



Appeal Decision

Site visit made on 6 November 2023

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 9TH JANUARY 2024

Appeal Ref: APP/J1155/X/22/3311906

Overton Quarry, Coddan Hill, Bishops Tawton, Barnstaple, Devon

EX32 ODX

- 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 Taw Valley Contractors Ltd against the decision of Devon County Council.
- The application ref DCC/4321/2022, dated 16 August 2022, was refused by notice dated 6 October 2022.
- 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 described as 'Use of minerals extracted from Overton Quarry sites on land farmed in the vicinity for agricultural purposes. See attached statement for further details'.

Summary Decision: The appeal is dismissed.

Application for costs

1. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Preliminary Matter

2. The appellant and Council omitted to provide copies of case law referred to in written representations. Copies of these judgments were obtained and representations subsequently made have been taken into account.

Main Issue

3. The main issue is whether the Council's refusal to issue a lawful development certificate ('LDC') was well-founded. This will turn upon whether the proposed development would have been lawful as at the date of the LDC application. Planning merits are not relevant and neither are matters related to the Council's handling of the process. The onus is on the appellant to make their case on the balance of probability.

Reasons

Background

4. The Council issued an enforcement notice on 11 November 2020 ('2020 EN') encompassing the land which is the subject of the present LDC application. The development attacked by the 2020 Notice was: 'Without planning permission mining operations consisting of the extraction and export of stone'. The requirements were to: (i) Cease the extraction of minerals from the Land;

- and (ii) Cease the export of minerals from the Land; and (iii) Remove all plant and machinery used in association with (i) and (ii) above.
5. An appeal submitted against the 2020 EN was withdrawn and following the effective date of the 2020 EN, the Council sought an interim injunction order to control further mineral operations on site, which was granted in May 2022.

Proposed development

6. I have taken the description of the proposal in my banner heading from the application form, which cross references the application statement. The description in the application form refers to 'use' of minerals but the application statement alludes to permitted development ('PD') rights under Schedule 2, Part 6, Class C of the Town and Country Planning (General Permitted Development) (England) Order 2015 ('GPDO'). Class C relates to the *'Winning and working on land held or occupied with land used for the purposes of agriculture of any minerals reasonably necessary for agricultural purposes within the agricultural unit of which it forms part.'*
7. The Council comments that the description as a 'use' could of itself have been fatal to the application but that the proposal was considered on the basis of the Class C PD right. I consider the proposed development on the same basis as this appears in line with the appellant's intentions.

Legislative position

8. Section 191(2) of the Town and Country Planning Act 1990 ('1990 Act') states that operations are lawful at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission, because the time for enforcement action has expired, or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force. Matters as to lawfulness under both s191(2)(a) and (b) are in dispute.
9. As regards s191(2)(a) the appellant submits that the development proposed is PD under Class C as referred to above. As regards s191(2)(b) the appellant's submission is that per the judgments in *Mansi*¹ and *Duguid*² an enforcement notice cannot remove permitted development rights and cannot be interpreted so as to make a criminal offence out of a lawful activity. Thus, the appellant submits that the 2020 EN does not render the proposal unlawful.
10. The Council's position is that the appellant has not made their case that the development proposed is PD under Class C as the boundary of the agricultural unit has not been established in a precise and unambiguous manner, and due to a lack of detail as to whether the winning and working of minerals would be reasonably necessary for the purposes of agriculture. The Council further submits that the proposal would contravene the requirements of the 2020 EN and that s191(2)(b) therefore renders the proposed development unlawful.

Whether PD under Class C

11. As outlined above, development permitted by Class C is *'The winning and working on land held or occupied with land used for the purposes of agriculture of any minerals reasonably necessary for agricultural purposes within the*

¹ *Mansi v Elstree Rural DC* [1964] 16 P & CR 154

² *Duguid v SSETR & West Lindsey DC* [2001] JPL 323

agricultural unit of which it forms part'. A limitation at paragraph C.1 is apparently complied with on the basis that excavation would not be within 25 metres of a metalled part of a trunk road or classified road.

12. Paragraph C.2 states the condition that no mineral extracted during the operation is moved to any place outside the land from which it was extracted, other than to land held or occupied with that land and which is used for the purposes of agriculture.
13. The term 'agricultural unit' is defined in paragraph D.1 of Schedule 2, Part 6 to the GPDO as *'agricultural land which is occupied as a unit for the purposes of agriculture, including (a) any dwelling or other building on that land occupied for the purpose of farming the land by the person who occupies the unit, or (b) any dwelling on that land occupied by a farmworker'*. 'Agricultural land' is defined as *'land which, before development permitted by this Part is carried out, is land in use for agriculture and which is so used for the purposes of a trade or business, and excludes any dwellinghouse or garden'*.

Evidence

14. Evidence submitted by the appellant seeking to demonstrate that the proposed development would be PD is very limited. As regards the relevant agricultural unit, a list and plans are submitted showing various parcels of land in the surrounding area. These, the appellant submits, do not encompass the full extent of the appellant's holding, but rather show 'land in the immediate vicinity that it is believed can legitimately be said to be farmed as an agricultural unit.'
15. The appellant outlines in this regard that land in an agricultural unit need not form a contiguous block³ and that the 'connectivity' of these parcels of land as seen from the application plans indicates the functional relationship between them. The application statement also suggests that it would be appropriate to grant a LDC that includes in the relevant agricultural unit any land within 5km of either quarry⁴ which the appellant may farm in the future.
16. As regards whether the winning and working of minerals would be reasonably necessary for agricultural purposes within the unit, the appellant indicates that such purposes are intended to 'include, but not be strictly limited to': the provision and maintenance of tracks and hardstandings on the land identified in the application either resulting from the grant of planning permission or from exercise of PD rights under Classes A, B and E of Part 6 to the GPDO; and construction of any building permitted on the identified land that will be used for agricultural purposes.

Analysis

17. The appellant states that the land shown blue on the application plans forms an agricultural unit, relying on the proximity between parcels of land to justify this. As the LPA highlights though, no detailed information is submitted as to the tenure under which the land is held and nor as to how the parcels of land are operated as a unit. Significant ambiguity is introduced by the attempt to

³ Per *Fuller v Secretary of State for the Environment & Dover DC* [1987] JPL 854

⁴ The reference to quarries in the plural relates to the fact that the application plan originally indicated in red both Overton and Horwell quarries which are apparently both owned by the appellant; a revised plan was provided for validation purposes showing only a particular area of Overton Quarry where stone was considered most accessible

include within the ambit of the claimed agricultural unit any land acquired in the future within a 5km radius of the quarries.

18. There is a similar lack of precision and ambiguity as regards the intended agricultural purposes for the minerals; the appellant's non-exhaustive list includes uses related to agricultural tracks, hardstandings and buildings. There is though a catch-all that agricultural purposes will not be 'strictly limited' to those stated and indeed there is very little detailed information as to the exact proposed uses such as to properly inform a decision as to whether minerals worked would be 'reasonably necessary' for agricultural purposes.
19. The Council further highlights that the description of agricultural purposes in the application statement cross-references Classes B and E of Part 6 to the GPDO. Class B relates to agricultural development on agricultural units of less than 5 hectares and the Council comments that, since the land identified on application plans as forming an agricultural unit amounts to more than 5 hectares, this would suggest this land does not constitute a single agricultural unit. Class E then relates to forestry development which would not fall within agricultural purposes. Both of these references introduce further ambiguity into the assessment of the agricultural unit and whether the minerals worked would be reasonably necessary for agricultural purposes.
20. As such, the appellant's evidence as regards the agricultural unit and intended agricultural purposes for the minerals worked is not sufficiently precise and unambiguous to justify the grant of a certificate. The appellant argues that the Council could have granted a certificate based on more limited terms/in respect of a fixed agricultural unit rather than including the 5km catch all. However, it is not open to the Council in a s192 application to amend the proposal. While I acknowledge the appellant's comment as to the impracticality of applying for a LDC in respect of all mining activity under Class C, I agree with the Council that a LDC must be narrowly framed since it is conclusive as to lawfulness.
21. A final additional matter is that the appellant makes reference in final comments to the Council having resolved to make an Article 4 Direction removing Class C PD rights in respect of the appeal site. I do not have full details as to the status of this Article 4 Direction and, since I have found the proposal to not be PD on the evidence before me, I have not sought any additional information on this.
22. On the available evidence, I find as a matter of fact and degree that the development proposed does not represent PD under Class C.

Effect of 2020 EN on lawfulness

23. In an application for a LDC under s192 of the 1990 Act, the determination to be made is whether the proposal would have been lawful as at the date of the LDC application. At the time of the LDC application, the 2020 EN was in force and its requirements stipulated that extraction and export of minerals from the site must cease. Section 285 of the 1990 Act makes it clear that the validity of an enforcement notice cannot be questioned on any of the grounds on which an enforcement appeal can be brought, other than in such an appeal.
24. No saving was made in the 2020 EN for any extraction and export that would represent PD under Class C. As the appeal against the 2020 EN was withdrawn, no ground (f) appeal was made on the basis that the requirements

were excessive for failing to make such a saving. The Council submits on this basis that the proposed development cannot be lawful as it would constitute a contravention of the requirements of an enforcement notice which is in force (s191(2)(b)).

25. However, although I acknowledge that *Mansi* relates to use rights and note case law cited by the Council indicating that this does not apply to operational development⁵, nonetheless, the judgment in *Duguid* is clear that it is not necessary for an enforcement notice to make a specific saving in respect of PD rights since these are codified by the statutory regime. Thus, it would not be necessary in a ground (f) appeal to make a variation to the notice to account for PD rights since an enforcement notice cannot make a criminal offence out of a lawful activity i.e. here the 2020 Notice cannot be interpreted so as to render unlawful mining operations which would otherwise be lawful pursuant to PD rights.
26. This approach does not infringe s285 of the 1990 Act; it represents an interpretation of the 2020 Notice rather than questioning its validity. Equally, this does not result in the creation of rights, only an interpretation of an enforcement notice to give effect to existing GPDO rights. Consideration of the lawfulness of the proposed development necessarily requires me to construe the notice and s285 does not preclude interpretation of the notice.
27. I acknowledge that both the *Mansi* and the *Duguid* cases relate to a use whereas the development in question here is a mining operation. However, *Duguid* refers to the preservation of PD rights in general terms and absent some convincing explanation, I cannot see why an enforcement notice would be precluded from making a criminal offence out of a lawful use, but would be permitted to do so as regards an otherwise lawful mining operation.
28. I appreciate that mining operations are not a use of land and that mining is a continuing operation, with each successive shovelful constituting a further act of development. The Council comments that for this reason there can never be complete compliance with a minerals notice in the way that there would with a use notice and that as such, extraction of minerals 'from Overton Quarry without permission will always be in breach of the [2020] Notice'.
29. Whilst I acknowledge the special status of mining operations as a continuing operation, as the Council acknowledges in representations, mining operations at the appeal site would be lawful following a specific grant of planning permission even with the 2020 Notice in force. I cannot therefore see why the same would not be true of mining operations undertaken in accordance with planning permission granted by the GPDO⁶.
30. Finally, the Council seeks to rely on the *Duguid* judgment to support the proposition that even if PD rights were available to the appellant in spite of the 2020 Notice being in force, these would only be available once the appellant has evidenced that it has permanently ceased the 'permanent purposes' attacked by the notice.

⁵ *Mohamed v SSCLG & LB Brent* [2014] EWHC 4045 (Admin)

⁶ Indeed, s181 of the 1990 Act, which confirms the continuing effect of enforcement notices, indicates that a use attacked by an enforcement notice must only be discontinued permanently to the extent that it is in breach of Part 3 of the 1990 Act. A use permitted by a development order such as the GPDO would not be in breach of Part 3. It is then logical that mining operations which are not in breach of Part III of the 1990 Act by reason of being permitted by the GPDO would also not be prevented by reason of the 2020 Notice being in force.

31. However, in my view, this qualification as outlined in *Duguid* is not applicable in the present case. In *Duguid*, the PD rights in question related to a temporary use for 14 days in a calendar year and it was therefore held that such a PD use could only begin in a calendar year when there have not already been more than 14 days of such use. It was on this basis that it was necessary to evidence discontinuance of the more permanent market use against which the notice had been directed before the PD temporary use could be begun.
32. I therefore find that the proposed development would not constitute a contravention of any of the requirements of the 2020 Notice as construed to preserve PD rights. Nonetheless, on the available evidence, I find as a matter of fact and degree that it would not be PD under Class C and so would not be lawful for this reason.

Conclusion

33. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of 'Use of minerals extracted from Overton Quarry sites on land farmed in the vicinity for agricultural purposes' 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.

Formal Decision

34. The appeal is dismissed.

V Bond

INSPECTOR