



Appeal Decision

by **J Whitfield BA (Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 19th April 2024

Appeal Ref: APP/W1145/X/23/3315033

Barn at Wendon Cottage, Woolsery, Bideford, Devon EX39 5QU

- 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 to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Stephen King against the decision of Torridge District Council (the LPA).
 - The application, Ref 1/0940/2022/CP, dated 8 September 2022 was refused by notice dated 8 December 2022.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is a lawful commencement of planning permission ref: 1/0096/2009/FUL has been made within 3 years of the permission being granted.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed operation which is considered to be lawful.

Procedural Matters

2. The appeal can be determined without a site visit without causing injustice to any party, as I am satisfied I can reach a decision on the evidence submitted.
3. The LDC application was made under S192(1)(b) of the Act. It therefore sought to establish that the proposed conversion of the barn to a dwelling would be lawful on the basis that such works would be in accordance with an extant planning permission. The application therefore seeks an LDC on the basis the proposed conversion of the barn to a holiday let in accordance with planning permission ref: 1/0096/2009/CP (the 2009 permission) would be lawful, not that the commencement of development in accordance with that planning permission was lawful as set out in the description. The appellant has confirmed that is what was sought, and the LPA has confirmed that is the basis on which it determined the application. I have therefore proceeded accordingly.

Main Issue

4. The main issue is whether the LPA's decision to refuse the LDC application was well-founded.

Reasons

5. S191(2) of the Act sets out that 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 any of the requirements of any enforcement notice then in force.

6. In this case, the appellant seeks to establish that the proposed conversion of the barn at Wendon Cottage to a holiday let would have been lawful at the date the LDC application was made – 8 September 2022. The appellant's case is that enforcement action could not have then been taken in respect of the development, as planning permission was granted for it.
7. Whilst the LDC does not seek to establish whether the works done to date are lawful, it is necessary to ascertain whether the 2009 planning permission was lawfully commenced to establish whether the proposed conversion of the building in accordance with that permission would be lawful.

Status of the 2009 Permission

8. The 2009 permission was granted on 12 June 2009. It permitted the conversion of the barn to a holiday let. Condition 1 required the development to be begun not later than the expiration of three years beginning with the date on which the permission was granted.
9. S56(2) of the Act sets out that development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. S56(4) sets out material operations as; (a) any work of construction in the course of the erection of a building; (aa) any work of demolition of a building; (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building; (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in (b); (d) any operation in the course of laying out or constructing a road or part of a road; (e) any change in the use of any land which constitutes material development.
10. The appellant states that the conversion of the building commenced in 2011. At that time, those works comprised a new concrete floor slab, excavation for internal load bearing wall, a new slab and damp-proof membrane, plus the installation of pipework to be connected to the septic tank. During the conversion works in 2011, it is said that the original roof and part of the rear wall collapsed and a lintel in the rear wall, which varied from the approved 2009 permission, was installed. Beyond that, the appellant says no further work has occurred.
11. Building Control inspection records from 2011 indicate that preparation for the new concrete floor was done on 22 September 2011, excavation for the internal load bearing wall on 27 September 2011 and the new floor slab and damp-proof membrane were in place as of the 10 October 2011.
12. The LPA indicates that the floor slab, the excavation for the wall and the slab laid on membrane are not considered to be material operations in the context of S56(2). However, the LPA does not state why it considers that to be the case. Rather it seems to me that the laying of a concrete slab for a new floor and the excavation of the ground to facilitate an internal load bearing wall would amount to any work of construction in the course of the erection of a

- building, bearing in mind S336(1) of the Act defines building as any structure or erection and any part of a building.
13. The LPA states that there is no evidence to confirm if those works were new or part of the original building. However, the Building Regulation record from 2011 indicates that the slab and membrane apparent on 10 October 2011 were new. Indeed, the record indicates that work had commenced on 22 September 2011 to prepare the floor for the new slab.
 14. The LPA indicates that photographs taken on 14 March 2022 show a concrete floor on the southern end of the building which was marked with green areas and moss, suggesting it was unlikely to have been laid in the last few years. If anything, that proposition supports the appellants case that a concrete floor slab was laid in 2011. Indeed, the photographs submitted by the appellant said to be from 2011 show a concrete slab floor in the southern part of the building, with what appears to be damp-proof membrane laid atop. That is consistent with the Building Control records, the appellant's submissions and with the LPA's statement that a concrete floor of some age was apparent in 2022.
 15. As a result, I consider that the works done in September and October 2011 amount to material operations. The question is thus whether those works were comprised in the 2009 permission.
 16. The description of development for which permission was granted in 2009 is the conversion of the barn to a holiday unit. Whilst the decision notice indicates that the permission was granted in accordance with the application and plans submit therewith, no condition was imposed requiring compliance with the plans. An informative is contained at the end of the decision listing the plans relating to the approved development. However, the Planning Practice Guidance states that informatives do not carry legal weight and cannot be used in place of conditions¹.
 17. Indeed, it was held in *R v Ashford BC ex parte Shepway BC* [1998] EWHC 488 (Admin) that documents that were listed in an 'Informative/Amendment' on the planning permission could not be incorporated so as to restrict the ambit of the operative sections of the permission.
 18. However, *Ashford* related to an outline planning permission where the public could not know from the permission what was incorporated into it unless clearly stated on its face. The same principle would apply to a planning permission solely for a material change of use.
 19. In contrast, a full planning permission for building operations would not purport to be a complete and self-contained description of the development that had been permitted. A person reading the decision notice would realise it was incomplete without the approved plans and drawings.
 20. Indeed, in *Wood v SSCLG & the Broads Authority* [2015] EWHC 2369 (Admin), the Court held that an Inspector, in seeking to identify the lawful use of the relevant planning unit, was entitled to consider all of the public documents and drawings comprised in the relevant planning applications, as well as the decision notices. That approach was endorsed in *Kemball v SSCLG* [2015] EWHC 3338 (Admin) and *University of Leicester v SSCLG & Oadby & Wigston BC* [2016] EWHC 476 (Admin). In the latter, the Court held that, in order to

¹ PPG: Paragraph: 026 Reference ID: 21a-026-20140306

- resolve the ambiguity on the face of the planning permission, it is permissible to look at extrinsic evidence including, but not limited to, the application form and other documents.
21. The description of development on the 2009 permission is the conversion of the building. Conversion can mean both the change of the use and the physical works necessary to change the use of the building from one thing to another. Moreover, it is clear from the wording of the conditions that the development permitted intended to incorporate building operations. Notably, condition 2 requires details of the windows to be agreed, condition 3 requires the roof lights thereby permitted to be flush fitting with the face of the roof and condition 4 requires details of the stone facing and roofing materials to be used in the construction of the proposed conversion to be agreed.
 22. In this instance, I am satisfied that the 2009 permission was not solely for the change of use of the building but a full permission for both the change of use to a holiday let and the building operations necessary to facilitate that change. Thus, whilst the list of plans submitted with the application were not incorporated in the operative part of the permission, it is open to me to use those plans as an aid to understand what was permitted.
 23. There is no annotation on any of the plans that indicate the laying of a concrete floor. However, the section drawing, which takes a section through the southern part of the building, appears to show the provision of a floor beneath the bedroom and en-suite. Moreover, the Conditional Report which was submitted with the application and referenced in the informative, indicates that all existing ground floors are to be checked and replaced where necessary to provide compliance to Building Control legislation.
 24. The Building Control inspection record also notes the excavation for a central wall. A central wall with an opening in it between the two parts of the building is shown on the proposed floor plan.
 25. As a result, I consider, on the balance of probabilities, that the works to install a new concrete floor and excavations for an internal wall, were material operations comprised in the development pursuant to the 2009 permission within the meaning of S56 of the Act.
 26. I therefore conclude that the development was begun at the latest, 10 October 2011, within the time limit specified by condition 1 of the 2009 permission.
 27. It is nevertheless possible that, even if development commenced within the timescale, that the permission expired if there was a failure to comply with a condition precedent before the deadline for commencement of the permission.
 28. The LPA states that condition 10 of the 2009 permission is a condition precedent and was not complied with. Condition 10 states that, notwithstanding the details hereby permitted, no works or development shall take place until full details of all proposed tree planting and landscaping have been approved in writing by the LPA. It goes on to state that the agreed details shall be implemented in accordance with the agreed scheme. There is no evidence of any details having been agreed and thus the condition has not been complied with.

29. In *F G Whitley & Sons v SSW & Clwyd CC* [1992] JPL 856, the Court of Appeal held that the only question, when deciding whether development was begun in accordance with a planning permission, is whether the development was permitted by the planning permission with its conditions. If the development was in contravention of a 'condition precedent', it cannot properly be described as commencing in accordance with the planning permission.
30. in *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin), it was held that a distinction had to be drawn between a condition which required some action to be undertaken and one that expressly prohibits any development taking place before a particular requirement has been met.
31. It was found that a condition will only be a condition precedent where it expressly prohibits the commencement of development and goes to the heart of the permission. If both tests are satisfied, the *Whitley* principle applies and there would be development without planning permission.
32. This was further clarified in *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908 where it was made clear that it is not necessary for the wording of the condition to be expressly prohibitive. It is enough for the condition to be prohibitive in substance or effect. A condition that requires something to be done prior to the commencement of development is capable of being a true condition precedent.
33. In this case, the condition sets out that no works or development shall take place until full details of all proposed tree planting and landscaping and the proposed times of planting, have been approved in writing by the LPA. To that effect, it is expressly prohibitive of the commencement of development.
34. The LPA indicates that the condition goes to the heart of the permission because the site is in a countryside location and without the landscaping, the development would have had a detrimental impact on the surrounding landscape.
35. However, the reason for the condition is that insufficient information had been submitted in respect of the landscaping proposals, not that it was necessary for a landscaping scheme to be carried out to prevent harm to the surrounding landscape. Moreover, the development is the conversion of the building and not a new building. Whilst building operations are involved, the development does not involve any significant increases in the height, massing, siting or scale of the building itself.
36. It seems to me that the requirement for tree planting and landscaping details to be agreed were peripheral matters that were unlikely to affect the form and substance of the development comprising a barn conversion. Condition 10 is not therefore of such significance to the permission that it goes to the heart of it.
37. As a result, I find that condition 10 is not a 'condition precedent' and the development which has commenced in breach of it does not amount to development without planning permission. The LPA does not suggest any other conditions attached to the 2009 permission are true conditions precedent, nor do I see any reason why, on the evidence before me, I would reach that conclusion.

38. Thus, I find that the development subject of the 2009 permission commenced prior to the end of the three-year time limit specified in condition 1 and did not fail to comply with a condition precedent before the deadline for commencement of permission. Consequently, the 2009 permission remains extant.
39. Nonetheless, as I have set out, the LDC applied for here is not to certify that the development was lawfully begun, but that the proposed conversion of the building to a holiday let would have been lawful at the date of the LDC application. It is therefore necessary to assess whether the development permitted by the 2009 permission could have been carried out at that date.

Lawfulness

40. Once commenced, a planning permission remains extant and capable of implementation unless there is a material change that renders it impossible to complete the approved development. In *Singh v SSCLG & Sandwell BC* [2010] EWHC 1621 (Admin), it was held that where some parts of the development are incapable of being completed and the permission cannot be implemented in its entirety, the whole development becomes unlawful.
41. The appellant says no additional work has occurred to the barn since 2011. It is said that the original roof to the barn collapsed in a storm during the initial works in which a section of the rear wall also collapsed. A lintel was installed in the rear wall which varied from the approved plan.
42. However, it is apparent that works subsequent to those carried out in 2011 have taken place. Photographs have been provided by the LPA said to be from an inspection in March 2022. They show that work has clearly been carried out on the building beyond the laying of the floor slab, the damp proof membrane and the excavation for the central wall.
43. The LPA indicates those works include timber frames for internal walls, internal roof joists, some internal blockwork, external stone work to create the front wall of the building and a pitched covered roof. The LPA's case is that these works were constructed after the three year time period set out in condition 1 of the 2009 permission. However, since I have found that the permission was commenced in time and is extant, the timing of those works is not relevant. It is whether they are comprised in the planning permission or whether they would prevent the implementation of that permission that is relevant.
44. The existing and proposed drawings from the 2009 permission show little alteration was proposed to the exterior walls. Whilst the permission includes changes in some of the openings, it does not include any changes in the height, design or arrangement of the walls.
45. The images show that most of the exterior walls remain in the same form from the time of the 2009 permission. However, some courses are missing from the top of the north-western wall and some repair work has been carried out. In addition, the two supports in the south-east elevation have gone and the cob below the ridge line on the wall between the two parts of the building has also been removed.
46. Nonetheless, the Conditional Report from the 2009 permission indicated that the area of wall over the large opening in the south-east elevation would require replacement due to its condition. Moreover, the Report also identified

- the potential need to replace unsound material in the walls, in particular the central wall between the two parts of the building.
47. The photographs also show the installation of an internal wall between the stable and byre parts of the building has been done. However, a wall in this location is shown on the approved plans, albeit the opening within it has been moved slightly towards the centre of the wall.
 48. In addition, the LPA identifies the construction of timber frames for internal walls has been carried out. However, these frames appear to be in the same location as internal walls are shown on the approved plans in order to delineate the kitchen, bedroom and en-suite.
 49. I am thus satisfied that the works to the external and internal walls observed by the LPA are comprised in the 2009 permission.
 50. Turning to the roof, I can see from the photographs that there is no roof on the byre section of the building where one was shown as existing on the survey plans of the 2009 permission. Moreover, the roof over the stable section of the building is a lean-to, corrugated sheet roof with supporting timbers underneath. This is in contrast to the original roof and that shown on the proposed plans which is dual pitched with slate covering. The roof which has been done on this part of the building is not the roof which forms part of the 2009 permission and is therefore not comprised in it.
 51. The plans from the 2009 permission only show that the roof would be the same height and shape as the original roof. They do not make clear if the development was to reuse the original roof or construct a replacement. The Conditional Report from the 2009 permission is, however, explicit that the existing roof is to be removed and a new roof constructed, with new support members. I am thus satisfied that the removal of the original roof and its replacement with a roof of the same height, design and arrangement as existed previously formed part of the 2009 permission.
 52. It seems to me that the lean-to roof is a relatively minor deviation from the approved plans that could be adequately remedied by its removal and would not prevent the carrying out of the new roof comprised in the 2009 permission.
 53. Finally, it appears an opening has been made in the north-west elevation where one is not shown on the approved plans. Nonetheless, again, it seems to me that it is a relatively minor deviation which could be easily remedied and which would not make it impossible to implement the 2009 permission.
 54. Indeed, as the Courts held in *Hussain v SSCLG* [2017] EWHC 687 (Admin), it is possible to commence a development for the purpose of S56 of the Act and thereby meet a deadline forming a condition of the planning permission, and then later to deviate from the permitted works in a manner that later becomes an enforcement issue without retrospectively altering the fact that the commencement of the development had occurred for S56 purposes.
 55. Overall, I find that, having regard to the relevant tests laid down in case law, in particular *Commercial Land Ltd v SSTLR & Kensington & Chelsea RBC* [2002] EWHC 1264 Admin, aside from the creation of an opening in the north-west elevation and the provision of a lean-to roof on part of the building, the works observed by the LPA are comprised in the 2009 permission. Furthermore, I am satisfied that those works which have been carried out to the building which

are not comprised in the 2009 permission would not render it impossible to complete the development in accordance with the permission such that the entire development is unlawful. Moreover, I am satisfied that the barn remains in sufficient form such that it can be converted in accordance with the 2009 permission, and would not require substantial building operations to convert it that would go beyond the scope of the 2009 permission.

56. I conclude therefore that, on the balance of probabilities, the development permitted by the 2009 permission was lawfully commenced prior to the 12 June 2012. Although that development was carried out in breach of conditions on the 2009 permission, no such conditions were conditions precedent and thus, the works would not constitute development without permission.
57. As a consequence, the 2009 permission remains extant. Therefore, the proposed conversion of the barn to a holiday let in accordance with the 2009 permission would have been lawful, in the meaning of S191(2) of the Act, at the date of the LDC application was made because no enforcement action may have been taken against the development as it had planning permission. Moreover, the development did not constitute a contravention of any of the requirements of any enforcement notice then in force.

Conclusion

58. For the reasons given above I conclude, on the evidence now available, that the LPA's refusal to grant a certificate of lawful use or development in respect of the proposed conversion of the barn to a holiday let in accordance with planning permission ref: 1/0096/2009/CP was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

J Whitfield

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 8 September 2022 the development described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

Enforcement action could not have been taken in respect of the development because planning permission had been granted for it in 2009 and that permission remained extant, and, the development did not constitute a contravention of any of the requirements of any enforcement notice then in force.

Signed

J Whitfield
Inspector

Date: 19th April 2024

Reference: APP/W1145/X/23/3315033

First Schedule

The proposed conversion of the barn to a holiday let in accordance with planning permission ref: 1/0096/2009/CP.

Second Schedule

Land at Barn at Wendon Cottage, Woolsery, Bideford, Devon EX39 5QU

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 19th April 2024

by **J Whitfield BA (Hons) DipTP MRTPI**

Land at: Barn at Wendon Cottage, Woolsery, Bideford, Devon EX39 5QU

Reference: APP/W1145/X/23/3315033

Scale: Not to scale

