The Planning Inspectorate

Appeal Decision

Inquiry Held on 12 June 2018

Site visit made on 12 June 2018

by R J Perrins MA MCMI ND Arbor TechArborA

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

Decision date: 8 February 2019

Appeal Ref: APP/G3110/X/17/3191929
29 Old High Street, Headington, Oxford OX3 9HP

- 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 John Martin Baldwin Young against the decision of Oxford City Council.
- The application Ref 17/02576/CPU, dated 25 September 2017, was refused by notice dated 27 November 2017.
- The application was made under sections 191(1)(a) and 191(b)of the Town and Country Planning Act 1990 as amended.
- The use and development for which a certificate of lawful use or development is sought is the sub division of the existing house to form 2x 2-bed-flats (Use Class C3) and erection of 3no. dwellings to create 2x 2-bed flats and 1x 1-bed flat (use Class C3)as described in planning permissions A56/73 and A198/74.

Decision

1. The appeal is dismissed.

Applications for costs

2. At the Inquiry an application for costs was made by both parties against each other. These applications are the subject of separate Decisions.

Preliminary Matters

3. S.191(4) allows the local planning authority (LPA) to modify the terms of the application, and to issue a certificate in somewhat different terms to those applied for, so that it accords with the facts and evidence, rather than issuing an outright refusal. This power is also granted to the Secretary of State or the Inspector in the case of an appeal. It was agreed at the Inquiry that the description could be changed without prejudice as per my final bullet above which accords with the development being sought.

4. All of the oral evidence was given on oath or by sworn affirmation. At the Inquiry a number of photographs showing the interior of the property some years ago were examined. It was agreed that given the dilapidated nature of the property as shown, and the fact that it had been boarded up for some years, inspection of the interior would be both impractical and potentially unsafe. Moreover, any internal inspection would not aid my deliberations. On that basis I carried out an unattended site visit after the close of the Inquiry.

5. The appeal concerns the legality of the development and use. For the avoidance of doubt arguments concerning planning merits and planning policies are not for my consideration under this appeal. In the context of an appeal under section 195 of the Town and Country Planning Act 1990 as amended, which relates to an application for a lawful development certificate, my decision rests on the facts of the case and on relevant planning law and judicial authority.

6. The burden of proof rests with the appellant, the relevant test of the evidence being the balance of probability.

Background

7. The site has a planning history which includes two planning permissions A56/73 and A198/74 (the 1973 permission and the 1974 permission). The 1973 permission dated 3 April 1973 was for an "*outline application for alteration and extension to existing building to form three flats and erection of 2 No. flats in separate blocks, with car parking for private car, at 29 Old High Street". The site plan submitted with the application shows the existing dwelling to be converted into 3 flats, with two new buildings being constructed within the grounds to form two further flats*" subject to conditions.

8. The 1974 permission dated 10 April 1974 was for "*conversion of existing dwelling to form 2 no. flats and construction of 1 no. two bedroom house; 1 no. two bedroom maisonette and 1 no. one bedroom flat. (Reserved Matters)." at 29 Old High Street*" also subject to conditions.

9. These two decisions were part of three appeals[1] heard in February 2014 by way of Inquiry. At that time the appellant appealed against a refusal to grant a certificate of lawful use or development for the same development as being sought here. In respect of that appeal the Inspector came to a number of conclusions including:

   - The 1973 permission lapsed without having being implemented and would not have been lawful if carried out at the date of the application.
   - The 1974 permission had also lapsed at the time the application was made and would not have been lawful.
   - Following the conversion of the dwelling into two flats, its subsequent use as a single dwellinghouse over a significant number of years represented a new chapter in the planning history of the property.
   - The Council's refusal to grant a certificate of lawful use or development in respect of development of the house and site at 29 Old High Street Headington Oxford, in the way permitted by the 1973/4 planning permissions A56/73 (outline) and A198/74 (detailed) was well-founded and the appeal failed.

10. Since that time nothing has changed on site although the appellant brings forward new arguments and evidence as discussed below. In addition the appellant is now legally represented unlike the previous Inquiry. Nevertheless, there is some inevitability given the evidence heard on oath at the last Inquiry, that I give the Inspector's decision and findings considerable weight. In

[1] APP/G3110/X/13/2201840, APP/G3110/A/13/2205149 & APP/G3110/E/13/2205151

addition there seems to be little merit in rehearsing the arguments made so well in the previous decision except where they are now germane to the new evidence and arguments put forward.

Main Issue

11. The main issue is whether the planning permissions (refs: A56/73 and A198/74) were still extant at the time of the application (25 September 2017), and accordingly whether the development permitted under them would be lawful if carried out at that date.

Reasons

For the appellant – Main Points

12. In the first instance the main thrust of argument is that the 1974 permission (A198/74) 'the Second Permission' is a reserved matters approval for the 1973 permission (A56/73) 'the First Permission'. Furthermore works of implementation were carried out and in principle were capable of implementing the permission. Even though those works were in breach of the third condition[2] of the Second Permission they nevertheless implemented the permission as a matter of law.

13. If that is not accepted then, as the previous Inspector found, the Second Permission amounted to a full planning permission, works were implemented and whilst in breach of the third condition, implemented the permission as a matter of law. If a material change of use did occur over time it is of no relevance and even so it is permissible to grant a certificate of lawfulness in respect of part of the site only. Namely the operational development falling outside of the existing building, that being the new dwellings.

14. To support the appellant's case I am directed to a number of judgements including; in respect of reserved matters permission being conditional, the case of *Newbury*[3]*;* with regards to a full planning permission also amounting to a reserved matters permission, *Cardiff*[4] and *Etheridge*[5]*;* concerning the failure to comply with the third condition and whether works amounted to implementation, *Whitely*[6] and *Hammerton*[7]*;* and with regard to a new chapter in the planning history of the site the cases of *Durham*[8]*, Staffordshire*[9]*,* and *McDonalds*[10]*.* I address the relevance of each case below where required.

For the Council – Main Points

15. In essence the Council seek to rely on the previous Inspector's findings and aver that the 'new' evidence submitted by the appellant under this appeal does not add anything that would change those findings. Namely there were significant differences between the First and Second Permissions and the Second Permission approved a different development to the First Permission.

[2] "In order to preserve the visual amenities of the area, details of the materials to be used shall be submitted to and approved by the Local Planning Authority prior to the commencement of work"
[3] *Rv Newbury DC Ex p.Stevens and Partridge* [1992] 65 P&CR.438
[4] *Cardiff Corporation v Secretary of State for Wales* [1971] 22 P&CR. 718
[5] *Etheridge v Secretary of State for the Environment* [1984] 48 P&CR. 35
[6] *Whitley & Sons v Secretary of State for Wales and Clwyd County Council* [1992] 64 P&CR. 296
[7] *Hammerton v London Underground Ltd* [2003] J.P.L. 984
[8] *Durham County Council v Secretary of State for the Environment and Tarmac Roadstone Holdings Ltd* [1989] 60 P&CR. 507
[9] *Staffordshire County Council v NGR Land developments Ltd* [2002] EWCA Civ 856
[10] *LB Camden v McDonald's Restaurants Ltd [1*993] 65 P&CR. 423

In addition the Second Permission had lapsed without ever having been implemented.

16. Whilst the Inspector found that the works undertaken by Mr Young in 1977-78 were capable of implementing the Second Permission there was no evidence to suggest that Condition 3 of that permission had been discharged and that was fundamental to the Second Permission. Therefore any works which were carried out would have been in breach of condition and this would not have the effect of implementing the Second Permission. Moreover even if the Second Permission had been implemented it would no longer be possible to rely on it because a 'new chapter' in the planning history of the site had begun after Mr Young had moved into the property. That had resulted in the lawful use of the premises reverting from two separate planning units to a single planning unit.

17. The evidence of the appellant remains inconclusive. The grant of outline permission under the First Permission established the principle of sub-diving the existing dwelling into multiple residential units. It did not mean the detailed approval would be inevitably be granted nor that the Council was unable to issue a subsequent free standing full permission in respect of the site as set out in *Braintree*[11]. In addition Condition No 3 was a true condition precedent and the unauthorised works put forward by the appellant were not immune from enforcement action as they remain incomplete as set out in *Sage*[12].

18. Furthermore the appeal should fail in any event given there was a new chapter in the history of the site as per *Atkins*[13].

Appraisal

Reserved Matters

19. There is no dispute between the parties that the works carried out by the appellant and as described by the previous Inspector were capable, in principle of implementing the Second Permission. It follows therefore that if the Second Permission was in fact the reserved matters approval to the earlier outline First Permission then those works should be considered in the context of both permissions. In that scenario the permission as a whole (outline and reserved matters) could be deemed to have been implemented.

20. In that light it is appropriate to first consider any new evidence with regards to the Second Permission being a reserved matters permission and secondly whether works of implementation were carried out. In respect of the first matter that would go against the findings of the previous Inspector who found, amongst other things, that the 1974 submission showed a significantly different development from that approved in outline in 1973 and that the judgment in *Cardiff* concerned different circumstances such that it was not applicable to that case. I see no reason to disagree with my colleague on the applicability of the *Cardiff* case. However I accept that a number of matters now put forward by the appellant were not considered at that time. It is to those matters that I now turn.

21. In the first instance I am directed to three other planning applications[14] that fell between the First and Second Permissions all of which were refused. In the

[11] *Braintree DC v Secretary of State for the Environment* [1996] 71 P&CR 323 QBD.
[12] *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 22
[13] *Atkins (and others) v Tandridge District Council (and others)* [2015] EWHC 1947 (Admin)

first instance it is clear that these applications were not considered by the previous Inspector. In respect of application ref A1227/73 for the *'Conversion of existing dwellings to form flats and construction of three new flats. Residential use.'* there is some ambiguity in Section 3 of the application form as it states that it is not for the approval of reserved matters but then goes onto set out the First Permission as the outline permission to be considered. That was refused on 18 October 1973 for two reasons.

22. The application form for scheme ref A1552/73 for the '*Conversion of existing dwellings to form two flats and construction of three new flats. Residential use.'* does state that it is not for outline permission and is for the approval of reserved matters concerning the First Permission. There is also a letter from the architect who set out that the application is a detailed one and that it had addressed some matters that were impossible to keep from the outline application. In addition a letter from the City Architect & Planning Officer dated 30 October 1973 refers to the application and that the 'proposals follow the spirit of the approved outline application'. That application was refused on 6 December 1973 for two reasons.

23. In respect of application ref A1761/73 for the '*Conversion of existing dwellings to form two flats and construction of three new flats. Residential use.'* That states it is an application for full planning permission and seeks approval of reserved matters for the First Permission. Although it also deletes all the reserved matters at Section 3 as if it were seeking outline permission. In addition there is a file note, submitted at the Inquiry, which sets out that the scheme did follow the spirit of the outline approval. That application was refused on 6 February 1974 for one reason.

24. The evidence for the Second Permission shows the Council's 'Notice of Receipt' dated 27 February 1974 with hand-written amendments which includes the words 'Reserved matters' which duplicates the words previously typed in the amended heading. Furthermore, correspondence from the Council concerning the Second Permission (prior to the permission but post application) refers to the approval in outline and subsequent applications attempting to achieve approval for details of the scheme and that 'An eventual approval is inevitable since the outline has been given..'. Although, as discussed by the previous Inspector, the standard reserved matters for an outline application are crossed out and it appears to apply both for a full planning permission and reserved matters.

25. Drawing all these elements together the view that the three refused applications depict a series of submissions, with successive changes to address the concerns of the Council and against the background of the outline consent (the First Permission) resulting in the Second Permission, is not without merit. However, there remains a degree of ambiguity particularly in terms of clarity on the application forms and what was being sought, in terms of outline, full or reserved matters permission in that series of events. The architect who submitted the applications has not given evidence and neither have any of the Council Officers involved at the time. That is inevitable given the time that has passed. Nevertheless, given the ambiguity and lack of clarity, the weight I can give to this 'fresh' evidence must be tempered.

[14] Refs: A1227/73, A1552/73 and A/1761/73

26. I accept the submissions that reserved matters approvals may be conditional as set out in *Newbury.* Furthermore that granting of full planning permission may have the effect of approving exactly those matters that would have had to be approved in respect of the sites, to which they related, on applications for approval of details. Thus the purpose of the requirement of the approval of details can be served by the granting of full planning permission as set out in *Etheridge.*

27. However, none of the fresh evidence or submissions, either on their own or in combination, lead me to disagree with the previous Inspector who was clear in her reasoning; the Second Permission shows a significantly different development (as was not the case in *Etheridge*) from that approved by the First Permission and reserved matters may not be used to alter the nature of the development for which outline permission was granted and was not comparable to the case in *Cardiff.* Moreover, the previous Inspector's view that the wording of the Second Permission is not commensurate with the granting of a reserved matters approval or with the commencement condition attached to the First Permission carries significant weight.

28. For these reasons I find, as a matter of fact and degree and as set out in *Braintree* that the Second Permission was not a reserved matters permission in respect of the First.

Works of implementation

29. Given the findings thus far the question to be asked at this juncture is whether the works of implementation relied upon by the appellant were capable of implementing the Second Permission. To that end the previous Inspector found the works carried out were capable, in principle, of implementing the Second Permission. I see no reason to disagree. However, the Inspector also found that the Second Permission could not be implemented because there was a conditions precedent; that the development could not start before a condition was complied with. In addition there is no dispute that condition No 3 which states "*In order to preserve the visual amenities of the area, details of the materials to be used shall be submitted to and approved by the Local Planning Authority prior to the commencement of work*" has not been complied with.

30. Nevertheless the appellant now argues that, as it is accepted that the works carried out could qualify as starting the development, and the Council failed to take enforcement action against the breach of that condition, the development is now immune from enforcement action and has become lawful over time. To that end I accept that a planning permission as set out in *Whitely* is controlled by and subject to its conditions and if the development contravenes those conditions it cannot be properly described as commencing that which has been authorised by the permission. In that judgment Woolf LJ set out that it is not necessary to try to determine whether or not the conditions contained in a planning permission are properly capable of being classified as conditions precedent or otherwise. The commencement of the development would not only be development without permission, but must also be a breach of the conditions of that permission.

31. There are though exceptions and the courts have, since *Whitley,* applied the principles established therein flexibly. The appellant points to the cases of *Hammerton* and *Hart Aggregates* where the principles are further discussed and reaffirm that the matter of whether a particular condition is a condition

precedent may not be determinative. In addition the appellant considers the period for enforcement action, in respect of the implementation works which were undertaken without compliance with the third condition, has passed and any attempt to take enforcement action now would be *ultra vires* in public law terms.

32. However, regardless of the findings in *Hammerton and Hart Aggregates,* in this case there is no dispute that the unauthorised works remain incomplete. It is well established that the time limit for enforcement action does not run until unauthorised works are substantially complete. In that light there is nothing before me to counter the argument of the Council that enforcement action could still be carried out. The works cannot be considered to have had the effect of implementing the permission. That is corroborated in some detail by the Inspector in the previous decision, I need not repeat it here, and again I see no reason to come to a different conclusion in that regard.

New Chapter

33. With regards to a new chapter in the planning history of the site the previous Inspector found that the use of the dwellinghouse as two flats ceased and it reverted to a single dwellinghouse. The subsequent use as a single dwellinghouse over a significant number of years represented a new chapter in the planning history of the property. The conversion of part of the dwelling back into two flats would now amount to a material change of use by virtue of section 55(3)(a) of the Act[15].

34. The appellant now argues and I accept that the First and Second Permissions were for operational development and that the case of *Durham* supports the view that operational development is not spent when the development begins. However, unlike the case here, the original permission had been implemented. That is reflected in the case of *Staffordshire* where both the 1956 and the 1987 planning permissions were also implemented and I fail to see how they support the appellant's case concerning the planning unit. In the same way the case of *Mcdonald's* concerned the implementation of a 1988 planning permission with a condition that the permission was implemented within 5 years and McDonald's sought to take advantage of that permission within the period; again that does not reflect the situation here. The submissions made do not aid the appellant.

35. I also heard at the Inquiry from the appellant with regards to the new chapter and that he had, in his own words, 'over-egged the truth' for the previous appeal in terms of what was recorded by the Inspector in respect of the living arrangements and layout of the flats. Without any legal representation at that time he was unaware of the nuances of applying for a lawful development certificate and he made a mistake.

36. I have some sympathy with the appellant in that regard he has clearly spent a great deal of time on this case and has referred to many aspects of planning law and practice in his lengthy submissions. He may well have been ignorant of the way his submissions would be used at the time and the significance of his responses to the Inspector. Nevertheless they were made on oath. The submissions made now including, amongst other things, that the kitchen was just a bedroom with a sink in it, No 29 wasn't his main residence, and the

[15] the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used;

tenants simply adapted the premises themselves, must inevitably carry little weight as they are at odds with previous evidence given on oath. That is particularly so given the appellant has not called anyone else with knowledge of how the property was, or was not, divided up. Again I find little to lead me to a different conclusion than that of the previous Inspector.

37. Finally, I do not accept that it would be open to me to grant a certificate of lawfulness for the curtilage of the existing building, excluding the existing building itself as any change in use would have been restricted to the building itself. Notwithstanding the fact that the there is no all-encompassing, authoritative definition of the term curtilage, there is simply nothing before me to establish that the residential curtilage in this case did not, as is commonly found, equate with the residential planning unit or units. As such, on the evidence before me, it is not clear that the dwellinghouse can be separated out in such a way.

38. For these reasons I find, as a matter of fact and degree, that there was a new chapter in the planning history of the site as identified by the previous Inspector and that would have superseded any implementation in any event.

Overall Conclusion

39. For the reasons set out above and having considered all matters raised and heard I find, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the sub division of the existing house to form 2x 2-bed-flats (Use Class C3) and erection of 3no. dwellings to create 2x 2-bed flats and 1x 1-bed flat (use Class C3)as described in planning permissions A56/73 and A198/74 was well-founded and the appeal should fail. I will exercise the powers transferred to me under section 195(3) of the 1990 Act as amended

Richard Perrins

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Matthew Henderson	Of Counsel, instructed by direct access
He called	
John Young	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mr Matt Lewin	Of Counsel instructed by Oxford City Council.
He called	
Hayley Jeffrey	Development Manager Team Leader

DOCUMENTS

1	Appellant's Opening
2	Case note for application 1761/73 submitted by the appellant
3	Council's closing submissions
4	Appellants Closing Submissions
5	Copy of *Rastrum Ltd v SoSCLG* [2009] EWCA Civ 1340 submitted by the Council
6	Copy of *Durham* submitted by the appellant
7	Copy of *Staffordshire* submitted by the appellant
8	Copy of *McDonald's* submitted by the appellant
9	Appellant's closing bundle including the following judgments: a. *Etheridge* b. *Hammerton* c. *Cardiff* d. *Hart Aggregates* e. *Whitley* f. *Newbury*
10	Council's closing bundle including the following judgments: a. *Atkins* b. *Greyfort Properties Ltd v Secretary of State for Communities & Anor* [2011] EWCA Civ 908 c. *Rastrum v SSCLG* [2009] EWCA Civ 1340 d. *Braintree* e. *North Wiltshire v SSE&C* [1992] 65 P&CR f. *Sage* And g. Copy of Power to serve enforcement notice