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Development Control Division
Arun District Council
Maltravers Road
Littlehampton
BN17 5LF

CHARTERED TOWN PLANNER

Wednesday, 17 March 2010

Dear Sir/Madam:

Re: 95 West Front Road, Pagham

Certificate of Lawfulness of Existing Development

Erection of dwelling without implementing outline planning permission P/17/85 and reserved matters approval P/90/85

This application raises the complex issue of 'conditions precedent'.

In summary the application seeks to establish whether the dwelling as built was a lawful implementation of outline planning permission P/17/85 dated 22 May 1985 and reserved matters approval P/90/85 dated 7 October 1985; or whether, as I consider, that the planning permission was not implemented.

The house was built during 1986 and therefore if it is considered that planning permission P/17/85 was not implemented, then the dwelling is now lawful by virtue of the provisions of Section 171B which provides a time-bar of four years from substantial completion of works for breach by way of operational development. The relevant part of the section reads as follows:

"(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed."

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(1) The conditions

The 1985 permission was for “outline application for detached dwelling and garage”. A copy of the permission is attached. The planning permission reference is P/17/85.

In my opinion there are two relevant conditions.

Condition 3 reads:

“Details of screen walls and/or fences shall be submitted to and approved by the Local Planning Authority before development is commenced and such walls and/or fences shall be erected before the building with which they are associated are first occupied and shall thereafter be maintained to the satisfaction of the Local Planning Authority.”

Condition 4 reads:

“Before development is commenced a schedule of materials and finishes and, where so required by the Local Planning Authority, samples of such materials and finishes to be used for the external walls and roofs of the proposed building(s) shall be submitted to and approved by the Local Planning Authority.”

(2) Implementation of a planning permission

A planning permission is controlled and subject to its conditions. If the operations which are said to implement a permission contravene its 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: per Lord Justice Woolf in **Whitley & Sons v Secretary of State for Wales (1992) 64 P&CR 296 at 302**.

It was indicated by Keene J in **Leisure Great Britain Plc v Isle of White Council (2000) 80 P&CR 370** that there are three exceptions to this principle; the third and only relevant exception for these purposes was where the relevant condition had been met in substance, although not in form (**R v Flintshire County Council ex parte Somerfield Stores Limited [1998] P&CR 336**).

In a comprehensive statutory code, there is no power for informal action: **R v Leicester City Council ex parte Powergen plc (2001) 81 P&CR 47** (paragraphs 2, 47 and 48) re-affirmed by the Court of Appeal in **Henry Boot Ltd v Bassetlaw DC [2003] 1 P&CR 23**. This ensures that the claim of applications and approvals are evidenced on the planning register and that decisions are based upon requisite material. It also ensures mistakes are correctable.

Any approvals under conditions require the formality of being in writing because Article 24 of the General Permitted Development Order “*envisages an application, the date of which can be used as the basis for deciding the time for appeal, and a notice of decision. Although there are no special formalities for*

those acts it is implicit in the scheme of the GDPO seen against the background of ordinary administrative practice, that they should be in writing.” per Carnwath J. in **R v Flintshire County Council ex parte Somerfield Stores Limited [1998] P&CR 336**. As with a planning permission, correspondence purporting to be such an approval should be interpreted solely by reference to its terms and any other incorporated documents: **R v Ashford Borough Council ex parte Shepway DC [1998] 2 PLCR 12**.

The Decision in Hart Aggregates

Mr Justice Sullivan has considered the application of the Whitley principle in the case of **R (on the application of Hart Aggregates Ltd) v Hartlepool Borough Council [2005] EWHC 840 (Admin)** (“Hart Aggregates”). The case of Hart Aggregates was a case in which the claimant was a company primarily involved in quarrying. It was argued that condition 10 in a 1971 permission (which provided that worked out areas shall be progressively back-filled and restored to levels shown on the submitted plan or to the level agreed by the LPA in accordance with a restoration scheme to be agreed by the LPA before extraction is commenced) was a condition precedent. A restoration scheme not having been agreed by the LPA, it was argued that this condition had been breached. The effect of this, it was argued, was to render the extraction of limestone from the quarry for 34 years unlawful despite the fact that condition 10 had itself been overtaken by the restoration provisions in permissions granted in 1989 and 1996.

Mr. Justice Sullivan held at paragraph 91:(a) that condition 10 had been complied with; and (b) that it was not a condition precedent to which the Whitley principle applied to in any event (because it was simply concerned with backfilling and did not say that details shall be submitted and approved by the LPA before any development takes place). He also went on to consider what would happen if (c) the Whitley principle should be applied to condition 10 and he found as follows: *“the 1971 permission was implemented because the extraction of limestone from the original quarry is immune from enforcement action ...”*

In relation to Sullivan J.’s issue (b) his ratio is at paragraphs 59-62. A condition precedent is a condition which prohibits any development before a particular requirement has been met. Furthermore, it must be bourn in mind that Woolf L.J. (with whom Parker L.J. and Sir David Croom-Johnson agreed) in Whitley (above at page 302 of the report) in relation to how best to describe the relevant conditions said: *“Although in the light of the authorities, Mr Sullivan was right to divide his submission in this way, in my judgment the second submission does not add anything to the first submission and that it is not necessary or helpful to try and determine whether or not the conditions contained in a planning permission are properly capable of being classified as conditions precedent.”*

In respect of Sullivan J.’s issue (c) he was applying the dicta of Buxton LJ in **R (Prokopp) v London Underground Ltd [2003] EWCA Civ 961 [2004] 1 P&CR 31 (CA)** in which he said:

“83. The “Whitley principle” is that development in breach of a condition is not development relevant to the planning permission, and thus must be ignored for the purposes of deciding whether that permission has been implemented. Woolf LJ however recognised an exception to that

principle, in cases where enforcement action in respect of the breach of condition would not be possible: that is, would constitute a breach of the authority's public law obligations. Mr. Clayton argued strongly that that exception must be strictly limited, relying on the judgments in this court in the subsequent case of Henry Boot Homes v Bassettlaw DC [2003] 1 P&CR 372. There the developer relied on what he alleged was a legitimate expectation that the condition would not be enforced. Keene LJ, at §§ 55 and 56 of the leading judgment, emphasised that such claims, while not necessarily to be excluded, must be treated with great caution. The public nature of the planning process was inconsistent with giving effect to private understandings between the developer and the planning authority.

"84. I would venture the following comments. First, there is nothing in Boot to suggest that Woolf LJ's recognition of the possibility that public law rules might inhibit enforcement was limited to cases where, as alleged in Whitley, it would be unfair to enforce because, as in that case, a consent lacking at the date of development had been obtained by the time that enforcement was contemplated. Indeed, at p86B of the report in Whitley Woolf LJ treated that as only a particular example of matters to be reviewed at the enforcement stage. Second, while I respectfully give great force to the observations in Boot referred to in §83 above, the claim made by LUL does not seek private exemption from the planning process but rather, in however unusual and accidental a form, relies on the binding nature in rem of the public documents produced by that process.

"85. I would therefore respectfully agree with the view of Ouseley J in Hammerton that irrationality of enforcement action falls within the public law exception to the Whitley principle; and with the submission of LUL that this case falls within that rubric. Enforcement action is therefore not available in any event against the continued development of the ELLX."

At paragraph 90 Mr. Justice Sullivan applied this approach and held: "if I had concluded that condition 10 of the 1971 permission was a "condition precedent" of a kind to which "the Whitley principle" applied, I would have concluded that there had nevertheless been an effective implementation of the 1971 permission. I would have reached that conclusion on the basis that, limestone having been extracted from the original quarry for some 34 years and the restoration scheme mentioned in condition 10 having been overtaken by the restoration provisions in the 1989 and 1996 permissions, it would be both irrational and an abuse of power for the defendant now to commence enforcement action ...".

Since Sullivan J.'s decision this issue has been considered (obiter) by the Court of Appeal in **Ian Norris v First Secretary of State and Stoke on Trent City Council [2006] EWCA Civ 12**. Laws LJ. (with whom Sir Paul Kennedy agreed at 48 but Arden LJ at 47 preferred not to express a view beyond saying that the relevant question is whether a public law exception to the Whitley principle applies), having discussed the relevant authorities, summarised the position at paragraph 40:

"40. We can see from this line of authority how the Whitley principle stands today. It is to the effect that unlawful operations cannot amount

to the commencement of development under a planning permission. On the face of it operations undertaken in breach of a condition will be unlawful. But there will be circumstances in which, for one reason or another, operations which on their face violate a condition are not to be treated as unlawful: notably, but not exclusively, where enforcement action taken against such operations would on the facts be irrational within the meaning of the Wednesbury principle ([1948] 1 KB 223). As the citation from Buxton LJ's judgment in Prokopp at paragraph 85 shows, the Whitley principle has heretofore been expressed as a rule that operations in breach of condition cannot suffice to commence development under a planning permission, and then there is recognised exception to the effect that the breach of condition is excused for the purpose of the rule if it could not lawfully be the subject of enforcement process. I venture to think that this formulation fails to catch the principle's true basis. The reason why operations in breach of condition will not ordinarily suffice to commence development is that a developer (like anyone else) should not be advantaged by his own unlawful act. But a breach of condition will not be treated as unlawful for this purpose if it would be irrational, or otherwise legally objectionable, to enforce against it. As it seems to me the true principle, therefore, is that unlawful operations cannot amount to the commencement of development.

41. Consistently with this approach Mr Dove submits that the March 2002 works were not unlawful operations. To make good his submission he has to show it would not have been legally proper for the council to have taken enforcement action in relation to them."

The Decision in Bedford

Judge Wakeman QC has recently considered the application of the Whitley principle in the light of the Hart Aggregates case in the case of **Bedford BC v (1) The Secretary of State for Communities and Local Government and (2) Alexander Stanislaw Murzyn [2009] J.P.L. 604** ("Bedford"). The planning permission in question related to a barn conversion. There were two material conditions attached to the permission. A landscaping condition [2] which started: *"Before the development is commenced..."* And a boundary treatment condition [3] which required such details *"prior to commencement of development"*. A distinction was drawn between these wordings.

However limited weight can be attached to *Bedford* because the Judge was not made aware of the judgement of the Court of Appeal in *Tesco Stores Limited v North Norfolk District Council*, 11th March 1999 ("Tesco").

The Decision in Tesco

In the *Tesco* case condition 4 (drainage) used the wording *'prior to commencement'* whilst condition 5 (highway improvements) used the wording *'no development shall take place before'*. In the Court of Appeal in this respect Buxton LJ stated:

"It will be particularly noted in relation to the drainage condition that, as also did Condition 5, it imposed a condition precedent to the commencement of development. If those conditions had not been fulfilled

on 2 June, 1995, the works undertaken on that day could not in any event fulfil the condition as to the commencement of development, since such development must take place in accordance with the requirements of planning control: see Whiteley and Sons v Secretary of State Wales (1992) 64 P&CR 296. Those conditions are in this respect to be contrasted with the reserved matters conditions, which imposed a specific requirement to seek approval of those matters, and limited the time for commencement of the development according to the granting of such approval."

Importantly there was no attempt to distinguish between the different wording used in conditions 4 and 5 – both were held to be conditions precedent.

Conclusions.

From the above it is clear that one should approach the matter in the following way:

- (a) Has the condition been breached?
- (b) Is the condition a condition which expressly prohibits any development before a particular requirement has been met?
- (c) Would it be irrational or otherwise legally objectionable to enforce against the breach of condition? ie Does the condition go to the "*heart of permission*" dicta of Sullivan J?

In relation to (a), the applicant has checked his records and I have checked with the Council planning application and reserved matters files which are now contained on microfiche.

I have therefore concluded that condition 3 has not been complied with.

I have concluded that condition 4 was only complied with, in part – namely the sample of bricks.

The conclusions are confirmed in the letter from the Council dated 12 May 2009 (copy attached for information).

In terms of the exception to the Whitley principle in Flintshire on the information that I have seen there is nothing to indicate that the conditions have been complied with in substance. If no information was submitted as required by the conditions then it could not be argued that all that was missing was a formal application to discharge the conditions and a formal notice of their discharge.

In relation to (b), it is my view that Condition 2 of the 1989 expressly prohibits any development before a relevant requirement has been met (the materials of the development to be constructed). It clearly prohibits **development being carried out** until details of the materials have submitted to and approved by the LPA.

In relation to (c), I have seen nothing to indicate that it would be irrational, or otherwise legally objectionable, to enforce against these breaches of condition. More importantly I consider that the materials of the building go to the heart of the permission. In this regard I note that none of the approved plans give any indication of the materials to be used.

17 March 2010

Therefore I conclude that the permission has not been implemented.

As the dwelling was substantially completed more than four years ago it is immune from enforcement action by virtue of section 171(B)(1).

Accordingly a certificate should be issued on the basis that an unauthorised dwelling was substantially completed more than four years preceding the date of this application.

Yours sincerely,

Stephen Jupp

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Chartered Town Planner



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Our Ref: PE/00091/09

Town and Country Planning Act 1990

Dear Mr Jupp,

RE: 95 West Front Road, Pagham

I write with reference to your letter dated 29th April 2009.

I can advise you that I have worked through the microfiche P/17/85 and have not been able to locate any letters which confirm the conditions have been discharged.

I have also worked through the microfiche P/90/85, which were for the reserved matters, this had one letter which referred to a sample of bricks for the external walls. I have attached this letter for your attention.

I hope this is of some assistance.

Yours sincerely,



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12 May 2009

Please ask for: Mr D Vick

Ian Sumnall Chief Executive, Strategy Director • **Colin Rogers** Services Director • **Nigel Croad** Resources Director

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(10/01/85) 12/87

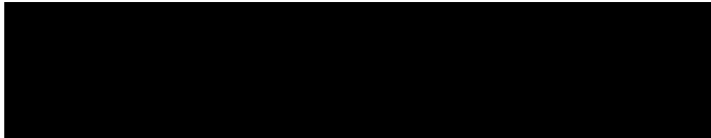
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Dear Mr Perry,

P/90/85 - Erection of Detached Dwelling and Garage
95 West Front Road, Pagnam

I refer to the samples of Capel medium stock bricks recently deposited at my office and can confirm that their use on the external walls of the above building, in place of Rudgewick Multi stock bricks, is satisfactory.

Yours sincerely,



Assistant Chief Planner

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