



Appeal Decision

by S A Hanson BA(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 November 2023

Appeal Ref: APP/W1850/X/22/3311916

**Land at The Three Horseshoes Inn, Little Cowarne, Hereford,
Herefordshire HR7 4RQ**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development.
 - The appeal is made by Mr David Notley against Herefordshire Council.
 - The application ref 221751 is dated 26 May 2022.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is for the residential occupation of the dwelling and detached garage approved under Planning Permission 153174 granted 3 February 2016 separately from the property known as The Three Horseshoes Inn on the basis that Condition 4 of planning Permission 153174 is unlawful, invalid and unenforceable.
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Mr David Notley against Herefordshire Council. This is the subject of a separate decision.

Preliminary Matters

3. It has not been necessary to visit the site. This is because all the required information is included with the application and appeal documents, and a decision can be reached on the papers. Both parties were contacted regarding this matter and given the opportunity to comment on the appropriateness of the proposed approach and no objections were received.
4. The Council had not given notice to the appellant of its decision on the application for a certificate of lawful use or development (LDC) application within the prescribed period. The appeal is therefore made under section 195(1)(b) of the Town and Country Planning Act 1990 as amended (the Act).
5. Section 191(4) of the Act provides that if, on an application under that section, the Local Planning Authority are provided with information satisfying them that the use or operations described in the application would be lawful, if instituted or begun at the time of the application, they shall issue a certificate to that effect. In any other case they shall refuse the application.
6. For the avoidance of doubt, the planning merits of the matters applied for do not fall to be considered. The decision is based strictly on factual evidence, the history and planning status of the site in question and the application of relevant law or judicial authority to the circumstances of the case.

Main Issue

7. It is clear from the evidence provided within the Council's statement of case dated 23 January 2023 that had it made a decision on the application it would not have issued an LDC. The Council took the view that the determination of the application involved a matter under s191(c) of the Act, constituting a failure to comply with condition 4 of planning permission ref.153174/F for a 'new single storey dwelling and detached garage' granted on 3 February 2016 (the 2016 permission). Therefore, it should be considered under section 191(3) of the Act, that is that the time for taking enforcement action in respect of the failure has then expired and it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.
8. Since the Council has not issued a decision, the application is deemed to have been refused. Therefore, the main issue for this appeal is whether that deemed refusal would have been well-founded.

Reasons

9. Condition 4 of the 2016 permission states that 'the single storey dwelling and detached garage subject of this permission and the property known as The Three Horseshoes Inn shall not be sold, leased or let separately from each other'. The reason for the condition is that 'it would be contrary to the policy of the local planning authority to grant permission for a separate dwelling in this location having regard to Policy RA4 of Herefordshire Local Plan-Core Strategy and the National Planning Policy Framework'.
10. The LDC application sought a legal determination as to whether the occupation of the dwelling and detached garage separately from the property known as The Three Horseshoes Inn was lawful at the date of the application.
11. Section 191(1) of the Act entitles any person wishing to ascertain:
 - (a) whether any existing use of buildings or other land is lawful,
 - (b) whether any operations which have been carried out in, on, over or under land are lawful; or
 - (c) whether any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.
12. The references to 'use' and 'operations' align with the definition of 'development' in s55 of the Act and the general requirement in s57 of the Act to obtain planning permission for development.
13. The appellant confirms in their statement that the application was submitted under s191(a) of the Act to ascertain if the 'use' was lawful. However, the application form indicates that the reason for applying for the LDC is to ascertain whether "an existing use, building work or activity in breach of condition" is lawful, that is s191(c) of the Act. It is pertinent to acknowledge that s191(1)(c) does not specify that the condition must be lawful, as alluded to by the appellant.

14. Notwithstanding this inconsistency, the basis of the appellant's case rests on the argument that condition 4 is unlawful, invalid and unenforceable. For this reason, they consider that the existing use of the land is lawful, relying on the phrase 'for any other reason' within s191(2)(a) of the Act being applicable to their circumstances.
15. Section 191(2) provides that, for the purposes of the Act, 'uses' and 'operations' are lawful at any time if: (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of the requirements of any enforcement notice then in force. Lawfulness for s191 of the Act purposes is determined simply by reference to the tests in subsection (2), even if the use or operation contravenes other legislation.
16. 'For any other reason' in this context refers to lawful uses for the purposes of s57(4) of the Act. In this case, the development was made with the benefit of express planning permission. Failure to comply with a condition does not render a use unlawful except with conditions precedent and condition 4 is not a condition precedent. The use of the development is lawful, but there is a failure to comply with a condition.
17. It follows that to ascertain whether the residential occupation of the dwelling and detached garage separately from the property known as The Three Horseshoes Inn, the appellant must show that the time for taking enforcement action in respect of the failure has then expired, and it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force. This is in accordance with s191(3) of the Act.
18. Time limits are provided under s171B of the Act. Relevant to this appeal, a failure to comply with a condition, is s171B(3) which states that no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. Consequently, it is for the appellant to demonstrate that the appeal site has been sold, leased or let separately from the Three Horseshoes Inn for the requisite time and is therefore immune from enforcement action. Whether the condition satisfies the tests of reasonableness, necessity, relevance, enforceability and preciseness as set out in the Planning Policy Guidance¹ is of no consequence in this context.
19. I have been provided with an appeal decision ref: APP/Y0435/X/20/324233 which the appellant considers supports their case. The LDC sought whether to implement a planning permission by carrying out a material operation without compliance with a condition concerning the submission of a deed of easement in respect of noise would be lawful. Section s192 of the Act, enables any person to make an application to ascertain whether any 'proposed' use of buildings or land or any operations proposed to be carried out in, on, over or under land, would be lawful. In this case it was determined that the condition was of no effect as it should have been imposed on the outline permission rather than at the reserved matters stage. The Inspector in these circumstances considered the condition to be ultra vires and that the development could be implemented without complying with the condition.

¹ Paragraph: 003 Reference ID: 21a-003-20190723

20. An application under s191 provides for a different purpose. It is my opinion that under this section of the Act, as reasoned above, there is no scope to question whether the condition is lawful or not and therefore I cannot determine the appeal as pursued by the appellant under s191 of the Act.
21. Overall, and in accordance with s191 of the Act, in order to demonstrate lawfulness, it must be shown that the development has become immune from enforcement action. In this case it is necessary to show that the failure to comply with the relevant condition has taken place for a period of ten years prior to the date of the application beginning with the date of the breach and that the breach has continued throughout that period without significant interruption. Consequently, I am not able to issue an LDC for what the appellant sought in their application.

Conclusion

22. For the reasons given above and having regard to all other matters raised, I conclude that the Council's deemed refusal to grant an LDC was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act as amended.

S A Hanson

INSPECTOR