The Planning Inspectorate

Appeal Decision

Hearing held on 2 September 2015

No site visit made

by Simon Hand MA

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

Decision date: 30 September 2015

Appeal Ref: APP/U1240/X/15/3005687
Peartree Business Centre, Cobham Road, Ferndown Industrial Estate, Wimborne, Dorset, BH21 7PT

- 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 Dunnett Investments Ltd against the decision of East Dorset District Council.
- The application Ref 3/14/0637/CLP, dated 2 July 2014, was refused by notice dated 28 October 2014.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is the proposed change of use of Peartree Business Centre, Cobham Road, Ferndown from Use Class B1(a) (offices) to Use Class C3 (dwellinghouses) under the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013, Schedule 2 Part 3 Class J.

Decision

1. The appeal is dismissed.

Background to the Appeal

2. In January 2014 the appellants made a prior approval application to the Council for conversion of an office block from B1 to C3 (dwellinghouses) under Class J of Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995, which was at the time the order in force. The Council issued a letter purporting to refuse the application in March 2014.

3. It is now agreed between the parties that the letter purporting to refuse the application did not do so and so no response was made to the application for prior approval. Class N of Part 3 sets out the procedure for applications for prior approval and section 9 states:

> *"The development shall not be begun before the occurrence of one of the following— (a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required; (b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or (c) the expiry of 56 days following the date on which the application was received by the local*

planning authority without the authority notifying the applicant as to whether prior approval is given or refused".

4. The appellants made the LDC application the subject of this appeal on the basis that the Council had made no response to their application within the 56 days set out in N(9)(c) and so planning permission was granted by the GPDO.

5. However the Council refused the application on the grounds that the planning permission for the office block contains a condition which, because of its wording, effectively prevents the operation of Class J and so the conversion of the offices to dwellings would not be lawful but requires a specific planning permission.

Main Issue

6. The main issue is therefore whether the condition in question prevents reliance on Class J of the GPDO.

Reasons

7. Planning permission was first granted for the office block in 1981 and in 1995 planning permission was granted to vary condition 7 of the 1981 permission. A new planning permission was thus created with a new condition 1, which states "*The use of this building shall be for purposes falling within Class B1 (business) as defined in the Town and Country Planning (Use Classes) Order 1987, and for no other purpose whatsoever, without express planning consent from the Local Planning Authority first being obtained*". This is the condition in dispute.

8. The appellants argue firstly that there is no reference to the GPDO and so rights conferred by that Order are not removed by the condition. Secondly, the requirement for express planning permission to be obtained has been fulfilled as the condition should not be read as only allowing the Local Planning Authority to grant such a permission and thirdly the prior approval procedure is the same as an express planning granted by the Local Planning Authority. I shall deal with these points in the same order below.

Legal background

9. The legal background to the interpretation of conditions was set out in a number of court cases. In Royal London[1] Mrs Justice Patterson recently brought together a number of previous legal decisions and a number of key phrases were quoted from that decision. For permissions generally "*The question is not what the parties intended but what a reasonable reader would understand was permitted by the local planning authority*". For conditions in particular the conditions "*must be clearly and expressly imposed, so that they are plain for all to read*". Mrs Justice Patterson then quoted from Carter Commercial[2] that "*conditions should be interpreted benevolently and not narrowly or strictly*" and to that Mr Katkowski added further from the Carter Commercial judgement "*….and given a common-sense meaning…*" and also "*construing them in such a manner will mean the court should be astute to ensure, if at all possible, that conditions are not so interpreted that they are……unreasonable*". Finally Mrs Justice Patterson confirmed that "*there is no*

[1] R on the application of Royal London Mutual Insurance Society Ltd v SSCLG [2013] EWHC 3597 (Admin)
[2] Carter Commercial Developments Ltd v SSE [2002] EWHC 1200 (Admin)

room for an implied condition in a planning permission". This then is the background that should inform any decision about the scope of a condition.

Exclusion of the GPDO?

10. There is no dispute that the condition expressly mentions the UCO but makes no mention of the GPDO. This omission is fatal according to the appellant. In Carpet Décor[3] it was held that "*where a local planning authority intended to exclude the operation of the Use Classes Order or the General Development Order they should say so by the imposition of a condition in unequivocal terms, for in the absence of such a condition it must be assumed that those orders will have effect by operation of law*". However, it is clear this does not mean that the exact words 'Use Classes Order' or 'General Permitted Development Order' must necessarily be included in the condition. This was dealt with in Dunoon[4]. In that case a condition said "The use of the premises shall be limited to the display, sale and storage of new and used cars….". The Court of Appeal accepted there was no mention of the GPDO in the condition but went on to say "*the question therefore is whether it [the exclusion of the GPDO] is to be implied from the words themselves, in the context in which they are used, to so exclude them*". Because the condition simply "limited" the use to a particular activity that did not exclude the operation of the GPDO. However it is clear the court envisaged that GPDO rights could be excluded by implication if the wording of the condition was sufficiently emphatic.

11. This is supported by the RFU[5] case, where a condition which stated the stand in question should be used "ancillary to the main use of the premises as a sports stadium, and for no other use" without the Council's prior written consent was held to exclude the operation of the UCO, despite not mentioning it. Mr Justice Ousley said "*The words "for no other use" are clear. They have no other sensibly discernible purpose than to prevent some other use which might otherwise be permissible without planning permission. The Use Classes Order is an obvious source of such a permission*". The appellant argued that the UCO was different from the GPDO as the former sought to control the movement of uses within various classes, whereas the later specifically granted planning permissions for developments of various kinds, including changes of use. In my view this is not quite the whole story. A material change of use is development and the UCO groups together similar uses so that there is no dispute that movement within a use class is not development, even if such a change could be argued to be material and would ordinarily therefore require a separate planning permission. The wording used by Farquharson LJ in Dunoon is explicit that "*The Use Classes Order is an obvious source of such a permission*". Equally the GPDO could be a source of a planning permission, so in my view the principle in Dunoon that a condition can exclude the operation of the UCO by implication holds good for the GPDO as well. This would sit comfortably with the general advice that conditions should be given a common-sense meaning. A condition which says "a building shall be used for X purpose and no other purpose" is quite clearly meant to limit that building to the single use X. If the UCO and the GPDO could be used to circumvent that condition then it would have "no sensibly discernible purpose".

[3] Carpet Décor (Guildford) Ltd v SSE and Guildford BC [1981]
[4] Dunoon Developments v SSE & Poole BC [1992] WL 895054
[5] The Rugby Football Union v SSLGTR [2001] EWHC 927 (Admin)

12. In this case the condition is written in emphatic and clear English. It specifically mentions the UCO and limits the use to one particular Class and that it should be for that purpose "and no other purpose whatsoever". That is a clear statement of meaning which excludes the operation of any order, including the GPDO. This view is reinforced if I consider the reason for attaching the condition which is given in the 1995 permission as "in order that the Council may be satisfied about the details of the proposal due to the particular character and location of this proposal". Clearly the operation of Class J of the GPDO prevents the Council from being satisfied about the details of the proposal except for a very limited number of issues, and so is contrary to the reason for imposing the condition in the first place. Finally, the Council could not have been expected in 1995 to envisage that future changes to the GPDO could be introduced that would require the exclusion of certain, at that time unknown, classes from the GPDO as well. They could not have excluded the whole of the GPDO on the off-chance of any future changes as a general exclusion of the whole of the GPDO would be held to be excessive. By clearly expressing the condition as they did, there is no doubt in my mind that it does exclude the GPDO and therefore the operation of Class J.

Can only the local planning authority grant the planning permission?

13. The Council, having written a firm and clear condition, introduced the tailpiece "*without express planning consent from the Local Planning Authority first being obtained*". There is no need for this phrase as all conditions can be circumvented following a grant of planning permission. The appellant argues that a grant of planning permission (or consent) has been obtained through the operation of Class N. Class J grants planning permission for the change of use subject to a condition that prior permission must be obtained from the local planning authority. In full that condition states "*Class J development is permitted subject to the condition that before beginning the development, the developer shall apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to— (a) transport and highways impacts of the development; (b) contamination risks on the site; and (c) flooding risks on the site, and the provisions of paragraph N shall apply in relation to any such application*". The developer did apply for the determination in the format required by Class N and no determination was received. Therefore, according to N(9)(c) the development could proceed.

14. The appellant argues that this tailpiece means that the restriction in the condition can be ignored if a planning permission is granted by a competent decision maker. The reference to the local planning authority cannot be taken to be exclusive as this would preclude any appeal to the Secretary of State, which of course would be a nonsense. If so, then Parliament, the highest tier of decision makers and which ultimately created Class J, is similarly not excluded and so there has been a grant of planning permission and the requirements of the condition are fulfilled. The Council respond that the condition means exactly what it says. There is no reference to the Secretary of State because that is understood. Many conditions refer to matters to be agreed by the Council or local planning authority, and do not go on to explicitly include the right to appeal against such a refusal, but they are in no way weakened by this omission.

15. In my view neither of these arguments take us very far as the words of this tailpiece cannot bear the weight that is being placed upon them. The common-

sense meaning of the condition for a non-planner would be as the Council argue; before any use other than that in B1 is contemplated the Council must first grant planning permission for that proposed use. However, for a planner the only way the phrase "*without express planning consent from the Local Planning Authority first being obtained*" when embedded in a condition can be given any ascertainable meaning is that the developer should make an application, for example, under s73 for a new planning permission without that restrictive condition. This right is of course unaffected by the phrase in question. Whatever wording is included in the condition the only way it can be lawfully circumvented by a would be developer is by a planning appeal within the time limit allowed from the date of the grant of the permission; by an application under s73 to grant a new planning permission without complying with the condition or under s73A to allow the use to continue without complying with the condition. All these routes carry a right of appeal to the Secretary of State and all are available whether or not the phrase is included in the condition and none of these routes can be denied whatever wording in the conditions is used. In other words the phrase adds nothing to the condition and therefore really has no meaning. Alternatively a development order, such as the GPDO, can grant a planning permission which also could have the effect of circumventing the condition and I deal with this below.

Is the planning permission granted by the GPDO?

16. The third argument of the appellant is a variant on the second; that the grant of planning permission made through the GPDO acts as the grant of planning permission required by the condition. I think the same logic applies. There is no locus for any decision maker to operate within the requirements of the condition to circumvent its restrictions other than through the usual means of dealing with conditions such as an application under s73. Of course a planning permission granted by the GPDO could also be another way of lawfully avoiding the restriction in the condition but I have already found the condition excludes the GPDO. Having done so I do not believe that a common-sense or benevolent reading would allow Class J to be brought back into play by reliance on the tailpiece, which as I conclude above does not add anything to the condition. Therefore I do not believe the appellant can rely on the wording of the tailpiece to forward their case.

17. If I am wrong that the tailpiece does not add anything to the condition then its meaning can only be to explicitly define the means of circumventing the condition's restrictions, and those means are reduced to an "*express planning consent from the Local Planning Authority*". This clearly excludes the operation of the GPDO, which on any commonsense reading of the condition is not a grant of permission by the local planning authority. It is stretching the meaning of this simple tailpiece much too far to include Parliament within its ambit. If it did then the tailpiece would again be essentially meaningless as it would encompass all possible lawful means of circumventing its own restrictions, which, for similar reasons to those made above, means it adds nothing to the condition.

Other Matters

18. Various appeal decisions were brought to my attention but as both parties agreed they are fact and context sensitive. In other words each case must be decided on its own merits. None of the decisions dealt with a condition worded

in the same way as the one before me. Nevertheless, in one case the Inspector found the condition only specified the use that was granted by the planning permission[6]; in a second the condition only set out what it "purported" to grant planning permission for and nothing more[7]; and in a third the condition expressly allowed a residential use[8]. Three other cases[9] all found the conditions in question sufficiently clearly worded to exclude the operation of the GPDO despite it not being mentioned in the conditions themselves. Consequently my conclusion is in agreement with the general thrust of these decisions.

Conclusions

19. I have found the condition is so worded that a common-sense and benevolent reading of it is one that excludes the operation of the GPDO. Because the tailpiece is in effect otiose, then no reliance can be placed on it to circumvent the objective of the condition by the back door, as it were. Consequently, the use of the building as dwellings as applied for is not lawful and I shall dismiss the appeal and decline to issue a certificate.

Simon Hand

Inspector

[6] APP/G3110/A/14/2215751, Canterbury House
[7] APP/R3650/A/13/2208348 etc, Smithbrook Barns
[8] R3650/A/14/2216290, The White House
[9] APP/L3815/A/14/2217105 Ham Farm; APP/Z1510/A/13/2206122 Newton Brickworks; APP/P0119/A/13/2206126

APPEARANCES

FOR THE APPELLANT:

Christopher Katkowski QC

FOR THE LOCAL PLANNING AUTHORITY:

David Fosdick QC

DOCUMENTS

1 Appellant's submissions
2 Transcript of Carter Commercial Developments and copies of the 1978 Interpretation Act and the 1990 Town and Country Planning Act
3 Council's submissions