
Appeal Decision

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 November 2016

Appeal Ref: APP/H1515/X/16/3149183

**Chivers Farm, Swallows Cross, Wyatts Green Road, Wyatts Green,
Brentwood, CM15 0ST**

- 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 refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr D Keeble against the decision of Brentwood Borough Council.
 - The application Ref 15/00067/S192, dated 23 January 2015, was refused by notice dated 17 June 2015.
 - 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 a two-storey front extension.
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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 proposed operation which is considered to be lawful.

Procedural matter

2. My decision turns entirely on legal submissions and therefore it was not necessary to undertake a site visit.

Main Issue

3. The main issue is whether the Council's refusal of an LDC was well-founded. Having regard to s192(2) of the 1990 Act, the onus is on appellant to prove, on the balance of probability, that the proposed extension would have been lawful if begun at the time of the application.

Reasons

4. The relevant parts of s191(2) provide that, for the purposes of the 1990 Act, "...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 or because the time for enforcement action has expired or for any other reason; and (b) they do not constitute contravention of any requirements of any enforcement notice then in force."
5. No relevant enforcement notice was in force. Furthermore, the Council accepts that, on the date the application was validated (16 February 2015) the

proposed two-storey extension would, in the normal course of events, have been permitted development (PD) under Classes A and B of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2008, (the 2008 GPDO). However, it maintains that an Agreement made on 10 February 1989 pursuant to s52 of the Town and Country Planning Act 1971 (the s52 Agreement) effectively removed those PD rights.

6. I have no reason to disagree that, on the face of things, the proposed development would have benefitted PD rights, but I note the application was dated 23 January 2015. Whilst the Council may not have 'validated' that application until 16 February, there is nothing before me to indicate that it was not validly made on 23 January. I will work on the basis of that date, though nothing turns on the point because, whichever date is correct, the position was still governed by the 2008 GPDO.
7. Whilst the appellant concedes in his grounds of appeal that the more limited provisions of the 2015 GPDO relating to front extensions mean that an LDC cannot be granted, that concession is misconceived. The 2015 GPDO did not come into force until 15 April 2015 and I must consider the legal position as at the date of the application. It is common ground between the parties that the proposal would have been PD under the 2008 GPDO.
8. The Council's case is that, notwithstanding the proposal's conformity with the 2008 GPDO, the land is bound by the s52 Agreement which, at clause (4)(c), included the following covenant by the Developer, who was also the freehold owner of the land:

"The Developer hereby covenants to surrender all residential permitted development rights within Classes A B C D and E of Part 1 of the Schedule 2 of the Town and Country Planning General Development Order 1988."
9. The appellant accepts that the s52 Agreement binds the land. However, his case is that it has become irrelevant, as the surrender of PD rights was only in relation to the Town and Country Planning General Development Order 1988 (the 1988 GDO); it has no effect in relation to the PD rights granted by the 2008 GPDO, or indeed the 2015 GPDO.
10. The Council acknowledges that the wording of the s52 Agreement "could, for clarity, have included reference...to future versions of the Order." In my experience, it is normal for conditions and obligations restricting PD rights to refer to the Order then in force and "any order revoking, re-enacting or modifying that Order." However, this s52 Agreement used no such form of words. It refers exclusively to the 1988 GDO and, under it, the covenantor cannot be deemed to have surrendered PD rights granted by subsequent Orders, including the 2008 GPDO.
11. Although a letter dated 30 January 2015 from the Council to the appellant's agent referred to a "contrary argument to (his) proposition under the Interpretation Act 1978", that argument was not developed in that letter and not referred to in the Council's appeal statement at all. For the sake of completeness, I note that, under the Interpretation Act 1978, a reference in any Act or Statutory Instrument to the 1988 GDO would be construed as a reference to the 2008 GPDO and indeed the 2015 GPDO. However, the Council has not identified any provision which applies that principle to references in a deed, such as a s52 Agreement. In the absence of any clear submissions to the

contrary, I do not accept that the Interpretation Act 1978 cures the problem with the s52 Agreement.

12. As a result of my finding that the s52 Agreement only surrendered PD rights under the 1988 GDO and given the agreement between the parties that the proposed development would otherwise have been PD under Classes A and B of Part 1 of Schedule 2 of the 2008 GPDO, the appellant has proved that the proposed extension would have been lawful if begun at the time of the application. Accordingly, the refusal of an LDC was not well-founded and the appeal is allowed.

J A Murray

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(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 23 January 2015 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged with a thick black line on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

It would have constituted permitted development under Classes A and B of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2008.

Signed

J A Murray

Inspector

Date **24 November 2016**

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First Schedule

A two-storey front extension as shown on drawings numbered 14.2366/M003, 14.2366/P201, 14.2366/P202 and 14.2366/P203.

Second Schedule

Land at Chivers Farm, Swallows Cross, Wyatts Green Road, Wyatts Green, Brentwood, CM15 0ST

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, 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 operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any 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.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

