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# Appeal Decision

**by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH**

**an Inspector appointed by the Secretary of State**

**Decision date: 27 July 2020**

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**Appeal Ref: APP/J0405/X/20/3248060**

**Old Oak House, 23B Old End, Padbury MK18 2BE**

- 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 E Pranevicius against the decision of Buckinghamshire Council - Aylesbury Area.
  - The application Ref 19/03554/ACL, dated 1 October 2019, was refused by notice dated 14 February 2020.
  - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended (the Act).
  - The development for which a certificate of lawful use or development is sought is a detached dwelling (C3).
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## Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the existing operation which is considered to be lawful.

## Procedural and Preliminary Matters

2. On 1 April 2020, Aylesbury Vale District Council was one of several local planning authorities to merge into a single Unitary Authority called Buckinghamshire Council. Accordingly, although the LDC application was determined by the former it is proceeding as an appeal in the name of the latter.
3. In response to the COVID-19 pandemic I consider that this appeal can be determined without the need for a physical site visit. This is because I have been able to reach a decision based on the information already available. The Council agreed to the appeal proceeding on this basis and the appellant did not make any objection or comment when asked.
4. In his application, the appellant sought a LDC on the grounds that "the construction of the detached dwelling was commenced in accordance with permission 15/01216/APP by the clearance of the site and demolition of garages from 29th November 2016". Therefore, that is the issue before me and not whether the dwelling as partially built on the site is lawful (or indeed, was lawful at the date of the LDC application).
5. For the avoidance of doubt, I should explain that planning merits are not for me to consider in the context of an appeal against refusal to issue a LDC. My decision rests on the facts of the case, and on relevant planning law and judicial authority.

## Main issue

6. The main issue in this appeal is whether the Council's decision to refuse to grant a LDC was well-founded.

## Reasons

7. The appeal site was formerly 13 garages with a large area of concrete hardstanding. The Council gave planning permission on 25 August 2015 for "demolition of existing garages and the erection of a new, detached dwelling and associated works" (15/01216/APP, the planning permission). Condition 1 of the planning permission provides: *The development hereby permitted shall be begun before the expiration of three years from the date of this permission.*
8. The appellant has submitted evidence, including photographs, showing that the demolition of the garages and hardstanding occurred within the three-year period referred to in Condition 1. The Council does not dispute these operations occurred within this period and, based upon the evidence, I find as a matter of fact that they did so.
9. Demolition of a building is a 'material operation' under Section 56 of the Act for the purposes of determining when development has begun, and it is clear that demolishing 13 garages is not *de minimis* in this respect. It is well-established case law<sup>1</sup> that the test for commencement is not the quantum of work undertaken, but whether the work is related to the planning permission involved. Demolition of the garages was an explicit element of the scheme approved by the planning permission and accordingly represented a material operation comprised in the development. Therefore, its carrying out before the expiry of the three-year period was commencement of the approved development.
10. I acknowledge that the dwelling as partially constructed is materially different to that approved, as dealt with in comments made by Inspectors when dismissing appeals against the Council's refusals to grant retrospective permission for what has been built<sup>2</sup>. However, that fact does not alter the legal position that the permission was commenced by the demolition works within the relevant timeframe. The planning permission is therefore extant. It is however a matter for the Council to consider whether it is expedient to take enforcement action in respect to deviation from the approved scheme.
11. The Council has raised the case of *Whitley*<sup>3</sup> in which a principle was established that if a development contravenes its conditions it cannot be properly described as commencing that authorised by the permission. However, the principle has been further developed in the courts. In the *Hart Aggregates* case<sup>4</sup>, the court took the view that it is necessary for a contravened condition both to be expressly prohibitive of commencement of development and to go to the heart of the permission; only when both tests are satisfied is it a condition precedent to which the *Whitley* principle applies.
12. However, I have seen nothing in the appeal papers to indicate that prohibitive pre-commencement conditions were not discharged. The Council has cited

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<sup>1</sup> *Malvern Hills DC v Secretary of State for the Environment* [1982] JPL 439; *Thayer v Secretary of State for the Environment* [1992] JPL 264

<sup>2</sup> APP/J0405/W/18/3208655, APP/J0405/W/19/3233999

<sup>3</sup> *F G Whitley & Sons v SSW and Clwyd CC* [1992] JPL 856178

<sup>4</sup> *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin)179

condition No 8: “*No windows other than those shown on the approved drawing No.1238-27 shall be inserted in the building hereby permitted*”. This is clearly not a pre-commencement condition, and it follows it is not a condition precedent. Therefore, the *Whitley* principle is not engaged.

### **Conclusion**

13. For the reasons given above I conclude, on the evidence now available, that the Council’s refusal to grant a LDC in respect of the commencement of permission 15/01216/APP 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.
14. Attached to this decision is a LDC describing the extent of the existing operation which is considered to be lawful. The wording of the LDC reflects that the development as a whole approved by the planning permission had commenced.

*Andrew Walker*

INSPECTOR



## 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

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**IT IS HEREBY CERTIFIED** that on 1 October 2019 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red 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:

Operations had been carried out, within the relevant timescale, which constituted a "material operation" to begin the development permitted by planning permission.

Signed

*Andrew Walker*

INSPECTOR

Date: 27 July 2020

Reference: APP/J0405/X/20/3248060

***First Schedule***

Planning permission 15/01216/APP was commenced by the demolition of garages.

***Second Schedule***

Land at Old Oak House, 23B Old End, Padbury MK18 2BE

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.



# Plan

This is the plan referred to in the Lawful Development Certificate dated: 27 July 2020

by **Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH**

**Land at: Old Oak House, 23B Old End, Padbury MK18 2BE**

**Reference: APP/J0405/X/20/3248060**

Scale: Do not scale

