
Appeal Decision

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 June 2020

Appeal Ref: APP/L3815/X/19/3240564

Land at Kellys Farm, Bell Lane, Birdham PO20 7HY

- 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 Paul Knappett against the decision of Chichester District Council.
- The application Ref BI/18/02204/ELD, dated 26 August 2018, was refused by notice dated 22 October 2018.
- The application was made under section 191(1)(c) 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 was described as the "use of building as a dwelling."

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

Preliminary Matters

1. Following a review of the evidence presented in this case and consultation with the appellant and Council, I have decided that a site visit was not necessary. Consequently, I have based my decision in this case on the written evidence provided by the appellant and Council.
2. My attention has been drawn to appeals¹ relating to enforcement notices for the use of land at this property as a car wash. I have taken them into account insofar as they are relevant to this appeal.
3. The description of the existing use, operation or activity set out on the application form is for the use of the building as a dwelling, but the ground for which the LDC has been sought is for the use, building works or activity in breach of a condition began more than 10 years before the date of the application. Evidence submitted by the Council and appellant is consistent that the building has been in use as a dwelling in excess of 10 years, and that the use of the building as a dwelling is lawful. I see no reason to disagree with that conclusion.
4. The background documentation submitted is clear that the appellant is seeking to ascertain whether or not the building was constructed in accordance with outline planning permission reference BI/00/02896/OUT and the reserved matters approved under reference 02/00454/REM. The evidence shows that the

¹ Appeal references APP/L3815/C/18/3193453 and APP/L3815/X/19/3240564

building has been constructed in accordance with the details submitted with those applications.

5. The Council have set out that they understand the intention of the appellant is to demonstrate that the property was not constructed in accordance with the planning permission (comprising outline permission BI/00/02896/OUT and reserved matters permission 02/00454/REM), in which case the dwelling would not have planning permission. As the dwelling is lawful, that would enable occupation other than in accordance with condition 4 of permission BI/00/02896/OUT that restricts occupancy to persons solely or mainly working or last working in the locality in agriculture or forestry, or a widow or widower of such a person, and any resident dependants.
6. Section 193(5) of the Act states that an LDC shall not affect any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted unless that matter is described in the certificate. As the application and decision of the Council did not mention the conditions most relevant to the case within their descriptions, if I were to use the same description for my decision it would confirm that the building could be used as a dwelling. However, it would not affect whether or not the development complied with any conditions on the planning permission and, consequently, would not address the reasons for which the appellant has submitted the application.
7. Section 191(4) of the Act allows the local planning authority 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. This power is also granted to the Secretary of State or an Inspector in the case of an appeal. As a result, I consider that the use and development would be better described as "the use of the building as a dwelling other than in accordance with planning permission comprising outline reference BI/00/02896/OUT and reserved matters reference 02/00454/REM." Although the Council did not alter the description in this manner, it is clear they have considered it in this way. Consequently, I do not consider either party would be disadvantaged if I were to proceed with that description.

Background and Main issues

8. As set out above, the question before me is whether there are any pre-commencement conditions attached to the planning permission granted under references BI/00/02896/OUT and 02/00454/REM, and whether they have been complied with. It is disputed whether conditions 10 and 17 attached to the outline permission, BI/00/02896/OUT, are pre-commencement conditions that have not been complied with. I understand that the dwelling is otherwise in compliance with the conditions attached to that planning permission.
9. Case law sets out the matters that need to be considered in order to determine whether conditions are true pre-commencement conditions. These are whether the condition expressly prohibits any development taking place before a particular requirement has been met; whether the condition goes to the "heart of the matter"; and whether they fall within any of the "Whitley"² exceptions. If they were pre-commencement conditions, they would need to be discharged through the submission of details and agreement of the Council in order for the

² As established in the Court of Appeal case *F G Whitley & Sons v SSW and Clwyd CC* [1992] JPL 856

dwelling to be lawfully constructed, in accordance with the details submitted, and occupied.

10. Consequently, the main issues in this case are whether the Council's refusal to grant an LDC was well-founded in relation to whether the following conditions are true pre-commencement conditions and whether they have been complied with:

- Condition 10 relating to screen walls and/or fences; and
- Condition 17 relating to surface water and foul drainage and means of disposal.

Reasons

11. In this case, the appellant and Council agree that the wording of conditions 10 and 17, stating "no development shall take place until ..." and "no works shall commence on site until ...", prohibit any development taking place before the requirements of the conditions are met. I see no reason to disagree with their conclusions on this point.

12. Both conditions required information be submitted and approved by the Council, and the development take place in accordance with those details. The appellant and Council agree that some information was submitted in relation to both conditions, but that the Council requested further information on both that was never supplied. On that basis, it is clear that the conditions have not been discharged.

13. However, it is disputed as to whether the conditions go to "the heart of the matter". This is a matter of planning judgement and relates to the significance of the conditions to the permission. As they relate to separate issues, I will deal with them separately.

Condition 10

14. The appellant states that they never intended to construct screen walls and/or fences around the property as these weren't required. It is unclear from the condition what the screen walls and/or fences were expected to screen. There is an assumption that they related to the boundary and correspondence suggests this was simply to delineate the boundary. Taking this into account, I consider that that they were not necessary to enable occupation of the dwelling. It seems to me, especially as the Council appear to have acknowledged that no new screen walls or fences were proposed at the time, that this requirement does not go to the "heart of the matter".

15. For these reasons, I conclude that condition 10 does not go to the "heart of the matter". Consequently, the fact that it was not discharged has no effect on the lawfulness of the use of the dwelling.

Condition 17

16. Condition 17 relates to means of disposal of surface water and foul drainage. I understand that the application for planning permission proposed that the dwelling would be connected to the mains foul water and surface water would drain to soakaways. However, that lacked detail as to where soakaways would be located, or how the foul water would be connected to the mains. As a result,

as set out in the reason for the condition, the Council applied it to ensure that the development was satisfactorily drained.

17. Details have been submitted of discussion between the appellant and Environment Agency (EA) with regard to disposal of surface water. It was not intended to alter hardstanding at the property, such as to provide additional parking. As such, the EA agreed that, in relation to surface water on the hardstanding, the condition could be discharged even though nothing was proposed. Limited information has been provided as to the disposal of surface water from the dwelling itself, for example run off from the roof. It is unclear how it is disposed of although such drainage is necessary for the building.
18. Provision of foul water drainage is required to enable disposal of sewage and other waste water arising from occupation of the dwelling. On 23 May 2003, the developer informed the Council that drainage had been provided in accordance with the Building Regulations. However, on 7 August 2003, the Council wrote to the developer requesting that the information was provided to them to seek compliance with the condition. Although I understand the developer accepted that was required, it was never submitted.
19. On 7 March 2002, Southern Water stated that there were no public surface water sewers in the vicinity of the site, although a plan of the sewer records provided by Southern Water on 27 April 2016 shows a foul sewer along the road in front of the site. Although the appellant suggests foul water drainage is not connected to the public sewer system, it is not clear as to how foul water is drained.
20. The implications of the lack of detail of how surface water and foul drainage are dealt with is unclear. Nevertheless, surface water drainage is essential for any building. Foul water is generated by residential occupation and needs to be safely disposed of. Although this matter is also dealt with through the Building Regulation system, it is common for these matters to also be dealt with through the planning process, for example to ensure development does not lead to surface water flooding and pollution of water courses. I consider that, for the above reasons, this would go to the "heart of the matter".
21. I conclude that the condition relating to surface water and foul water disposal does go to the "heart of the matter". Consequently, the fact that it was not discharged does, subject to the following, affect the lawfulness of the use of the dwelling.

Whitley

22. The judgement in *F G Whitley & Sons v SSW and Clwyd CC* [1992] JPL 856 set out that the only question to be asked was whether the development was permitted by the planning permission read together with its conditions. If it contravenes the conditions, it cannot have been commenced as authorised by the permission. However, in that case an exception was made as the information required by the condition had been submitted in time but the development commenced before the details submitted had been approved. As they were subsequently approved, the court held that the development had commenced and was, therefore, lawful. As a result, there was an exception in that case and the courts have held that this principle is to be applied flexibly.

23. Given my conclusions above, this is only relevant in relation to condition 17. The development has been completed other than in compliance with that condition and it was open to the Council to take enforcement action. I understand that the Council were aware that construction of the house commenced on 2 September 2002 and I have been provided with subsequent correspondence in relation to condition 17 between the appellant and the Council. However, the Council did not identify a need to take enforcement action against the development.
24. The Council suggest that the condition was complied with in substance taking account of subsequent correspondence, in particular the letter from the Council to the developer dated 7 August 2003. However, that is clear in stating that further information "must be submitted" in order to comply with the condition. As a result, the Council considered it important at that time, and I see no reason to disagree with that conclusion.
25. The Council suggest that an exception to the Whitley principle would be where enforcement action against operations would be "Wednesbury unreasonable"³. A condition is considered "Wednesbury unreasonable" where no reasonable planning authority properly directing itself could have imposed it, or it is otherwise invalid such that no enforcement notice could be founded on it.
26. The Council suggest that it would have been irrational to take action as the development was carried out in accordance with the planning permission, other than in relation to condition 17, and they indicate demolition of the dwelling would be considered excessive in the circumstances.
27. It is not clear why it would have been irrational to take enforcement action, bearing in mind that there would have been reasons to apply that condition albeit they were poorly expressed in the permission. It would be legitimate to be concerned, for example, that the drainage provision was inadequate in relation to surface water flooding and pollution of watercourses. In addition, it is not clear whether lesser steps could have been taken to secure compliance with the condition rather than demolition of the dwelling, or whether the issue of a breach of condition notice could have been investigated.
28. As a result, I consider that enforcement of the condition would not have been "Wednesbury unreasonable".
29. For these reasons, I conclude that there is not a "Whitley" exception that would apply in this case.

Conclusion

30. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the building as a dwelling other than in accordance with outline planning permission reference BI/00/02896/OUT and the reserved matters approved under reference 02/00454/REM 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.

³ Principle established by *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

Formal Decision

31. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the matter constituting a failure to comply with a condition or limitation which is found to be lawful.

AJ Steen

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by section 10 of the Planning and Compensation Act 1991)

THE TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 26 August 2018 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 would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The building has not been constructed in accordance with outline planning permission reference BI/00/02896/OUT and the reserved matters approved under reference 02/00454/REM as condition 17 of BI/00/02896/OUT was not complied with, that is a true pre-commencement condition. The building has been occupied as a dwelling for a period in excess of 10 years.

Signed

AJ Steen

INSPECTOR

Date: 10 June 2020
Reference: APP/L3815/X/19/3240564

First Schedule

The use of the building as a dwelling other than in accordance with outline planning permission reference BI/00/02896/OUT and the reserved matters approved under reference 02/00454/REM.

Second Schedule

Land at Kellys Farm, Bell Lane, Birdham PO20 7HY

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

This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any 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: 10 June 2020

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Not to scale

