

Appeal Decision

Site visit made on 21 October 2024

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 30th October 2024

APP/E3335/X/24/3339732

Middlemoor Farm, Lower Gully Drove, Clewer, Wedmore BS28 4JE

- The appeal is made under section 195 of the Town and Country Planning Act 1990, (the Act), as amended by the Planning and Compensation Act 1991 against a refusal by Somerset Council to grant a certificate of lawful use or development.
- The appeal was made by Mr C Dinotaro.
- The application, reference 17/23/00060, was received by the Council on 21 August 2023. It was refused by a notice dated 7 December 2023.
- The Application for a Certificate of Existing Lawful Development for use of the dwelling without occupancy condition at Middlemoor Farm, Lower Gully Drove, Clewer, Wedmore BS28 4JE.

Summary of decision: The appeal fails. A certificate of lawful use or development is not issued.

Application

1. The application concerns a single story detached house built at Middlemoor Farm, Clewer. A Building Regulations completion certificate is dated 28 March 2019.
2. The lawful development certificate, (LDC), application now the subject of this appeal was stated as: (Existing Use), 'Dwelling house without any occupancy restriction'.

Appeal dwelling – planning permission

3. Planning permission 17/10/00075 CJA for the erection of an agricultural workers dwelling at Middle Moor, Lower Gully Drove, was issued on 10 May 2011. The permission was subject to 7 conditions. Condition 1 limited the permission to 3 years prior to implementation; Condition 4 said occupation of the dwelling was to be limited to a person solely or mainly working, or last working, in the locality in agriculture or in forestry, or a widow or widower of such a person, and to any resident dependants. Condition 6 is most applicable to this appeal decision.

Condition 6: Surface water drainage details, including the results of soil percolation tests, and detailed design of the soakaway (complete with calculations and results) undertaken in accordance with BRE Digest 365 to confirm the design of proposed soakaways, and location of the proposed soakaway, together with depth to the ground water table if this is within the depth of the soakaway, shall be submitted to and approved by the local planning authority before development is commenced. Full design calculations,

soakaway size(s), plans and soil percolation test results and calculations are required. Should the ground water table level be close to or above the base level of the soakaway, then the soakaway size will have to be modified to avoid the ground water level or an alternative surface water solution be found.

The LDC application

4. Mr Dinotaro's application seeks an LDC to confirm that the single story detached house built at Middlemoor Farm and completed by 28 March 2019 was built in breach of planning control and became immune from enforcement action on 28 March 2023.

Considerations

Applicant's case

5. The Applicant, Mr Dinotaro, applied to the Council for a lawful development certificate under s.191(1)(a) of the Act asserting that dwelling at Middlemoor Farm completed on 28 March 2019 was not been built in implementation of the 17/10/00075/CJA planning permission. It had been built in breach of planning control. The dwelling was now lawful and immune from enforcement action by the passage of time, (s.171B - 4 year rule applies under transitional provisions where development is substantially completed by 25 April 2024). The 17/10/00075/CJA planning permission condition 6, (nor any of that permission's conditions applied to the dwelling completed by 28 March 2019), did not apply to the new dwelling.
6. Mr Dinotaro said that for a planning permission to be lawfully implemented, the developer must first ensure that all pre-commencement conditions are complied with as set out by the Court in *F G Whitley and Sons Co. Ltd. v SSW & Clwyd CC [1990] JPL 678; [1992] 3 PLR 72*, (the 'Whitley Principle' - condition precedent - a condition which delays the vesting of a right until the beginning of an event). Condition 6 of the 17/10/00075/CJA permission, relating to the submission of surface water details prior to commencement, was not complied with. There had been no lawful implementation of the permission.

The 'Whitley Principle'

7. There have been a number of decisions in the Courts dealing with 'conditions precedent' where a planning permission development subject to pre-commencement conditions is started before one or more of those conditions has been complied with.
8. Woolf LJ, (as he then was), in *FG Whitley & Sons Co Ltd v Secretary of State for Wales [1992] 3 PLR 72* outlined that works that contravene true conditions precedent cannot be taken as lawfully commencing development. That determination became known as the *Whitley* principle.
9. In *R (Hart Aggregates Ltd) v Hartlepool Borough Council [2005] EWHC 840* (Admin) Sullivan J, (as he then was), said if the *Whitley* principle applied one had to consider how the condition was phrased and did it go to the heart of the permission so that a failure to comply would make the development unlawful?

10. The *Bedford Borough Council v The Secretary of State for Communities and Local Government and Aleksander Stanislaw Murzyn* [2008] EWHC 2304 (Admin) case confirmed the need to examine whether a condition was a true condition precedent and so did the *Whitley* principle apply. Following *Hart*, it was necessary to examine how the condition was worded, a true condition precedent being negatively worded, "*no development shall take place until...*". There was also a need to consider the context of the condition. Landscaping and boundary treatment were found to be not central to development of a barn conversion – breach of such conditions would not render the development unlawful. The permission remained alive.
11. *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908 - breach of condition relating to plans of the ground floor levels. Court held it fell within *Whitley* principle – condition prohibited development; it went to the heart of the permission.

Considerations

12. In the present instance, there was no dispute there had been a failure to comply with condition 6 to the 17/10/00075/CJA permission. If the 'Whitley Principle' was rigidly applied here, it may have been concluded that the appeal dwelling at Middlemoor Farm was built without planning permission. If that were so, its construction and residential use would now be immune from enforcement action and unfettered by any planning conditions.
13. More usually, as in the above 'Whitley' cases, appellants sought to show that their planning permissions had been lawfully implemented despite failing to comply with a pre-commencement condition and that the permissions were still alive. Here, Mr Dinotaro sought to show that the new dwelling had been unlawfully built because of the failure to implement pre-commencement condition 6 to the 17/10/00075/CJA permission and that unlawful development had become immune from enforcement action by the passage of time.
14. Dealing with how condition 6 is phrased - *Surface water drainage details, including shall be submitted to and approved by the local planning authority before development is commenced*, the Court of Appeal in *Greyfort* said there was no material difference between a condition which expressly prohibited development before a particular matter was approved, and one which required a particular matter to be approved before development commenced. That conclusion would appear to aid Mr Dinotaro, a prohibition of a start before approval of details more likely to imply that works would be seen as the start of a different development to that approved rather than a breach of a planning condition of the approved development. Against that, however, when considering the question asked in *Hart* as to whether or not condition 6 to the 17/10/00075/CJA permission here went to the heart of the permission, I do not regard an early pre-commencement need to submit and settle on a surface water scheme as in any way fundamental or pre-requisite to its implementation. The house was seemingly built as permitted. Its outward appearance was unchanged by the failure to comply with condition 6. Its need to satisfy the agricultural justification was unchanged. The Council would not have been able to conclude from a site

inspection during building works that a new unlawful development was taking place. The late application of condition 6 would have had no significant effect on the dwelling as built.

15. In concluding that this appeal should fail I particularly note the comments of Sullivan J, in *Hart* on what he described as the ... "*absurd and wholly unforeseen consequences that would arise from an over-rigid application of the Whitley rule, in that a breach of a fairly minor condition precedent could be relied upon to show that the permission had never been implemented. Where the period for taking enforcement action had expired such an approach would mean the development would not be bound by any conditions and in order to avoid such a conclusion the condition at issue was found not to be a condition precedent*".
16. Mr Justice Sullivan further referred to the object of judicial intervention being to give effect to the purpose of the legislation. In that regard, he said *the 1990 Act draws a clear distinction between development without planning permission and development in breach of condition; see section 171(A)(1)(a) and (b). It is important that that distinction is not blurred by an indiscriminate use of the judge-made term "condition precedent"*.
17. I find that to be authority, in the present instance, for not rigidly applying the application of the 'Whitley Principle', rather concluding that a breach of condition occurred when there was a failure to comply with condition 6 to planning permission 17/10/00075/CJA, that such permission was implemented when the new house was built and that the 7 conditions to that permission are existent.

FORMAL DECISION

18. For the reasons given above, I conclude that the Council's refusal to grant a lawful development certificate for the use of the dwelling without occupancy condition at Middlemoor Farm, Lower Gully Drove, Clewer, Wedmore BS28 4JE was well founded and that the appeal should fail. I exercise accordingly the powers transferred to me by s.195(3) of the Act, (as amended).

John Whalley

INSPECTOR