
LEGAL OPINION FOR HENRY AND SARA RICE

relating to the Site at Harewood Park Farm, Leek Road, Cheadle,
Staffordshire, ST10 2EF



3 The Osiers Business Park
Leicester
LE19 1DX

Ref: CAM1/245597.0001

Introduction

- 1 I am asked to advise Mr Henry and Mrs Sara Rice (“the Applicants”) in respect of the planning application (“the Application”) made to Staffordshire Moorlands District Council (“the Council”) for the removal of Condition 3 (“Condition 3”) of the original permission SMD/1988/0163 for the erection of a dwelling (“the Dwelling”) at Harewood Park Farm, Leek Road, Cheadle, Staffordshire, ST10 2EF (“the Site”) which restricts occupancy.
- 2 I am specifically asked to advise whether Condition 3 is enforceable or otherwise compliant with the relevant law and Government policy on the use of conditions following the issue of a Certificate of Lawful Existing Use or Development by the Council which certified that the breach of Condition 3 was now lawful. For the reasons given below, I conclude that the condition is no longer enforceable or compliant with relevant law and Government policy on the use of planning conditions.

Background

- 3 Planning permission was granted in April 1989 for the erection of an agricultural workers dwelling at Harewood Park Farm with reference SMD/1988/0163 (the “Original Permission”).
- 4 The Original Permission contained a condition (“Condition 3”) that restricted occupancy as follows:
 - 4.1 *Condition 3: “The occupation of the dwelling shall be limited to a person solely or mainly employed, or last employed, within 10 miles of the site in agriculture as defined in Section 290(1) of the Town and Country Planning Act, 1971, or in forestry (including any dependants of such a person residing with him), or a widow or widower of such a person.”*
- 5 The Applicants have been occupying the Dwelling, in breach of this condition, for over 10 years. As such, an application for a Certificate of Lawfulness of Existing Use or Development (“the CLEUD”) was made by the Applicants on 3 April 2023 and approved by the Council on 25 May 2023 (application reference: SMD/2023/0163).
- 6 Approval of the CLEUD meant that the Council certified that the breach of Condition 3 in the Original Permission had become lawful within the meaning of Section 191 of the Town and Country Planning Act 1990 (as amended). This makes the breach by the Applicants immune from enforcement action, i.e. unenforceable.

- 7 Following approval of the CLEUD, the Applicants applied to remove Condition 3 from the Original Permission under Section 73 of the Town and Country Planning Act 1990 (as amended) (application reference: SMD/2023/0274) on the basis of it no longer being enforceable (the “Removal Application”).
- 8 The Council refused the Removal Application on 3 August 2023 on the basis of the condition being in line with the National Planning Policy Framework and *“inappropriate in the Green Belt and, by definition, harmful.”*
- 9 The Applicants wish to appeal this decision (the “Appeal”) under Section 73 of the Town and Country planning Act 1990 (as amended).

The Law

- 10 Section 72(1) of the Town and Country Planning Act 1990 (as amended) allows local planning authorities to impose conditions on the grant of planning permission:
- (1) Without prejudice to the generality of section 70(1), conditions may be imposed on the grant of planning permission under that section—*
- (a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission;*
- (b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period.*
- 11 Whilst the power to impose a condition is broad, the discretion is not unfettered: *“those conditions to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their power for an ulterior object, however desirable that object may seem to them in the public interest”* (Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 1 QB 554)
- 12 Legal tests have been established, as confirmed by Supreme Court in *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd* [2017] PTSR 1413 that a condition must:

- 12.1 Must be imposed for planning purpose;
 - 12.2 Fairly and reasonably relate to the development permitted;
 - 12.3 Not so unreasonable that no reasonable planning authority could have imposed it;
 - 12.4 Subject to other rules of administrative law, such as requirement to take into account all relevant considerations and not to take into account irrelevant considerations
- 13 It has been established that, to comply with the requirement to fulfil a planning purpose, the condition can be no wider in scope than necessary and must relate to a planning need arising from the development (*Newbury DC v SSE* [1978] 1 WLR 1241).
- 14 An inability to enforce a condition falls within consideration of whether a condition is manifestly unreasonable. The right approach to consider enforceability was, not on the basis of what was theoretically possible, but on the basis of whether a person served with an enforcement notice could reasonably be expected to have to comply with (*R (Tew) v Rochdale MBC* [1993] 3 PLR 74).
- 15 Section 70(2) of the Town and Country Planning Act 1990 (as amended) (“the 1990 Act”) requires that, in dealing with an application for planning permission, a local planning authority must have regard to the provisions of the development plan, so far as is material to the application, and to any “*other material considerations*”.
- 16 Section 38(6) of the Planning and Compulsory Purchase Act 2004 (as amended) provides:
- “If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise”*
- 17 S171B of the 1990 Act provides that where there is a breach of planning control not comprising operational development, the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the period of ten years beginning with the date of the breach.

- 18 S191 provides that a person may make an application to ascertain whether any matter constituting a failure to comply with a condition subject to which planning permission has been granted is lawful (s191(1)) and, in the event that the Council is so satisfied and issues a certificate confirming such lawfulness, the lawfulness for which the certificate is in force shall be conclusively presumed.
- 19 In the case of *Ocado Retail Ltd, R (on behalf of) v London Borough of Islington* [2021] EWHC 1509 (admin), the High Court concluded:
- 20 *159. I have reached the clear and certain conclusion that, with great respect, I should not follow the decisions in Ellis and in Nicholson, that a breach of condition which has become lawful after continuing for 10 years does not remain lawful unless that breach continues thereafter. I do not consider that those decisions can be reconciled with the following key points, along with the earlier analysis in this judgment:-*
- (i) The requirement that a breach should continue during the immunity period is not contained in the legislation (Sullivan J in North Devon at [30]);*
 - (ii) That requirement is based solely on the rationale for the time limits in s.171B, namely that throughout the relevant period the local planning authority had the opportunity to take enforcement action but failed to do so. The continuity requirement is only concerned with whether the time period for satisfying an immunity period is running. Time only runs while a breach of planning control, whether a change of use or a breach of condition, is liable to enforcement action. Time does not run when a use or breach of condition has ceased;*
 - (iii) Once an immunity period is satisfied, the legislation prohibits the taking of enforcement action thereafter (s.171B). It follows that from then on, any question about whether there is an ongoing breach of planning control against which a local planning authority would be able to take enforcement action would be completely irrelevant. The raison d'être for the continuity requirement disappears upon the expiration of an immunity period. There is no need to consider whether time is running for the purposes of s.171B;*
 - (iv) Once an immunity period expires, what was formerly a breach of planning control becomes "lawful at any time", save only that that planning right does not accrue if it would contravene the requirements of an enforcement notice then in force;*
 - (v) There is nothing in the legislation to indicate that the requirement for continuity to satisfy an immunity period also characterises the nature of the*

legal right which accrues upon the expiration of a time limit in s.171B, or conditions the basis upon which that right may continue to exist thereafter, or that a right which accrues under s.191(2) or (3) ceases to exist when it ceases to be exercised;

(vi) The legislation does not treat a use, operation or breach of condition differently in these respects.

162. The correct legal position is that a lawful planning right which has accrued upon the expiry of a time limit in s.171B is not lost merely because subsequently that right is not exercised for a period of time. That conclusion applies just as much to a right legitimising a breach of condition which prohibited a use as to a use right derived from a material change of use. The law does not require that such a right be exercised on the date when an application for a CLEUD is made (or an enforcement notice is issued), or that it has been exercised throughout the intervening period from the time when it accrued. Instead, the law requires that the right remains in existence at the date when the lawfulness of what it authorises is in issue...

Policy and Guidance

- 21 Paragraph 56 of the National Planning Policy Framework (2021) (“NPPF”) confirms that planning conditions should be kept to a minimum and sets out the only instances in which they should be imposed, that is where they are:

- (1) Necessary;*
- (2) Relevant to planning;*
- (3) Relevant to the permitted development;*
- (4) Enforceable;*
- (5) Precise; and*
- (6) Reasonable in all other aspects.*

- 22 All six circumstances or ‘tests’ as set out above must be satisfied. A local planning authority cannot apply a condition if all six tests are not satisfied.

- 23 The Planning Practice Guidance (“PPG”) provides guidance on what a material consideration is,

“one which is relevant to making the planning decision in question (e.g. whether to grant or refuse an application for planning permission). The scope of what can

constitute a material consideration is very wide and so the courts often do not indicate what cannot be a material consideration. However, in general they have taken the view that planning is concerned with land use in the public interest, so that the protection of purely private interests such as the impact of a development on the value of a neighbouring property or loss of private rights to light could not be material considerations”

Application of the Law and Policy to the Development

- 24 It is clear that the NPPF and the CLEUD are material considerations that the decision maker has to take into account when considering whether Condition 3 should be deleted pursuant to the Removal Application.
- 25 It is clear that Condition 3 is no longer enforceable as a result of the CLUED. In this regard, the Council would not be able to lawfully or reasonably issue an enforcement notice or breach of condition notice which required compliance with it. As such, Condition 3 now clearly fails the legal requirements identified by the above authorities and clearly fails the policy requirements of the NPPF. In this regard, it should rightly be deleted from the Original Permission.
- 26 Whilst the lack of enforceability of Condition 3 is sufficient to warrant its deletion, it is also considered that Condition 3 can now no longer fulfil a planning purpose, be necessary or relevant to planning and the development given that it is established by the CLEUD that the Dwelling can be occupied lawfully without an agricultural occupancy restriction.
- 27 I would also add that any argument that the potential to enforce the condition in the future means that it should not be deleted is entirely flawed. As the CLEUD establishes that it is lawful for the dwelling to be occupied without compliance with Condition 3, there is no ability for the condition to be “resurrected” by subsequent compliance with it, for example, by occupation of someone last employed in agriculture. The Ocado case is clear on this point; once an immunity period expires, what was formerly a breach of planning control becomes “lawful at any time” thereafter. Therefore, the established lawfulness of the breach of Condition 3 is and continues to be lawful for the future. It makes no difference whether the condition is subsequently complied with or not and the right accrued upon the expiry of the time limit in s171B is not lost merely because subsequently that right is not exercised for a period of time.

Conclusion

- 28 In light of the above, my firm conclusions are:
- 28.1 Condition 3 of the Original Permission is clearly no longer enforceable as per the grant of the CLEUD by the Council.
- 28.2 Condition 3 also now no longer fulfils a planning purpose, is no longer necessary and is now not relevant to planning and the development.
- 28.3 In such circumstances, I cannot see how the Council can reasonably defend its decision to refuse to delete Condition 3 pursuant to the Removal Application.
- 29 I trust that I have dealt with the issues in relation to this case but, needless to say, if there are any other matters with which I can assist or if any queries arise from this Opinion I shall be pleased to assist further as required.

Chris May LARTPI LLB

Partner, Howes Percival
LLP

9 October 2023