Appeal Decision

Site visit made on 30 July 2012

by Pete Drew BSc (Hons) DipTP (Dist) MRTPI

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

Decision date: 10 August 2012

Appeal Ref: APP/W1145/X/12/2173239

Site of Old Piggeries, Huntshaw Barton, Huntshaw, Torrington, EX38 7HH

- The appeal is made under section 195 of the Town and Country Planning Act 1990 [hereinafter "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 Mrs J Staines against the decision of Torridge District Council.
- The application Ref 1/0342/2011/CPE, dated 6 April 2011, was approved by notice dated 22 September 2011 [but see below].
- The application was made under section 191 (1) (b) of the Act.
- The development for which an LDC is sought is access area (pursuant to outline planning permission reference 1/1449/2003/OUT dated 10th December 2003).

Decision

1. The appeal is allowed and an LDC is issued, in the terms set out in the attached LDC, for access area (pursuant to outline planning permission reference 1/1449/2003/OUT dated 10th December 2003). A plan that defines the area of land involved edged red is attached to the LDC.

Procedural matters

2. The application was approved and an LDC issued for “formation of a vehicular access for in excess of four years”. Section 195 (1)(a) of the Act says there is a right of appeal where amongst other things the application is refused in part. Section 195 (4) says: “References in this section to a refusal of an application in part include a modification or substitution of the description in the application of the...operations or other matter in question”. On the basis that the description for which an LDC has been issued has been modified from that for which an LDC was sought I accept the appeal should be dealt with as if the application was refused in part. I propose to deal with the appeal on this basis.

Background and approach to conditions

3. The Council granted outline planning permission under reference 1/0253/2000 for “workshop/store/office to replace existing fabrication workshop/store...” on 2 August 2000. There is no suggestion that this outline planning permission was implemented. It is however relevant in the sense that outline planning permission reference 1/1449/2003/OUT, with which I am concerned was for “Renewal of consent 1/0253/2000 for workshop/store/office to replace existing fabrication workshop/store”. The application form for renewal of the outline planning permission is dated 21 February 2000 but this appears to be because the same form was ‘recycled’ in 2003, which cannot be good practice. The date received has been altered to ‘28/7/03’ and the new reference added.

4. The form says siting and means of access were not reserved for subsequent approval. As the Council’s e-mail dated 23 July 2012 acknowledges this gives rise to a tension with some of the conditions imposed on the notice of decision,
e.g. condition 1 asked for details of (ii) siting; and (v) means of access. It is also unclear where this leaves condition 5, which at face value is a condition precedent that requires details of the "treatment of the visibility splays" to be submitted and approved, even if there is no implementation clause. To add to the confusion condition 5 refers to “condition 3 above”, which concerns paint spraying rather than visibility splays. On this basis alone I have to agree with the Appellant’s submission that the conditions are in a bit of “a mess”.

5. In light of the above it is worth setting out the correct approach to conditions in respect of outline and reserved matters applications. At outline stage conditions should be imposed on any matter not covered by the standard reserved matters, but which it might be necessary to control before granting permission, e.g. drainage. Non-reserved matters cannot be controlled later if a condition is not imposed at outline stage. At reserved matters stage it is possible to impose further conditions provided they arise directly from the reserved matters application and do not materially derogate from the outline permission [R v Newbury DC ex parte Stevens & Partridge [1992] J.P.L. 1057].

6. Circular 11/95 “The use of conditions in planning permissions” sets out model conditions, including No 2, which requires details of reserved matters to be obtained and No 3, thereafter implemented as approved. In contrast the conditions on the outline permission with which I am concerned are less easily discerned. By way of example conditions 1 (vii), 8 and 9 concern landscaping but conditions 8 and 9 read as if they applied to a full planning permission.

The law relating to condition precedent

7. The main parties have between them referred to 6 legal authorities and I shall summarise each in turn with appropriate commentary where appropriate and reference to a related case where necessary. In Whitley & Sons v Secretary of State for Wales and Clwyd County Council [1992] 64 P. & C.R. 296 Woolf L.J. laid down the following general rule: "...it is only necessary to ask the single question: are the operations...permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful”.

8. However Woolf L.J. went on to identify and apply an exception to this general rule and held that although the planning permission set a deadline by which development had to commence, it did not stipulate that the schemes had to be approved prior to that date. What was required of the Applicant was to apply for the approvals prior to the deadline as the Applicant had no control over how long the LPA [or Secretary of State] would take to determine the application. If the application was subsequently approved there would be no point taking enforcement action. He held: “I consider that...whether or not the planning permission has been implemented has to be tested by examining the situation in an enforcement context by considering whether enforcement action is possible and if it is leaving the outcome to be determined in the enforcement proceedings. This is a sensible and practical solution to the possible problems in obtaining approval. Obviously if the planning authority or the Secretary of State does not regard it as desirable where a time limit has expired to give approval to reserved matters they are not under a duty to give approval. They can take the stand (as long as they act reasonably) that the developer has lost

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1 Source of quote: page 302.
his chance. If...they give approval, no purpose would be served in requiring a fresh application for planning permission”.

9. A second exception was recognised in *R v Flintshire County Council Ex p. Somerfield Stores* [1998] P. & C.R. 336. In this case the condition had been complied with in substance even though the formalities, including a written notice of approval, had not been issued before work started. The High Court ruled the works had been done in conformity with the plans approved by the planning and highway authorities, and with their full knowledge and cooperation. The condition had been complied with in substance and accordingly it was held that the planning permission had been lawfully implemented. Carnwath J, as he then was, said that the narrow approach in *Whitley* needed to be applied with common sense and with regard to the facts of the case.

10. A third exception was identified in *Agecrest v Gwynedd County Council* [1998] J.P.L. 325, which concerned, among others, landscaping. The Appellant submits that this case is particularly relevant to this present situation. However in the light of the Court of Appeal judgement of *Henry Boot Homes Ltd v Bassetlaw DC* [2003] J.P.L. 1030 Agecrest is no longer good law. Keene L.J., who gave the leading judgement in *Henry Boot Homes Ltd*, emphasised that planning law was contained in a comprehensive code, and as that code provided a procedure in section 73 of the Act for modifying or removing conditions, it was not open to an LPA to exercise discretion in order to waive compliance with a condition because this would bypass the role of the public in the planning process.

11. Amongst other things Keene LJ found the question asked in *Whitley* (see above synopsis) "...operates even where the necessary detailed approvals for the works actually carried out have been obtained but where another condition on the permission has to be complied with before development began and there has been no compliance with that other condition: *Leisure Great Britain plc v Isle of Wight Council* [1999] 80 P. & C.R. 370”. Since the conditions had not been complied with the Court held that the planning permission had lapsed.

12. The case of *Hammerton v London Underground Ltd* [2003] J.P.L. 984 placed the exception to the *Whitley* rule on a broader basis. Ouseley J held: "where it would be unlawful, in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development...Enforcement action may still be taken to remedy the breach by requiring compliance with the condition. But the development cannot be stopped from proceeding...".

13. The Court in *Hammerton* went on to hold that whether or not the operations had been effective to constitute the start of development depended on whether it would be rational for the LPA to take enforcement action to prevent the entire development from proceeding. The question therefore became whether the breach of planning control can be enforced against. Where enforcement action is no longer possible the planning permission is to be viewed as having been lawfully implemented, despite the fact that the operations might have commenced in breach of a condition precedent.

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3 I acknowledge that Henry Boot has not been referred to by the parties but the commentary at P56.13.5 of the Encyclopedia of Planning Law and Practice is quite clear that "...the case law...has moved on since the Agecrest decision" and in those circumstances it would be quite wrong of me to base my decision on Agecrest.

4 Source of quote: paragraph 39.

5 Source of quote: paragraph 127.

14. In *R. (on the application of Hart Aggregates Ltd) v Hartlepool BC* [2005] J.P.L. 1602, Sullivan J, as he then was, identified 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.

15. However Sullivan J. said obiter dictum that the condition at issue did not go to the heart of the permission so that failure to comply with it would mean that the development had to be regarded as unlawful. It was held that the condition was simply concerned with the back-filling and restoration of the worked out area of a quarry: non-compliance would render restoration in breach of the condition but that had no effect upon the legality of extraction. Such restoration provisions had been overtaken by subsequent permissions and in that context it would be irrational and an abuse of power to commence enforcement action. He said that each case needed to be considered upon its own facts and the outcome may depend upon the significance of the condition that has not been complied with. The matter was one for the decision maker.

16. The Council says "The first question is "is the fact that the works were carried out in advance of the grant of reserved matters fatal?", which the answer must be no." Thereafter it cites the case of *The Queen vao London & Stamford Investments Ltd v Stoke on Trent City Council* [2008] EWHC 2746 (Admin). However I do not understand the relevance of the reference because paragraph 5 of the transcript confirms that this case was concerned with a detailed planning permission with a 5-year commencement condition. In short the case does not appear to be relevant to, let alone answer, the question posed. In *London & Stamford Investments Ltd* Sullivan J applied *Whitley* to the conditions at issue in that case. It appears to be an example of what I must do here.

**Reasons**

17. The outline planning permission is dated 10 December 2003. In accordance with [unnumbered] condition (a) the application for reserved matters had to be made within 3-years and the appeal decision confirm the application was dated 5 December 2006, within time. Condition (b) relates to implementation and it appears to be common ground that the access was a material operation [as defined in section 56 of the Act], which was undertaken by 2006 at the latest. There appears to be no suggestion that the means of access has been laid out otherwise than in accordance with the approved details. My site visit corroborated this view. Subject to compliance with condition precedents I conclude that the development was begun less than “...five years from the date on which this permission is granted” [condition (b)].

18. In addition to the above conditions, the outline planning permission is subject to 11 conditions, but only some of these required details to be submitted to and approved by the Council prior to the commencement of the development. Conditions 2, 3, 4, 6, 7, 9, 10 and 11 are not true condition precedents because, whilst they might require works to be done, the trigger for the works is occupation rather than commencement of development, e.g. condition 9 says “Before the development hereby permitted is occupied...”. Whilst a local

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\[7\] The appeal decision, dated 1 April 2008, confirms that the details for which approval was sought was “design, landscaping and external appearance”. Paragraph 1 of that decision confirms that such details were approved, albeit subject to conditions, which I shall examine in due course.
resident has raised an issue about the extent of the visibility splay, suggesting part of it is outside of the Appellant’s control, at best that might be a breach of condition 4. However it is not relevant to the determination I must make.

19. Expressing this another way, in any enforcement notice proceedings to secure compliance with conditions 2, 3, 4, 6, 7, 9, 10 and 11, the Council would not allege that the planning permission had not been implemented at all. Rather it might allege that although the planning permission had been implemented by carrying out of works [leading to the completion of the building] there had been a breach of the conditions attached to the permission governing the use of the building that had been constructed pursuant to the planning permission. So in respect of condition 4 the Council might allege a breach of the condition insofar as the visibility splays had not been provided but the requirements of any such notice could not require the completed building to be demolished. Such a requirement would be totally disproportionate to the alleged breach.

20. For these reasons I shall focus on conditions 1, 5 and 8 of the outline planning permission. Condition 1 is in my view the most important of these and says:

*The development hereby permitted shall be carried out only in accordance with detailed drawings which shall previously have been submitted to and approved in writing by the Local Planning Authority. Such detailed drawings shall show: (i) design and external appearance of all proposed buildings; (ii) their siting and layout; (iii) the materials of which they are to be constructed; (iv) the arrangements for the disposal of foul and surface water; (v) the means of access from public highways and areas for vehicle parking; (vi) all other works including walls, fences and other means of enclosure and screening; (vii) the location and species of all trees existing on the site showing those to be felled and those to be retained.*

21. Dealing with each in turn, (i) was the subject of reserved matters approval and I shall examine that in due course. It is agreed that siting was approved at outline stage but unclear whether layout, also required by (ii), was expressly agreed in writing. The reserved matters approval is solely granted in respect of design, landscaping and external appearance rather than layout. However drawing No 0667 D02, expressly recorded as being before the Inspector when he made his decision, shows the proposed layout. On this basis, applying Whitley, I am satisfied that the Applicant applied for approval of the proposed layout prior to the deadline and so this is not a reason to reject this claim.

22. In respect of (iii), materials, these are recorded in paragraph 5 of the appeal decision albeit that a planning condition was imposed in this respect, which I shall examine in due course. It is agreed that access was approved at outline stage but unclear whether layout, also required by (ii), was expressly agreed in writing. The reserved matters approval is solely granted in respect of design, landscaping and external appearance rather than layout. However drawing No 0667 D02, expressly recorded as being before the Inspector when he made his decision, shows the proposed layout. On this basis, applying Whitley, I am satisfied that the Applicant applied for approval of the proposed layout prior to the deadline and so this is not a reason to reject this claim.

23. In respect of (vi) drawing No 0667 D02 provides details of means of enclosure, including a block plan and elevation of the proposed hit and miss fence that is proposed around the storage compound. Whilst it is unclear from the limited information before me whether such details were approved in writing I can be satisfied that such details were submitted to the Council. Finally in respect of (vii) drawing No 0667 D02 does show the location and species of existing trees.
including the 15 oak trees that appear to have been planted when the access was laid out, which I was able to see during the course of my site inspection.

24. For these reasons I am satisfied that detailed drawings pursuant to discharge of condition 1 of the outline planning permission were submitted on time. Applying Whitley and Flintshire County Council it matters not that the Council might not have approved all of the submitted details in writing by the time that the access works were implemented in accordance with the approved details.

25. I have already had cause to express concerns about condition 5. It is neither precise nor enforceable in the absence of an implementation clause. Although the Council’s letter dated 15 November 2006 is restricted to the means of access being acceptable pursuant to “Condition 1 of the outline consent” it is now acknowledged that the details of the access were approved as part of the outline permission. It is therefore unclear whether it was necessary to impose condition 5 in those circumstances. The fact that it refers to condition No 3 would appear to be because it has been copied down from the original outline planning permission [No 1/0253/2000], which suggests that it might not be relevant to the development permitted by 1/1449/2003/OUT. Moreover the appeal decision confirms that the Council considered the access was “acceptable”, without reservation as to, for example, treatment of visibility splays. The visibility splays are laid out within the land under the Appellant’s control and laid to grass. Drawing No 0667 D02 suggests, in respect of those visibility splays, any obstructions would be a “maximum 600 above road level”.

26. Because condition 5 is so poorly worded it would not be reasonable to find against the Appellant on the basis of this condition. Common sense therefore determines that a condition such as this one, which does not meet the tests for conditions in Circular 11/95, cannot be a good reason to reject this appeal.

27. The Appellant’s legal advice suggested the error in the condition might mean “...it is void because it is meaningless”; I agree. Moreover there would appear to be judicial authority to support this line arising from Elmbridge BC v Secretary of State for the Environment [1989] J.P.L. 277. Malcolm Spence, sitting as a Deputy Judge, “...rejected entirely the notion that in a case of the imposition of a condition which was plainly invalid the applicant had first [to] appeal to the Secretary of State or apply to the court before he might legitimately proceed with his development. Indeed the proposition only needed to be stated for the wrongness of it to be at once apparent”.

28. Turning to condition 8 this required details of landscaping. Such details are shown on drawing No 0667 D02 to include a hedge bank to the west of the proposed building. This plan was before the Inspector when he reached his decision, which is dated 1 April 2008. I appreciate that the grounds of appeal say “It is true that no complete landscaping scheme has been submitted...”. However the fact is that paragraph 1 of the appeal decision unambiguously approves the details of landscaping, albeit subject to imposing conditions.

29. In granting reserved matters approval the Inspector refers to landscaping being approved pursuant to condition 1 but, as I have noted, condition 1 was concerned solely with the existing planting rather than proposed landscaping. The appeal decision was in my view concerned with proposed landscaping as is evident from the Inspector’s comments in paragraphs 5, 8 and 9, and for this reason I consider that such details as were being approved were pursuant to condition 8 of the outline planning permission. He was not approving the

8 Source of quote: page 279.
existing trees. Applying the approach set out in paragraph 5 there is a powerful argument that conditions 8 and 9 should not have been imposed in this form at outline stage because the application form confirms landscaping was a reserved matter. I strongly suspect that the confusion in the Inspector’s appeal decision arose from the use of non-standard conditions on the outline.

30. Even if I am wrong I am not persuaded that the landscaping condition went to the heart of the outline planning permission. I appreciate that the site is in an elevated and prominent position, which affects the setting of the listed church, but the elements reserved by the condition, i.e. landscaping, are peripheral to the development, i.e. “workshop/store/office”, being approved. The Council would still be able to take action in respect of any breach of the landscaping condition around the periphery of the site. However given the approval of the proposed landscaping as a reserved matter, there must be a doubt as to whether it would be rational, or an abuse of power, for the Council to do so.

31. The Appellant’s Agent confirmed in an e-mail dated 1 August 2012 that “since that appeal no submissions have been made relating to the conditions imposed by the Inspector”. This might be said to contrast with the assumption in the legal advice obtained by the Appellant, which was that “...all the other approvals of reserved matters have been obtained for the development within the period required”. However I intend to determine this appeal on the basis that this was an assumption that reserved matters approval had been obtained rather than discharge of conditions on the reserved matters approval.

32. The reserved matters approval was subject to three further conditions relating to: (1) materials; (2) levels; and (3) realignment of a public footpath and boundary treatment including tree and shrub planting. In my view these are not inconsequential matters, but none of these conditions are couched in expressly prohibitive terms, e.g. “No development should take place before...". Condition 1 starts: “No building work shall take place until...” and conditions 2 and 3 say “...before excavations and building site preparation works begin...”. No claim is made that building work, excavations or building site preparations have taken place that would constitute a material operation. I do not doubt that in framing the conditions in this way the Inspector took account of the “acceptable” access, which he had noted to exist at the time of his inspection.

33. In respect of condition 1 (i) [design and external appearance] on the outline planning permission it seems to me that the reserved matters approval granted on appeal did approve such details without reservation. However in respect of condition 1 (iii) [materials] I have considered whether the failure to discharge condition (1) of the reserved matters approval might be said to mean condition 1 of the outline planning permission was not fully discharged. However this is not an argument that the Council advances. Moreover this would seem to be an example of the absurd and wholly unforeseen consequences that Sullivan J. anticipated in Hart Aggregates. In the context of the scheme as a whole, where the Inspector imposed a materials condition that required details prior to building work taking place, I consider it is a relatively minor element. It does not lead me to find that the access works, for which full details were submitted prior to the outline planning permission, did not implement that permission.

34. In these circumstances, applying Whitley, I consider the operations, namely the laying out of the vehicular access, were permitted by the outline planning permission, which expressly approved the full details of the access. The access was implemented within the timeframe envisaged by condition (b) of the

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outline planning permission. Although there were 3 condition precedents on the outline planning permission I have given reasons why I consider that those conditions have, in substance, been discharged following submission of details. Alternatively the details required by the conditions, where not expressly approved on the evidence before me, have at a minimum been submitted to the Council which, applying *Whitley*, is all that the Applicant can do.

**Other matters**

35. I have noted the correspondence from interested parties but I am satisfied that the access was approved as part of the outline planning permission. At final comments stage the Appellant has clarified that in using the term ‘original’ it was intended to refer to the originally approved application and not the original plans submitted with the 2000 application, which might have been different. On the issue of consultation the Parish Council and residents appear to have been consulted by the Council and so I see no substance to this complaint. Although the planning permission was issued to a company, which it is claimed no longer exists because it has been dissolved, the planning permission was not personal to that company or any individual and would run with the land.

36. The officer’s delegated report refers to submission of a Statutory Declaration, which I have not been provided with. However there appears to be no issue over the date of when the access was constructed and so it does not matter.

**Conclusion**

37. For the above reasons, having regard to all other matters raised, I am satisfied that the Council’s refusal to grant an LDC for access area (pursuant to outline planning permission reference 1/1449/2003/OUT dated 10th December 2003) was not well founded. The appeal will succeed and I shall exercise the powers transferred to me in section 195 (2) of the Act.

*Pete Drew*

INSPECTOR
Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 6 April 2011 the operation described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Act, for the following reason:

1. The access comprised a material operation that benefited from an express grant of planning permission (reference 1/1449/2003/OUT dated 10th December 2003) and construction thereof lawfully implemented the planning permission.

Signed

Pete Drew
Inspector

Date: 10 August 2012
Reference: APP/W1145/X/12/2173239

First Schedule

Access area (pursuant to outline planning permission reference 1/1449/2003/OUT dated 10th December 2003)

Second Schedule

Site of Old Piggeries, Huntshaw Barton, Huntshaw, Torrington, EX38 7HH
NOTES

This certificate is issued solely for the purpose of Section 191 of the Act.

It certifies that the operation described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the Act, on that date.

This certificate applies only to the extent of the operation described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any 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.
Plan

This is the plan referred to in the Lawful Development Certificate dated: 10 August 2012

by Pete Drew BSc (Hons) DipTP (Dist) MRTPi

Land at: Old Piggeries, Huntshaw Barton, Huntshaw, Torrington, EX38 7HH

Reference: APP/W1145/X/12/2173239

Scale: Do not scale as original plan has been scanned which might cause variations.