

PLANNING DEVELOPMENT CONTROL COMMITTEE

7 APRIL 2005

BUMBLE COTTAGE, NEWTOWN – LEGAL ISSUES

REPORT OF CITY SECRETARY AND SOLICITOR

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RECENT REFERENCES:

PDC 517- DEVELOPMENT CONTROL APPLICATIONS – 10 MARCH 2005 Item 2

EXECUTIVE SUMMARY:

At its last meeting of 10 March 2005, the Committee considered a part retrospective application in respect of Bumble Cottage, Liberty Road, Newtown, Fareham. The application sought to regularise a deviation from plans approved when an application for a replacement dwelling had been approved in 2002. The Committee resolved to defer consideration of the application pending a Viewing Sub-Committee site visit. This took place on 21 March 2005, and the minutes appear elsewhere on this agenda.

This report sets out the action taken by officers in dealing with the breach of planning control, and considers whether or not the City Council might be estopped from taking enforcement action as a result of advice given to the applicant.

RECOMMENDATIONS:

- 1 That the advice contained in this report be considered with the minutes of the Viewing Sub-Committee meeting of 21 March 2005 when determining the retrospective application.

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BUMBLE COTTAGE, NEWTOWN – LEGAL ADVICE ON ESTOPPEL ISSUES

REPORT OF CITY SECRETARY AND SOLICITOR

DETAIL:

1 Introduction

- 1.1 Planning permission for a replacement dwelling at Bumble Cottage, Liberty Road, Newtown, Fareham was granted in 2002. After development had commenced, it came to the Council's attention that the development was not being constructed in accordance with the approved plans.
- 1.2 Subsequently, a part retrospective application was submitted, to regularise the deviation from the approved plans. The Planning Development Control Committee considered the application at its meeting of 10 March 2005, and resolved to defer consideration of the application pending a Viewing Sub-Committee site visit. This took place on 21 March 2005, and the minutes appear elsewhere on this agenda.
- 1.3 At the 10 March 2005 meeting, it was suggested that advice given by officers was such that the Council would not be legally entitled to take enforcement action against any deviation from the approved plans. This report considers what advice officers have given when dealing with the matter, and considers whether or not the City Council might be estopped from taking enforcement action as a result.

2 Records of Site Visits Carried Out

- 2.1 On 3 December 2004, the Compliance Officer from the Council's Enforcement Team visited the site. The approved plans could not be found, but using a copy of the plan produced by the owner, she checked the siting of the dwelling, and it appeared to be approximately 0.5m forward of the approved position. The Officer explained to the owner that the matter would have to be discussed with a senior officer, and advised the owner that if he continued with the works, this would be at his own risk. It is understood that building work stopped at this point.
- 2.2 The Enforcement Manager visited the site on 7 December. On the plans which were viewed at that time, and the work which had been carried out at that point, the officers did not consider that there was a material impact on the amenities of occupiers of adjacent dwellings. No-one representing the owner was on site at the time. Later, the owner telephoned the Enforcement Section, and was told that it was not considered that there was any material impact on the amenities of occupiers of adjacent dwellings. The owner was also reminded that there were outstanding conditions which had to be fulfilled. These included a landscaping condition which should have been discharged before development commenced.

- 2.3 The owner wrote to the Council on 14 December, indicating that he had recommenced work, following the telephone conversation of 7 December.
- 2.4 Further plans were subsequently obtained, indicating the line of a grass verge, which had not been evident on the first set of plans which were considered. The Enforcement Manager consequently carried out a further site visit on 5 January 2005. With the evidence of the additional detailing shown in the further set of plans, it was agreed on site that the dwelling had been built closer to the road than originally thought. The owner was advised to stop work, and asked to submit an amended application for the development as built. Officers remained of the view that the development as built would not have a material impact on the amenities of the neighbours, but as the discrepancy was so significant, an amended application was requested (rather than an enforcement notice being issued).
- 2.5 At the original meeting in December, the discrepancy was noted, and the owner advised that any subsequent work would be at the owner's risk. Subsequently, a planning judgement was taken that the development as built would not have a material impact on neighbours' amenity. However, once the full extent of the discrepancy became apparent at the January site visit, the owner was advised to stop work.

3 Legal Issues

- 3.1 The Courts have evolved the doctrine of estoppel, which applies in situations where one person acts in a particular way (e.g. agreeing to a particular course of action), resulting in another person acting to their detriment. The first person may be "estopped" from subsequently changing their view if they seek to prevent the second continuing with the course of action which had originally been agreed.
- 3.2 The doctrine was applied in the planning law field, in cases where there was a clear and unambiguous statement from a council officer with ostensible authority to make a decision in the situation.
- 3.3 More recently, however, the courts have indicated that the doctrine of estoppel (which originally arose in matters between private individuals) should not be extended to situations involving public bodies governed by a freestanding statutory code (such as the planning system). Where the planning system has a clear set of processes and procedures (involving formal applications, consultations, determinations, and enforcement action), estoppel is not appropriate.
- 3.4 In *R – v – East Sussex County Council ex p Reprotech (Pebsham) Limited (2002) JPL 821*, the House of Lords concluded that it was no longer appropriate to apply this private law doctrine in the public law field. It is fair to say therefore that the argument of estoppel cannot be argued in planning law.
- 3.5 The House of Lords did refer to the analogous concept of "breach of legitimate expectation", which might amount to an abuse of power. However, it went on to point out that public bodies must also take into account the interests of the general public, and so the concept may not be a real remedy in planning situations.
- 3.6 This latter point was taken further in *R (on the application of Wandsworth) - v - Secretary of State for Transport and O2 UK Limited (2004) JPL 291* by Sullivan J. In that case, he considered that the circumstances where a legitimate expectation might be found in the planning field were limited.

- 3.7 The Courts have therefore significantly reduced the opportunities where developers can claim that action by a planning authority cannot be taken because of what the authority has said or done on previous occasions.

4 Conclusions

- 4.1 In this case, the owner was warned to stop work after the original site visit on 7 December 2004. Subsequently, officers expressed a view that the development as built did not materially affect the amenity of neighbouring properties, and no further action was taken at that stage. However, this view was given in the context of plans which did not show certain features, and the actual discrepancy between the approved footprint, and the footprint as built, was therefore underestimated.
- 4.2 When further copies of the plans were obtained which showed these additional features, it became clear that the discrepancy between what had been approved, and what had been built, was more significant. This became apparent a calendar month after the original assessment, although given the Christmas and New Year holiday period this period equated to less than three working weeks. As soon as the significant discrepancy became apparent, officers advised the owner to again stop work, and asked for an amended planning application to be submitted, in accordance with government advice on enforcement.
- 4.3 Taking into account the latest judicial statements on the relevant law, the fact that the officer advice only changed once new information appeared, and the short period between the original view being expressed and the subsequent advice being given, it is considered that the Council would not be estopped from taking enforcement action if it so wished.
- 4.4 In reaching any such decision, Members will have to decide whether or not it would be expedient to do so. If it is concluded that planning permission would have been granted if the original application had been on the basis of the development as built, it would not be expedient to take enforcement action simply because what was originally approved, and what was subsequently built, are different.

OTHER CONSIDERATIONS:

5 CORPORATE STRATEGY (RELEVANCE TO):

- 5.1 The planning function relates to Key Priority 1 (Homes and Environment).

6 RESOURCE IMPLICATIONS:

- 6.1 None

BACKGROUND DOCUMENTS:

None

APPENDICES:

None