
Appeal Decision

Site visit made on 21 August 2017

by K R Seward Solicitor

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

Decision date: 31 August 2017

Appeal Ref: APP/K0235/X/17/3167076

Vicarage Farm, Rushden Road, Sharnbrook MK44 1NG

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Deep Banghard against Bedford Borough Council.
 - The application is dated 13 September 2016.
 - The application was made under section 191(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 external works to a building (external finish of walls and roof, insertion of windows and doors, guttering and pipework).
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Decision

1. The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Decision.

Procedural Matters

2. The appeal follows the Council's non-determination of the application for a LDC within the prescribed period. The Council states that had it determined the application then it would have been refused because the works were undertaken in breach of condition and the time for enforcement action has not expired.
3. The application is made pursuant to section 191(1)(b) which applies where a person wishes to ascertain whether any existing operations carried out in, over or under land are lawful. The Council maintains that the application should have been brought under section 191(1)(c) as another matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted. However, the whole thrust of the appellant's argument is that development has been undertaken without the benefit of any planning permission.

Main Issue

4. The main issue is whether an LDC should have been issued for the works described in the application. In the first instance, this turns on whether the external works undertaken are those for which planning permission was granted by the Council or whether they are building works without planning permission which have become lawful through the passage of time. If the works are those for which planning permission has been granted, then the issue will then turn to whether or not those works were undertaken in breach of a condition precedent.

5. The burden of proof is upon the appellant to demonstrate that the existing development would have been lawful at the time of the application.

Reasons

6. Conditional full planning permission was granted on 22 December 2009 pursuant to Council ref: 09/02506/FUL for a "proposed two storey side extension and conversion of outbuilding to annex accommodation". It is undisputed that the converted outbuilding does not accord with the approved plans which are listed in the Council's decision notice. Due to the differences, the appellant maintains that the development is not that for which planning permission was granted and having been completed in 2011, the development has become lawful through the passage of time. The Council, on the other hand, considers that the 2009 permission has been implemented as the deviations from the approved drawings are minor.
7. The starting point for consideration is whether there has been a material departure from the approved plans for the 2009 permission resulting in the development having been built without planning permission.
8. If the planning permission has not been implemented then, pursuant to section 171B(1), where there has been a breach of planning control consisting in the carrying out without planning permission of building operations, no enforcement action may be taken after the end of the period of 4 years beginning with the date on which the operations were substantially completed.
9. Planning permission is expressed to be granted in accordance with the application and plans received on 2 November 2009. No condition was imposed to require compliance with the approved plans, but they are listed in the decision and are clearly incorporated within the permission. They are noted as being received on 1 April 2009. This does not tally with the date in the description, but the drawing numbers are given to enable the plans to be identified. They are dated April 2009.
10. The proposed elevations show a single storey building of simple design with pitched roof and chimney stack feature at one end. The main differences drawn to my attention by the Council (and which the appellant does not dispute) are:
 - the addition of black timber batons on top of the approved render wall finish
 - the absence of timber boarding on the kitchen lean-to
 - the addition of some timber boarding on the north-west side elevation at roof level
 - some triple paned windows in place of double paned windows
 - no chimney
 - parapet walls above roofline to sides of kitchen lean-to
 - an additional window to the side of the door on the kitchen lean-to
 - no windows on the rear elevation of the kitchen lean-to.

11. I also noted at my site visit that two of the three rear elevation windows are larger than those shown in the plans. The rendering is painted white rather than cream.
12. Visually, the most dramatic change is the patterned effect created by the addition of black batons set against the light coloured render of each elevation. These are a cosmetic change only as is the black stained timber boarding added to the top of one side elevation and its omission from the lean-to.
13. Moreover, a condition (no.2) attached to the planning permission reads:

"No development shall take place until full particulars of the external materials to be used (to include walls, roof, doors, windows and external gutters and pipework) have been submitted to and approved in writing by the Local Planning Authority."

Had there been compliance with that condition and details of the external materials submitted to the Council for approval then it is possible many of the changes could have been made without contravening the permission. In particular, the addition of batons, colour of rendering, style and colour of guttering and pipework, different window types and altered locations of the timber boarding are all external materials that were subject to approval.
14. By imposing such a condition, it must have been contemplated that the details would not necessarily be the same as those shown in the plans. Otherwise the condition would have been unnecessary given the level of detail contained in the plans.
15. Apart from the batons and changes in the timber boarding finish, the appearance of the building overall does not differ significantly from the plans. There are differences in design arising most notably from the omission of the end chimney stack, but this cannot be described as a key feature or one that altered its character. Some changes have also been made to the fenestration at the rear although they are relatively minor.
16. Other design changes concern the lean-to element at the side/rear of the main building. Whereas the plans show a gently sloping roof, a parapet wall has been added to this part of the development giving the appearance of a flat roof of increased height. Instead of two small windows in the rear elevation of the lean-to, one small window has been added next to the door in the side elevation. The lean-to is a relatively small part of the building overall. The combination of changes made to it (including black batons against white render instead of a timber boarding finish) alters the appearance of one side and the rear elevation. However, neither the nature nor effect of those changes is fundamental when considering the building as a whole.
17. The Council submits that all of the deviations were capable of being approved as non-material changes to the 2009 permission. The gist of the argument is that if they are non-material changes then they cannot be of such significance as to cause this to be development without planning permission.
18. Section 96A of the 1990 Act gives local planning authorities discretion to make a change to any planning permission relating to land in their area if they are satisfied that the change is not material. In deciding whether a change is material, regard must be had to the effect of the change, together with any previous changes made under section 96A. As set out in the national Planning

Practice Guidance, there is no statutory definition of 'non-material' because it will be dependent on the context of the overall scheme. An amendment that is non-material in one context may be material in another.

19. In my view, the changes could have been properly dealt with as non-material amendments. That being so, it reinforces that the deviations from the approved plans are not of such magnitude to constitute a materially different development. Indeed, the appellant himself clearly considered that the works were those in the 2009 permission when in a reply to a planning contravention notice in 2013, he said "planning was granted for the works" and gave the date for the 2009 permission.
20. Taken as a whole, the external changes are not as a matter of fact and degree fundamental or substantial to take the executed development outside the scope of the planning permission granted. The ordinary man in the street would be likely to regard the building as the one for which planning permission has been granted. Therefore, the 2009 planning permission might have been implemented depending upon the nature of the conditions attached to the permission.
21. If the development has been carried out in breach of a condition precedent it cannot properly be described as implementing the planning permission and the building is without planning permission.
22. On the other hand, if there has been non-compliance with a condition which is not a condition precedent, then the planning permission will have been implemented but in breach of condition. It will not be too late for the Council to take action in respect of a breach of condition which attracts a 10 year limitation period beginning with the date of breach (section 171B(3)).
23. There are three conditions attached to the 2009 permission. There is no dispute that development commenced within the 3 years prescribed in condition no.1. Condition no.3 restricts occupation. It is condition no.2 which is pertinent to the issue of whether the permission was implemented.
24. Condition no.2 required approval of external materials in full, as set out above. From inclusion of the words "*No development shall take place...*" it is a clear and express prohibition on development before the Council's approval of the external materials was obtained. No details were submitted or approved. When works were undertaken, it resulted in the contravention of a pre-commencement condition. In such circumstances, *F G Whitley & Sons v SSW and Clwyd CC* [1992] JPL 856 is authority that the operations cannot be properly described as commencing the development authorised by the permission.
25. This premise, known as the *Whitley* principle, has been considered in numerous subsequent judgments. The Council has drawn my attention in particular to *Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908. At paragraph 20 of the judgment, Lord Justice Richards quotes from a section of the appeal decision being challenged where the Inspector referred to the details of the external finish of flats, such as facing materials, as an example of a minor component to the development.
26. In *Greyfort*, the point in issue was the construction of a condition restricting commencement of works before the ground levels of the building were agreed with the local planning authority. There was no issue over the status of any

- condition requiring approval of external facing materials. I read nothing from inclusion of the quote to signify that any such condition dealing with external materials must be a minor component. That will depend on the circumstances.
27. Each condition must be considered on a case by case basis to establish if there is a true condition precedent which goes to the heart of the permission.
28. Here, the finishes were specified on the application drawings. Despite those details the Council imposed a condition necessitating the approval of the external materials. Even though the surrounding area does not have any special protection, the very fact that condition 2 was included indicates that the external materials were a matter of considerable importance to the Council. So much so, that it precluded development until those details were approved.
29. The finishes to the external faces of the building would have been an integral part of the alterations to the building needed to bring about the conversion of the outbuilding to annex accommodation. They were not a minor matter of detail. Until those details were approved, it would not have been known what the building would have looked like. Whether or not those details would now be considered appropriate does not influence whether the condition goes to the heart of the permission.
30. In the circumstances of this case, I find that the specification for the external materials was fundamental to the development permitted. Thus, condition no.2 does go to the heart of the permission to be a true condition precedent. At no stage were details submitted and the 2009 permission was not lawfully implemented.
31. Section 191(2) of the 1990 Act provides that operations are lawful at any time if (a) no enforcement action may then be taken in respect of them and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
32. The development carried out was development without planning permission. Contradictory information appears to have been supplied in the past by the appellant in his replies to Planning Contravention Notices when asked by the Council what date the building was erected. In one reply he gave the date as 2009 and in another reply he gave the completion date as February 2014. The most persuasive evidence is the Building Control completion certificate to which both parties refer. This confirms that the substantive requirements of Building Regulations for the "conversion of existing garage block" were satisfied on 24 October 2011. Building Control is a separate regime but in all likelihood the operational development was substantially completed around the same time.
33. It follows that section 191(2)(a) is met as the 4 year time period for taking enforcement action against the operations had expired under section 171B(1) by the time of the LDC application. Whilst there is a Breach of Condition Notice issued in 2015 regarding the use of the building, there is no enforcement notice in force in respect of the works and so section 191(2)(b) is also met.

Conclusion

34. For the reasons given above I conclude, on the evidence now available, that the Council's deemed refusal to grant a certificate of lawful use or development in respect of external works to a building (external finish of walls and roof, insertion of windows and doors, guttering and pipework) 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 as amended.

KR Seward

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 13 September 2016 the operations 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 section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

There was no lawful implementation of planning permission ref: 09/02506/FUL.

The operations carried out were substantially completed more than four years before the date of the application so that no enforcement action could be taken (section 191(2)(b)).

The operations do not contravene the requirements of any enforcement notice in force (section 191(2)(b)).

Signed

KR Seward

Inspector

Date: 31 August 2017

Reference: **APP/K0235/X/17/3167076**

First Schedule

External works to a building (external finish of walls and roof, insertion of windows and doors, guttering and pipework).

Second Schedule

Land at Vicarage Farm, Rushden Road, Sharnbrook MK44 1NG

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: 31 August 2017

by **K R Seward Solicitor**

Land at: Vicarage Farm, Rushden Road, Sharnbrook MK44 1NG

Reference: APP/K0235/X/17/3167076

Scale: NOT TO SCALE

