

DELEGATED DECISION REPORT

SMD/2024/0116
Valid 07/03/2024

HAREWOOD PARK FARM
LEEK ROAD
CHEADLE

**APPLICATION FOR REMOVAL
OR VARIATION OF A
CONDITION
IN RELATION TO
APPLICATION SMD/1988/0163
RE: AGRICULTURAL
WORKERS DWELLING
CONDITION 3**

(FULL - MINOR)

MAIN ISSUES

Whether it is reasonable and necessary to continue to impose the disputed condition, having regard to evidence relating to the need for an agricultural worker's dwelling on the holding and in the local area and to national and local policies relating to development in the Green Belt.

DESCRIPTION OF SITE

Large detached bungalow, located within the Green Belt to the north of Cheadle 400m from the edge of the settlement. Accessed via a long driveway with a compacted unmade surface that connects to Cheadle Road. Deciduous trees line the roadside and the edge of the driveway.

PROPOSAL

The application is made under s73 of the Act, seeking a new planning permission for the development already carried out without complying with conditions subject to which the previous planning permission was granted.

Specifically, the application seeks a new permission for the dwelling that is not subject to the agricultural occupancy condition that was attached to the outline planning permission granted on the 17th April 1989.

SM.1201-88, 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 a widower of such a person."

Reason: The development is justified only on agricultural grounds

This is a second attempt revised application to have this condition lifted from the planning permission for the dwelling. Both applications follow the grant of a certificate of lawfulness that confirms the applicant's current occupation, in breach of the occupancy condition, is lawful because the authority is out of time to take action. With this application, as with the previous attempt, the applicant argues that the condition

is past its usefulness and reasonableness because it is unenforceable. The previous application was refused on the basis that the current breach of condition could come to an end and a new period of occupancy and breach of condition could begin that would be enforceable.

With this application the applicant submits a legal opinion and points to a recent High Court judgement *Ocado Retail Ltd, R (on behalf of) v London Borough of Islington* [2021] EWHC 1509 (admin). This judgement was not previously relied upon and it came to light for both parties after the determination of the previous application and prior to the submission of this one.

RELEVANT LOCAL AND NATIONAL PLANNING POLICIES

Local Plan Development Plan Document (Adopted 2020)

S01 Spatial Objectives

SS1 Development Principles

SS10 Other Rural Area

National Planning Policy Framework

SITE HISTORY / RELEVANT PREVIOUS APPLICATIONS

SM.1201-88 Outline Planning permission for agricultural workers dwelling. Approved 17th April 1989.

SMD/2023/0163 Certificate of Lawfulness confirming the applicant's current occupation of the dwelling, in breach of the condition, is now lawful because the authority would be out of time to take action. APPROVED

SMD/2024/0116 s73 application for a new permission for the dwelling without the restriction of the occupancy condition. REFUSED.

CONSULTATIONS

Publicity

Site Notice expiry date: 2/05/2024

Neighbour consultation period ends: 2/05/2024

Press Advert: N/A

Public Comments

None

Town / Parish Comments

Cheadle Town Council: Awaited

OFFICER COMMENTS

It is clear that the Council would be out of time to take action against the current occupation of the dwelling and breach of planning condition, it is therefore lawful and a certificate of lawfulness has already been granted. The previous application was refused on the basis that, while the current occupation is lawful, this does not have the effect of removing the planning condition from the planning permission. It was the

Council's analysis, with a logic grounded in the judgements in *Nicholson* and *Ellis*, that when the current breach of condition is concluded a new breach of condition could commence that could be the subject of enforcement. It was considered therefore, that when the current occupancy came to an end there would be an opportunity for the property, exceptionally permitted in the Green Belt, to be again exclusively available to agricultural workers within the locality. The Council refused to lift the condition in the absence of any evidence that need within the area had been tested through an exercise of marketing.

However, following the determination of that application the Council became aware of the case of *Ocado Retail Ltd, R (on behalf of) v London Borough of Islington* [2021] this repeat application is submitted, relying on the points from that case. In that case the High Court concluded:

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...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...

Condition 3 of the permission is clearly no longer enforceable, as per the grant of the CLEUD. It also now no longer fulfils a planning purpose, is no longer necessary and is now not relevant to planning and the development. The Ocado case is clear that there is no ability to “resurrect” the condition by subsequent future compliance with it; 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.

CONCLUSION / PLANNING BALANCE

Condition 3 of the Original Permission is clearly no longer enforceable as per the grant of the CLEUD. Condition 3 also now no longer fulfils a planning purpose, is no longer necessary and is now not relevant to planning and the development. In such circumstances, the varied permission, omitting the occupancy restriction, should be granted.

OFFICER RECOMMENDATION : APPROVE

Case Officer: Ben Hurst

Recommendation Date: 2/05/2024

X *J. Colley*

Signed by: Jane Colley Signature

On behalf of Staffordshire Moorlands District Council