Appeal Decision

Site visit made on 4 December 2008

by Colin A Thompson DiplArch DipTP RegArch RIBA MRTPI IHBC

an Inspector appointed by the Secretary of State for Communities and Local Government

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email:enquiries@pins.gsi.gov.uk

Decision date: 6 January 2009

Appeal Ref: APP/R3325/X/08/2078408
Copperfields, Windwhistle Ridge, Cricket St Thomas, Chard, Somerset TA20 4DQ

- The appeal is under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is by Mr and Mrs M Pearce against the decision of South Somerset District Council.
- The application Ref 08/01373/COL, dated 17 March 2008, was refused by notice dated 13 May 2008.
- 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 to construct a 3 bay *Burwood* style Oak Framed Garage /Machinery Store, next to the existing barn some 10 metres from the house. Overall width 8.48m, overall depth 5.6m, ridge height 3.98m. The building will be approximately 50 metres from the road and hidden behind an existing bank.

Summary decision: the appeal is dismissed.

Procedural Matter

1. Since the appeal was made there has been an amendment to the *Town and Country Planning (General Permitted Development) Order 1995* GPDO: *Amendment (No 2)(England) Order* 2008. This came into effect on 1 October 2008 and altered the terms of the old *Schedule 2, Part 1, Development within the Curtilage of a Dwelling House, Class E*. The revised criterion *(b) to Class E* would mean that the building on the site proposed would fall outside that Class as amended. This is a problem completely beyond the appellant's control. It seems to me that to amend the LDC plan to show the proposed garage /machinery store located to the east of the dwelling house, but not beyond its frontage (the new position shown on the plan attached to the appellant's letter to PINS dated 30 September 2008), would cause no harm to the interests of the parties and would be within my wide powers under the Act. The Council's position is that it is happy to leave this matter to me.

Background

2. The background to this case is that following a withdrawn appeal to the Secretary of State (SoS) the Local Planning Authority (LPA) reclaimed jurisdiction and granted a planning permission for a new dwelling. This permission was the subject of a S106 Agreement which effectively withdrew all Permitted Development rights. The present owner wants to build a garage

/machinery store and is seeking an LDC for the lawfulness of this *operational development*.

My Assessment

3. An LDC is not the equivalent, in law, of a planning permission. Instead, section 192(4) of the Act provides that the lawfulness of any use or operation covered by the certificate shall be conclusively assumed, unless there is a change in the law or other circumstances affecting the status of the land before the use commences or the operation is begun. In *Saxby v SSE [1998] JPL 1132* it was held that the only procedure to determine whether planning permission was required was contained in section 192, and that the old law whereby every planning application was also said to include an implied application for a determination (*Property Investment Holdings v SSE [1984] JPL 587*) no longer applied.

4. Section 55(1) of the Act defines *development* as including *...the carrying out of building operations ...or other operations... in, on over or under, land.* This is the first limb of the definition of *development* which comprises activities which result in some physical alteration of the land, or operational development, which has some degree of permanence to the land itself. Section 55(2) identifies some operations, which are not *development*, but none of these are appropriate in this case.

5. *Building* is defined by section 336(1) of the Act as including *...any structure or erection, and any part of the building as so defined*... The approach of the Courts in construing the definition has been to ask first whether what has been done has resulted in the erection of a *building*. If it has then there would need to be a very compelling case made out that the erection of it had not amounted to a *building operation* (*Barvis Ltd v SSE (1971) 22P&CR 710 at 715, per Bridge J*) and was therefore development under the terms of the Act.

6. In *Barvis* reliance was placed on the judgement in *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd [1949] 1KB 385,* (subsequently endorsed by the Court of appeal in *Skerrits of Nottingham Ltd v SSET&R (N° 2) [2000] 2 PLR 102*) which identified 3 primary factors as being relevant to the question of what was *a building*:

   (i) *size*, a building would normally be something which was constructed on site as opposed to being brought ready made to the site;

   (ii) *permanence*, a building, structure or erection, normally denotes the making of a physical change of some permanence, and;

   (iii) *physical attachment*, whilst not being conclusive, when weighed against other factors, may tilt the balance.

   In this instance what is proposed is a 3 bay *Burwood* style oak framed, garage /machinery store of a not insubstantial size (8.48m wide by 5.6m deep (47.488 square metres) with a ridge height of 3.98m). I am not told how this is to be made but, the large size, and type of frame and cladding, shown on the perspective drawing which accompanies this appeal indicate to me, on the balance of probabilities, that it is something that would be put together on the site. Constructed with an oak frame, clad in what looks like timber boarding

with a tiled roof, it clearly would be a structure of some permanence. Although there are no details such a structure would be likely to need to have a firm fixture to the ground: probably by way of some kind of concrete foundations. As a matter of fact and degree on the balance of probabilities, therefore, it is a *building* under the Act which would require planning permission unless it is *permitted development.*

7. The relevant *permitted development* exceptions are to be found within the GPDO as recently amended (see my paragraph 1 above). The Council admit that the proposed building would be erected within the curtilage of Copperfields. But as already noted any *permitted development* rights would be effectively removed by the section 106 Agreement attached to the 1999 permission referred to in my paragraph 2 above.

8. Notwithstanding the LPA's concerns about my questioning of the lawfulness of this planning permission, in that it holds the view that this is a matter for the Courts not the SoS or her Inspector, I have no option but to address the matter now, if I am to determine this LDC appeal, because it goes to the heart of my decision. In any event section 192 of the Act would appear to require a determination on *...whether the carrying out of the proposed operations would be lawful without needing any further planning permission...* As the commentary in paragraph P192.03, of the Encyclopaedia of Planning Law and Practice, states *...to answer that question requires an analysis of the background issues including the validity or scope of any permission...*

9. The central question the appellants raise, and the dispute which remains between the parties, is that once an application is appealed to the SoS whether, upon withdrawal of that appeal, jurisdiction returns to the Council for a decision. The Council helpfully acknowledges that, on an appeal under section 78 of the Act, jurisdiction to determine that application passes to the SoS and that this can be treated as a common ground.

10. There remains an unresolved dispute about when the appeal on the 1999 application was actually withdrawn (that is the precise date upon which the claimed return of jurisdiction to the LPA could legitimately have taken place (if it could at all)). This is relevant because if the 1999 LPA decision was made before the appeal was withdrawn then it is difficult to see how it could be legitimate (jurisdiction would still lie with the SoS).

11. The Council states that it has in its possession a copy of a fax dated 6 September 1999 from the agents of the then appellant stating that the appeal would be withdraw on receipt of planning permission. Planning permission was actually granted on 8 September 1999 and a letter from PINS accepting withdrawal of the appeal was dated 9 September 1999. But I do not know when the appeal was actually withdrawn and whether it pre-dated the 1999 LPA decision. It would be going too far to take the intention to withdraw on receipt of a planning permission as proof, even on the balance of probabilities, that the permission did pre-date the withdrawal of the appeal. Because the only facts I have are those stated above this matter cannot be taken further so I have to set it aside as being unresolved for the purpose of this appeal.

12. The parties originally stated that there is no relevant case law and nothing conclusive in Statute. The latter may still be true but *R (on the application of*

Corbett) v First Secretary of State [2005] EWHC 2433 (Admin), CO/5679/2004 (Transcript: Smith Bernal) would appear to me to go to the core of the appellant's concerns. This case was first referred to in the appellant's statement dated August 2008. It is not identical to the issue surrounding the disputed 1999 planning permission: in that it is not whether the LPA can retrieve jurisdiction, rather, whether on withdrawal of an appeal does the SoS had the power to reinstate it?

13. To my mind *Corbett* has more than a passing relevance to the matter before me. This is because in paragraphs 53 and 54 of the judgement Ouseley J concludes that *...the withdrawal of an appeal should take with it the consequences of the withdrawal of an appeal. That is to say, it is the end of the appeal, and nothing more is to be done with it. This was the decision made by the appellant. It may have been ill advised but the withdrawal is as effective as it would be if he had acted upon negligent advice...No reinstatement power should be implied...* This seems to me to be an unequivocal answer to the question what happens to an application /appeal when it has been withdrawn. The answer is that it is dead. Because the LPA cannot regain jurisdiction, or make a determination, in regard to a dead application /appeal it follows, as a matter of logic, that any decision it made on that dead application /appeal must be null and void and have no effect. (It would seem to me to defy reasonableness to attempt to differentiate between the original application and the subsequent appeal: they are one and the same in regard to this judgement.) It follows that the normal presumption of regularity in respect of the LPA's grant of planning permission is clearly overridden by the *Corbett* decision. So Copperfields, which I saw has been built and is occupied, has been constructed without the benefit of planning permission.

14. The section 106 Agreement was tied to the proposed development sought by virtue of planning application N° 99/00374/FUL. This is because the planning permission was contingent upon the Agreement being made and the covenant expressly related to the proposed development. Reading the Agreement in the round leads me to the opinion that it was conditional both on the grant of planning permission and the commencement of development. In view of my conclusion that there was no valid planning permission, and that any resulting commencement of the development was unlawful, I fail to see how the Agreement can continue to have any effect.

15. Section 171B(1) sets out the time limits for the carrying out of enforcement action against breeches of planning control. For operational development, the case here, *...after 4 years, beginning with the date when the operations were substantially completed, no enforcement action may be taken...* Bearing in mind that the null and void decision was made in September 1999 the house was probably constructed, and substantially completed, some time thereafter but I do not have sufficient evidence on this aspect of the case to make any determination on precisely when that was or whether more than 4 years has elapsed since the building was substantially completed and its residential use commenced.

16. Because there is no valid planning permission and I cannot determine, as a matter of fact and degree on the balance of probabilities, whether the time has passed when enforcement action could be taken against the construction and

residential use of the building which was completed without planning permission, the LDC appeal, as the appellant acknowledges, must fail.

Decision

17. I dismiss the appeal.

Colin A Thompson

Inspector

Appeal Decision

Site visit made on 6 January 2009

by Mike Robins MSc BSc (Hons)

an Inspector appointed by the Secretary of State for Communities and Local Government

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email:enquiries@pins.gsi.gov.uk

Decision date:
16 January 2009

Appeal Ref: APP/R3325/A/08/2085432
24 Blackdown View, Ilminster, Somerset TA19 0AZ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr and Mrs M Jefferson against the decision of South Somerset District Council.
- The application Ref 08/00154/FUL, dated 29 March 2008, was refused by notice dated 17 March 2008.
- The development proposed is a second storey extension on an existing ground floor extension for additional bedrooms.

Decision

1. I dismiss the appeal.

Main issue

2. The effect of the proposed extension on the living conditions of the occupiers of 23 Blackdown View, with particular reference to visual impact and daylight.

Reasons

3. The appeal property is one of a semi-detached pair set on sloping site. The properties are split level, with small original rear extensions creating an L shaped layout. No 24 has infilled with a ground floor extension, however, No 23 retains its original form.

4. The proposal would introduce a first floor extension above the existing infill extension and would therefore present a full height side elevation on the shared boundary directly adjacent to the principle rear elevation of No 23. This elevation has four windows serving the principal habitable rooms of this property.

5. This would be a visually imposing addition which would have a dominating and enclosing effect on the rear elevation and garden area of No 23. It would be overbearing, materially harming the living conditions of the occupiers of this property. Furthermore it would significantly reduce the daylight received by the windows in the rear elevation.

6. The proposal would therefore be in conflict with the South Somerset Local Plan, adopted 2006, and Policy ST6 which seeks to ensure that new development does not unacceptably harm the residential amenity of occupiers of the adjacent properties.

7. While I note the appellants' points and have sympathy with their need to create more space within their family home, the positioning of this extension on the shared boundary results in a level of harm which is not outweighed by these personal circumstances. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal should be dismissed.

Mike Robins

INSPECTOR