



Appeal Decision

Site visit made on 21 February 2023

by P N Jarratt BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 February 2023

Appeal Ref: APP/Y1138/X/22/3294056

Pixton Woodlands, Bampton, Tiverton, Devon, EX16 9HU

- 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 Ms Isla Farrington against the decision of Mid Devon District Council.
 - The application ref 20/01686/CLU, dated 3 October 2020, was refused by notice dated 1 June 2021.
 - The application was made under section 191(1) 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 a dwellinghouse without planning permission.
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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 existing operation which is found to be lawful.

Preliminary Matters

2. For the avoidance of doubt I should explain that the planning merits of any use or operations are not relevant and they are not therefore an issue for me to consider in the context of an appeal under section 195 of the Town and Country Planning Act 1990, as amended, which relates to an application for a lawful development certificate. My decision rests on the facts of the case and on relevant planning law and judicial authority.
3. The onus of proof rests with the appellant and the level of proof is on the balance of probabilities.
4. An interested party has made representations in respect of this appeal but these make reference to an original objection to the application for an agricultural workers dwelling and breach of conditions. No evidence is presented that is relevant to this LDC appeal.

Main Issue

5. The main issue is whether the Council's decision to refuse an LDC was well-founded. This turns on whether planning permission 14/01304/FULL was implemented.

The appeal site and relevant planning history

6. The appeal site is located towards the eastern side of Pixton Woodlands, outside a settlement and in open countryside. The building is a single storey flat-roofed dwelling built of straw bales and rendered. It is set within an

excavated and levelled site adjacent to the base of a former agricultural building and accessed by a track through the woodland enterprise from the public highway.

7. Permission 14/01304/FULL was issued on 22 October 2014 for the erection of an agricultural worker's dwelling. This was granted subject to seven conditions of which Condition 1 required that the use of the temporary dwelling shall be discontinued on or before 22nd October 2017 and prior to its discontinuance, a scheme for the restoration of the site shall be submitted, approved and implemented within 6 months of the use discontinuing. Condition 6 imposed an agricultural occupancy on the temporary dwelling. The conditions were imposed to allow time for the agricultural enterprise to become established and meet the essential need provisions of the Mid Devon Local Plan.
8. The appellant makes reference to the Council having issued a Breach of Condition Notice alleging a breach of condition 1 but stresses that the provisions of s191(3) do not apply to this appeal as lawfulness is not claimed in respect of condition. The current appeal is claimed in respect of the erection of a dwellinghouse and not in relation to its use.

Reasons

9. The appeal was originally made on three grounds but two of these are no longer being pursued by the appellant following a change in the agent. The grounds not being pursued relate to use as a single dwellinghouse having begun more than four years before the application (for the LDC) and that the condition requiring removal (of the building) was unlawful.
10. The appellant's case rests on the assertion that the building is lawful because it was built without the benefit of planning permission as it had been built significantly differently from the approved plans and substantially completed more than four years previously, which is accepted by the Council. The appellant asserts that it follows therefore that its use could not be subject to a condition.
11. As constructed, the building differs from the details of the permission. These relate to its dimensions and fenestration rather than to its positioning on site which overlaps the red area in the application drawing. Its siting generally reflects that shown on the block plan PW1/9B Revised, approved under the permission, and I do not regard any differences arising from the increased size of the building to result in any materially significant change to the siting or position.
12. The plan shows the alignment of the access track to the north side of base of the former agricultural building rather than between the base and the dwelling. However, the revised alignment is of little consequence to this appeal.
13. The dimensions of the dwelling indicated on the approved plan compared to those calculated by the appellant are:
 - West (and east) elevation: 15.7m compared to 20m
 - Through the building: 15.1m compared to 17.1m
 - Footprint: 207.7 sqm compared to 280.7sq m
 - Height 2.9m compared to 3.0m

14. The Council estimates the building to be 20% to 30% larger than indicated by the floor plan although the appellant's estimate is a 35% increase over what was permitted. Although I was able to confirm the appellant's east elevation dimension on site, it was not possible to measure the through building dimension as access to the interior was not available. Other changes from the approved plans relate to the dimensions and positioning of windows, the positioning of a stove pipe and a different internal layout.
15. Because of the setting of the building within an engineered level space and with no other building in the vicinity, from a casual inspection it is visually difficult to appreciate the increase in the dimensions, footprint and volume of the building from what was originally approved. Had this been constructed in a more urban environment, where comparisons in height and scale with its neighbours could have been made, then these changes would have been more obvious and taken on a different degree of materiality. Nevertheless in comparing actual dimensions, the increase in size is more readily apparent.
16. The appellant makes a point that for every metre in height of the building's walls, the enlargement adds 73cu m by volume. Whilst this may be a matter of fact, its relevance is questioned as the increase in the height of the roof according to the appellant is 0.1m. An increase of this magnitude was not distinguishable by me at my site inspection.
17. The building is unconventional in design, appearance and construction. Consequently changes in respect to fenestration are probably not as apparent as with a more conventionally designed house. I therefore consider that whilst they are not in accordance with the approved drawings, their materiality is not so significant.
18. The main change to the internal layout appears to be the creation of an internal corridor between bedrooms 2 and 3 to give access to the projecting central east elevation of the house. Again I do not regard this as significant as the internal layout is largely as originally proposed.
19. The appellant cites Handoll¹ and Sage². It was held in Handoll that a building subject to an agricultural occupancy condition was not built as approved and the planning permission was not implemented, it would be immune from enforcement action and free of conditions. I note that the building was constructed some 90 feet from its permitted location. In Sage it was held that if a building operation is not carried out, both internally and externally, fully in accordance with the permission, the whole operation is unlawful. Notwithstanding Sage, it is generally accepted that there has to be a margin of tolerance expressed in Handoll as divergence 'in a material respect, or to a material extent, with the permission granted'.
20. The appellant refers to three decisions in support of his case to which I have had regard.
21. The Cloverlands³ case concerned an extension to a dwelling which had been built with different openings and internal layout. The Inspector judged that whilst most of the individual differences were minor when assessed in isolation, they resulted cumulatively in a development substantially different to that

¹ Handoll and Suddick v Warner Goodman and Stret and East Lindsey DC [1995] JPL 930

² Sage v SSETR & Maidstone BC [2003] UKHL 22

³ APP/L3815/X/14/2215056

approved. Having had regard to case law the Inspector noted that whether a development pursuant to an existing planning permission is a matter of fact and degree and requires a judgement to be made and it is not sufficient simply to mark and measure the extent of differences. Similarities and the degree of compliance with the plan are also highly relevant, together which the works are substantially useable in the permitted building.

22. In the Westlands⁴ case, the Inspector found that a dwelling had been built without planning permission because its access were built 18m from the approved location, it had a larger footprint and the layout had been varied.
23. The Retsel Cottage cases⁵ involved a development substantially larger than approved, providing some 474-539sqm of accommodation compared to the 295-299sqm approved, in which the Inspector considered the differences between what was approved and what was built go well beyond what could be considered as minor. As the building was built without planning permission, and following the Handoll judgement, the development was not subject to any conditions.
24. In its final comments, the Council has not sought to challenge the caselaw or appeals referred to or to refer to others in support of their case. They rely on the development having a similar floor layout and design, albeit slightly larger, but the Council is of the view that this is not material in the sense that it is so different to mean the permission has not been implemented.
25. Having considered some of the individual variations between what has been approved and what has been built to be of minor significance, which alone would not have been so materially significant, I find that cumulatively, these changes and in particular the increase in the overall dimensions, to be of a material extent such that I conclude that the original planning permission has not been implemented.

Conclusion

26. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of erection of a dwellinghouse without planning permission was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under s195(2) of the 1990 Act as amended.

P N Jarratt

INSPECTOR

⁴ APP/E2001/X/3224843

⁵ APP/N1215/X/13/2190232;280;284 and 229

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(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 3 October 2020 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and marked in red (and identified by the arrow on the plan and description 'Pixton House') attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

It has been demonstrated on the balance of probabilities that the construction of a new dwellinghouse as built is materially different to that permitted under planning permission reference 14/01304/FULL such that the original permission was not implemented. As it was substantially completed more than four years prior to the LDC application, it is immune from enforcement action under s171(B)(1) of the Act.

Signed

P N Jarratt

Inspector

Date: 27 February 2023

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First Schedule

The erection of a dwellinghouse without planning permission.

Second Schedule

Land at Pixton Woodlands, Bampton, Tiverton, Devon, EX16 9HU

IMPORTANT NOTES – SEE OVER

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /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 use /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.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 27 February 2023

by **P N Jarratt BA (Hons) DipTP MRTPI**

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Scale: Not to Scale

