



Appeal Decision

Inquiry Held on 29 June 2021

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH

an Inspector appointed by the Secretary of State

Decision date: 5th August 2021

Appeal Ref: APP/A1910/X/20/3261710

Parker House, Maylands Avenue, Hemel Hempstead HP2 4SJ

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Graham Ellinor (Parker Hannifin Manufacturing Limited) against Dacorum Borough Council.
 - The application (Ref. 20/02060/LDP) is dated 21 July 2020.
 - The application was made under section 192(1)(a) and (b) of the Town and Country Planning Act 1990 as amended (the Act).
 - The development for which a certificate of lawful use or development is sought is conversion of office building for residential use.
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Decision

1. The appeal is dismissed.

Costs Application

2. An application for costs was made by Mr Graham Ellinor (Parker Hannifin Manufacturing Limited) against Dacorum Borough Council. The costs application is the subject of a separate Decision.

Procedural Matters

3. For the avoidance of doubt, while David Forsdick QC did not represent the appellant at the inquiry, I have fully considered the written advice he provided to the appellant and which was submitted as part of the appeal process.
4. Given the nature of the appeal, and as agreed with the main parties, it has not been necessary for me to conduct a site visit to determine it.
5. While the Council did not give notice within the prescribed period, it has provided reasons why it opposes the LDC application.

Main Issue

6. The main issue is whether the deemed refusal by the Council was well-founded, based on a position that it had refused the application for prior approval 4/01588/19/OPA by a decision notice dated 23 August 2019 (disputed by the appellant) with the consequence that none of the events specified in paragraph W(11) of Schedule 2, Part 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) have occurred.

Reasons

7. The appellant does not dispute that he received a document from the Council dated 23 August 2019, within 56 days of the Council's receipt on 2 July 2019 of the prior approval application. Therefore, were this document to constitute a refusal of the application then the appeal must fail on the main issue as the matter in paragraph W(11)(1)(c) would have occurred.
8. The appellant argues that the document was not a refusal but a 'purported refusal' materially similar to that given by East Dorset District Council (EDDC) in the case of *Dunnett*¹. Further, that as the reasons given in the 23 August 2019 document of 'purported refusal' were not the various specified matters for determination by the Council under the prior approval process, it was outwith the statutory scheme and of no legal effect.
9. The *Dunnett* judgement was a challenge to an Inspector's decision to dismiss an appeal against a refusal to grant an LDC for proposed development. As in the facts relevant to the appeal before me, the Council in that case (EDDC) considered that a condition attached to an earlier planning permission prevented the use of permitted development rights through the prior approval process to convert a building from offices to dwellings. The Court of Appeal dismissed the appeal as it was held that the condition in that case did exclude the operation of the General Permitted Development Order in force at that time.
10. While I have considered the appellant's arguments carefully, I do not consider that the *Dunnett* judgement assists his case. As is explicit in the judgement transcript, the focus of that appeal concerned a narrow issue of construction of a planning condition. Neither the Court of Appeal nor the Inspector needed to make a finding about the validity of the decision notice, since:

"It is common ground that, although that letter purported to refuse the application for prior approval, it did not properly do so – so that the Council never properly responded to that application – but that letter made clear that the Council did not consider that the proposal fell within the GPDO at all, because rights under the GPDO had been excluded by the condition."
[paragraph 8 of the judgement]
11. There is accordingly little in the judgement or the Inspector's decision which assists in explaining what the circumstances were that made EDDC's notification a 'purported refusal' rather than one properly made (though I note the wording used at the beginning of the letter was to 'advise' of the Council's view rather than to 'refuse' the application). However, the document sent by the Council on 23 August 2019 very clearly refuses the prior approval application made. It identified the prior approval application made, with associated reference and date, and said "the application is refused" on the first page with the "reasons for refusal" given on the second page. I place no weight on the appellant's argument that the same format was not used as for the Council's decision on 4/02172/19/OPA as there is no prescribed form or format to be used for a prior approval decision, and it was otherwise clear.
12. Accordingly, I find that the only reasonable way for the appellant to have understood the document was as formal notification of refusal. While the

¹ *Dunnett Investments Ltd v Secretary of State* [2017] EWCA 192

appellant disagrees with the reason given for refusal, and indeed is of the opinion that it was a reason that it was not possible for the Council to give ('outwith of the statutory scheme'), it does not alter the fact that the document contained a clear refusal of the prior approval application within the statutory period and it was open to the appellant to challenge it. There are several authorities which support this view², based on an established legal principle that a decision made by a public body is valid and effective unless and until it is overturned by a court of competent jurisdiction. The appellant did not take such steps (nor did he appeal against the decision under section 78 of the Act). I do not accept the appellant's position that a challenge was not possible in these circumstances as the document was of 'no effect', and in coming to my decision I am incorporating the principle in *Thornton Hall*³ that the Council's unquashed decision cannot safely be ignored and has legitimacy and legal effect even should it be legally flawed.

13. In the absence of a successful challenge against it, I consider that the 23 August 2019 document has the status as what it says it is, namely a refusal, and it is not within the scope of this appeal on the LDC application to revisit the reason for that earlier, unquashed, decision. The fact that the Council did not use its discretion to require further information from the appellant under paragraph W(9) of the GPDO before it sent the decision is of no consequence in this context, and it does not affect my finding. Further the *Smolas* judgement⁴ indicates that it is open to a local planning authority (LPA) to make a decision as to a prior approval application in one stage rather than two (whether prior approval is required and whether it is granted or refused) as in this case.
14. The *New World Payphones* judgement⁵ found that an LPA "is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development." I have considered the judgement, but I do not see that it assists the appellant's case. The Council argues that it supports the position that it was valid for it to consider whether the previous planning condition rendered the proposed development compliant with the applicable conditions, limitations and restrictions of the GPDO including those set out in the Articles⁶. But even if the appellant is right that the Council was legally wrong in its reason to refuse the prior approval application, it does not affect my finding on this appeal as it was open to the appellant to challenge that reason and have the decision quashed.

Conclusion

15. For the reasons given above I conclude that the Council's deemed refusal to grant a LDC in respect of conversion of office building for residential use 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.

Andrew Walker

INSPECTOR

² Pages 8 and 9 of the Council's skeleton argument

³ R (Thornton Hall Hotel Ltd) v Wirral MBC [2018] EWHC 560 (Admin)

⁴ R (oao Smolas) v Herefordshire Council [2021] EWHC 1663 (Admin)

⁵ New World Payphones v Westminster City Council [2019] EWCA Civ.2250

⁶ Including Article 3(4): "Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise by this Order"

APPEARANCES

FOR THE APPELLANT: Ben Garbett (Advocate, Consultant Solicitor)

FOR THE LOCAL PLANNING AUTHORITY: Jack Parker (Barrister)

INTERESTED PERSONS: None