NEW HOUSE AT INSH HOUSE KINCRAIG

SUPPORTING STATEMENT FOR REVISED PLANNING APPLICATION

1. This is an application to remove or amend Condition 2 of the Planning Consent granted on 26 September 2008, ref 08/130/CP. Specifically, the applicants wish to remove the condition that *"the house and two holiday cottages indicated within the red line site plan shall be retained within the same ownership and not sold separately from each other".*

   The applicants are content that the designated use of the two holiday cottages shall remain as holiday cottages; therefore they are content with the second and third sentences of Condition 2.

2. The applicants wish to state that they intend to retain the holiday cottages as such to derive income from them for the foreseeable future. This is consistent with the statement made by them in support of their planning application dated 19 January 2007.

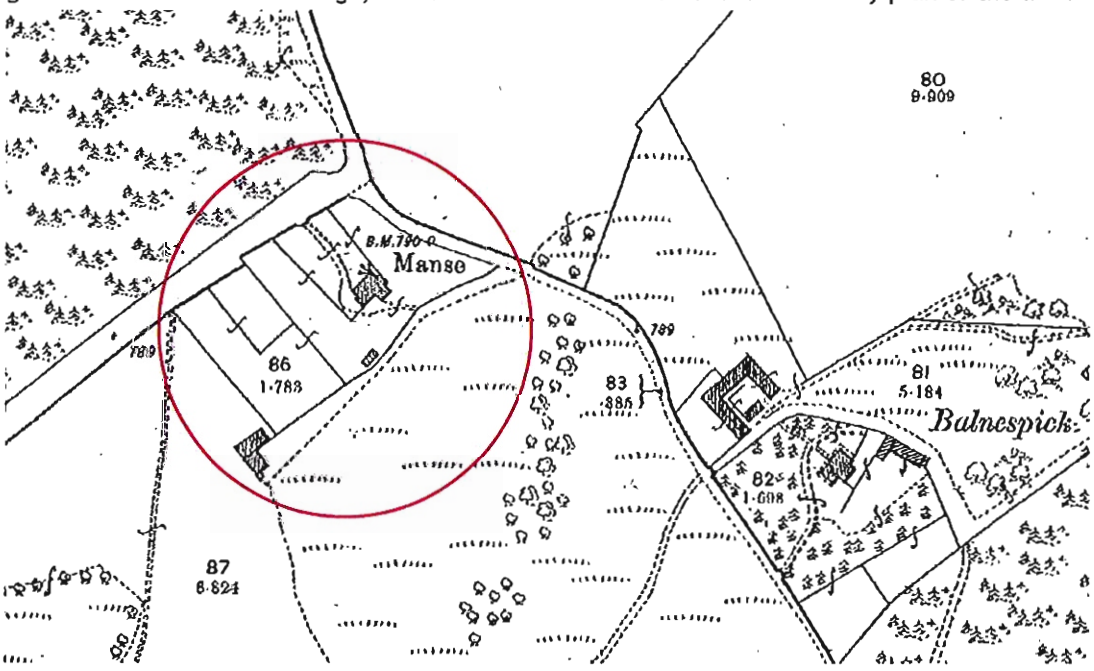
3. The reasons for this request are:

   A) The linking of the properties places an unfair burden on the applicants for two reasons;

   - Although the applicants wish to retain the holiday cottages as a source of income, they consider that, as they will be in retirement, at some time in the future they may no longer be fit enough or able to continue servicing the cottages and at that stage disposal may be a suitable option, and
   - The condition places them in an unfair position regarding relief from VAT on what is in reality a new house designed for their retirement. The VAT rules state that zero rating of goods and services in relation to the construction of buildings is removed if the separate use or disposal of the dwelling is prohibited by the term of any covenant, statutory planning permission or similar provision. The applicants consider that they gave a very full statement of their intentions at the time they applied for planning permission in 2007 and that as there is no change in their intentions the removal of VAT relief places an unfair burden on them.

   B) A further reason is that the application was previously made in terms of the new house being part of a building group, although, at the time, this was not one of the main reasons which led to the granting of the permission. The new CNP Local Plan Supplementary Planning Guidance 'Housing Development in Rural Building Groups' has now clarified the position and it is considered that the new house fits in well with this guidance.

   Insh House, originally a Telford designed manse, was built in a substantial plot with garden ground and a servant's cottage, as can be seen in the 1901 Ordnance Survey plan of the area:



Over time there have been changes to the building group; the servant's cottage was destroyed by fire in the 1950s and was replaced by a new house respecting the siting and orientation in 1977. The Thompson's added the two holiday chalets in 1989 and again respected the SE/NW orientation of the group and also used materials (slate, granite) that related to the existing dwellings.

The new house again is aligned to reflect the original plot divisions and uses the same palette of materials, roof pitches, etc. The resulting building group complies with the terms of the Supplementary Planning Guidance, in particular the buildings are arranged with a good deal of open space around each*, it is not a ribbon development along the road but is set back and relates to the original plot divisions and the group as a whole, with its stone walls, areas of grass and density of tree planting forms a consistent group quite distinct from the surrounding fields and the woodland across the road. This is evident in the layout given below (which is taken from the current revised application drawings).

*Note - there are no windows of apartments in the new house opposite the holiday cottage; small windows to the garage and utility room have been fitted with obscured glass. The minimum distance between the nearest apartment window of the house and those of the nearest cottage are in excess of 19m. These dimensions are figured on Dwg no. BKN 101 which accompanies the application.

Alan Marshall
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12 November 2010

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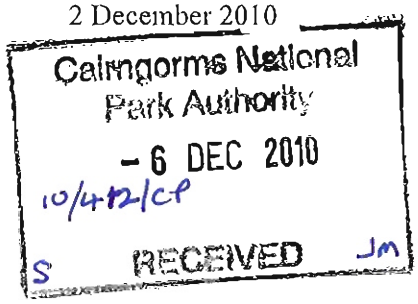
BKN/ASM

2 December 2010



For the attention of Don McKee
Cairngorms National Park Authority
Albert Memorial Hall
Station Square
BALLATER
Aberdeenshire AB35 5QB

Dear Mr McKee

10/412/CP (Highland Council Ref: 10/04625/FUL) – PLANNING APPLICATION FOR APPLICATION UNDER SECTION 42 TO REMOVE OR AMEND CONDITION 2 OF PLANNING PERMISSION 08/90/FULBS (CNPA APPROVAL: 08/130/CP)
AT LAND TO WEST OF INSH HOUSE, INSH, KINGUSSIE FOR NICHOLAS AND PATRICIA THOMPSON

I refer to your letter of 29 November 2010 and write on behalf of Mr & Mrs Thompson to request that they are given the opportunity to address the Planning Committee.

I also write on the applicants' behalf to stress the importance of the matter as it appears that (what is assumed to be) an unintended consequence of condition 2 of the planning consent (08/130/CP) has placed them in an unfair position regarding the application of VAT to their new, retirement, home. This is set out in the statement accompanying the planning application and is not repeated here.

I am concerned that the reason given for CNPA calling in the application " ... *The proposal raises issues of linked significance to the application (08/130/CNP) which the CNPA has previously dealt with and consequently raises issues of general significance for the aims of the National Park*" is properly explained and set out for the applicants prior to the application going before the Planning Committee. In particular, in my opinion, the following points should be addressed:

- The applicants have, for 27 years, provided guest house, letting and caravan stance accommodation for many visitors to, what is now, the National Park. They have been active members of the community since moving to Insh house and as far as I can see their activity has contributed to all four of the aims of the park set out in your letter.

- In deciding to retire from the guest house business, the option of remaining in the location in a sustainable self-build home provided a good long term solution. Retaining the two holiday cottages is a sensible economic provision for their retirement and, at the same time, continues to provide visitor accommodation, again fitting in with the aims of the park. At the same time there may come a point in the future when the applicants no longer feel able to continue servicing the holiday cottages. However, these could continue in their designated use regardless of future ownership.

- The applicants situation can be seen to be quite different from, say, that of a large estate or company providing holiday accommodation that might seek to capitalise on separate disposal of individual properties. Unlike many larger concerns the applicants are not VAT registered and instead have to rely on being able to establish the zero rating of VAT applicable to new housing. In my opinion there is a strong case for treating applications involving holiday letting property on an individual basis, distinguishing applications by scale and intent, rather than trying to establish general rules across the sector, which is where the phrase "... *issues of general significance...* " is of concern.

Partners:
Alan S Marshall BArch RIBA FRIAS MaPS
Jocelyn M Cunliffe MA DipArch RIBA ARIAS MaPS

Consultant:
Tom Gray BArch FRIAS

Another very important issue relating to the VAT rules is that, assuming the CNPA look favourably on this application, it would be important that the consent to remove or amend of the condition is back-dated to the date of the original consent or at the very least to the date that construction commenced (1 December 2009). The reasoning for this is set out in the attached report on a recent tax ruling which has been given to the applicants by their VAT adviser.

I trust that the CNPA will give careful consideration to this application. It is particularly unfair that the applicants, who have contributed to the aims of the park for many years, and now wish to provide for their retirement through a self-build project, are facing a very large financial penalty arising out of the combination of the condition attached to the original consent and the inflexibility of the VAT regulations.

I look forward to your response.

Yours sincerely

ALAN MARSHALL
GRAY, MARSHALL & ASSOCIATES

cc. Mr and Mrs Thompson

Specialist Case Digests

TC00780: Michael James Watson

LNB News 19/11/2010 5

Published Date
19 November 2010

Jurisdiction
England; Scotland; Northern Ireland; Wales

Citation
TC00780

Decision Date
22 October 2010

Court
First-tier Tribunal (Tax)

Judges
MISS J C GORT

Decision
DISMISSED

Catchwords

VAT -

Abstract

VALUE ADDED TAX--Refund on construction of building--Original planning permission for annex--Building Control required further work to be done on basis was new dwelling--Appellant carried out works--Retrospective planning permission for new dwelling granted--Local authority would not use its powers under s.73A of the Town and Country Planning Act 1990 to backdate it to start of work--Whether Appellant caught by Note 2(d) of Group 5 of Sch. 8 of VATA.

Full Text

TRIBUNAL:	FIRST-TIER TRIBUNAL (TAX CHAMBERS)
DECISION NUMBER:	TC00780
APPELLANT:	MICHAEL JAMES WATSON
CASE REFERENCE NUMBER:	LON/2008/0954
NEUTRAL CITATION:	[2010] UKFTT 526 (TC)
RESPONDENTS:	THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
TRIBUNAL JUDGE:	MISS J C GORT
LOCATION:	SITTING IN PUBLIC IN LONDON
DATE:	9 JANUARY 2009, 2 NOVEMBER 2009 AND 10 SEPTEMBER 2010
FOR THE APPELLANTS:	THE APPELLANT IN PERSON
FOR THE RESPONDENTS:	MR C ZWART
RESULT OF THE APPEAL:	DISMISSED

Decision

1. This is an appeal against a decision of HMRC dated 6 September 2007 not to refund VAT in the sum of £11,932.61 claimed under the DIY Builders and Converters VAT Refund Scheme.

2. By his Notice of Appeal Mr Watson stated:

> "Due to wording on original planning document refund was refused. However, Council has issued later, but before completion of project, a letter classing it as a new dwelling. They have later granted a retrospective planning permission for new dwelling for exactly the same build as first planning issued."

The appeal first came on for hearing before Miss J C Gort and Mrs C Farquarson on 9 January 2009 when evidence was heard. The hearing was adjourned until 2 November 2009 for HMRC to approach the Mid Beds District Council, and enquire whether it would ever seek to enforce Condition 5 of the planning decision. The Council replied by a letter dated 22 May 2009 stating inter alia:

> "Planning permission ref: 07/01821/FULL for the retention of the dwelling and vehicular access has now superseded planning permission ref: 05/01047/FULL."

3. Condition 5 related to ref. 05/01047/FULL and provided:

> "The extension hereby approved shall not be used or occupied at any time as a separate dwelling."

The reason given for the imposition of this condition was that: "The additional accommodation created by the development is not suitable, because of the circumstances of the site, to be used as a separate, independent residential unit."

4. Because the letter from the Council did not unequivocally state that Condition 5 of the original planning permission would not be enforced, nor from which date the new planning permission was operative, HMRC were not prepared to concede the appeal. On 2 November 2009 therefore we further adjourned the appeal for Mr Watson to approach the council and ask for the retrospective planning permission to be backdated to the start of the works, or, at the latest, to August 2006.

5. At the date for the further resumption of the hearing, 10 September 2010, Mrs Farquarson was suddenly and unexpectedly unavailable. Both parties were consulted about this prior to that date and both consented to my hearing the continued appeal without Mrs Farquarson. That consent was re-iterated orally before me on 10 September, I therefore conducted the resumed hearing without Mrs Farquarson.

The law

6. Section 35(1) VATA 1994 provides:

> (1) Where -
>
> (a) a person carries out works to which this section applies
>
> (b) his carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and
>
> (c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works
>
> The Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.

Section 35(1A) VATA 1994 provides:

> (1A) The works to which this section applies are -
>
> (a) the construction of a building designed as a dwelling or number of dwellings;

(b) the construction of a building for use solely for a relevant residential purpose or relevant charitable purpose; and

(c) a residential conversion.

Section 35(4A) VATA 1994 provides:

The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that group but this is subject to subsection (4A) below.

Section 35(4A) VATA 1994 provides:

The meaning of "non-residential" given by Note (7A) of Group 5 of Schedule 8 (and not that given by Note (7) of that Group) applies for the purposes of this section but as if -

(a) references in that Note to item 3 of that Group were references to this section.

(b) paragraph (b)(iii) of that Note were omitted.

Note (2) to Group 5 of Schedule 8 VATA 1994 provides:

A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied -

(a) the dwelling consists of self-contained living accommodation;

(b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;

(c) the separate use or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision; and

(d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent.

The Town and Country Planning Act 1990 (as amended) provides:

73A-(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.

(2) Subsection (1) applies to development carried out -

(a) without planning permission;

(b) in accordance with planning permission granted for a limited period; or

(c) without complying with some condition subject to which planning permission was granted.

(3) Planning permission for such development may be granted so as to have effect from -

(a) the date on which the development was carried out; or

(b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period.

Background

7. The Appellant is a private individual not registered for VAT. The claim in dispute relates to the Appellant's property called Thornton View.

8. On 17 June 2007 the Appellant submitted a completed VAT Refund Scheme Claim together with supporting documentation.

The evidence

9. An agreed bundle of documents had been provided and Mr Watson gave evidence on his own behalf. He was a straightforward and reliable witness.

10. The circumstances of this appeal are that Mr Watson at the time of the original application for planning permission was living in Sandy, Bedfordshire, and was working part-time as a scaffolder and part-time as a farmer helping his father, who lived at the property the subject of the appeal.

11. The property lived in by Mr Watson senior and his wife was a three-bedroomed bungalow. As Mr Watson senior became older it became harder for him to manage the herd of pedigree South Devon and Red Poll cattle which he had built up. It was therefore decided to construct an adjoining building in which Mr Watson, the Appellant, could live with his family to be on hand to help his father more readily. In 2004 Mr Watson submitted plans to the local authority in respect of a new building on the site but an issue arose in respect of the requirement that any dwelling on the site be occupied by a person involved in agriculture, and that application, which had been rejected, was withdrawn. Mr Watson consulted with the local planning officer who advised him that if the new building adjoined the bungalow and was annexed to it, permission would be granted.

12. Plans were drawn up for a four-bedroomed house connected to the existing bungalow via a door which led into al corridor and then into the hall of the new house. Planning permission reference 05/01047/FULL, dated 25 August 2005, was granted for a two-storey extension to the existing dwelling to form a self-contained annexe. Five conditions were attached, the relevant one being Condition 5, set out above. The final paragraph of the planning permission states:

> "This permission relates only to that required under the Town and Country Planning Acts and does not include any consent or approval under any other enactment or under the Building Regulations. Any other consent or approval which is necessary must be obtained from the appropriate authority."

13. Despite the clear statement in the planning permission that the new building was to be a two-storey extension to an existing building and formed a self-contained annexe, by a letter dated 31 October 2005 the Building Control department referred to the proposal as being for a 'New dwelling'. On 31 October 2005 the Building Control Surveyor wrote to Mr Watson under reference FP/05/2942 referring to the "Full Plans applications (sic) deposited on 19/10/2005". There is no reference to the planning permission of 25 August 2005. By this letter Mr Watson is informed that under A1 Loading he must provide site specific foundation designs; under H2 Wastewater Treatment Systems and Cesspools he must provide details of septic tank and any outfall; under H3 Rainwater Drainage he must confirm neighbours' permission for soak away to be located across boundary and under M1 Access and use he must provide external works plan to show disabled access to the dwelling. He is also informed that a decision will be made by 23/11/2005 and amended plans should be received at least 14 days prior to that date. Presumably that letter was not received by Mr Watson until 1 November at the earliest, and therefore he had only nine days to produce the plans required. Having given Mr Watson this time limit, on the deadline of 9 November 2005 the Council, using reference FP/05/2942, wrote to Mr Watson describing the application as one for a 'New dwelling' and rejecting it. The reasons for the rejection relate to the following: A1 Loading; H2 wastewater treatment systems and cesspools; H3 Rainwater drainage; M1 Access and Use.

14. By a letter dated 29 December 2005, in which they refer to the planning approval given by reference number 05/1047/FULL, the Building Control department contacted Mr Watson about the naming of the proposed dwelling. It is subsequently given the name of 'Thornton View'. The bungalow is named 'Burford Farm'.

15. The Building Control department appear to have been dissatisfied with the proposed new building because they viewed it as an independent dwelling and not as an annexe. In order to satisfy the requirements of that department Mr Watson had to (i) take more lead out of the holding; (ii) construct a new 4-metre wide x 58-metre long driveway; (iii) create an 18m x 18m five turning area and (iv) create a disabled parking area and disabled access. Mr Watson did not dispute these requirements because, despite the substantial cost of implementation, the effect of the Council treating the planned building as a new dwelling was, he believed, that he would be able to reclaim the VAT, which he could not have done for an annexe.

16. Mr Watson completed the work in accordance with the above requirements and moved in with his family in June 2006, from when he was charged council tax independently of the bungalow. A completion certificate was issued by the Building Department on 17 may 2007 in respect of a New Dwelling. This certificate referred to the plans deposited on 19 October 2005, plans which had been passed by the department on 19 January 2006 under reference FP/05/2942. It should be noted that, following the Building Department's classification of the building as a New Dwelling, Mr Watson did not incorporate the door adjoining the bungalow to the new building, but built a wall there and used the space that was formerly a corridor as a cupboard. He also built on a Conservatory. The plans approved in August 2005 show an inter-connecting door between the bungalow and the approved annex.

17. Following receipt of the completion certificate, Mr Watson made an application for recovery of the VAT paid in respect of the building work under the DIY Builders and Convertors Scheme. It is the rejection of this application which is the subject of this appeal. It was rejected by HMRC on the basis that the Planning Permission of 25 August 2005 referred to the building as an 'extension'.

18. By a letter dated 27 June 2007 the Commissioners requested information about the work undertaken between the date of occupation and the date of completion. The Appellant responded by letter dated 4 July 2007 stating that some of the work was carried out after occupation because of financial and time constraints and also because of remedial work needed to be carried out to satisfy building control for the completion certificate to be issued.

19. By a letter dated 6 September 2007 the Commissioners informed the Appellant of their decision to reject the claim on the grounds that the separate use of the new property was prohibited by the terms of the planning permission for the development, which meant that it was not "designed as a dwelling", for VAT purposes.

20. By a letter dated 9 September 2007, the Appellant advised the Commissioners that he would be seeking reconsideration of the Commissioner's decision because changes had occurred to the development following permission being granted on 25 August 2005. The Appellant enclosed a letter from the Mid Beds Council stating that the building was approved as a new dwelling. He further stated that he would seek a definitive statement from the Mid Beds District Council regarding the property.

21. By a letter dated 21 September 2007, the Appellant wrote to the Appeals Unit, informing the Commissioners that he would be making an application to the Mid Beds District Council to have the planning permission amended. The Appellant included with the letter copies of his correspondence with Mid Beds District Council.

22. On 1 October 2007 the Commissioners requested additional information from the Appellant about the amendment he would be seeking.

23. Mr Watson contacted the Mid Beds planning department who confirmed that it was a new dwelling, and advised him to put in a retrospective planning application to cover all the work for the new dwelling. This was done on 25 October 2007 and on 31 January 2008 the Council issued a Notice of Approval giving retrospective planning permission under reference 07/0182/FULL. This Notice gives the date of the valid application as 25 October 2007. Condition 5 of this Notice is different from the earlier approval, but it does restrict the occupation of the dwelling to an agricultural occupant.

24. By a covering letter dated 3 February 2008, the Appellant provided a copy of the retrospective planning permission granted by Mid Beds District Council on 31 January 2008.

25. In the course of their review the Commissioners contacted the Mid Beds District Council on 15 February 2008 to clarify what effect the subsequent planning permission has on the original planning permission. The Council responded by letter dated 6 March 2008 stating that "*Condition 5 of planning decision (ref; 05/01047/FULL) no longer applies. This decision has been superseded by the planning permission of 12 January 2008*".

26. By a letter dated 1 April 2008 the Commissioners advised the Appellant of their reconsidered view to uphold the original decision and to reject the appeal on the basis that the planning permission did not cover the earlier period when the work was carried out.

27. The Appellant filed a notice of appeal and supporting documentation at the Tribunal on 14 April 2008.

28. By a letter dated 25 June 2008 the Commissioners sought further clarification from the Mid Beds District Council about when the subsequent planning permission came into effect. The Council replied by a letter dated 7 July 2008 stating that the new permission took effect from 31 January 2008.

29. The matter than came before the Tribunal on 9 January 2009 and subsequent events are set out in part above. Subsequent to the letter of 22 May 2009 from the council, and after the second hearing of the appeal, on 21 November 2009 Mr Watson again wrote to the Council in the terms suggested by counsel for HMRC, making reference to s.73A(1) of the Town and Country Planning Act 1990 |(as amended). That section provides a power to the planning authority to grant planning permission for development carried out before the date of the application, whether without planning permission, or without compliance with a condition. By subsection (3), planning permission for such development may be granted so as to have effect from (a) the date on which the development was carried out. Mr Watson had initially contacted the Council by telephone and had been told to put his case in writing, which he did in a lengthy and coherent letter of 21 November 2009. The Council did not reply in writing but informed Mr Watson by telephone that (i) s.73 was not relevant as the new planning permission 07/01821/FULL did not need remedying; (ii) s.73 could not be applied to planning permission 05/01047 as this had been superseded by 07/0181; and (iii) there was no legislative authority for the Council to amend 07/0181.

30. Following the refusal of the Council to apply s.73A Mr Watson consulted a planning expert who gave substantial advice in the following terms:

> "1. I had completed the relevant planning application form in good faith as requested by the local planning authority. With regard to the type of application (item 4 on the application form, copy enclosed), I had ticked type "A" full application. This appeared to be both appropriate and reasonable as there is no specific s.73A option. It is clearly stated on the application form that the development has already taken place and that the application is retrospective (section 3 of the form). The local planning authority has accepted the application as valid and subsequently approved it; the development permitted is the retention of dwelling and vehicular access (Retrospective). It is, therefore, evident that the application is made under Section s.73A; i.e. the application is for planning permission that has already been carried out.
>
> 2. The date on which the development was carried out is made clear in the application documentation (the Completion Certificate issued on 17 May 2007 under the Building Regulations was submitted as supporting information with the planning application). Although not expressly stated in the planning permission itself, the application is clearly retrospective. It is clear that the local planning authority had intended that the permission is granted from the date on which the development was carried out, as provided for by s.73A(3)(a).
>
> 3. It is unfortunate that the local planning authority has been sloppy in drafting the decision notice.
>
> The Act provides that all planning permissions are granted subject to the condition that the development to which it relates must be begun not later than the expiration of three years beginning with the date of the grant, or other such period of time that the local planning authority consider appropriate (s.91). If the planning permission is granted without the time limit condition, it shall be deemed to have been granted subject to the Three year limit by the Act.
>
> Planning permission 07/01821/FULL (dated 31 January 2008) includes a 'standard' condition requiring commencement of the development within three years. This is clearly wholly unnecessary as the development has already been carried out (there also appears to be no need for conditions 2, 3 and 4).
>
> Where an application is made under s.73A, planning permission may be granted so as to have effect from the date on which the development was carried out. The word "may" could be construed as giving discretion to the local planning authority to pre-date the permission rather than it being deemed to be pre-dated by the Act.
>
> However given that s.91 is not appropriate as the development has already been carried out. May I put the case that the intent of this section is to deem that the planning permission does have effect from the date on which the development was carried out. [another example of poor drafting of legislation!]
>
> The local planning authority appears wholly satisfied that the initial supposed breach of planning control has been remedied by the most recent planning permission. For most purposes the current planning permission does suffice."

31. Mr Watson submitted that, on the above basis, s.73A was deemed to be satisfied, and that all relevant matters would need to have been taken into account when 07/01821 was allowed. It should also be considered that when he made his application for retrospective planning permission there was no specific box provided on the form issued by the Council for reference to s.73A to be made.

The Respondents' case

32. It was submitted by Mr Zwart that:

(a) Section 35(1) of the VAT Act 1994 requires the Commissioners to refund VAT to a claimant where statutory criteria (a) and (b) are satisfied in fact by:

(i) qualifying works and;

(ii) the carrying out of such works lawfully;

(b) By section 35(1A)(a), qualifying works means works falling inside the meaning of: "the construction of a building designed as a dwelling" and not other works;

(c) The activity of "construction of a building" assumes the pre-existence in fact of a design of such building;

(d) By application of section 35(4) and Note (2) of Group 5 of Schedule 8, works fall within a "building designed as a dwelling" where conjunctive criteria Note (2)(a) to (d) are satisfied:

(i) Criterion (a), (b), and (c) expressly refer to the same particular ("the") dwelling;

(ii) Criterion (c) requires the absence of both: (1) a statutory consent prohibition upon its "separate use" (2) disposal of that same dwelling;

(iii) Criterion (d) requires in respect of that same dwelling and in chronological sequence:

(1) The existence of a statutory planning consent;

(2) That that statutory consent may be in respect of "that dwelling" to which criterion (a), (b) and (c) refer;

(3) By use of the phrase "and has been" that that consent subsists *before* commencement of the works of construction or can by the terms of a subsequent consent by reference to a date on the face of that subsequent consent be objectively related objectively back to a date also before that commencement;

(4) That those works have been carried out after and also "in accordance with that consent", thereby ensuring that those particular physical works are permitted;

(iv) Criterion (d) cannot be satisfied:

(1) by works undertaken in advance of a statutory consent because these works cannot qualify within the meaning of the Note (2)(d) phrase "*has been carried out* in accordance with", and thereby such works cannot qualify within the meaning of "designed as a dwelling". In consequence of which, those works cannot qualify within section 35(1A)(a) or thereby section 35(1)(a);

(2) by works other than those undertaken "in accordance with" the consent because such other works are by definition not in accordance with that consent;

(v) Since planning permission is required by section 57(1) of the 1990 Planning Act (as amended), it follows that works requiring planning permission, but not undertaken with or within the terms of a statutory consent, cannot qualify under criterion Note 2(c) or (d) nor under section 35(1)(b);

(e) There is a difference between a planning permission granted under the Planning Act 1990 and an approval granted under the Building Act 1984, notwithstanding that the same Council is authorised to exercise these discrete statutory functions;

(f) The terms of the planning permissions state them to not be approvals under the Building Act 1984. It follows that approval under the latter could not detract from the terms of the Planning Act 1990, section 55;

(g) The First Permission permitted a "two storey extension to existing dwelling to form self-contained annexe [sic]" in respect of specified submitted plans including drawing reference 04-297 P D I and was subject to a prohibition on discrete use of the dwelling; Drawing 04-297 P D I shows a door between "existing dwelling" and the "annexe" B135;

(h) Subsequently, the Appellant undertook construction works, completing these on 16 May 2007 shortly before the Council also certified their completion under the Building Act 1984;

(i) On 22 May 2009 the Council stated that "the dwelling was being used as a separate dwelling". It is not known from what date this first occurred. By section 55(3) of the Town and Country Planning Act 1990, planning permission is required for use as one of more dwellings. At the time of completion of the works, there is no evidence of a discrete further planning permission having been granted for an additional dwelling;

(j) On 27 June 2007, the Commissioners received the Appellant's section 35(1) claim;

(k) However, and subsequently, on 25 October 2007 In pursuance of the Council's request of him, the Appellant made an application to it under section 73A(1) of the Planning Act 1990 for permission for his previously constructed development because the local planning authority considered it "was being used as a separate dwelling and was not built in accordance with the approved plans";

(l) Subsequently, on 31 January 2008, the Second Permission was granted for "retention of dwelling and vehicular access (retrospective)" and there is no evidence of it being expressly backdated to a time before the Appellant's completion of his works;

(m) On 22 May 2008, the local planning authority confirmed in writing that (essentially) prior to 31 January 2008 it was entitled to enforce Condition 5 because the Appellant's 'annexe' "was being used as a separate dwelling" (despite Condition 5 prohibiting the same). It follows that it considered Condition 5 prohibited until that January 2008 that discrete planning use.

33. It was submitted by Mr Zwart that:

(a) if the works undertaken are said by the Council to have been in breach of Condition 5 of the First Permission. Note 2(c) cannot have been satisfied by the Appellant at the relevant time (see *Lamming*);

(b) the Second Permission is irrelevant to the Appellant's claim because its grant post-dated his claim and the Council did not in January 2008 exercise their discretion to identify the Second Permission as operative from a date before the currency of the construction works (by back date under section 73(3) of the Planning Act 1990 its currency to a date on or before the Appellant's commencement of the construction work.

34. It was submitted that subsequent qualification in fact within Note 2(c) and/or (d) by reference to the Second Permission is legally impermissible because: (i) as at the relevant time of works completion. Note 2(c) was not capable of being satisfied by reason of the then currency of Condition 5 of the First Permission; (ii) Note (2)(d) required the particular works to have been undertaken before and not after the event of a grant of the Second permission and thereby the Second Permission is irrelevant.

Reasons for Decision

35. In my judgment Mr Zwart's reasoning as set out above is impeccable and therefore Mr Watson cannot succeed in this appeal. For Mr Watson to have succeeded he would have needed the Council to have used its powers under s.73A at the time it issued the retrospective planning consent to backdate the consent to 25 August 2005, so that he would have a valid planning permission at a time before the work began, this was not done by the Council for the reasons set out above. That they might have done it unfortunately does not avail Mr Watson in this appeal.

36. It is disturbing that the Council did not take account of the implications of the above VAT legislation and its potential impact on anyone wishing to build a new dwelling when it devised the application forms for those wanting retrospective planning permission. It is also disturbing that one branch of a local authority, namely, the building department, can apparently misunderstand the nature of a planning permission granted by another department of the same authority. In this case Mr Watson was required to undertake expensive construction works and sacrifice some farmland in order to comply with the conditions imposed by the building department, conditions many, if not most, of which would not have been necessary had it been recognised that the planning permission was for an extension to the existing building, with a prohibition on its use as a separate residential dwelling, and not for a separate dwelling. In their letter of 22 May 2009 (cited above) in which they stated that they could have enforced Condition 5 of the planning permission of 25 August 2005, the Council failed to recognise that it was its own building department which had misled Mr Watson and caused him to consider it appropriate not to build a connecting door.

37. Because of the strict requirements of the VAT legislation Mr Watson's appeal must fail, but it is a matter of great concern that he has been put to the expenditure of a lot of time and trouble, as well as money, as a

result of the above failings of the Council. It is to be hoped that failings will be recognised by Mid-Beds and appropriate steps taken to remedy the situation.

38. This appeal is dismissed.

39. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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