Appeal Decision

Site visit made on 21 August 2017

by K R Saward Solicitor

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

Decision date: 30 August 2017

Appeal Ref: APP/K0235/X/16/3159470
45a High Street, Harrold, Bedford MK43 7DA

- 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 Yilmaz against the decision of Bedford Borough Council.
- The application Ref 16/00741/LDE, dated 15 March 2016, was refused by notice dated 10 May 2016.
- 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 "residential".

Decision

1. The appeal is dismissed.

Procedural Matters

2. The Appeal Form indicates that the LDC application was made pursuant to section 191 of the 1990 Act for an existing use described simply as "residential". Upon seeking clarification ahead of my site visit, the Council confirmed that the application is for an existing use whereas the appellant said he wished "to build a flat". Having undertaken my site visit, it is apparent that there is not an existing residential use but a proposal to build a flat pursuant to a planning permission granted in 2006 which the appellant maintains has been implemented. The application is therefore for proposed operations to be carried out under section 192(1)(b) of the Act.

3. The parties agree that the application would be more accurately described as the "creation of first floor flat above garage showroom and creation of a skylight in the roof of no.1 The Green", being the description applied in the planning permission which the appellant claims has been implemented. With the appellant's agreement to the change, I shall apply that description.

4. It became apparent at my site visit that the premises which are the subject of the application and appeal are now known as No 45a High Street rather than No 45 as appeared in the application form. No 45 is the garage behind No 45a. Both premises had previously been under single ownership. The appellant has provided written confirmation that No 45a is the correct address.

5. The planning merits of the proposed development are not relevant to the consideration of the purely legal issues involved in determining an LDC application. Therefore, arguments regarding the adequacy of off-street

parking, enhancement of the building frontage, party walls and suchlike, do not fall to be considered.

Main Issue

6. The main issue is whether the Council's decision to refuse to grant a lawful development certificate was well-founded. This turns on whether the proposed development would have been lawful at the time of the application. It is not a matter of whether planning permission should be granted.

Reasons

7. In order for an LDC to be granted under section 192 of the 1990 Act, the onus is firmly on the appellant to show that the development would be lawful.

8. No 45a High Street is a single storey building currently in use as a fish and chip shop. It is located near to the corner of The Green. Prior to its present use the unit had been a garage showroom. On 17 August 2006, planning permission was granted on appeal[1] for the "creation of first floor flat above garage showroom and creation of skylight in the roof of no. 1 The Green". At that time both the showroom and No 1 Green had been in the same ownership. They are now under separate ownership.

9. The grant of planning permission was subject to three conditions. The first condition required development to begin before the expiration of 5 years from the date of the decision i.e. before 17 August 2011. The second condition was for no development to take place until samples for external materials had been submitted and approved by the local planning authority. The third condition required the submission and approval of a parking space before development commenced.

10. The key issue is whether that planning permission was lawfully implemented enabling the development to be completed or if it has lapsed. Two points arise. Firstly, whether the works undertaken were sufficient for development to be taken to be commenced under section 56 of the 1990 Act. Secondly, whether any development was initiated in breach of a condition precedent so that there was no lawful implementation of the planning permission.

11. The appellant maintains that development was commenced by the former owner, Mr Palladino, by the digging of a trench. In a statutory declaration made on 11 February 2016, Mr Palladino says that after the grant of planning permission he dug a hole approximately 1m in width and depth and slightly longer in length. The hole was dug to look at the foundations and then re-use the trench for the purposes of a foundation. He then formed the view that a separate foundation would be needed to build the wall. The hole was left open whilst he decided what to do and subsequently backfilled a 'month or so' after the initial dig.

12. The factual evidence of Mr Palladino has not been contested by the Council. As sworn evidence I have no reason to question its accuracy. I read nothing into the Council's submission that the appellant made an unsupported LDC application previously claiming that the same development had commenced through the installation of the skylight with no reference to a trench. The application must be considered on the evidence now before me.

[1] Pursuant to Appeal ref: APP/W0205/A/06/2010469

13. Section 56 sets out the provisions relevant to establishing if development can be considered to have begun for the purposes of the 1990 Act. Section 56(2) provides that development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. 'Material operation' includes at section 56(4)(b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building.

14. From his account, Mr Palladino did not dig the hole in order to implement the planning permission but to check the foundations. However, the appropriate test under section 56 is an objective one rather than the intention of the person carrying out the development. A planning permission may be kept alive by the digging of a trench even if there was no intention to proceed with the development at that time and the trench was backfilled. Thus, rather than the intention of Mr Palladino, the question is firstly, whether those works were done in accordance with the planning permission and secondly, whether the works were more than '*de minimis'.*

15. The plan exhibited to Mr Palladino's statutory declaration identifies the location of the hole. It is shown inside the showroom next to a wall which divided it from the adjoining hairdressers. The approved plans show all works at first floor level to create a flat above the showroom. There is nothing in those plans to indicate that foundations would be laid at ground floor level in order to create an additional floor above.

16. The evidence suggests that Mr Palladino had not dug a trench in this place to accommodate foundations in accordance with the 2006 planning permission. Rather, it was nothing more than a hole to check the existing foundations.

17. Moreover, the works undertaken for a small square shaped hole are so minor and positioned in such a place as to cast significant doubt over whether they were in fact material so far as the 2006 permission is concerned. The appellant has the burden of proof and on the information before I am not satisfied that either the works were done in accordance with the permission or that they were more than '*de minimis'.*

18. Even if the digging of the hole constituted a material operation, it is possible that the permission expired if there was a failure to comply with a condition precedent before the deadline for commencement of the permission. This is one of the main points of dispute between the parties.

19. Condition 2) of the permission reads: "*No development shall take place until samples of the materials to be used in the construction of the external surfaces of the building hereby permitted have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details."*

20. Condition 3) says: *"Before development commences details of the provision within the site of one demarcated parking space shall be submitted to and approved in writing by the local planning authority. The approved space shall be provided before the flat is first occupied and shall be kept available for car parking thereafter."*

21. It was established by the Court of Appeal in *F G Whitley & Sons v SSW and Clwyd CC* [1992] JPL 856 that the only question to be asked was whether the

development was permitted by the planning permission read together with its conditions. If the development contravenes the conditions it cannot be properly described as commencing the development authorised by the permission. Woolf LJ stated that it is not necessary to try to determine whether or not the conditions contained in a planning permission were properly capable of being classified as conditions precedent or otherwise. There are exceptions to this principle set out in *Whitley* itself and subsequent case law, but they are narrow in scope and do not apply in this instance.

22. The *Whitley* principle was considered in *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin) where it was held that a distinction must be drawn between a condition which required some action to be undertaken before development is commenced and a condition which expressly prohibits any development taking place before a particular requirement has been met. Sullivan J. took the view that even so it is necessary for the condition both to be expressly prohibitive of commencement of development and to go to the heart of the permission. Only when both tests are satisfied is it a condition precedent to which the *Whitley* principle applies and where the development would be development without planning permission.

23. In subsequent cases, the Courts have been prepared to apply the *Whitley* principle flexibly.

24. The appellant refers me to "the Murzayn case" which I take to be a reference to *Bedford BC v (1) Secretary of State for Communities and Local Government and (2) Murzyn* [2008] EWHC 2304. In that case, the *Whitley* principle was found not be engaged where the conditions required details to be submitted and approved prior to commencement of development without expressly precluding it. The conditions, however, were for a landscaping scheme and the boundary treatment, being peripheral matters that were unlikely to affect the form and substance of the development comprising a barn conversion.

25. Moreover, that decision pre-dates the later Court of Appeal decision in *Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908 which applied both the *Hart Aggregates* judgment and the *Whitley* principle. It specifically endorsed the need for the condition to go to the "heart of the matter" to be a true condition precedent. Further, there was no material difference between a condition which expressly prohibited development before a particular matter was approved, and one which required a particular matter to be approved before development commenced.

26. The judgment makes clear that whilst a true condition precedent must both prohibit development without compliance with it and must also go to the heart of the permission, it is not necessary that the wording itself should be expressly prohibitive. If the substance of the condition is essentially prohibitive in its effect, even though it is only expressed as requiring something to be done "prior to the commencement of development" then it is still capable of being a true condition precedent.

27. Notwithstanding *Greyfort*, condition 2) does in this case explicitly prohibit commencement of development until samples of external materials have been approved by use of the words "No development shall take place…". The reason given by the Inspector for imposing this condition is that it was necessary "given that the proposal is in a conservation area".

28. There is a statutory duty[2] to pay special attention to the desirability of preserving or enhancing the character or appearance of conservation areas. Undoubtedly the Inspector would have been aware of ensuring that duty was fulfilled. The choice of external materials could have significant implications in a conservation area. Until those materials are approved, it would not be known how the completed development would look.

29. It is also reasonable to conclude that the Inspector was deliberate in his choice of words to ensure that no development should take place before those details were approved. I am reinforced in that view by the different form of words used by the Inspector for condition 3) concerning approval of parking provision where the condition is to submit details "before development commences". There is a clear distinction in how the two conditions have been worded and I believe this to be purposefully so.

30. The provision of parking is unlikely to go to the heart of the matter when the development is for the "creation of first floor flat". Parking is peripheral to the development itself and would not be a condition precedent. That is reflected in how the condition is framed in contrast with condition 2).

31. Applying the case law, I am satisfied that the effect of condition 2) was to prohibit any development until samples of external materials were approved. In doing so condition 2) recognises the importance of the conservation area and the impact the development could have on it. Those details are a matter of substance going to the heart of the matter. It is a true condition precedent.

32. Therefore, even if development had commenced by the digging of a 'trench' it would have been in breach of a condition precedent i.e. condition 2). No details were subsequently approved for the external materials and the permission has expired.

33. Consequently, I find that the appellant has not discharged the burden of proof to demonstrate that the works undertaken sufficed to constitute commencement of the development approved in 2006. Even if I had concluded otherwise, I have also found that condition 2) is a condition precedent. The non-compliance with that condition means the planning permission could not properly be described as implemented and it has lapsed regardless of any operation carried out at the site.

Conclusion

34. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the creation of first floor flat above garage showroom and creation of a skylight in the roof of no.1 The Green 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.

KR Saward

INSPECTOR

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[2] Under section 72 of The Planning (Listed Buildings and Conservation Areas) Act 1990