



Appeal Decision

Inquiry Held on 9 March 2021

Site visit made on 10 March 2021

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 April 2021

Appeal Ref: APP/M9496/X/20/3252910

The Garrett, High Street, Calver S32 3XP

- 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 & Mrs A Coupe against the decision of Peak District National Park Authority.
 - The application Ref NP/DDD/0419/0377, dated 4 April 2019, was refused by notice dated 29 November 2019.
 - The application was made under section 191(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 conversion of former garage and workshop to a single dwellinghouse and use as a Class C3 dwellinghouse.
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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 existing building operation and use which is considered to be lawful.

Application for costs

2. An application for costs was made by Mr & Mrs Coupe against the Peak District National Park Authority, and vice versa. These applications are subject to separate decisions.

Procedural Matters

3. During the course of the appeal a new plan, Ref: 0649-04 Rev A was provided by the appellant to clarify the site area for which the certificate of lawful development is sought. The plan was provided in response to a query over landownership by the Peak District National Park Authority (PA). No party has been prejudiced by the introduction of the revised location & block plan, which now correctly identifies the land for which the certificate is sought. I have made my decision on that basis.
4. The Inquiry was held virtually and sat for one day.

Background and Main Issues

5. Section 191 (4) of the Town and Country Planning Act 1990 as amended (the '1990 Act') indicates that if, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, they shall issue a certificate to that effect. In any other case they shall refuse the application. The planning merits of the development are not relevant in this appeal and the issue is whether the Council's decision to refuse to grant a Certificate of lawfulness of existing use or development (LDC) was well founded.
6. The appeal site is situated at the junction of High Street and Cross Lane and lies within the Calver Conservation Area. Its central part is taken up by a detached house, 'The Garrett', and there are associated parking and garden areas to the north and south respectively.
7. Planning permission was granted for the "proposed conversion and modification to existing garage to local needs dwelling" on 16 June 2008¹. The 2008 permission was subject to 23 conditions and was also subject to a legal agreement restricting the future occupancy of the building to local needs.
8. In essence, the appellants' case is that 'The Garrett' was not converted and extended in accordance with the approved plans and the conditions attached to the 2008 planning permission. As a result, that permission was never implemented; the conditions attached to it do not apply, nor does the related legal agreement. As the development was completed more than four years ago and the property has been occupied for more than four years, the converted building and its use is lawful as it is now immune from enforcement action.
9. The appellants' application is underpinned by two premisses: firstly, none of the six 'pre-commencement' conditions were discharged: and, secondly, that the scheme was not carried out in accordance with the approved plans.
10. The PA do not dispute that the development was completed more than four years ago and that it has been occupied since March 2009. At the Inquiry it was also agreed that because of the way in which the wording of some of the conditions has been constructed, only Conditions 2 and 18 were capable of being pre-commencement conditions, i.e. conditions precedent. There is also no dispute that these two conditions had not been discharged in form or substance.
11. The main issues in dispute are therefore whether the Conditions 2 and 18 attached to the 2008 permission were "true" conditions precedent; and secondly, whether the development was built in accordance with the approved plans. It was agreed at the inquiry that should I find that either Condition 2 or 18 are true conditions precedent, then the development would be lawful. It would not therefore be necessary for me to determine whether or not the scheme had been carried out in accordance with the approved plans.

¹ Planning permission ref. NP/DDD/0707/0651. The parties refer to this as 'the 2008 permission', a term that I shall also use.

Reasons

Pre-Commencement Conditions

12. In *R (Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin) 179 it was held that a distinction had to be drawn between a condition which expressly required some action to be undertaken before development is commenced, and a condition which expressly prohibits any development taking place before a particular requirement has been met. It was held that it is necessary for the conditions both to be expressly prohibitive of commencement of development and to go to the heart of the permission; only when both tests are satisfied is it a condition precedent to which the *Whitley*² principle applies and there would be development without planning permission. If that is not the case, it would be a breach of the conditions and there would not be development without planning permission.
13. The subsequent Court of Appeal decision in *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908 applied both the *Hart Aggregates* judgement and the principles set out in *Whitley*. It specifically endorsed the need for the conditions to go to the “heart of the matter” to be a true condition precedent.
14. Condition 2 of the 2008 permission stated:
“The development shall not be commenced until a scheme to identify and control any contamination of land has been submitted to and approved in writing by the Authority; and until the measures approved in that scheme have been implemented. The scheme shall include all of the measures (phases II and III) contained in the Derbyshire Dales District Council Pollution Control Officer’s letter to the Authority dated 25 July 2007, or in accordance with an alternative scheme that has been submitted to and agreed in writing by the Authority.”
15. The condition required information to be submitted to and approved by the PA, and for the approved measures in that scheme to be implemented before the development was commenced. It therefore expressly prohibits any development taking place before that requirement has been met. The PA confirmed that no scheme had been submitted to them for approval, and as set out above, Condition 2 was not discharged in form or substance.
16. However, for Condition 2 to be a true condition precedent, it must also go to the heart of the subject matter of the planning permission. In this case, the planning permission was for the conversion and modification of an existing garage to a local needs dwelling. The reason stated in the decision notice for imposing the condition was: *“In the interests of amenity, to protect human health and the wider environment, and to prevent pollution of the water environment.”*
17. In cross examination at the Inquiry the PA’s witness conceded that Condition 2 related to whether the site was safe for human habitation, and consequently the condition was directly related to the subject matter of the planning permission, a dwelling. However, in his view, Condition 2 did not go to the “heart of the matter.” The reason he gave for this was because the

² *FG Whitley & Sons v Secretary of States for Wales* [1992] 3 WLUK 339. (If the development was in contravention of a ‘condition precedent’, it cannot properly be described as commencing in accordance with the planning permission. This is the ‘Whitley principle’).

development was for the conversion of an existing building, with only a very small extension to it. It was not for a new building. Furthermore, as the contamination related only to the possibility of elevated soil lead conditions, it was a condition that in his view, only related to the garden area and an investigation of the soils around the existing building. Therefore, despite the construction of the wording of the condition, it did not need to be a pre-commencement condition and it was not necessary for it to be discharged before the commencement of development, only prior to occupation.

18. However, the letter from Derbyshire Dales District Council's Pollution Control Officer, dated 25 July 2007, referenced in Condition 2, is clear that this condition would be necessary in order to protect the health of any residents from hazards arising from natural contamination of the site which might be brought to light by development of the land. In cross-examination the PA's witness confirmed that he deferred to the Pollution Control Officer for expert advice on such matters.
19. The expert advice set out in the letter is that investigations and remediation measures should be carried out before any development commences. Whilst the original garage may well have encapsulated the ground beneath it, the development required new footings for the extension and there were also changes to ground levels within the garden itself. Moreover, it is established case law that *"...the subject matter of the condition need not be central; i.e. not concern itself directly with the activity permitted, for example, the extraction or the building"*³. Consequently, whilst in this case the contamination issue cited in the condition may not in itself have related to the actual conversion works, it is manifestly about the essential subject matter of the planning permission, which the Authority agree relates to the occupation of the land for human habitation.
20. For the reasons given above, I conclude that Condition 2 does go to the "heart of the matter" and is therefore a "true" condition precedent.
21. Condition 18 of the 2018 planning permission stated:

"Before commencing the development hereby approved a detailed scheme for landscaping (including tree and shrub planting, seeding or turfing, earth mounding, walling, fencing or ground surfacing as necessary) shall be submitted to and approved in writing by the National Park Authority. Once approved, the planting or seeding shall be carried out to the reasonable satisfaction of the Authority within the first planting season following completion or occupation of the development. Any walling or surfacing shown on the approved plan shall be completed before the building is first occupied. Any trees dying, being severely damaged or becoming seriously diseased shall be replaced within the next planting season with trees of an equivalent size and species or in accordance with an alternative scheme agreed in writing by the Authority before any trees are removed."
22. This condition expressly prohibits any development taking place before a detailed landscaping scheme has been submitted to and approved in writing by the Authority. The PA confirmed that no scheme was submitted for approval, and it was not therefore discharged in form or substance. The decision notice stated that the reason for Condition 18 was: *"To ensure that the site is*

³ *Bedford Borough Council v SSCLC* [2008] EWHC 2304 (Admin)

landscaped following the completion of the development to protect the character of the locality.”

23. Observing that the appeal site lies in a National Park and within a conservation area, the appellants say that ensuring that the site is suitably landscaped is clearly about the subject matter of the planning permission. However, it is not a measure that I would deem necessary in order to facilitate the implementation of the approved works, nor it is something that needs to be agreed or carried prior to those works taking place. Indeed, the reason for the condition is explicit in that it seeks to ensure that the site is suitably landscaped following the completion of the development. Mindful of the nature of the planning permission, I do not consider that landscaping can reasonably be regarded as being central to any of the permitted operations in this instance. In the circumstances of this case, landscaping is not a matter that goes to the heart of the planning permission. In the light of this and having regard to the case law set out above, Condition 18 of the 2008 planning permission is not a true condition precedent.

Conclusion

24. In conclusion, although I have found that Condition 18 is not a “true” condition precedent, I have found that Condition 2 of the 2008 planning permission is. It was not discharged in substance or form and therefore the 2008 planning permission was never implemented, and the conditions attached to it and the legal agreement do not apply. Whether or not the development was constructed in complete accordance with the approved plans does not therefore need to be considered.
25. The evidence shows that the appellants did not implement the 2008 permission and carried out the building operations to convert the former garage and workshop to a single dwellinghouse without express planning permission. The operations involved in the conversion were substantially completed by March 2009 and the development has been continually used thereafter as a dwellinghouse. By the date of the application for a LDC, immunity from enforcement action for the unauthorised development had been achieved.

Other Matters

26. Taking into account the correspondence that took place between the appellant and the PA in relation to the site’s boundary wall and landscaping in 2012 and 2013⁴, it is not unreasonable for the PA to have assumed at that time, that there was no dispute between the parties that the 2008 permission had been implemented lawfully. However, that correspondence did relate solely to matters of landscaping, removal of permitted development rights and alterations to the site access, i.e. Conditions 18, 19 and 20. From the evidence before me, it was only that specific breach of planning control that the PA later resolved would not be expedient to enforce against⁵. There is no evidence that consideration was given at that time as to whether the remaining conditions in the 2008 permission had been breached. Furthermore, the actions of the PA at that time would not have precluded them from taking action against any other breach of conditions, including those conditions precedent.

⁴ Core Documents EP12, EP13 & EP3.

⁵ Core Document CD3B.

27. In coming to my conclusions, I have had regard to all the case law cited in the PA's Delegated Officer Report⁶ and appeal submissions. However, it is established case law that where a "true" condition precedent has not been discharged in substance or form, then the development is without planning permission.
28. I have not been provided with any substantive evidence that would lead me to conclude that the appellants made their original planning application for a local needs dwelling in anything other than "good faith". Nor is there any evidence that the appellants deliberately concealed the breaches of planning control. Therefore, the PA's consideration that the appellant regaled from a "promise" to develop a local needs dwelling is not a consideration to which I attach any weight.

Overall Conclusion

29. For the reasons given above I conclude that the PA's refusal to grant a certificate of lawful use or development for the conversion of former garage and workshop to a single dwellinghouse and use as a Class C3 dwellinghouse 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.

Elizabeth Pleasant

INSPECTOR

APPEARANCES

FOR THE NATIONAL PARK AUTHORITY:

Hashi Mohamed	Barrister, No5 Chambers
John Keeley Dip URP MRTPI	Planning Manager North

FOR THE APPELLANT:

Killian Garvey	Barrister, Kings Chambers
Rawdon Gascoigne BA (Hons) MTCP MRTPI	Emery Planning

⁶ Core Document EP10.



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 4 April 2019 the operations and use 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, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The conversion of the former garage and workshop to a single dwellinghouse and use as a Class C3 dwellinghouse is lawful because the time for enforcement action has expired.

Signed

Elizabeth Pleasant

INSPECTOR

Date 16 April 2021

Reference: APP/M9496/X/20/3252910

First Schedule

Conversion of former garage and workshop to a single dwellinghouse and use as a Class C3 dwellinghouse.

Second Schedule

Land at: The Garrett, High Street, Calver S32 3XP

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

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /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: 16 April 2021

by Elizabeth Pleasant DipTP MRTPI

Land at: The Garrett, High Street, Calver S32 3XP

Reference: APP/M9496/X/20/3252910

Scale: Not to Scale

