



Appeal Decision

by JP Roberts BSc(Hons) LLB(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 May 2020

Appeal Ref: APP/Y3940/X/19/3235143

Pinnells Farm Bungalow, Sodom Lane, Grittenham, SN15 4JS

- 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 in part to grant a certificate of lawful use or development (LDC).
 - The appeal is made by the beneficiaries of the will of Raymond Ody against the decision of Wiltshire Council.
 - The application (Ref.19/01292/CLE), dated 7 February 2019, was refused in part by the Council by notice dated 17 July 2019.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is:
The dwelling known as Pinnells Farm Bungalow and its residential curtilage (as edged in red on the enclosed plan numbered DWG 1) has been built not in accordance with condition 4 of planning permission ref: 72/UA/447/O as the cottages have not been demolished and remain on site to date and that the bungalow has been built for a period far in excess of 4 years.
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Decision

1. The appeal is dismissed.

Procedural matters

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. This is because I have been able to reach a decision based on the information already available. Both the appellant and the Council have agreed to the appeal proceeding on this basis.
3. The Council granted a Certificate of Lawful Use or Development in the following terms:

Certificate of lawfulness for dwelling known as Pinnells Farm Bungalow and its residential curtilage: non-compliance with condition 4 of planning permission 72/UA/447/O.

4. The reason given for issuing the certificate was:

The existing development, erection and occupation of the dwelling, known as Pinnells Bungalow, Grittenham was lawfully erected in compliance with the 1972 permission but thereafter occupied not in compliance with Condition 4 of the 1972 permission. Therefore, the breach of Condition 4 of the 1972

permission (Reference: 72/UA/447/0) is lawful as the evidence submitted demonstrates that it has been breached for in excess of 10 years.

5. The Council dealt with the application as one made under s.191(1)(c), solely in relation to the breach of condition, which it accepts has been breached for more than 10 years. The appellants' complaint is that the certificate has not been issued in the terms sought, as one made under s.191(1)(a), and, in short, they seek a certificate showing that the dwelling has not been built in accordance with planning permission 72/UA/447/O, but is nevertheless lawful because the time for taking enforcement action has passed.

Main Issue

6. The main issue is whether the Council's decision was well-founded.

Reasons

7. Planning permission 72/UA/447/O is an outline planning permission for a "site for agricultural dwelling". It was granted subject to a number of conditions dealing with the submission of reserved matters (condition 1), compliance with revised plans (condition 2), an agricultural occupancy condition (condition 3), and matters of access, parking and design (conditions 5 and 6). The only condition in contention is condition 4 which states:

Before the development hereby permitted is brought into use or within such reasonable time thereafter as agreed previously in writing with the Local Planning Authority, the existing cottages on OS.952 shall be demolished and the land reinstated to the satisfaction of the local planning authority.

8. The reason given for the condition is:

To ensure that at no time the number of properties associated with the holding exceed the maximum number in accordance with the viability of the farm unit and to ensure that the substandard property for which this dwelling is allowed as a replacement is demolished within a reasonable time after the erection of the new houses.

9. Subsequent to the approval of reserved matters, the dwelling was constructed and then occupied, without the demolition of the cottages as required by condition 4 having taken place.
10. As a starting point, despite the somewhat awkward wording of the permission, it is clear that it permits the erection of a dwelling, that is to say, the carrying out of operational development. It does not expressly permit any residential use, but s.33(2) of the 1971 Act provides that where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used and if no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed.
11. The condition in question places no restriction on the commencement of work in constructing the dwelling. Indeed, the requirements of condition 4 would not be triggered until the building was brought into use, by which time the building would have been completed, or at least have been substantially completed. There is no suggestion that the Council permitted an alternative timescale. The appellants allege that the dwelling "has not been built in accordance with

- condition 4", but they have misconstrued the effect of the condition; it has no bearing on the building of the dwelling, only on its occupation.
12. Whilst the condition is a condition precedent to the occupation of the dwelling, it is not a condition precedent to the commencement of development or the construction or completion of the dwelling. So, at the time that the building was constructed, there was no breach of condition. Simply put, the erection of the building was lawful, and a subsequent breach of condition, important though that condition may have been, did not render the erection of the building unlawful. The only remedial action open to the Council would have been to prevent occupation of the building until such time as the cottages were demolished, and the building as such would have been immune from enforcement action.
 13. The appellants argue that the condition goes to the heart of the permission and is a condition precedent to the occupation of the dwelling, and thus an essential part of the permission. The key legal case on this is *FG Whitley and Sons Ltd v Secretary of State for Wales* (1992), the principles from which were affirmed in *Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908.
 14. The "Whitley principle" was set out in the judgment of Lord Woolf:

"As I understand the effect of the authorities to which I am about to refer, it is only necessary to ask the single question: are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful. This is the principle which has now been clearly established by the authorities."
 15. Both the *Whitley* and *Greyfort* cases involved the erection of flats and were subject to conditions which required matters to be approved by the Council prior to the commencement of development.
 16. These situations are clearly distinguishable from the case here where the relevant condition does not prevent the implementation of the planning permission. Counsel's opinion for the appellant suggests that this is a "slightly different" position, but to my mind, the difference is significant in that not only does the condition not prevent the implementation of the planning permission, it does not preclude its completion either. Accordingly, the permitted operations did not contravene the conditions.
 17. Moreover, I consider that the condition does not "go to the heart" of the planning permission. The planning permission is for the erection of a dwelling – the permitted operations were carried out lawfully. It is only the occupation of the dwelling that is restricted by condition, and whilst that condition is no doubt important, ultimately it addresses only a secondary aspect of the permission, the use of the dwelling, rather than its erection.
 18. Accordingly, I find that the erection of the bungalow was lawful, being permitted by planning permission 72/UA/447/O and that the Council's decision

to grant a certificate of lawfulness only in respect of a breach of condition was well-founded.

Conclusion

19. For the reasons given above, I conclude that the appeal should be dismissed.

JP Roberts

INSPECTOR