

23 April 2013

Ref: 08NP0057

Development Manager
Northumberland NPA
Eastburn
South Park
Hexham
NE46 1BS

Dear Sirs

RE: PLANNING PERMISSION - THE WHITE HOUSE

I am instructed by Andrew Davison the owner of land adjacent to The White House, Harbottle to submit this application. It is an application to discharge conditions on permission 08NP0057.

The sequence of events is that permission was granted in 2005 and again in 2008 for a dwelling on garden land in the village. The permission was dated 16 February 2009 and would have expired on 15 February 2012. The development was commenced on site prior to that date by the installation of a drain into the site from the public mains. This was agreed by the NPA, in correspondence, as being an effective commencement of development such that the permission would thereafter remain extant.

Further the NPA agreed that it would not strictly enforce the conditions on the 2008 permission so that works could be undertaken in stages with the relevant conditions discharged as appropriate. This is embodied in the e-mail of 23 June 2011 from Jessica Taylor. The only condition which the NPA advised should be discharged at that stage was condition 11 relating to a detailed parking plan. Given the site layout drawing 0314/4 submitted with the original application clearly shows 4 parking spaces this condition is at best otiose.

Having commenced the development in 2012 in reliance upon the advice given by the NPA Mr Davison recently sought a certificate of lawfulness in this regard.



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However LDC 13NP0107 was refused by the NPA by notice of 10 January 2014 for the following reason –

"...it is considered that development has commenced on the site, but it has not been commenced lawfully in accordance with planning approval 08NP0057 as commencement of the development has been carried out without meeting the requirements of 6, 8, 9 & 11."

Whilst I agree with the logic expressed in the above refusal reason, there is no reason in law to prevent the NPA from discharging the remaining conditions retrospectively. Hence this application is to regularise the development on site.

This is a specialist legal area and not one I would expect a planning officer to be overly familiar with. I am therefore setting out the relevant case law to assist with this application. The general principle is that set out by Woolf LJ in *FG Whitley & Sons v Secretary of State for Wales* [1992] 3 PLR 72 that development is permitted by the planning permission read with the conditions. Therefore if operations contravene the conditions then they cannot be properly described as commencing the development.

Whilst this principle (commonly known as the Whitley principle) was applied in many cases through the 1990s it is not a statutory code but a judicial creation to fill the gap where the comprehensive planning code was silent. It was followed in *Hart Aggregates* where the Judge advised that it should not be applied in an unduly rigid fashion such that it would frustrate to the underlying purpose of the legislation and lead to absurd and wholly unforeseen events [para 43]. There also exists an exception to the *Whitley* principle whereby an application can be made to discharge conditions after the works have been commenced but before the permission would have expired.

In this case full permission has been granted for a scheme detailing the siting, means of access and appearance for one new dwelling. The NPA now takes issue with conditions relating to a programme of archaeological recording, parking and a temporary storage compound. Put quite simply given the amount of detail which has been approved these are minor details which do not go to the heart of the permission.

Whilst the *Whitley* principle provides flexibility to informally waive or deal with conditions retrospectively it is not to be used to bypass public engagement. Therefore I accept the scope for waiving or discharging conditions in a non-statutory way is limited [see *Henry Boot Homes Ltd. v Bassetlaw DC*].

The second point made in the refusal reason is that the conditions are now not capable of being discharged. I agree that case law generally is to the effect that any conditions can be discharged retrospectively provided the application is made to the LPA before the date on which the permission would lapse.

However this point was considered in *Henry Boot Homes* where the applicant argued that the planning system needs to be practical and flexible such that the Council could allow implementation in a phased way without insisting upon strict compliance with conditions. The Court held that the scope for waiver by the Council by non-statutory means could arise in principle but it would be extremely limited. They found that "circumstances might arise where it was clear that there was no third party or public interest in the matter, and a court might take a view that a legitimate expectation could arise from the LPAs conduct or representations" [see para 56]. Further the court held the conduct of the officers is likely to be germane in such cases. This is self evident because it is the representations of the officers which create an estoppel.

Applying those principles to this case it is clear from correspondence that officers of the NPA made representations to the applicant in 2011 that the conditions could be dealt with in phases (and retrospectively) and/or waived. The applicant relied on those representations in making the drainage connection and not discharging all the conditions in 2011. In my submission the applicant can still rely on that legitimate expectation to have the remaining conditions discharged. It is plainly one of the rare exceptions set out in *Henry Boot*.

Further the NPA has already agreed to deal with conditions in phases *after* the time limit has elapsed so the applicant can raise a legitimate expectation to have this application dealt with now. Finally, there is no requirement to publicise applications under s.73 so this application in no way circumvents public engagement with the proper operation of the planning system.

I am therefore submitting this application to deal with conditions 6, 8, 9 & 11. In relation to condition 6 a qualified archaeologist was on site when the drain connection was made and oversaw the works. A further WSI is therefore provided to discharge the condition in full.

Condition 8 requires a temporary car park, condition 9 a storage area and condition 11 a plan showing four car parking spaces, despite these already being shown on the approved site layout drawing. For the avoidance of doubt I am resubmitting part of the site layout which shows an area at the front on the new house which will be initially used during the construction phase as a temporary car park and storage compound and then as 4 parking spaces.

Should you require any further information, or if your legal officers wish to discuss this in more detail please do not hesitate to call me.



Nicola Allan MRTPI Dip Law