



Appeal Decision

by Katie Peerless DipArch RIBA

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

Decision date: 9 April 2018

Appeal Ref: APP/L2250/X/17/3181855

106 Cheriton Road, Folkestone, Kent CT20 2QN

- 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 Charles Hagger against the decision of Shepway District Council.
 - The application Ref Y17/0327/SH, dated 8 March 2017, was refused by notice dated 5 June 2017.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is a change of use from B1 to residential as granted planning permission under reference Y04/0563/SH.
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Decision

1. The appeal is dismissed.

Main Issue

2. I consider the main issue in this case is whether the Council's refusal of a certificate of lawful use or development was well founded or whether planning permission Y04/0563/SH has been validly implemented.

Reasons

3. The appeal site contains premises in a mixed use for commercial and residential occupation. Planning permission (reference Y04/0563/SH) was granted in 2004 for the conversion of part of the building from a B1 office use into 6 residential units. 3 of the units have been converted and occupied and the appeal application seeks confirmation that the planning permission has been implemented and that the remaining 3 units could also be created under the same permission.
4. The reason for refusal of the application relates to a condition (no. 3) attached to the permission which states (*with my emphasis*):

'No development shall be commenced until a site investigation has been undertaken to determine the nature and extent of any contamination and the results of the investigation, together with an assessment by a suitably qualified or otherwise competent person, and details of a scheme to contain, treat or remove any contamination, as appropriate, have been submitted to **and approved in writing** by the Local Planning Authority.

Prior to the first occupation of the development hereby permitted (or where the approved scheme provides for remediation and development to be phased, the occupation of the relevant phase of the development), the approved scheme shall be fully implemented (either in relation to the development as a whole or the relevant phase, as appropriate), and a Certificate shall be provided to the Local Planning Authority by a suitably qualified or otherwise competent person stating that remediation has been completed and the site is suitable for the permitted end use.

Thereafter, no works shall take place within the site such as to prejudice the effectiveness of the approved scheme of remediation '.

The Council submits that this condition has not been discharged and that the permission has not, therefore, been validly implemented.

5. An asbestos report prepared by a firm of consultants was submitted to the Council in 2009, prior to the commencement of development. However, it appears that the Council did not accept that this was sufficient to discharge the condition. There is a memo on the Council's website dated 18 March 2009 indicating that this report was not considered acceptable as it only covered asbestos and did not deal with the possibility of contamination from other sources.
6. I have been shown nothing that indicates that the Council ever sent this decision to those who submitted the report, nor is there a record of any response from the applicant either seeking a decision, responding to any correspondence or making an appeal against a decision or the failure of the Council to issue a decision. I must therefore conclude, on the balance of probabilities, that, to date, condition 3 has not been discharged.
7. I consider that the wording of the condition goes to the heart of the planning permission, as it is clearly intended to ensure that there is no risk to the health of the public through the redevelopment of the site and that any remediation works are carried out before the units are first occupied. It is therefore a '*condition precedent*', with which compliance is required in order to implement the permission.
8. This has not happened and the planning permission has consequently not been validly commenced. Whether or not the units that have been created and occupied as dwellings are now immune from enforcement action is not before me in this appeal. I have only been asked to decide whether the planning permission can be used to justify the conversion of the remainder of the building. However, as the permission is now time expired, it follows that the appellant cannot rely on it to authorise the further development that he seeks to carry out.
9. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a change of use from B1 to residential as granted planning permission under reference Y04/0563/SH 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.

Katie Peerless

Inspector

