



Appeal Decision

by D H Brier BA MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 May 2020

Appeal Ref: APP/E2001/X/19/3243901

Cross Trods House, Spellowgate, Driffield YO25 5UP

- 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 Miss K Dove against the decision of the East Riding of Yorkshire Council.
 - The application Ref 18/04132/CLE, dated 20 December 2018, was refused by notice dated 26 June 2019.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The certificate of lawful use or development is sought for 2 holiday cottages – confirmation of meaningful start.
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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 operation which is considered to be lawful.

Preliminary Matters

COVID 19 Implications

2. In response to travel restrictions currently in place due to the COVID-19 pandemic, I consider that this appeal can be determined without the need for a physical site visit. The nature of the case is such that I am satisfied that a decision can be reached based on the information already available. Both the appellant and the Council have agreed to the appeal proceeding on this basis.

Scope of the Appeal

3. In addition to the description set out above, in response to question 9 on the LDC application form, 'why an LDC should be granted' reference is made to planning application 14/01932 having been 'completed and signed off'. While this introduced an element of ambiguity insofar as the scope of the application was concerned, the appellant has confirmed the appeal relates solely to the question of the commencement of the development, a point acknowledged by the Council. Mindful that this is how the matter is described on the notice of refusal, albeit the word 'lawful' is used instead of 'meaningful', my decision will focus on this matter.

Background

4. On 16 October 2012 planning permission ref 12/03727/PLF was granted for 'erection of dwelling, following demolition of existing dwelling, with external

and internal alterations to stable/tack room to create additional living space, erection of two self-contained holiday units following demolition of pig building, construction of wall to enclose existing barn with installation of solar panel to barn roof, construction of replacement roof over existing garage/workshop and site landscaping’.

5. Condition 1 attached to the permission states, *“The development hereby permitted shall be begun before the expiration of three years from the date of this permission”*. Condition 2 states, *“No development shall take place until there has been submitted to and approved in writing by the Local Planning Authority a plan indicating the positions, design, materials and type of boundary treatment to be erected for the whole site. The boundary treatment shall be completed in accordance with a programme to be submitted to and agreed in writing with the Local Planning Authority before the development commences. Development shall be carried out in accordance with the approved details and thereafter retained.”*

The reason for condition 2 is, *“This condition is imposed in the interests of the visual amenities of the area.”*

6. On 11 February 2013, under ref DC/12/30575/CONDET/EASTNN, the Council approved details required by a number of the conditions attached to planning permission 12/03727/PLF. Among these was *“Condition 2 (Boundary Treatment)”*. Condition 1 of the approval states, *“The details are hereby approved in accordance with the information submitted in your letter and plans [sic] (2012/116/10B) received by the Council on 31 January 2013”*.

Reasons

7. Referring to section 56 of the 1990 Act, the Council acknowledge that work on the approved scheme began in September 2015, less than 3 years before the period for commencement specified in condition 1 attached to the October 2012 planning permission expired. But, although details of the boundary treatment were approved beforehand¹, the nub of the Council’s concern focuses upon the failure to complete this before the works begun as, it is contended, the second arm of condition 2 of the 2012 permission requires. It is further submitted that condition 2 is a true condition precedent and the failure to complete the boundary treatment as required has rendered the development unlawful; the 2012 permission has lapsed.
8. From the representations made by the parties, I consider there are 2 main issues, both of which stem from the manner in which the penultimate sentence of condition 2 attached to the 2012 planning permission is framed. Firstly, whether the provisions of the condition have been complied with, and, secondly, whether this condition is a true condition precedent.
9. On the first issue, it is not disputed that the various details required by condition 2 of the 2012 permission were submitted and approved prior to the commencement of the development. However, I am concerned that the penultimate sentence of the condition lacks precision to the extent that it is somewhat ambiguous. According to the Council, this part of the condition makes it clear that the boundary treatment should be completed before the commencement of the development. However, as I see it, the condition as

¹ These are shown on plan no.2012/116/10B referred to in condition 1 of the approval ref DC/12/30575/CONDET/EASTNN.

drafted could be construed as only requiring the programme of boundary treatment to be submitted and approved beforehand. The condition does not explicitly require the boundary treatment to be implemented prior to the commencement of development.

10. My concern about the lack of clarity is fuelled further as the information on plan no.2012/116/10B, expressly referred to in condition 1 of the 2013 approval, indicates, "*Planting is to be carried out during the planting season October – March*". This notation, however, is silent insofar as which year it is meant to apply to. Furthermore, there is nothing to indicate that this omission was queried by the Council. In other words, the approved "*programme*" lacks a specific completion date. Taking this into account, along with my concern about the wording of condition 2 of the 2012 planning permission, I am not satisfied that the claimed non-compliance with the condition due to the failure to carry out the approved boundary treatment renders the development in question unlawful.
11. Turning to the second issue, while the parties have opposing views as to whether condition 2 of the 2012 permission is a true condition precedent, they both cite *F G Whitley & Sons v SSW and Clwyd CC [1992] JPL 856, R (on the application of Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin)* and *Bedford Borough Council v The Secretary of SSCLG and Aleksander Stanislaw Murzyn [2008] EWHC 2304 (Admin)*. I also have had regard to these judgements in coming to my conclusions.
12. I acknowledge that *Whitley* established the principle that development commenced in contravention of a condition is development without permission. But, in *Hart* it was found that it was necessary for the condition to be expressly prohibitive of the commencement of development, and, as the Council note, to go to the heart of the permission. Only when both tests were satisfied, would it be a condition precedent to which the *Whitley* principle applied. And, as the Council also say, the approach taken in *Hart* was endorsed in *Murzyn*. The need for the condition to go to the 'heart of the matter' to be a true condition precedent was also confirmed subsequently in *Greyfort Properties Ltd v SSCLG [2011]* and *Torbay Council EWCA Civ 908*.
13. Notwithstanding my reservations about the lack of clarity and precision inherent in the manner in which the penultimate sentence of condition 2 attached to the 2012 planning permission has been drafted, I am mindful that the preceding sentence begins with the words "*No development shall take place until...*". In the light of this, it seems to me that despite my misgivings about the condition, it does purport to prohibit development in advance of certain action being undertaken. In this respect therefore, I consider the condition falls within the ambit of the *Whitley* principle.
14. Observing that the appeal site lies in the countryside, and 2 of its sides are highly visible from the roadside, the Council say that the implementation of an acceptable boundary treatment for the whole site is necessary. Given the site's location, such action may well be a legitimate means of ameliorating the impact of the approved development on its surrounds. In addition, I acknowledge that the description of the scheme approved in 2012 includes landscaping.
15. Regardless of the perceived justification for boundary treatment here, it is not a measure that I would deem necessary in order to facilitate the implementation of the approved works, or that it is something that needs to be

carried out prior to this. Mindful of the nature of the approved scheme, I do not consider that boundary treatment can reasonably be regarded as being central to any of the permitted operations in this instance. In short, as I see it, boundary treatment is not a matter that goes to the heart of the planning permission involved in this particular case. In the light of this, and having regard to *Hart*, *Murzyn* and *Greyfort*, I am not satisfied that condition 2 of the 2012 planning permission is a true condition precedent.

Overall Conclusion

16. Given the Council's acceptance that work on the approved scheme began before the expiration of the period specified in condition 1 attached to the 2012 planning permission, the question of whether a material, or 'meaningful' as it is put, start was made on the approved scheme is not a point in dispute in this case. And, because of the manner in which condition 2 is drafted, I do not find it is expressly prohibitive of the commencement of the approved development prior to the completion of the approved boundary treatment, or that there has been a breach of this condition. But, even if I were to agree with the Council's interpretation, this would not render the development unlawful as, for the reasons given above, I do not regard condition 2 as a true condition precedent.
17. The LDC application only addresses one component of the approved scheme, but the commencement of works represented an implementation of the 2012 planning permission as a whole, including the 2 holiday cottages expressly referred to in the application. No claim that this is not the case has been made.
18. I therefore conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of 2 holiday cottages – confirmation of meaningful start at Cross Trods House, Spellowgate, Driffield, 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.
19. I have taken into account all the other matters raised, but none are sufficient to outweigh the considerations that have led me to my conclusions.

D H Brier

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 20 December 2018 the operation described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

Work pursuant to planning permission ref 12/03727/PLF granted on 16 October 2012 commenced within the 3 year period specified in condition 1 of that permission. Condition 2 of that permission is imprecise and ambiguous and is not a true condition precedent.

Signed

D H Brier

Inspector

Date 07 May 2020

Reference: APP/E2001/X/19/3243901

First Schedule

2 holiday cottages – confirmation of meaningful start.

Second Schedule

Land at Cross Trods House, Spellowgate, Driffield YO25 5UP.

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 matter described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the matter described in the First Schedule and to the land specified in the Second Schedule. Any matter 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.