Appeal Decision

Site visit made on 27 January 2010

by David Nicholson RIBA IHBC

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

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Decision date:
9 February 2010

Appeal Ref: APP/R3325/A/09/2116327
Stewley Cross Filling Station, Ashill, Ilminster TA19 9NP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
- The appeal is made by Mr R Osborne against South Somerset District Council.
- The application Ref 09/02412/COU is dated 11 June 2009.
- The development proposed is change of use from car sales to café/hot food takeaway (A5 Use Class).

Decision

1. **I dismiss the appeal**.

Main issue

2. The main issue is the effect of the proposal on highway safety.

Reasons

3. The A358 bypasses Ashill. The old A358 runs through the village. The appeal site is on the corner of the old A358 and Wood Road, close to a junction with the bypass. The site was formerly a petrol filling station but currently benefits from a temporary permission for use for car sales ref. 07/00825/COU.

4. The submitted block plan indicates around 12 car parking spaces, plus 2 more for staff, which exceeds the requirements of the County Council's Parking Strategy. On the other hand, the Highway Authority is concerned that the proximity to the bypass would be likely to attract a good deal of HGV traffic. The proposals would not provide parking for lorries and there would be inadequate space within the site for large vehicles to turn and park in a suitable manner. Given the limited space on the site, HGVs would probably have to park on the old A358 and, if they needed to turn, would use the junction with Wood Road, interrupting traffic and causing a road safety hazard. I therefore find that traffic to and from the café/hot food takeaway would be likely to pose a significantly risk to highway safety.

5. The appellant has not queried the likely attraction of the proposed use to HGV drivers. Rather, he has argued that, when the temporary permission lapses, the site will revert to a petrol filling station. Based on its previous use, this would lead to many more traffic movements, and so would be less sustainable than the proposed use. While I accept that the lawful use of the site will revert to that of a petrol filling station, I have little evidence that a business selling fuel is likely to resume. Indeed, I am informed there was a reduction in trade

after the bypass opened, and that diversification of the business was necessary to bring in sufficient additional income so that the previous business remained profitable. I also note that the site is not as visible from the A358 as some other nearby filling stations, that all use of the site has ceased, and that resumption would require new investment. Consequently I am not persuaded that it is likely that the former use would resume. I therefore give limited weight to this as a fallback position.

6. I have noted the appellant's view that, of the HGV drivers, only those heading north would be likely to use the café/hot food take away, which would avoid the problem of them turning in Wood Road. However, even if I accepted this assertion, and I have little evidence to support it, HGVs would not be prevented from parking along the old A358. To my mind, a number of HGVs parked along this part of the road would significantly reduce the effective width of the carriageway, compromise manoeuvring space near the junction, and reduce visibility at the entrance to the site. Consequently they would still pose a risk to highway safety.

7. For all these reasons, I find that the proposal would be likely to lead to an unacceptable increase in risk to highway safety. In my opinion, this risk would not outweigh the benefits of additional employment. The proposed change of use would conflict with Policy 49 of the current adopted Somerset and Exmoor National Park Joint Structure Plan Review, which requires development to be compatible with the existing transport infrastructure.

8. For the reasons given above I conclude that the appeal should be dismissed.

David Nicholson

INSPECTOR

Appeal Decision

Site visit made on 2 February 2010

by Alan Langton DipTp CEng MRTPI MICE MIHT

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Decision date:
23 February 2010

Appeal Ref: APP/R3325/X/09/2115917
Copperfields, Windwhistle Ridge, Cricket St Thomas, Chard TA20 4DQ

- 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 M Pearce against the decision of South Somerset District Council.
- The application reference 09/03343/COL, dated 18 August 2009, was refused by notice dated 13 October 2009.
- 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 for a building operation comprising the erection of a 3-bay Burwood style Oak Framed Garage/Machinery Store.

Summary Decision

1. The appeal succeeds subject to an important qualification set out below.

Application for costs

2. An application for costs was made by Mr & Mrs Pearce against South Somerset District Council. This application is the subject of a separate Decision.

Reasons

Preamble

3. It is common ground between the parties that constructing the store building would amount to operational development, requiring planning permission, and that no express permission has been granted. Also that, but for matters I address shortly, the works would ordinarily be permitted by the Town and Country Planning (General Permitted Development) Order 1995 as amended (GPDO), under the provisions of Article 3 and Schedule 2, Part 1: Development within the Curtilage of a Dwelling House, Class E. Nothing I have read or saw during my visit called these undisputed matters into question.

4. The background is that on 8 September 1999 the Council issued a "planning permission" reference 99/00374/FUL for the *demolition of existing bungalow and garage and erection of a replacement dwelling* at the parcel of land subject to this appeal (the address was expressed differently). This was issued in association with a planning obligation of the same date in the form of an Agreement under Section 106 of the amended 1990 Act (the Act), an intended effect of which is to curtail permitted development rights.

5. The dispute primarily centres on whether 99/00374/FUL should be treated as having been a properly made valid permission and, if not, whether that would render the Section 106 Agreement as having no effect. Before turning to these

sequential questions, what I consider to be a non determinative issue has also been raised regarding the extent of the residential curtilage. I look at this first.

Curtilage

6. The present dwelling and its substantial outbuilding appear, so far as I could see, to accord in every significant way with the drawings subject to 99/00374/FUL. The former bungalow, which was evidently closer to the road, has been demolished. The Council maintain that the present residential curtilage is limited to the relatively small area outlined in the 1999 application (about 0.67 ha); the appeal application delineates a very much larger area taking in all land associated with Copperfields, just under 5 ha. Detailed submissions have been made in support of each proposition.

7. However, this appeal follows an application seeking a certificate of lawfulness for a proposed use or development with respect to a specified proposal: constructing a store building. *Curtilage* is a property of land and not of itself a form of use or development in planning terms, much less any *proposed* form of use or development, and less again is it the particular development proposed in this appeal. The Council accept, and I was able to confirm, that the location proposed for the store building, some 3 m to one side of the house, would be within the smaller area that is indisputably residential curtilage. Also, the appellents would be prepared, if needs be, to accept a certificate located by description rather than defined by the application plan. These points are sufficient for my purpose and I shall express no view on the quite separate question of the full extent of the curtilage.

The 1999 Planning Decision

8. Prior to the issue of 99/00374/FUL that application had been subject to an appeal to the Secretary of State against the Council's failure to determine it within the prescribed period. The appeal was accepted and validated by the Planning Inspectorate. The Council issued 99/00374/FUL at much the same time as the appeal was withdrawn although the precise sequence is unclear. Supported by counsel's opinion the appellants argue that 99/0374/FUL can only have been invalid: if issued just before the withdrawal then jurisdiction was still with the Secretary of State; if after, then there was no longer an application to determine, the matter was dead. The Council contest the latter point, arguing that a fee having been paid jurisdiction reverted to them on withdrawal of the appeal and that they retained a duty to decide it. They submit that *Corbett*[1], referred to by the appellants, is authority only that the Secretary of State cannot recover jurisdiction once an appeal is withdrawn but did not decide the position as regards a local planning authority.

9. This dispute is a matter of administrative law, for the Courts to determine, though my own understanding has long been that withdrawal of an appeal also closes the application. This is what lay behind twin-tracking applications, so as to leave one with a local authority while the other was taken to appeal. It has to be said though that I have not been presented with any legal authority directly to the point. *Corbett* records the agreement of the parties in that case on this point, but did not directly address the issue.

10. As a document, 99/0374/FUL has all the requirements of a valid permission and there is no scintilla of suggestion that its issue was vitiated by fraud. It seems to me that underlying the Council's submissions is the important legal

[1] R (on the application of Corbett) v The First Secretary of State [2005] EWHC 2433 (Admin)

principle of administrative certainty. There is a clear public interest served in a final clarity of outcome in such matters as a planning application: finance may be raised against the strength of a permission, land bought and sold, development carried out, asset values demolished, land searches informed during property transactions, individuals may make life changing decisions and subsequent planning applications may be affected. Put simply, there comes a time when everyone needs to know confidently where they stand.

11. The lawfulness of a planning permission can be challenged in the High Court by way of an application for judicial review, but promptly and that requirement has I believe been made for good reason. To the best of my knowledge I have no authority in effect to declare this more than 10 year old permission, doubtless included on the Council's Planning Register, to have been invalid from the outset, in fact a nullity, a mere scrap of waste paper.

12. I have no way of knowing how a Court would consider the matter: possibly leaning towards a purposive approach, focused on the intentions and actions of those involved in 1999 and who if anyone was then prejudiced by the process followed; or perhaps a more legalistic deconstruction of events assessed against legislation. What I am confident of is that in the absence of such a determination I must treat 99/0374/FUL as not having been a nullity. It is not for me to take on the role of the Court.

13. I have taken account of commentary in the Encyclopaedia of Planning Law and Practice (P192.03): that an application under Section 192 of the Act requires an analysis of the background issues, including the *validity* and scope of any permission (emphasis added). The commentary is authoritative but not binding. And in any event there are ways that a planning permission can be invalid without having been a nullity: for example if it is time expired or superseded by incompatible development. Alternatively it could be defective on its face so as to be self evidently invalid or indeed might have been quashed by order of a Court. None of this undermines my view that I have no power retrospectively to set aside 99/0374/FUL.

14. *Basingstoke and Deane*[2] is authority that a planning condition, in that case dating from the 1950s, may properly be found invalid by an Inspector determining a certificate of lawfulness appeal. But, subject to validity, that condition was one having continuing effect; it remained live, and was found to be invalid because it had been imposed for a non planning purpose. That is a policy test (instigated by legal judgements) as well as a question of law. Again I do not see the judgement as authority for me to decide on the legal standing of 99/0374/FUL. Nor having regard to *Riordan*[3] or *East Dumbartonshire*[4], which are each authority for an objective assessment of what amounts to the commencement of a development, not whether the preceding planning permission was valid.

The 1999 Agreement

15. Moreover, the Section 106 Agreement was a deed freely entered into (at least there is nothing to suggest otherwise) by the original signatories and in due course knowingly passed on to the present owners. Whether it is now enforceable is a matter of law, judiciable by the Courts (Circular ODPM 05/2005

[2] Basingstoke and Deane Borough Council v SoS for Communities and Local Government and Sir Thomas Stockdale [2009] EWHC 1012 (Admin)
[3] Riordan Communications Ltd v South Bucks District Council [2000] JPL 594
[4] East Dumbartonshire Council v SoS for Scotland and MacTaggart & Mickel Ltd [1999] 1 PLR 53 (the relevant statutory framework is similar in Scotland and England)

paragraph 3). Having concluded that I must treat the permission as valid, there is in any event no basis for me to question, even informally, the standing of the Agreement. However, were the permission to be not valid then I would doubt that the Agreement is either. This is because Recital (3) defines "the application" and Clause 3 of the Agreement states that "having regard to the covenants on the part of the Owners hereinbefore contained to the before-mentioned policy documents and to all other material considerations the Council shall immediately upon the execution hereof issue a certificate granting conditional planning permission for the proposed development *in determination of the application*" (emphasis added). Whether or not a consideration is required, one was plainly intended. But as I have said it is not for me formally to determine the legal standing of the Agreement, as distinct (for example) from considerations of its scope or relevance to the proposed development for which a Certificate is being sought.

16. The Agreement does not expressly remove permitted development rights under the GPDO though any exercise of those rights would conflict with Clause 2(e). The Council say that they would seek to enforce by means of an injunction under Section 106(5) of the Act. But Section 191(2) states that: "For the purposes of this Act … operations are lawful … if (a) no enforcement action may then be taken in respect of them …" Section 171A(2) states that "for the purposes of this Act – (a) the issue of an enforcement notice (defined in section 172); or (b) the service of a breach of condition notice (defined in section 187A), Constitutes taking enforcement action".

17. Notwithstanding the wider concept of "lawful" that might be inferred from *East Dunbartonshire* (cited above) it seems to me clear that an injunction under Section 106(5) falls outside the scope of immunity recognised by a Certificate of Lawfulness. I surmise that this arises because in seeking an injunction the Council would be acting as a party to the Agreement rather than directly as Local Planning Authority. As such the process is akin to, say, a restrictive covenant or restrictions under other legislation, to which a Certificate under Section 192 confers no rights.

18. As the store building would be lawful as defined by Section 191(2) it follows that the appellants are entitled to a Certificate of Lawfulness, which I append. I stress, though, the importance of the attached Notes and in particular the scope of the Certificate set out in Note 2. Nothing in this Decision notice or the Certificate is intended to imply immunity, or vulnerability, to action under Section 106(5) of the Act.

The 2009 Appeal Decision

19. My conclusions in some measure run diametrically opposite to those of a previous Inspector (APP/R3325/X/08/2078408, 6 January 2009) who went into the legal arguments in detail before concluding that 99/0374/FUL had been, in effect, a nullity from the outset and that the Agreement consequently had never had any force. The curtilage issue had not been raised, and the only reason he declined to issue a Certificate of Lawfulness was because, in that appeal, no evidence had been presented to demonstrate that Copperfields was lawful (on his reasoning) by having been substantially complete for at least 4 years.

20. That question was not resolved by the Council's certificate of lawfulness (09/02397/COL, 7 August 2009) which remains founded on 99/0374/FUL. But the question has been put beyond doubt, and beyond dispute, by evidence of

primary facts regarding the completion date. Works started soon after September 1999 and were plainly substantially complete by the end of 2000 (at the very latest by the beginning of 2002) and certainly well before the date that would be required to establish lawfulness under the 4 year rule. I can, therefore, well imagine the appellants' feelings on the reversal of their aims occasioned by my consideration of this appeal.

21. The previous Decision notice is an important material consideration, which I have reviewed carefully, indeed the whole case file. However, the Inspector's reasoning is not binding and my duty is to assess this present appeal afresh. *North Wiltshire*[5] does not require adherence to the previous Decision but an explanation if I disagree with it. As I trust will have been apparent, my disagreement both with respect to 99/00347/FUL and the Agreement is mainly on the issue of jurisdiction. Any possible challenge to the legal standing of the permission or Agreement needed to be precursors to consideration of this application and appeal rather an integral part of them.

Concluding Comments

22. The Council promptly forewarned the appellants by letter on 22 January 2009, to the effect that although they would not challenge the previous decision – overall the outcome was favourable to them – they disagreed with its legal reasoning and would act in accordance with their own understanding of the law in any future proceedings. The outcome now, a Certificate that is likely to be otiose, should not be a complete shock.

23. I have also taken all other matters raised into account, including the fact that the Council modified their reasons for refusal between the two applications, but I have found nothing to alter my conclusion that, solely on the narrow issue of the terms of the Section 106 Agreement, the Council's decision to refuse the appeal application was not well founded.

Formal Decision

24. I allow the appeal, and I attach to this decision a certificate of lawful use or development describing the proposed operation which I consider to be lawful.

Alan Langton
Inspector

[5] North Wiltshire District Council v SoS for the Environment and Clover [1992] JPL 955

Lawful Development Certificate

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

TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT PROCEDURE) ORDER 1995: ARTICLE 24

IT IS HEREBY CERTIFIED that on 18 August 2009 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule would have been lawful within the meaning of Section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The operations were permitted by the Town and Country Planning (General Permitted Development) Order 1995 as amended (GPDO), under the provisions of Article 3 and Schedule 2, Part 1: Development within the Curtilage of a Dwelling House, Class E.

Signed

Alan Langton
Inspector

Date: 23 February 2010

Reference: APP/R3325/X/09/2115917

First Schedule

Building operations comprising the erection of a 3-bay Burwood style Oak Framed Garage/Machinery Store.

Second Schedule

Land at Copperfields, Windwhistle Ridge, Cricket St Thomas, Chard TA20 4DQ, located 3 metres or thereabouts from the north-eastern side elevation of the existing dwellinghouse.

NOTES

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

2. 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, would not have been liable to enforcement action, under Sections 172 or 187A of the 1990 Act, on that date.

3. 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. 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.

4. 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

Costs Decision

Site visit made on 2 February 2010

by Alan Langton DipTp CEng MRTPI MICE MIHT

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

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Decision date:
23 February 2010

Costs application in relation to Appeal Ref: APP/R3325/X/09/2115917
At Copperfields, Windwhistle Ridge, Cricket St Thomas, Chard TA20 4DQ

- The application is made under the Town and Country Planning Act 1990, sections 195, 196(8) and Schedule 6 and the Local Government Act 1972, section 250(5).
- The application is made by Mr and Mrs M Pearce for a full award of costs against South Somerset District Council.
- The appeal was against the refusal of a certificate of lawful use or development for the proposed erection of a garage/machinery store.

Decision: The application fails and no award of costs is made.

Reasons

1. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

2. When the application for a certificate of lawfulness, now before me at appeal, was submitted it started a fresh process; the preceding application and appeal having been determined. The fact that the Council had previously omitted to raise the question of curtilage did not debar them from doing so in response to this fresh application. If there was a shortcoming it was the omission in the earlier refusal; there was nothing unreasonable in the Council seeking to put that right, as they saw it, in their subsequent determination. And it is the subsequent application and appeal that are before me. In the event, I did not see the curtilage as determinative. But it was hardly a spurious issue; rather it was of considerable and understandable interest to both parties, neither of whom could have known how I would approach the question.

3. On the substantive issue of jurisdiction regarding the planning permission and Agreement, it will be apparent from my Appeal Decision that I accept the Council's position. I differ from them in that I see the Agreement as dependent on the permission, but the Council supported their own position on this with substantial cogent submissions. I also disagree with the Council regarding the meaning of "lawful" in the context of the appeal, but this possibility was foreseen and addressed in their submissions, as well as them substantively supporting their own position by reference to case law.

4. It should be no surprise that I see no basis for considering the Council's behaviour to have been unreasonable. *North Wiltshire* confirms the desirability of consistency in planning decisions, but not slavishly so as to fetter a subsequent decision maker provided that reasons for departing from an earlier position are properly given. The Council's letter of 22 January 2009 was firmly

drafted, but it was to evidently robust and knowledgeable appellants and in the context I see it as more informative than confrontational. Indeed rather than being evidence of unreasonable behaviour, once the Council decided not to challenge the previous appeal Decision it would have been unreasonable for them not to have written such a letter. Otherwise the appellants could well have been left under a misapprehension that the Council accepted the previous Inspector's finding on matters of law. As it was they rightly put the appellants on almost immediate notice of the Council's actual position.

5. I need say little more, save that had I found substance in the costs application this would not have been supported by considerations of a "shot across the bows" with a token award; costs are not administrative warnings but intended to reimburse wasted or unnecessary costs incurred as a result of unreasonable behaviour. In this case, however, the issue does not arise since I have found no evidence of unreasonable behaviour.

Alan Langton

Inspector