decision

60. The appeal is dismissed. No change will be made to the partially granted certificate of lawful use or development (LDC) as issued by the Council.

Anthony J Wharton

Inspector