



Appeal Decision

Site visit made on 16 July 2024

by M Bale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 August 2024

Appeal Ref: APP/U1105/X/23/3333743

Barn Close Kennels, Combe Raleigh, Honiton, Devon EX14 4SG

- 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.
 - The appeal is made by Mr Paul Sparks against the decision of East Devon District Council.
 - The application ref. 23/0017/CPE, dated 3 January 2023, was refused by notice dated 8 June 2023.
 - The application was made under sections 191(1)(b) and (c) of the Town and Country Planning Act 1990 as amended.
 - As described on the application form, a certificate of lawful use or development is sought for a 'material start to ref. 02/P0677 through digging of trenches required for foundations and breach of condition 3 which required a pre-commencement landscaping scheme, lawful by virtue of exceeding 10-year rule.
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Decision

1. The appeal is allowed and a certificate of lawful use or development (LDC) is granted.

Preliminary Matters

2. The description of development for which an LDC is sought is set out in my heading above. A 'material start' is not in itself an operation or development, but it is clear that what has been done is the digging of foundation trenches. I have, therefore, approached the appeal on the basis of deciding whether those trenches are lawful by virtue of being in accordance with planning permission ref. 7/54/02/P0677/00017 (the Planning Permission).
3. The application also seeks to ascertain that the breach of condition 3 is lawful, having occurred more than 10 years before the application was made to the Council. That condition requires that no development shall take place until there has been submitted to and approved by the Local Planning Authority a scheme of landscaping, in accordance with attached details, which shall include indications of all existing trees and hedgerows on the land and details of any to be retained, together with measures for their protection.

Reasons

4. The Planning Permission, for the erection of workshop & staff accommodation for use with kennels and cattery was granted on 17 June 2002. In light of a building control inspection on 14 June 2007, there is no dispute that trenches, located so as to mimic the development permitted, were carried out before the date on which the Planning Permission expired.

5. However, condition 3 was not complied with. It is worded such that it prohibits development prior to the required landscaping scheme being submitted. If the condition goes to the heart of the Planning Permission then any works undertaken in connection with it would not be lawful by virtue of the Planning Permission.
6. The site, being within the Blackdown Hills National Landscape (formerly Area of Outstanding Natural Beauty), is clearly in a sensitive location where landscaping details are important. The parties have been unable to provide the 'attached details' referred to in the condition. However, there is no reason that the precise nature of the landscaping scheme is so central to the acceptability of the development and its integration into the locality that its fine detail would be required prior to the commencement of development. Rather, it could theoretically be agreed at some later date and still have the same effect.
7. The condition also requires details of any trees or hedgerows to be retained together with measures for their protection. However, it does not specify any particular features that must be retained and protected. Nor does condition 3, or related condition 4 about implementation of landscaping details, actually require their protection. Therefore, even if the details had been provided prior to the development taking place, which is all that condition 3 requires, it would not have been necessary to implement them prior to the foundation trenches being dug. That is the only work that has been done. Condition 4 explicitly requires new planting to be carried out following occupation.
8. Given what is required by condition 3 and the wording of the other conditions insofar as they relate to the implementation of those details, I find that the requirement to agree the details before development took place does not go to the heart of the permission. Therefore, on the balance of probability, the foundation trenches were dug lawfully in accordance with the Planning Permission.
9. Section 171B(3) of the Town and Country Planning Act 1990 as amended (the 1990 Act) provides that where a breach of condition has taken place (being a matter that does not fall within the provisions of sections 171B(1) or (2)), no enforcement action can be taken after the end of a period of ten years beginning with the date of the breach. Subject to another proviso that does not apply to this case, section 191(3) of the 1990 Act further provides that a failure to comply with a condition would be lawful if the time for taking enforcement action has expired.
10. As the foundation trenches were dug prior to their inspection on 14 June 2007, the breach of condition being the failure to submit the required information, must also have taken place before that date. Therefore, more than 10 years passed throughout which the breach of condition took place, prior to the submission of the application subject of this appeal.
11. Therefore, on the balance of probabilities, I find that both the construction of the foundation trenches and a failure to comply with condition 3 of the Planning Permission are lawful. As noted above, a 'material start' is not a description of development, therefore, the operations to be certified as lawful are the digging of trenches required for the foundations of the building. However, I have found them to be lawful on the basis that they accord with the Planning Permission, which was lawfully implemented.

12. Accordingly, I conclude, on the evidence now available, that the Council's refusal to grant an LDC in respect of a material start to the Planning Permission through digging of trenches required for foundations and breach of condition 3 which required a pre-commencement landscaping scheme was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act.

M Bale

INSPECTOR

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 12 January 2023 the operations and failure to comply with a condition or limitation subject to which planning permission has been granted described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, were lawful within the meaning of sections 191(2) and 191(3) of the Town and Country Planning Act 1990 (as amended), for the following reason:

Condition no 3 of planning permission ref. 7/54/02/P0677/00017 (the Planning Permission) does not go to the heart of the Planning Permission. Failure to comply with it does not, therefore prevent development being lawfully carried out in accordance with the Planning Permission. On the balance of probabilities, the trenches required for the foundations of the building were carried out in accordance with the Planning Permission and so are lawful. The breach of condition no 3 took place and continued for more than 10 years prior to the date of the application and is, therefore, lawful.

Signed

M Bale

INSPECTOR

Date: 05 August 2024

Reference: APP/U1105/X/23/3333743

First Schedule

The digging of trenches required for the foundations of the building permitted by planning permission ref. 7/54/02/P0677/00017, and a breach of condition 3, namely a failure to submit a landscaping scheme before development took place, of that planning permission.

Second Schedule

Land at Barn Close Kennels, Combe Raleigh, Honiton, Devon EX14 4SG

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 matter, constituting a failure to comply with any condition or limitation subject to which planning permission has been granted, described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 or 187A of the 1990 Act, on that date.

This certificate applies only to the extent of the matter described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any matter 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: 05 August 2024

by M Bale BA (Hons) MA MRTPI

Land at: Barn Close Kennels, Combe Raleigh, Honiton EX14 4SG

Reference: APP/U1105/X/23/3333743

Scale: Not to Scale

