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## Appeal Decision

Site visit made on 6 February 2023

**by Anthony J Wharton BArch RIBA RIAS MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 20 February 2023**

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**Appeal Ref: APP/N4720/X/22/3301466**

**Underwood Lodge, Underwood Drive, Rawdon , Leeds LS19 6LA**

- 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 on an application for a certificate of lawful use or development (LDC).
- The appeal is made by Mr and Mrs Paul & Patra Heaton against Leeds City Council. The application (Ref. 22/01273/CLE) is dated 11 March 2021.
- 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, Completion of garage attached to main house as per approved planning 27/29/00/FU (Demolition of old detached garage and landscaping completed within permitted time).

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### Decision

1. The appeal is allowed and a Lawful Development Certificate is attached below.

### Background information and the gist of the cases

2. The LDC application was made to establish whether the previous application (Ref: 27/29/00/FU) for a garage at the property was lawfully implemented and is, therefore, extant. The appeal property is a detached, two-storey, stone-built dwelling with extensive sloping surrounding gardens. It was originally constructed as a lodge/gate house to Underwood House which lies to the north-east.
3. Prior to the above approval, planning permission had been granted in 1996 for a large rear extension to the property and it would appear that it had previously been extended between 1987 and 1990. The surrounding area is characterised by other substantial dwellings on well-treed large sites within this semi-rural area. The site is located within an area designated as a Special Landscape Area (SLA) and the Green Belt. It is also located within Rawdon Cragg Wood Conservation Area.
4. The consent for the garage (27/29/00/FU) was subject to two pre-commencement conditions. These were Condition 2 (to provide samples of materials before any building works commenced) and Condition 4 (to provide a scheme of demolition of the former garage on the site and contouring of the land). With regard to Condition 2, it is indicated that, due to the passage of time, the LPA's confirmation of receipt of the samples had been misplaced/lost. The LPA has also indicated that it has no record of the samples.
5. However, with regard to Condition 4, by letter dated 31 May 2000, the LPA had confirmed to the appellants that the details submitted in relation to the demolition of

the former garage and the contouring of the landscape were considered to be acceptable. At this stage, therefore, it is accepted by the LPA that this pre-commencement Condition 4 had been satisfactorily discharged and that the dispute, only relates to Condition 2.

6. The Officer's Delegated Report for the LDC application indicates that, although quotations and receipts had been supplied for landscaping works at the property, it was concluded that they *'provide no certainty where within the site these landscaping works took place, or if they related to the 2000 planning consent'*. It is also stressed that the *'demolition of the previous garage could occur without the need for planning consent and, therefore, there is no certainty that works which may have occurred at the site in 2000/2001 relate to planning consent 27/29/00/FU'*.

7. It is indicated that the permission for the double garage to the side of Underwood Lodge, reference 27/29/00/FU, dated 30 March 2000, was commenced through removal of the existing garage in July 2000. It is stressed that this was part of the re-development granted permission and that commencement, therefore, took place with the 5 year time limit as set out in the decision notice.

8. With regard to Condition No 2 it is argued that, despite the fact that the information was submitted, the condition does not go to the heart of the permission as set out in case law. References are made to the following cases: *F G Whitley & Sons v SSW and Clwyd CC 1992 (Whitley)*; *JPL 856 (Court of Appeal)*; *Hart Aggregates v Hartlepool BC [2005] EWHC 840 (Admin) (Hart)* and *Greyfort Properties Ltd v Secretary of State for Communities and Local Government [2011] EWCA Civ 908 (Greyfort)*.

## **My assessment**

### *Introduction*

9. An appeal relating to a Certificate of Lawful Use or development (LDC) is confined to the narrow remit of reviewing the LPA's decision and Section 195(2) of the Act requires an assessment to be made as to whether the refusal of the application is, or is not, well-founded. The assessment is based on whether or not the development, for which the certificate is sought, would have been lawful at the time of the application (11 March 2021). The planning merits of the development are not relevant and the burden of proof lies with the applicant and the relevant test is *'the balance of probabilities'*.

### *The Main Issues*

10. The main issues are as follows:

1. Whether or not the evidence submitted in support of the LDC application is sufficiently precise and unambiguous to demonstrate that the demolition of the existing garage was lawfully implemented and constituted the commencement of planning approval 27/29/00/FU, and
2. Whether or not condition 2 of 27/29/00/FU was a condition precedent for commencement of the development.

11. The evidence before me is the same as that submitted to the LPA on the date of the LDC application, 11 March 2021. In a letter from the LPA it is confirmed that the aims of condition 4 of 27/29/00/FU were agreed. There are photographs of the site showing the cleared section of land where the former garage had been located. These are dated 13 August 2000. Further evidence includes quotations from the

building contractor, the landscape contractor and an electrical contractor all dated between September 2000 and August 2001.

12. Having considered the evidence and having seen the landscaping carried out on site, I consider that, on the balance of probabilities, it has been demonstrated that the old garage had been demolished by August 2000 and that landscaping and other works associated with the permission had been carried out and paid for by August 2001. As indicated these works constituted a substantial financial outlay and it begs the question that if they were not linked to the overall proposed scheme why were they carried out?

13. My conclusion in this respect is reinforced by the fact that the LPA had agreed to the scheme for removal of the garage and the landscaping works. With regard to condition 2, even if the submitted samples had no longer been available, one would have normally expected the LPA to have retained some record of the submission. Furthermore, the LPA has not produced any of its own evidence to challenge the appellants' position or to show that their version of events is not, on the balance of probabilities, most likely.

14. On this first issue, therefore, I consider that it has been demonstrated, on the balance of probability, that the demolition of the garage in relation to the permission granted, had lawfully commenced within the necessary timescale. It follows that the permission is extant.

#### *Condition No 2*

15. The LPA considers that condition 2 was a condition precedent but, as indicated above, cannot find any record of the materials provided. The condition states that no building works shall take place before the materials were agreed. In fact no actual building works to the garage were carried out. The only works were as referred to above, those being demolition of the old garage and landscaping works to the land. Both the demolition and the landscaping works formed part of the approved development.

16. In the case of *Whitley* it was held that the only question to be asked was whether the development was permitted by the planning permission read together with its conditions. If the development contravenes the conditions, it cannot be properly described as commencing the development authorised by the permission.

17. *Whitley* also sets out that it is not necessary to try to determine whether or not the conditions contained are properly capable of being classified as conditions precedent or otherwise. The Courts have, in subsequent cases, been prepared to apply *Whitley* flexibly and recognising that there may need to be some leeway, in terms of timing, provided there was no prejudice to the purpose of the conditions.

18. The purpose of condition 2 was to agree the materials to be used before any building works took place. In the case of *Hart* it was held that a distinction had to be drawn between a condition which 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.

19. In considering the above, it was expressly noted that it is necessary for the condition both to be expressly prohibitive of commencement of development and to go to the '*heart of the permission*'. It was concluded that only when both tests were satisfied would the condition be a 'condition precedent'. If that is not the case, it would be a breach of the condition and the development would not be development without planning permission. In this instance I agree with the appellants' position that the

timing trigger of the condition (i.e., prior to building works) has not been breached as no building works had been undertaken.

20. In *Hart* the need for a condition to be expressly prohibitive and to go to the 'heart of the matter', were not binding for the intentions that they posed. The subsequent Court of Appeal decision in *Greyfort* applied both the *Hart* judgment and the principles set out in *Whitley* and supported the need for the condition to go to the 'heart of the matter', to be a true condition precedent.

21. In this case I agree with the case put forward on behalf of the appellants that condition 2 does not go to the 'heart' of planning permission 27/29/00/FU. It was a detail referring simply to 'materials to be agreed'. It neither related to any specific building operation nor to any specific prohibition of commencement until something more critical that obviously did go to the 'heart' of the permission was carried out. Clearly external materials could have been agreed (or re-agreed) after demolition of the old garage and the carrying out of landscaping works. This remains the case.

22. I conclude, therefore, that the appellant has demonstrated precisely and unambiguously that the approved development was lawfully commenced by the demolition of the former garage and the landscaping works. Furthermore, I find that condition 2 does not go to the 'heart' of the planning permission. It follows that the appeal succeeds and a LDC is attached to this decision for 'Completion of the garage attached to the main house as per approved planning permission 27/29/00/FU'.

*Anthony J Wharton*

Inspector



The Planning Inspectorate

## 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 2010: ARTICLE 35

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**IT IS HEREBY CERTIFIED** that on 11 March 2021, the development described in the First Schedule hereto, in respect of the property specified in the Second Schedule hereto, was lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

*Planning permission 27/29/00/FU had been lawfully commenced and no enforcement action can be taken against its completion.*

*Anthony J Wharton*

Inspector

Date: 20 February 2023

Appeal Ref: APP/N4720/X/22/3301466

### **First Schedule**

Completion of garage attached to main house as per approved planning 27/29/00/FU (Demolition of old detached garage and landscaping completed within permitted time).

### **Second Schedule**

Underwood Lodge, Underwood Drive, Rawdon , Leeds LS19 6LA

### **Notes:**

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended) and relates only to the above property.

It certifies that the development described in the First Schedule, at the property specified in the Second Schedule, was lawful on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the development described in the First Schedule; to the property specified in the Second Schedule and to be in accordance with the approved drawings for Planning Permission 27/29/00/FU.

Any other development or use which is materially different from that shown on the above plans may result in a breach of planning control which is liable to enforcement action by the local planning authority.