
Appeal Decision

by **J A Murray LLB (Hons), Dip. Plan Env, DMS, Solicitor**

an Inspector appointed by the Secretary of State

Decision date: 1 July 2020

Appeal Ref: APP/Z1510/X/19/3243131

Workshop, Cobbs Fenn, Sible Hedingham, Essex, CO9 3RX

- 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 and Mrs Kim and Tanya Harding against the decision of Braintree District Council.
 - The application Ref 19/01736/PLD, dated 20 September 2019, was refused by notice dated 26 November 2019.
 - The application was made under section 192(1)(b) 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 creation of an access and hard-standing."
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr and Mrs Kim and Tanya Harding against Braintree District Council. This application is the subject of a separate Decision.

Procedural matters

3. The proposal was described in the application as: "Proposal to create a new access, layout and creation of new internal in the site permeable street leading to the construction of an associated hard-standing also made of porous material." This is unclear, but the description set out in the heading above was used by the Council in its delegated report and subsequent decision notice. With inconsequential differences, the appellants' appeal statement adopted the Council's description. I am satisfied they agreed that description and have determined the appeal on that basis.
4. Given that my decision turns on the extent of development on site as at the date of the LDC application, rather than the current position, I can properly determine the appeal on the evidence before me, without visiting the site. Neither party objected to my proceeding on that basis.

Main Issue

5. The issue is whether the Council's refusal of an LDC is well-founded. This will turn on whether the appellants have proved on the balance of probability that the proposed development would be lawful, if instituted or begun at the time of the application, namely 20 September 2019.

Reasons

6. On 1 March 2018, planning permission was granted on appeal Ref APP/Z1510/W/17/3187037 for "completion of development of two partly erected buildings into a single residence composed of a main house with an ancillary residential annex, both entirely comprised of residential living space." The approved plans provided for a site access, but the appellants now propose a second entrance, access and porous hard standing, as shown on plan 1508-2011 Revision B. They contend the proposal would be lawful, by virtue of being permitted development (PD) under the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO).
7. Class F of Part 1 of Schedule 2 to the GPDO grants permission for:
"the provision within the curtilage of a dwellinghouse of a hard surface for any purpose incidental to the enjoyment of the dwellinghouse as such."
8. Class B of Part 2 of Schedule 2 grants permission for:
"the formation, laying out and construction of a means of access to a highway which is not a trunk road or a classified road, where that access is required in connection with development permitted by any Class in this Schedule..."
9. So, the means of access would be required in connection with the provision of the hard surface, and the Council does not dispute that, in principle, the type of development proposed could fall within Classes F and B above. However, it argues that it would not be PD if begun at the date of the LDC application, because the dwellinghouse itself was not completed.
10. My attention has been drawn to *R (on the application of) Townsley v SSCLG* [2009] EWHC 3522 (Admin). The court held that, in a case involving PD rights in connection with a dwellinghouse, such rights are not available until a "building...has already been constructed and is...a dwellinghouse"; it is "not until it becomes a dwellinghouse that the GPDO can be used."¹
11. When the appeal the subject of *Townsley* was redetermined under Ref APP/X5990/C/08/2080509, the Inspector said:
"...The High Court concluded that permitted development rights could not have been exercised because at the time the property was still under construction, and such rights only arise in relation to a completed dwelling house. I have noted the appellant's comment that the physical shell was built, and was secure and weather tight, even though the final approval under Building Regulations had not been given. I also accept that the question of what constitutes a completed house can at times be difficult to determine. Nevertheless, in my opinion there is insufficient evidence to conclude that the building had become a dwelling..."
12. The Council's evidence includes the following points:
 - When a site visit was carried out in November 2019, after the LDC application was submitted, the dwellinghouse was still under construction and was not weathertight, as the windows had not been fitted. (Two

¹ At paragraph 16 of the judgement.

photographs (date stamped "2019/11/18") are submitted to demonstrate this);

- When the LDC application was validated in October 2019, a number of conditions, which were required to be discharged prior to any further work being carried out on site had not been discharged; and
- A completion certificate has not been issued under the Building Regulations (as at the time of the Council's statement).

13. The appellants' case in relation to completion includes the following principal points:

- The house has been built and is clearly recognizable as a house, with some interior detail being completed at the time of their statement; it does not need to be entirely completed "as in every detail in its approved plans";
- The main house has a completed roof, doors, glazing and windows, and the roof and main structure of the annex have been completed, but require extra work; and
- Five photographs show the main dwelling as at 16 April 2019 and 26 July 2019.

14. The existence of a completion certificate under the Building Regulations would provide compelling evidence that a dwelling had been completed. However, the absence of such a certificate at the time of the LDC application does not, of itself, prove a dwelling had not been completed. Similarly, failure to discharge conditions preventing further works is not decisive of that issue.²

15. The Council's photographs were taken nearly 2 months after the LDC application was submitted and show scaffolding still in place around the main dwelling and that the cladding was incomplete in places. The presence of glazing in all the window openings is not obvious, save where a reflection of a vehicle can be seen.

16. The Council does not detail the outstanding works, but the burden falls on the appellants to prove their case, on the balance of probability. Their photograph dated 16 April 2019 does show glazing in most, if not all the window openings visible in that shot and the 4 photographs dated 26 July 2019 show close-ups of other glazed windows. However, it is not possible to conclude from these images that all the glazing was installed, and they also show that the cladding was incomplete, and scaffolding was in place. Furthermore, the appellants do not say what interior detailing remained to be completed at the time of the LDC application. More to the point, they do not set out what interior works had been finished.

17. Proceeding on the basis that only the main house, rather than the annex needed to be complete for PD rights to be available, and even if the Council's contention that the building was not weathertight is wrong, I nevertheless have insufficient evidence to show that the building was capable of functioning as, or *being* a dwelling at the relevant time. That would depend on the existence of basic amenities within the building and not just on whether it looked like a dwelling from the outside.

² This could have other consequences because of article 3(5) of the GPDO, but it is not necessary for me to explore those and they have not influenced my decision.

18. As noted in the appeal decision referred to above, the question of what constitutes a completed house can at times be difficult to determine. Nevertheless, as a matter of fact and degree, there is insufficient evidence to conclude that the building had become a dwelling. Accordingly, the appellants have failed to prove on the balance of probability that the proposed development would be lawful, if instituted or begun at the time of the application, namely 20 September 2019, because they have not proved that the works would be PD.

Conclusion

19. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the proposed creation of an access and hardstanding 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.

J A Murray

INSPECTOR