



Appeal Decision

Site visit made on 1 August 2023

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 August 2023

Appeal Ref: APP/Z3825/X/22/3305969

Delspride, Kent Street, Cowfold RH13 8BB

- 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 Matthew Bennison against Horsham District Council.
 - The application (Ref DC21/1416) is dated 14 May 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 described as the continued use of Delspride, Kent Street, Cowfold, RH13 8BB, as a residential dwelling (Use Class C3) with associated residential curtilage (driveway, garage, parking area and garden) without compliance with planning permission CF/22/92 and the associated conditions.
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Decision

1. The appeal is dismissed.

Reasons

2. The appeal property is a detached single storey dwelling, located towards the end of a private road. The dwelling occupies an L-shaped plot encompassing land to one side and at the rear. On 16 April 1993, the Council granted planning permission reference CF/22/92 for the '*extension to and conversion of building into dwelling*' at the property. Among the conditions attached to the permission is condition 04, which restricts occupation of the dwelling to a person or persons solely or lastly employed in the locality in agriculture or forestry and their dependents, or a surviving spouse.
3. An LDC is sought on the basis that at the application date, the attached conditions did not 'bite' as the permission was not implemented and it was now too late to take enforcement action in relation to the change of use to a dwelling. At s171B (2), the Act provides that in the case of a breach of planning control consisting in the change of use of any building to a single dwelling, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. The effect of s191 (2) of the Act is that uses and operations are lawful if the time for taking enforcement action has expired. It is for the appellant to show that the matter for which an LDC is sought is immune from enforcement action and consequently, lawful, the relevant test of the evidence being on the balance of probability.

4. The Council's records indicate that the use as a dwelling was already occurring prior to the grant of planning permission. Nevertheless, the permission makes no reference, either in the description of development or elsewhere, to the application being made retrospectively in any way. On the evidence, the permission is clear, unambiguous and valid on its face. The conditions attached, including condition 01 which requires development to commence within five years, together with conditions 02, 03, 05 and 08 which require the submission to, and approval by, the Council of various details before development commences, are not supportive of the permission being partly retrospective.
5. From the information supplied there is little in the application and drawings submitted, incorporated with the permission by reference, from which it might reasonably be inferred that part of the works in the development had already been carried out. Since there is no ambiguity in terms of the development granted by the permission it is not necessary to have recourse to extrinsic material in construing its meaning. As a result, I am not persuaded that the permission was other than prospective in nature.
6. Even if I am wrong on that point, use as a dwelling at the time of the grant does not necessarily mean the permission was implemented. Whilst the facts may differ from in this appeal, the Court's approach in *R v Mid Bedfordshire District Council, ex parte Grimes* [2000] 80 P & CR 311 is relevant and appropriate in this respect. When looked at as a whole, including the description of the development and the conditions, there is little which might suggest that the permission was granted so as to have effect from the date on which development was carried out. Therefore, in examining whether the permission was implemented it is necessary to have regard to the attached conditions.
7. Condition 01 of the permission required development to commence by no later than 16 April 1998. The appellant referred to a Building Regulations application made in 2000 for an '*extension and alterations*' at the property¹, as support for their claim that works on the development only began after the permission had expired. Since consent under the Building Regulations can be obtained retrospectively however, I do not find this evidence particularly helpful. This is because it does not rule out the possibility that works comprised in the permission began before the end of the five-year period specified in condition 01. Although the electoral records show persons registered at the property from 1999 onwards, that is not incompatible with works commencing prior to the expiry date.
8. There is also little to support the statement, in a letter dated 28 March 2000 from an agent acting for former owners, that the '*original planning permission*'-presumably permission reference CF/22/92-had lapsed and that work had commenced on the '*second planning approval*'-most likely the extension permitted by the Council under reference CF/1/95 on 22 February 1995.
9. Consequently, there is an absence of clear and convincing evidence to support the purported failure to comply with condition 01. Aerial photographs with dates from 1 January 2001 onwards and other information relating to the later erection of the extension do little to assist in establishing when works in the permission began. No evidence from the former owners was provided; they

¹ Ref: 109/CF/00.

might possibly have been able to offer a first-hand, detailed account concerning events at the property during their ownership and may also have had access to contemporaneous documentation. Given that the available evidence lacks sufficient precision and is ambiguous, I am not persuaded that works comprised in the permission only commenced after the expiry date. That being the case, there remains the distinct possibility that works comprised in the permission were undertaken within the five-year period, thereby amounting to the commencement of development.

10. I accept that commencing works before the expiry of a planning permission does not necessarily mean that the permission in question was implemented. In *FG Whitley & Sons v SSW & Clwyd* [1992] 3 PLR, the Court established the principle that operations undertaken in breach of 'conditions precedent' could not be properly described as commencing a development granted planning permission. In *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin), the Court held that to be a condition precedent, it is necessary for the condition both to expressly prohibit commencement of the development and to go to the heart of the permission, being so fundamental that a failure to comply would take any works outside of that permission.
11. Condition 02 is clearly worded so as to prohibit development until details of the external materials have been submitted to, and approved by, the Council. Condition 03 is similarly worded in relation to a scheme of landscaping, as is condition 05 concerning details of the foul and surface water drainage and condition 08 in respect of details of screen walls and fences. The Council clearly considered that the details of these matters were sufficiently important that conditions should be imposed. There is no evidence that the conditions have been complied with.
12. Nevertheless, the permission relates to the extension and conversion of a building to a dwelling; it is not for external materials, landscaping, drainage and screens. The conditions do not concern the essential subject matter of the permission; they are detailed aspects of the development permitted. In relation to condition 05 in particular, provision of satisfactory drainage for the dwelling is a matter of detail, albeit one of considerable importance, but is not integral to the development in the permission. Condition 02 does not require development to be carried out in accordance with the approved details of the external materials, whilst the approved landscaping, drainage and screen details in conditions 03, 05 and 08 do not have to be implemented until a later stage-prior to occupation in the case of the drainage and screens and subsequently for the landscaping.
13. Accordingly, as a matter of fact and degree, conditions 02, 03, 05 and 08 are not fundamental to the development and they do not go to the heart of the permission. Breaches of those conditions would be liable to enforcement action, provided the ten-year period in s171B (3) of the Act has not passed, but that in itself does not make the works authorised by the permission unlawful. It follows that failing to comply with the above conditions is not conclusive as to whether the permission was implemented.
14. Therefore, based on the available evidence, and on the balance of probability, it is entirely possible that works comprised in the development were undertaken before the end of the five-year period following the date of the grant, implementing the permission; there is little clear and convincing

information before me which would suggest otherwise. With that in mind, although it is highly likely that the use as a dwelling commenced more than four years prior to the date of the application, condition 04 restricts its occupation. This means that the matter described in the application cannot be certified as lawful for planning purposes.

Conclusion

15. For the reasons given above I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of the continued use of 'Delspride' as a residential dwelling (Use Class C3) with associated residential curtilage (driveway, garage, parking area and garden) without compliance with planning permission CF/22/92 and the associated conditions was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me under section 195 (3) of the 1990 Act as amended.

Stephen Hawkins

INSPECTOR