

In the matter of
SYLVESTERS FARM, ROWNALL ROAD, WETLEY ROCKS, ST9 0BT

ADVICE

Introduction

1. I am instructed by Wharfe Rural Planning to advise on an application (“the Application”) for a Certificate of Lawful Existing Use or Development (“CLEUD”) number SMD/2024/0094 – COLE at Sylvesters Farm, Rownall Road, Wetley Rocks, ST9 0BT. The Applicant is John Pointon and Sons (“the Applicant”).
2. The Application relates to the former appearance and use of the building before the addition of cladding and roller shutter doors in 2022. This is described as:

“The erection of a general-purpose agricultural building, formed with three open sides and a profile sheet roof, with the remaining side abutting an existing building”.

3. Specifically, I am asked to address Staffordshire Moorlands District Council’s (“the Council”) assessment of the proposal in relation to the approach set out in *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] 1 W.L.R 983.

Legal principles

Substantial completion of operations

4. The statutory test for whether a Local Planning Authority must grant a CLEUD is at s.191 of the Town and Country Planning Act 1990 (“TCPA 1990”) which states, so far as is relevant:

“(2) For the purposes of this Act uses and operations are lawful at any time if—

- (a) no enforcement action may then be taken in respect of them
(whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
- (b) [...]

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.”

5. S.171B(1) TCPA 1990 provides that the time for enforcement action will have expired four years after the “date on which the operations were substantially completed”. Legislation does not define what is meant by substantial completion, but the leading authority is *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] 1 W.L.R 983. In *Sage* at [6] Lord Hope introduced the importance of a holistic approach taking into account the developer’s intention:

“[...] it makes better sense of the legislation as a whole to adopt the holistic approach which my noble and learned friend has described. What this means, in short, is that **regard should be had to the totality of the operations which the person originally contemplated and intended to carry out.** That will be an easy task if the developer has applied for and obtained planning permission. It will be less easy where, as here, planning permission was not applied for at all. In such a case evidence as to what was intended may have to be gathered from various sources, **having regard especially to the building's physical features and its design.**”

Emphasis added

6. Lord Hobhouse set out the recommended approach and the rationale behind it in more detail, in particular that:

“38. [...] Just as change of use can change the appropriate classification of a completed building so, too, in my opinion, **there can be no logical objection to the appropriate classification of a building in course of construction being changed by use, or by intentions for future use, of the uncompleted building inconsistent with its original classification.** As with a completed building, the change could be either a change from an uncompleted agricultural

building to an uncompleted dwelling, or a change from an uncompleted dwelling to an agricultural barn, whether completed or uncompleted.

39. For example, under the Town and Country Planning General Development Order 1988 (SI 1988/1813) planning permission is in general not necessary for the erection of a building which is reasonably necessary for the purposes of agriculture. A farmer who commenced the construction of such a building would not, by doing so, be in breach of planning control. But **if, before the building operations were complete, his intentions changed and he began to install a bathroom and other features indicative of a dwelling, the operations would be in breach of planning control.** Conversely, I suggest, in a case where the construction of a building as an additional dwelling has been commenced by a farmer but **before the building is complete he changes his mind, decides to use the uncompleted building for agricultural purposes and actually does commence and continue that use, the classification of the structure as an uncompleted dwelling would no longer be accurate. The structure would have become an agricultural building.”**

Emphasis added

7. The ratio of *Sage* was summarised in *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30 as follows:

“62. The ratio of the decision is that, for the purpose of section 171B(1) of the 1990 Act, building operations carried out without planning permission are not substantially completed until construction of the whole building contemplated by the landowner is substantially completed. It was the requirement to have regard for this purpose to the whole of the development contemplated by the landowner which was characterised as a “holistic approach”.”

8. As such, working out when the development has been substantially completed requires the intention of the landowner/developer to be understood as a whole; it is crucial in establishing a benchmark against which to assess whether the amount of development which was carried out at the relevant date can practically be deemed a “substantial” part of what the final structure was meant to be. In order to make this assessment the

decision-maker must have regard to objective sources including the physicality of the actual structure that has been constructed¹ and its subsequent use. This necessarily involves consideration of whether intention has evolved over time.

Burden and standard of proof

9. The Applicant bears the burden of proving the lawfulness of the development on the balance of probability i.e. that it is more likely than not that the development is lawful.
10. In *Gabbittas v Secretary of State for the Environment and Another* [1984] Lexis Citation 581, Dobry J held that an Inspector had erred in law as it was not a good reason to reject the appellant's evidence simply because it was not corroborated by independent evidence. This is reflected in the government's Practical Planning Guidance² which provides:

“Courts have held that Applicant’s evidence doesn’t need to be independently corroborated. If LPA has no evidence of its own or from others to make the Applicant’s account less than probable, there is no good reason to refuse the application unless the Applicant’s evidence alone is not sufficiently precise and unambiguous to meet the standard.”

The Council’s interpretation of caselaw

11. The Applicant considers the date operations were substantially completed to be 24 July 2017, as evidenced by an invoice for completed works. This means the relevant period in which to consider whether there have been four years of agricultural use - such that the opportunity to take enforcement action has expired - is 24 July 2017 to 24 July 2021. The Council consider the date to be March 2022 when the installation of rear and side walls and roller shutter doors were completed.
12. The Council’s Officer Report (“the OR”) correctly identifies the statutory tests and the leading authority of *Sage*, as well as the summary that “the correct approach is a holistic approach”³. However, the Officer then states that “Establishing and examining the applicant’s original intentions therefore, is the task at hand”⁴. The suggestion that it is

¹ *Barry Devine v Secretary of State for Levelling Up, Housing and Communities Cheshire West and Chester Council* [2022] EWHC 2031 (Admin) at [37-39]

² Reference ID: 17c-006-20140306

³ Para. 3.3 OR

⁴ Para. 3.5 OR

exclusively the applicant's intention at the *beginning* of construction which should be considered when assessing whether a building is completed or not,⁵ this contradicts the recommended approach to consider the development in its totality such that the applicant's intention throughout the construction of the development is also relevant.

13. Indeed, the developer's mind may well change after commencing the construction such that other operations are carried out; this is highly relevant when deciding how to classify the structure as substantially completed or not at the relevant date. As Lord Hobhouse sets out, the development may as a result exceed the scope of the original permission or fall within another classification altogether such that permission is not needed.⁶ How the final structure compares to the original intention and whether or not that has been substantially completed is not the only relevant piece of information where there has been a stated change of intention; it is important to then determine whether the latter intention can be supported by the objective physical design and use of the building such that in *that* context the development has been substantially completed.
14. Therefore, in the example provided by Lord Hobhouse - where a developer's original intention is to construct a dwelling house but changes their mind to using it for agriculture before the dwelling house has been completed and then in fact does use it for agriculture - the logical reclassification of the building as agricultural means the level of completion is to be assessed against that intention rather than its earlier intended status as a dwelling house which would be necessarily incomplete. As such, it seems the Council has misunderstood the fact that the intention may mutate *after* the construction has started and therefore it is not a binary decision between whether the Applicant intended to provide an open sided roof only hay barn, or an enclosed storage shed.⁷
15. The Applicant accepts that the intention was always to use the building for agriculture generally. However, the Applicant also submits that there was a more specific agricultural use intended; applying *Sage*, this should also be taken into account since it impacts both the physical designs of the structure and the need for planning permission. The Applicant states that their original intention was for general hay, machinery and grain storage but that they subsequently changed their mind to intend to store only hay and

⁵ Para. 3.4 OR

⁶ *Sage* [2003] 1 W.L.R 983 at [39]

⁷ Para. 3.5 OR

machinery. In those circumstances they argue that their intention as borne out in the construction was ultimately not to carry out the 2016 permission at all, but a structure with open sides i.e. their intention changed from carrying out the 2016 permission to a different type of development for agricultural use.

16. Even if the Council consider that the development started with an original intention to carry out the 2016 permission, they should apply the recognition of mutable intentions in *Sage* to also take into account the evolution to a different form of agricultural development and then consider whether *that* building was substantially completed. There is nothing in case law to suggest that their intentions within the same general category cannot be distinguished. Instead, the reference to a holistic approach must logically include the specific circumstances of that development and therefore the detailed intentions of the developer (as corroborated by objective evidence); these are what the decision-maker should judge the completion level of the building against.

The evidence

17. The OR refers to comments from 17 objectors.⁸ Although I have not had sight of the individual objections, the fact the Council say that they do not assist in determining the Application (because they are focussed more generally on the harms of using the site) supports the strength of the Applicant's evidence since it is not evidence that the Council can rely on to make the Applicant's evidence seem less probable.
18. The suggestion that another objector's observations in relation to an application for a solar farm and the sale of the Applicant's harvester in 2019 could provide information about the Applicant's original intention is overstated.⁹ As set out above, evidence from others is only important insofar as it can make the Applicant's account less than probable. Here, the fact that the Applicant may have been considering their options for a proposal which *surrounds* the site does not show that they did not intend to use the building for agriculture when it was constructed and/or for the duration of the four years even if they went ahead with that plan. Similarly, the sale of a harvester does not demonstrate that the other agricultural use of storing hay was not intended to continue;

⁸ Para. 5.2 OR

⁹ Para. 6.1 OR

the important fact was that the building could accommodate both hay and machinery if required, but that it could not store grain and was not intended to do so.

19. The OR asserts that developers would benefit from being able to “claim lawfulness after installing the rudimentary elements of the structure and using it for agriculture until the perceived risk from enforcement action had passed”.¹⁰ This is commercially illogical as developers would have to wait for four years to use it for its proper purpose. Further, insofar as this assertion is being presented to discredit the likelihood of the Applicant’s intention, this does not follow the approach in *Gabbitas* whereby actual evidence would be needed to show that this was the Applicant’s plan.
20. In analysing the Applicant’s statement, the OR criticises the fact that the Applicant’s statement “does not expand upon or explain the detail of those “changing needs” that, he says, was the motivation to disregard the terms of the 2016 planning approval”.¹¹ It is for the decision-maker to conclude whether or not the Applicant’s evidence is sufficiently precise and unambiguous such that their stated intention should be believed as more likely than not. Although more detail on why the intention changed may enhance the credibility that a new intention arose, there is no requirement to provide the reason for a new intention, let alone justify that reason. Indeed, the decision-maker is not required to agree with the logic of the Applicant’s plans but is merely to decide whether or not it is probable on the evidence provided. It does not follow that the evidence is necessarily imprecise; it does set out the most important detail in relation to the later intention i.e. what the difference in storage use was.
21. Similarly, the OR criticises the Applicant for not explaining why the size of the structure was required. This takes the need to consider whether the intention is supported by the objective physical design too far as there is no suggestion that the standard of proof is only met where an Applicant’s evidence demonstrates the building was used at all times to its full capacity. Indeed, if a dwelling is built with four bedrooms but there is only evidence of it being used by one person, there is still sufficient evidence to demonstrate a use that can evidentially support a stated intention. Following *Sage*, there would not even need to be evidence that the structure had been used as a dwelling if there were physical

¹⁰ Para. 6.3 OR

¹¹ Para. 6.6 OR

features that suggested it would ordinarily be used as such.¹² There must simply be sufficient evidence to show unambiguously that there was a continuous agricultural storage use of the type specified to reflect the stated intention.

22. The Council also seem to have misunderstood the key quality the Applicant's evidence needs to demonstrate as it suggests that the storage is only shown in photographs as "occasional". However, this fails to recognise the fact that the photographs were snapshots that were not taken at the time purely to support the Application. It also introduces a new criteria of requiring evidence to be frequent. This not only has no basis in case law, but also ignores the presumption in favour of the Applicant where there is, as here, no other evidence to contradict the case presented.

Conclusion

23. Applying *Sage*, the developer's latter intention to store only hay and machinery is essential when assessing when a structure that could be used for those purposes was substantially completed. The actual physical design of the structure and the subsequent years of use align with that intention, especially in the absence of contradictory evidence. Therefore, the Council should consider that the structure was substantially completed on 24 July 2017, and that as there has been continuous use for four years after that date, the CLEUD should be granted.

ELANA KAYMER

Kings Chambers

24 April 2024

¹² *Sage* at [14]