



Appeal Decision

Site visit made on 27 October 2020

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17th November 2020

Appeal Ref: APP/H0738/X/20/3249770

Coatham Lane Cottage, Coatham Stob, Elton TS21 1AJ

- 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 to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr and Mrs Keith and Lynn Mowbray against the decision of Stockton-on-Tees Borough Council.
 - The application Ref 19/2324/CPE, dated 21 October 2019, was refused by notice dated 13 December 2019.
 - The application was made under section 191(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 "Agricultural Building, approved under planning permission 06/3319/REV was not built in accordance with conditions precedent attached to that permission and not therefore lawfully implemented. It is now immune from any potential enforcement action by the Council and not subject to the conditions attached to that permission limiting or restricting its use."
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. I have taken the description of development by reference to the appellants' statement, and which the parties have agreed is accurately worded.

Main Issue

3. The main issue is whether the approved development was constructed in breach of 'conditions precedent' attached to planning permission 06/3319/REV and was not therefore lawfully implemented and subject to conditions attached to that permission, therefore since having become lawful of itself through the passage of time.

Background

4. The Council granted planning permission, reference 06/3319/REV, on 11 December 2006 for "Revised application for the erection of an agricultural building to accommodate a garage/workshop, tractor bay, sheep pens, stables and store. The permission was subject to seven conditions. To summarise, these included Condition 3, which required the external materials to be agreed prior to the construction of the external walls and roof; Condition 4, which required details of a landscaping scheme to be agreed prior to any

development taking place; Condition 5, which required provision to be made for the protection of trees on site that were to remain in place, in accordance with details to be agreed, prior to site works commencing and for the replacement of any damaged trees and Condition 6 which required details of protective measures for trees and vegetation, in accordance with BS5837, to be agreed and put in place before construction commenced.

5. The appellants' case is that Conditions 4, 5 and 6 are 'conditions precedent', which because they were not discharged prior to the commencement of development meant that the permission was not lawfully implemented and was therefore fatal to it. They say that, as such, the building is not bound by any planning conditions and is now immune from enforcement action due to the passage of time.
6. The Council says that the aforementioned conditions are not 'conditions precedent', and that as such the development was lawfully implemented and the permission and its condition restricting the use of the building continue to 'bite'.
7. It is undisputed by the parties that Condition 3 is not a true condition precedent and as such does not have a bearing on this decision. Furthermore, should I conclude that the building was not constructed under the aforementioned planning permission, there is no dispute that the building would then be immune from enforcement due to the passage of time.

Reasons

8. The appellants have referred to case law¹ where it was found to be necessary for a condition to be both expressly prohibitive of commencement of development before a particular matter was approved (or in requirement of a particular matter to be approved before commencement of development) and also to go to the heart of the permission in order for it to constitute a 'condition precedent'. A failure to discharge such conditions would result in development without planning permission.
9. There is no dispute between the parties that development was commenced on the site in breach of Conditions 4, 5 and 6, which were not discharged and which required prior approval as set out above. The question therefore is whether it can be said that these conditions were of such significance that they went to the heart of the permission.
10. The appellants note that the reason for each of the conditions was to protect the visual amenity of the area and also that from the officer report, the protection of visual and neighbouring amenity were the only issues that were of concern to the Council. Accordingly they say that, in this context, the importance of protecting amenity was a central and significant factor, such that the conditions must have gone to the heart of the permission.
11. The Council says that the purpose of Condition 4 was intended to secure additional landscaping as an enhancement measure, therefore a planning gain, rather than to make the development acceptable. In terms of Condition 5, the Council says that there is no evidence the tree[s] was not protected during construction works. In any event it says that the trees could have been

¹ *R (oao Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin) and Greyfort Properties Ltd v SSCLG [2011] EWCA Civ 908*

- removed prior to the commencement of development in which case the condition would then have been unenforceable. For these reasons the Council says that neither condition was fundamental.
12. The Council's decision makes it clear that the proposal was considered against Policy GP1 of the Stockton on Tees Local Plan 1997. This policy stated, amongst other things, that proposals for development will be assessed against certain criteria as appropriate, including its relationship with the surrounding area, the need for a high standard of landscaping and the contribution of existing trees and landscape features. The officer report confirms that conditions would be imposed to protect a tree and to provide additional tree planting, to replace those removed and to soften views onto the application site.
 13. I concur with the appellants that it would be unusual for a Council to argue that it issued a permission containing unnecessary conditions, that is to say conditions that were not required to make the development acceptable. Indeed to impose a condition that was not necessary would be contrary to one of the six policy tests for conditions as set out in the National Planning Policy Framework. In the context of the aforementioned Local Plan policy and the officer report, I am not persuaded by this argument, as it seems more likely than not that the Council would have been seeking to protect the quality of the landscape, at least at the time the decision was made.
 14. However, as to Condition 4, I consider that had the Council been concerned about the lack of landscaping measures submitted, then it could have instigated enforcement action against a breach of condition, to address this oversight. The fact that it did not do so weighs in favour of the consideration that it found existing landscaping arrangements to be satisfactory in this case after all. Even if it had done so, I consider it most unlikely that such action would have necessitated the demolition of the building in order to achieve a successful landscaping scheme. Indeed the condition only required implementation of an agreed landscaping scheme following substantial completion of the development.
 15. Furthermore, had any existing trees become damaged as a result of construction works, Condition 5 requires replacement trees to be planted. The inclusion of this clause, which provides a fallback position, together with the lack of formal preservation in place for trees subject to the condition, suggests that the value of retaining them was desirable but not of paramount importance.
 16. Condition 6 focusses on the protection of trees and vegetation in accordance with the relevant British Standard (BS5837). This British Standard is primarily concerned with the long-term protection of trees and their relationship with development. The condition therefore largely has the same objective as Condition 5, namely the protection of existing trees on the site, as reflected in the officer report. Therefore, although there is no replacement clause, relating to trees and vegetation, specifically attached to that condition, I nevertheless consider that the significance of the condition is not fundamental, in the context of the wording of Condition 5.
 17. From my visit it was apparent that the building is set in a rural landscape, predominantly of open fields, paddocks and trees with a small number of residential properties in the locality. I noted that the appeal building was

substantially screened by a tall hedgerow when approaching the site along Coatham Lane to the north west. Viewed from the same lane to the east of the site, the structure seemed to me to sit comfortably in its surroundings and did not appear incongruous or obtrusive.

18. Drawing the above considerations together, as a matter of fact and degree, I am not therefore persuaded that Conditions 4,5 and 6 were fundamental to the scheme and that the failure to discharge them was so significant as to strike at the heart of the permission. These conditions, in my view, despite the Council expressing in its officer report that it was concerned to protect amenity, related to relatively minor details, rather than significant matters. Though breached, they were not therefore conditions precedent and the failure to discharge them did not lead to development without planning permission that was not lawfully implemented. At the time of implementation the development was therefore subject to the various conditions attached to planning permission 06/3319/REV.
19. Whilst the appellants have raised concerns as to the validity of Condition 7, which seeks to retain the building in agricultural use throughout its life, this specific issue is not before me for consideration as part of the present appeal, the appellants having referred to the possibility of an application to "secure its removal", in the event of this appeal being unsuccessful.

Conclusion

20. I therefore conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of "Agricultural Building, approved under planning permission 06/3319/REV was not built in accordance with conditions precedent attached to that permission and not therefore lawfully implemented. It is now immune from any potential enforcement action by the Council and not subject to the conditions attached to that permission limiting or restricting its use" at Coatham Lane Cottage, Coatham Stob, Elton TS21 1AJ was, on the balance of probability, well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Roy Merrett

INSPECTOR