The Planning Inspectorate

Appeal Decision

Site visit made on 25 November 2020

by Simon Hand MA

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

Decision date: 26 November 2020

Appeal Ref: APP/B9506/X/19/3234931
Land at Rusper Cottage, Croft Road, Neacroft, Bransgore, Christchurch, BH23 8JS

- 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 W Barber and Mrs J Boultwood against the decision of New Forest National Park Authority.
- The application Ref 19/00140, dated 14 February 2019, was refused by notice dated 18 July 2019.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is use of a dwelling without complying with Condition 4 of planning permission 48135 and retention of rooflights.

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the matter constituting a failure to comply with a condition and the existing operations that are considered to be lawful.

Reasons

2. Rusper Cottage was granted planning permission as a replacement dwelling in 1992 and completed in 1993. As the original cottage was quite small and the Council wished to protect the stock of smaller dwellings a condition was attached to prevent the use of the loft area as accommodation, as well as conditions removing permitted development rights to extend the new house. The condition in question said simply "*No accommodation shall be provided within the roofspace of the building hereby permitted*". I note there was no condition to prevent the installation of roof lights.

3. Sometime around 2000 the then owners did install accommodation in the roof and rooflights as well. By 2004 the Council had apparently realised this and a planning application was made to regularise the situation. This was refused as was a subsequent appeal in 2005. A breach of Condition Notice was issued and although I have not seen it, the appellant states it required the use of the roof space as habitable accommodation to cease and for the rooflights and internal staircase to be removed. Eventually, after a hearing in the magistrates' court, the BCN was complied with and the case was closed in 2009. An aerial

photograph from 2009 shows the rooflights replaced by new tiles and it is accepted the BCN was definitely complied with that year.

4. In 2012 the current owners purchased the house. At that time the roof space remained as it had been, that is it looked like habitable accommodation, it was plasterboarded and insulated, electric sockets and lights were provided and running water, as one room had been converted into a bathroom. The sale details support this contention, and it makes sense as the BCN did not require the dismantling of the rooms, merely the use to cease and the removal of the stairs and rooflights.

5. Various applications for an extension were made in 2013 and 2014 and the appellant confirms at that time the roof space was used for storage. However, sometime in 2014 or 2105 it seems a spiral staircase was installed along with new rooflights and the use of the rooms in the roof began again as habitable accommodation. None of this past history is in dispute.

6. The dispute between the parties hinges on the interpretation of the condition. The appellant argues the 'provision' of accommodation began in 2000, but definitely in 2004. The condition was thus breached in 2004. The accommodation has been provided ever since, which means the condition has been breached for over 10 years. The Council argue the purpose of the condition was given in the 1992 permission as "*to ensure development proportional in size to the dwelling being replaced*". This has to be seen in the policy context of the time which was to protect the stock of smaller dwellings in the New Forest. Hence permitted development rights for extensions were also removed. Current policy allows smaller dwellings to be extended to 100m^2, and that allowance has been used up at the appeal site by the extension allowed in 2014. The end result of this is the condition should be interpreted to mean no habitable floorspace should be provided or used. The use clearly ceased in 2009 and did not start again until 2014 at the earliest so the breach is less than 10 years.

7. The Council's contention needs some analysis. Firstly I agree that 'accommodation' clearly has the meaning 'habitable accommodation'. Merely flooring the loft for storage purposes would not breach the condition. In my view the normal meaning of accommodation in the sense it is used in the condition would be creating a room or rooms that can be lived in. There is no doubt this had happened by 2004.

8. There is some dispute as to the meaning of the 2005 Inspector's decision[1]. That decision was in an appeal to determine a s73 application to remove the condition. The Inspector found the condition continued to be valuable in protecting the stock of small dwellings, but the application of that decision to the appeal before me is problematical, no doubt because the Inspector was grappling with essentially a policy argument, rather than a technical analysis of exactly what the condition meant. It is unclear to me what conclusion he reaches in the 7th paragraph concerning the importation of the phrase 'habitable' into the condition, but he does seem to conclude in the 9th paragraph that the breach took place as soon as the accommodation was provided "*even before the conversion to habitable rooms took place*". However, if the breach did occur in 1993, when the house was finished, then the breach had been going on for more than 10 years in 2005. This does not

[1] APP/B1740/A/04/1160122 – issued 14 March 2005

seem to have been an argument that was dealt with in the decision, which suggests it may not have been what the Inspector meant. However, whatever he meant exactly, in my view flooring a loft for storage purposes does not amount to the provision of accommodation. It does not seem the Inspector in 2005 was asked to make a specific finding on that issue, and I shall treat the uncertain sentence in the 9th paragraph as a throw away remark to which I shall attach little weight in the context of this LDC appeal.

9. Setting that issue aside, this appeal turns on whether the breach that occurred in 2004 has continued ever since, despite the compliance with the BCN and I have to say that I consider it did. The Council argue that really the condition seeks to prevent the use of habitable accommodation not just its provision, and if I look at the reason for applying the condition and the policy context then this is abundantly clear.

10. I am aware of the case law referred to by the Council[2] but this does not suggest that a condition that seems on the face of it to be perfectly clear and reasonable should have an alternative meaning read into it. In particular Hulme concerned a windfarm noise conditions that were poorly drafted and could be understood in the context of the permission as a whole to include a requirement to comply with the limits set in one of the conditions.

11. The fundamental principles the Courts have set down over the years is that a condition should be construed in the context of the planning permission as a whole, with a common-sense meaning when taken in conjunction with the reason for its imposition and not interpreted too narrowly or strictly. However, it should also be construed objectively, and not by what the parties may have intended at the time and a cautious approach should be taken as its breach can be a criminal offence.

12. The Council argue there is no 'natural' way to interpret the word "provided", the appellant's interpretation is just one possible one and one that is against the established principles of construction and interpretation in that it fails to give effect to the underlying policy.

13. I am not sure this is the case. The condition prevents the provision of accommodation in the roof space. This clearly relates to the reason attached to the permission that the new house should remain proportional in size to the old. It follows from the policy context that the stock of small dwellings should be preserved, and it does achieve all those ends. Unfortunately it does not achieve those ends as effectively as a differently worded condition, such as one that prevented the use of the roof space for any purpose other than storage, or one that required the roof space should not be used for habitable accommodation. These options were open to the Council but it chose to only prevent accommodation from being provided. In my view the condition as worded does apply policy and does support the ends the Council were seeking to achieve. There is no reason, with regards to Trump or Hulme, to read any more into the condition than it contains. The word 'provided' is clearly understood to mean 'to make available', or to 'make arrangement for'. It has no sense of being an ongoing obligation in relation to the use of whatever is being provided.

[2] Hulme v SSCLG [2011], EWCA Civ 638 & Trump International v Scottish Ministers [2015] UKSC 74

14. I can understand why the Council wish me to interpret the condition in the way they suggest, because otherwise the appellant will have successfully circumvented the intention of the condition by creating a house that is larger than policy would allow. But the Council had the opportunity to prevent that when they issued the BCN which should have required the accommodation to be removed, but failed to do so. I think it would set an unfortunate precedent and would be contrary to current case law if I were now to read into the condition something that isn't there and is not necessary to give a sensible meaning to the condition, namely that it somehow prevents the use of the accommodation that has been provided.

15. There is a subsidiary issue of the rooflights. These are to be considered against the criteria in Class C of Part 1 of Schedule 2 of the General Permitted Development (England) Order 2015. The appellant confirms they meet all the criteria of C.1. The rooflights are on the front and back of the house so the only criterion that would seem potentially to be relevant is C.1(b) and the roof lights protrude less then 15cm from the roof plane. This seemed to be the case from my site visit and I have no evidence to suggest otherwise.

16. For the reasons given above I consider the condition has been breached continuously for more than 10 years in that accommodation has been provided since 2004 and that fact that it may not have been used continuously is not relevant. The rooflights are permitted development by virtue of Class C. I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the breach of condition 4 and the installation of rooflights was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Simon Hand

Inspector

The Planning Inspectorate

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 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 14 February 2019 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched in green on the plan attached to this certificate, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason: Condition 4 has been breached for more than 10 years and the roof lights are permitted development by virtue of Class C.

Signed

Simon Hand
Inspector

Date 26 November 2020
Reference: APP/B9506/X/19/3234931

First Schedule

Use of a dwelling without complying with Condition 4 of planning permission so that the provision of accommodation in the roof space is immune from enforcement action and the retention of rooflights.

Second Schedule

Land at Rusper Cottage, Croft Road, Neacroft, Bransgore, Christchurch, BH23 8JS

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

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 and identified on the attached plan. 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.

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Plan

This is the plan referred to in the Lawful Development Certificate dated: 26 November 2020

by Simon Hand MA

Land at: Rusper Cottage, Croft Road, Neacroft, Bransgore, Christchurch, BH23 8JS

Reference: APP/B9506/X/19/3234931

Scale: not to scale