



Appeal Decision

Site visit made on 11 April 2022

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 May 2022

Appeal Ref: APP/D1265/X/21/3287203

Land Opposite Pound Farm Lane, from Hill House access to junction C24, Hinton Martell, Wimborne, Dorset BH21 7HP

- 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 Mr Brian Pitman against the decision of Dorset Council.
 - The application ref 3/20/1953/CLP, dated 22 October 2020, was refused by notice dated 19 May 2021.
 - 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: the erection of an agricultural barn.
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Preliminary Matters

1. The application for an LDC was made for a proposed development, under section 192 of The Town and Country Planning Act 1990 as amended (the 1990 Act). However, at the site visit I noted that there was a building on site similar to that proposed and located close to the field entrance. This appeared to be an agricultural barn.
2. If the agreement of the parties were secured, I am able to determine an appeal under section 191 of the 1990 Act, even if the application subject of the appeal was made under section 192. I have not, however, done this in this case for a number of reasons. Firstly, such a fundamental change to the basis of the appeal would mean that I would require substantial additional evidence from the parties, including evidence of how the building is used and details of the building constructed. Secondly, I have not been advised of whether or not the building was on site at the time the application was made, which is, of course, the relevant date for the determination of an LDC application. Thirdly, I have not been asked by the appellant to determine the appeal under section 192 of the 1990 Act, despite a building having been constructed on site.
3. Accordingly, I have determined the appeal under section 192 of the 1990 Act, which is consistent with the application as originally made and the Council's decision. I have not, therefore, had regard to the building on site when reaching my decision. Neither have I put my mind to whether or not the development on site accords with the proposed scheme that is before me.

Main Issue

4. Section 192(2) of the 1990 Act indicates that if, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate

to that effect; and in any other case they shall refuse the application. My decision is, therefore, based on the facts of the case and judicial authority.

5. I note that representations have been made that, in part, comment on the appropriateness of the proposed development. For the avoidance of doubt, the planning merits of the proposal are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a LDC was well founded. In this respect, the burden of proof is on the appellant to show that, on the balance of probability, the development referred to in the application would be lawful if begun on the date the application was made.
6. The matter in dispute between the parties is whether or not the proposed development, if instituted or begun at the time of the LDC application, would have been permitted by The Town and Country Planning (General Permitted Development) (England) Order 2015 (the 2015 Order). This is the main consideration in this case.

Relevant Legislation and Background

7. I have already mentioned the relevant sections of the 1990 Act. In addition to this, it is agreed that the relevant class of the 2015 Order is Class A, Part 6, Article 3, Schedule 2. This permits, amongst other development, the carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of works for the erection of a building. A.1. sets out the types of development that would not be permitted by Class A. This includes at A.1.(i) where the erection or construction of a building to be used for the accommodation of livestock would be within 400 metres of the curtilage of a protected building, as defined in D.1.(1) of Part 6, Article 3, Schedule 2 of the 2015 Order.
8. Under Class A, A.2. sets out the conditions that the development permitted by Class A would be subject to. In the case of a building permitted by Class A, condition A.2.(2)(i) requires the developer to apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting, design and external appearance of the building. I will refer to this as a prior approval application. Other conditions listed in A.2.(2) set out the process that must be followed with the prior approval application.
9. Of note is condition A.2.(2)(iii) of Class A, which states that the development must not begin before the occurrence of one of the following:
 - (aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
 - (bb) where the local planning authority give the applicant notice within 28 days following the date of receiving the applicant's application of their determination that such prior approval is required, the giving of such approval; or
 - (cc) the expiry of 28 days following the date on which the application under sub-paragraph (2)(ii) was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination.

10. Also relevant to this appeal is condition A.2.(2)(v) of Class A, which states that the development must, except to the extent that the local planning authority otherwise agree in writing, be carried out:
 - (aa) where prior approval is required, in accordance with the details approved;
 - (bb) where prior approval is not required, in accordance with the details submitted with the application.
11. On 5 December 2016, a prior approval application was made to the Council (reference 3/16/2816/PNFAG) pursuant to A.2.(2)(i) of Class A (the PAA). In the application form the development was described as 'a single span agricultural building'. I will refer to this development subject of the PAA as the prior approval building.
12. The 28 day period specified above expired without the Council making a determination as to whether the prior approval for the siting, design and external appearance of the proposed building was required. Despite this, the Council issued a decision notice on 13 February 2017 stating that 'prior approval is not required'.
13. A judicial review of the Council's decision was sought and the matter was determined in *R (oao Marshall) v East Dorset DC & Pitman [2018] EWHC 226 (Admin)*. I have been provided with a copy of the full judgment. In that case it was ordered that the Council's decision of 13 February 2017 is quashed.
14. The LDC application subject of this appeal followed for the erection of an agricultural barn. I will refer to this proposed development as the LDC barn.

Reasons

15. There is no dispute between the main parties that the LDC barn would fall within any of the criteria of development listed in A.1. of Class A. Accordingly, it is agreed that the proposed development subject of this appeal would be permitted by Class A, subject to the A.2. conditions. The matters in dispute in this case relate primarily to conditions (iii) and (v) of A.2.(2).

Condition A.2.(2)(iii)

16. As the Council failed to make any determination on the PAA within the 28 day period specified in A.2.(2)(iii)(cc), there is no dispute that condition A.2.(2)(iii) has been discharged for the purposes of the development subject of the PAA. The parties refer to this as the 'deemed prior approval' and I use the same phrase in this decision.
17. The parties also agree that the decision of Mrs Justice Lang has not had any effect on the deemed prior approval. Indeed, at paragraph 62 of her judgment Mrs Justice Lang refers to the PAA and, in quashing the Council's decision, she states, 'since I have found that the application was valid, and that the IP was entitled, under paragraph A.2(2)(iii) GPDO, to commence the development because the Defendant did not make a determination within 28 days, there is no point in ordering the Defendant to re-make its decision, as there is nothing for it to decide'.
18. It is the appellant's case that the deemed prior approval discharges condition A.2.(2)(iii) for the purposes of the LDC barn. The Council point to differences

between the proposal subject of this appeal and that subject of the deemed prior approval. It suggests that the differences are such that the appellant cannot rely on the deemed prior approval for the purposes of the development now proposed.

19. The Council refer to the PAA form and the answer given by the appellant in part 5; that the proposed development would be reasonably necessary for the purposes of agriculture as the building is to be used to winter house 45 ewes and their lambs through the winter period, as well as for the storage of 10 tonnes of potatoes. Whilst I note this, the appellant also points to part 4 of the form, where he answers 'no' to the question 'would the proposed building be used to house livestock, slurry or sewage sludge?'. He suggests that there is some ambiguity with regard to this matter.
20. The matter of the development proposed in the PAA is dealt with in great detail by Mrs Justice Lang in her judgment. In that case the appellant is an interested party, but was present at the hearing. It is clear that Mrs Justice Lang had the benefit of, and relied upon, the appellant's account of how he intended to use the building proposed in the PAA¹ in reaching her decision. She was also provided with the PAA form and, therefore, would have seen the appellant's answers in part 4.
21. With the benefit of all this, Mrs Justice Lang was clear in her judgment that the development proposed in the PAA 'was caught by the blanket prohibition on the erection of a building to be used for the accommodation of livestock in paragraph A.1(i), which formed part of the description of Class A' (paragraph 39). Whilst her judgment leaves the deemed prior approval untouched, it follows from her decision that she did not consider the development that is the subject of the deemed prior approval to fall within Class A. After all, the development subject of both the deemed prior approval and the Council's 13 February 2017 decision are one and the same; they come from the same PAA. It is worth noting at this point that the deemed prior approval does not confer planning permission for development outside Class A.
22. Despite what was put to Mrs Justice Lang at the hearing, she concluded that the prior approval building would fall outside Class A. This is because its purpose would be for the accommodation of livestock, as well as for the storage of potatoes. It is on the basis of this purpose that the deemed prior approval has been acquired. Whilst I acknowledge that the appellant later clarified that the prior approval building would not be used to accommodate livestock, this confirmation was after the expiry of the 28 day period and, therefore, after the date of the deemed prior approval. There may be a mechanism in condition A.2.(2)(v) for retrospectively altering the deemed prior approval in this way. However, I have not been advised that the Council provided any written agreement to the change suggested by the appellant.
23. The information submitted with the LDC application subject of this appeal confirms that the purpose of the LDC barn would be for the storage of hay, potatoes, fertiliser, diesel, machinery, a livestock trailer, a vehicle, and workshop tools. Whilst this description includes a potatoes store, the other purposes to which the LDC barn would be put are different to that of the prior approval building. I acknowledge that both buildings would be used for the

¹ Paragraphs 30 and 31 in particular.

purposes of agriculture, but I find a material difference between the stated purpose of each.

24. As noted in the judgment of Mrs Justice Lang, the correct approach to the interpretation of the 2015 Order is to use the ordinary meaning of the language. Accordingly, it is plain that the development with the benefit of the deemed prior approval resulting from condition A.2.(2)(iii) would be the development that was proposed and is the subject of the PAA that was made pursuant to condition A.2.(2)(i). Indeed, A.2.(2)(v)(bb) requires the development to be carried out in accordance with the details submitted with the application.
25. The development subject of this appeal would not be that described in the details submitted with the PAA. There would be a material difference between the LDC barn and the prior approval building, in terms of their stated purpose. Accordingly, it is more likely than not that the development subject of this appeal would not benefit from the deemed prior approval in order to discharge the relevant conditions of Class A, in particular those set out in A.2.(2).

Condition A.2.(2)(v)

26. It is the Council's case that the LDC barn would not comply with condition A.2.(2)(v), which requires the development to be carried out in accordance with the details submitted with the prior approval application, unless otherwise agreed with the local planning authority. In this regard the Council point to the difference between the proposed location of the prior approval building on the plans submitted with the PAA and the proposed location of the LDC barn. It has suggested the respective dimensions of the area shown as the building's location on each plan, as well as the distance of this area from the northern boundary of the site.
27. Whilst I note the appellant's suggestion that the plan submitted with the PAA was for reference purposes only, it nevertheless demonstrates the proposed location of the building. I also note that there is no mention on the plan that the location indicated is not to be relied on and is for reference purposes only. Condition A.2.(2)(ii) requires a prior approval application to be accompanied by, amongst other matters, a plan indicating the site. The plan submitted with the PAA showing the red outline of the field parcel and the black area of the proposed building complies with this.
28. The Council acknowledge that the layout and elevation plans for both the PAA and LDC application are the same, and that the footprint of the building shown in these plans is larger than the dimensions of the black area on the PAA layout plan. Nevertheless, the layout plan can be relied upon to show the location of the prior approval building. Having regard to the Council's suggested dimensions, referred to above, it is plain that the areas indicated as the location of each building on their respective layout plans would overlap to a degree, but would not occupy the same location within the field.
29. Again, condition A.2.(2)(v) may well provide a mechanism for altering the location of the prior approval building so that it would accord with the location indicated on the LDC plans. I have not, however, been advised that this has been pursued in this case.

30. Having regard to my findings above, even if the stated purpose of the LDC barn were the same as the stated purpose of the prior approval building, it is more likely than not that the development subject of this appeal if carried out would not comply with condition A.2.(2)(v). This adds further to my findings above with regard to whether or not the proposed development would benefit from the deemed prior approval.

Conclusions

31. I have found that the development subject of this appeal would not, on the balance of probability, benefit from the deemed prior approval in discharge of the relevant conditions of Class A of Part 6, Article 3, Schedule 2 of the 2015 Order, in particular those set out in A.2.(2). Even if the stated purpose of the LDC barn were the same as the stated purpose of the prior approval building, it is more likely than not that the development subject of this appeal would not comply with condition A.2.(2)(v).
32. For these reasons, and having regard to all matters raised, I conclude that, if instituted on the date of the LDC application, it is more likely than not that the development subject of this appeal would not have been permitted by the 2015 Order. Whilst the description of the proposed development subject of this appeal would fall within Class A of Part 6, Article 3, Schedule 2 of the 2015 Order, it is more likely than not that the development would be carried out without complying with conditions of the permission granted by Class A.
33. Accordingly, I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the erection of an agricultural barn 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.

Formal Decision

34. The appeal is dismissed.

J Moss

INSPECTOR