
Appeal Decision

Site visit made on 4 October 2016

by Alan Woolnough BA(Hons) DMS MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 9 November 2016

Appeal Ref: APP/M2270/X/16/3144580

The Chalet, North Road, Goudhurst, Cranbrook, Kent TN17 1JJ

- 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 Mr Alan Wilmhurst, Masterneat Ltd against the decision of Tunbridge Wells Borough Council.
- The application ref no 15/506713/LDCEX, dated 13 August 2015, was refused by notice dated 22 October 2015.
- The application was made under section 191(1)(b) 1990 Act as amended.
- The development for which a LDC is sought is described on the application form as: 'The carrying out of a "material operation" within the meaning of section 56(4)(c) of the Town and Country Planning Act 1990 being the laying of an underground drainage pipe in connection with the commencement of planning permission TW/11/02837'.

Summary of Decision: The appeal is dismissed.

Procedural Matters

1. The appeal site is referred to as Brandfold Terrace Cottage on the appeal form but as The Chalet on the LDC application form and Council decision notice. The latter address, as set out in the above heading, is correct.
2. Strictly speaking, the application now the subject of this appeal sought an LDC under section 191 of the 1990 Act as amended for existing development, namely the laying of an underground pipe. However, the Appellant's purpose in doing so was clearly to establish that the said works amounted to an initiation of development pursuant to section 56 sufficient to constitute the commencement of planning permission ref no 11/02837/FUL/CP4.
3. That permission was granted by the Council on 16 August 2012 for development described in the decision notice as 'Demolition of existing dwelling and erection of a replacement dwelling with a detached double garage'. I have therefore approached the determination of this appeal as if it concerned an application under section 192 for a LDC for works yet to be carried out, namely the proposed development subject to the 2012 permission.

Reasoning

4. The 'commencement' works cited by the Appellant consist of the laying of a short length of underground drainage pipe. Although there is nothing to be seen of these works on site, photographic evidence submitted to the Council before the deadline for the commencement of the 2012 permission fell on 16 August 2015 is sufficient to satisfy me that the works claimed had indeed
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taken place by the relevant time. In determining the application I must consider two principal questions:

- Were these limited works sufficient in themselves to qualify as a commencement under section 56?
- If so, is the 2012 permission precluded from implementation by other outstanding matters, namely non-compliance with conditions precedent?

5. The length of pipe in question is not specified in any of the submissions before me and is not clear from the photographs. However, it is described in the Appellant's 'method statement' as occupying a pit measuring approximately 1 metre x 1 metre. This tallies with plans purporting to show the chamber thus created, such that the maximum possible length (running diagonally across the pit from corner to corner), would be 1.41 metres. The Council has accepted that works so described could, hypothetically, amount to a commencement of permission, albeit subject to other requirements being met.
6. Nonetheless, I must assess the matter afresh irrespective of any common ground there may be between the parties, bearing in mind that the onus of proof is firmly on the Appellant. In doing so I am mindful that very little is needed to implement a permission for operational development. Section 56(2) records that development of land shall be taken to have been begun on the earliest date on which any material operation comprised in the development begins to be carried out. Section 56(3) specifies that the term 'material operation' encompasses, amongst other things, the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any trench which is to contain such foundations or part thereof.
7. In this case the works undertaken to date are so minor and positioned in such a way as to raise the question of whether they are in fact material so far as the 2012 permission is concerned, despite the Council's conclusion in that regard. Having regard to case law arising from the judgment in *Spackman v SSE* [1977] AER 257, 261, it is clear that underground drainage works that are no longer visible without excavation may sometimes constitute a commencement of development subject to a particular planning permission, even in circumstances where the foundations or trenches referenced in section 56(4) have yet to be created themselves.
8. However, this is a run of drainage so short and requiring so little excavation that, if considered in isolation, it would be more usual to regard such works as *de minimis*. Moreover, based on the various plans before me it would seem that rather than being laid to the position of the foundations of the intended replacement dwelling the pipework must surely end at least 1.5 metres short of where the foundations should be, thus falling outside the parameters of section 56(4)(c).
9. Additionally, although a 'new manhole base & pipe' is clearly marked in the position in question on the 'site plan' submitted with the LDC application (ref no 11/9/101 Revision B¹), nothing before me suggests that this plan was approved when planning permission was granted in 2012 or subsequently pursuant to any relevant condition. Nor are the works in question shown on any other plans drawn to my attention as having been approved, as part of a drainage system leading to the proposed foundations or otherwise.

¹ The date of this plan is partially obscured on the copy before me but appears to read 'August 2015', well after the granting of planning permission.

10. I appreciate that it would be possible to extend the pipework to meet the foundations of the approved scheme such that it would become part and parcel of the development subject to the permission in due course. However, this is not the case at present and the Appellant has not shown by means of a drainage layout that it would eventually do so, rather than being abandoned in isolation as development genuinely pursuant to the permission progressed. I am therefore inclined to take a more precautionary approach than adopted by the Council and conclude that, irrespective of any other factors, the Appellant has not fulfilled the burden of proof by demonstrating on the balance of probabilities that this limited operation could actually qualify as a commencement of the development in question.
11. I am aware that the Appellant neglected to address these considerations in his appeal submissions despite having had the opportunity to do so, either overlooking the possibility that I might take a different view to the Council or assuming erroneously that I am bound by areas of common ground. I have therefore considered inviting the parties to make additional representations in relation to that particular point. However, in the light of the further finding I now move on to make, this has proved to be unnecessary.
12. Irrespective of whether operational works sufficient to constitute a commencement of a permission have taken place, it can also sometimes be the case that failure to comply with conditions precedent attached to a planning permission before the deadline for commencement of that permission has passed causes that permission to expire. Indeed, this is the crux of the Council's case for refusal in this instance, its primary focus having been condition (4) of the 2012 permission.
13. This reads: 'Prior to the commencement of development, plans and sections showing the existing and proposed site levels and finished floor levels shall be submitted to and approved in writing by the Local Planning Authority. Levels shall be expressed with reference to an Ordnance Datum and relate to a fixed point within the public highway. The development shall be implemented in accordance with the plans approved under this condition'. The reason for the condition is given as: 'In the interest of visual amenity in accordance with Policy EN1 of the Local Plan'.
14. Two factors fall to be considered. Firstly, having regard to the current position in law, whether the submission and approval of site and floor levels is a genuine 'condition precedent' (going to the heart of the matter with which the permission is concerned such that it is essential that it be complied with before development commences). Secondly, if so, whether the matters subject to the condition had already been adequately addressed by the time it was imposed such that, in effect, it failed the test of necessity set out in the DCLG's Planning Practice Guidance and could have been set aside.
15. With regard to the first of these, the Court of Appeal established in *F G Whitley & Sons v SSW and Clwyd CC* [1992] JPL 856 that if development contravenes the conditions attached to a planning permission it cannot be properly described as commencing the development authorised by that permission. Woolf LJ stated that, in such cases, it is not necessary to try to determine whether or not the conditions contained in a planning permission are properly capable of being classified as conditions precedent or otherwise. Some

exceptions to this principle were contained in *Whitley* itself and subsequent judgments, but are fairly narrow in scope and do not apply in this case.

16. The *Whitley* principle was considered in *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin). Sullivan J held that a distinction had to be drawn between a condition which required some action to be undertaken before development is commenced and a condition which expressly prohibits any development taking place before a particular requirement has been met. He further found that even so it is necessary for the 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 would it be a condition precedent to which the *Whitley* principle applies and where the development would be development without planning permission.
17. However, the subsequent Court of Appeal decision in *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908, to which the Appellant does not refer, applied both *Hart Aggregates* and *Whitley* and, although specifically endorsing the need for the condition to go to the 'heart of the matter' to be a true condition precedent, also held that there was no material difference between a condition which expressly prohibited development before a particular matter was approved and one which required a particular matter to be approved before development commenced. That judgment thus makes it clear that the wording itself need not, after all, be expressly prohibitive. If the substance of the condition is essentially prohibitive in its effect, even though it is only expressed as requiring something to be done 'prior to the commencement of development' (as in this particular case) then it is still capable of being a true condition precedent.
18. Applying the above case law, I find it beyond question that condition (4) of the 2012 planning permission is a true condition precedent. It essentially provides for the finished levels indicated in somewhat rudimentary form on the approved elevational drawing (ref no 11/9/202 revision B) to be amended or refined to provide a more accurate and/or pragmatic response to the topographical challenges presented by developing such a steep site. This could have fundamental implications for the appearance and prominence of the dwelling in the wider landscape and thus goes to the 'heart of the matter'.
19. I have noted the Appellant's reference to the judgment in *Bedford BC v SSCLG & Murzyn* [2008] EWHC 2304 (Admin), in which it was held that particular conditions requiring details to be submitted prior to commencement were not true conditions precedent. However, not only did that case predate the more pertinent *Greyfort Properties* finding, it also addressed only landscaping and boundary treatment conditions. These dealt with more peripheral issues less likely to have implications for the fundamental form of the development than site and floor levels.
20. Turning to the question of whether levels had already been addressed adequately at the planning application stage, it is clear that the Council did not consider this to be so. There is nothing of substance before me to suggest that condition (4) was imposed in error and it is therefore reasonable to assume that the Council was convinced that further details were required. Moreover, had the Appellant considered the condition to be erroneous he could have done something about it at the time, by challenging it in Court, appealing against it pursuant to section 79 of the 1990 Act as amended or pursuing an application

under section 73 to seek planning permission without the need to comply with that condition.

21. He did none of those things. Consequently, the condition stands and has full effect in law. I agree that the Council had details of existing and proposed levels at the application stage sufficient to enable it to judge the likely impact of the development on the site and the surrounding area for the purposes of deciding whether planning permission should be granted in the first place. Nor do I question the Appellant's advice that much time was spent in negotiating an approvable scheme. However, this does not mean to say that the information thus accrued was sufficient to confirm that it would be possible in practice to construct the finished dwelling precisely in accordance with the elevations shown on the approved drawings.
22. In my experience conditions requiring indications of levels to be revisited and refined are commonplace where site topography is so steep, as in this case, as to have likely practical implications for construction methodology. Even where such conditions are not imposed it is not unusual for amendments to approved plans to be sought in response to more detailed practical and technical considerations that arise when, for example, addressing Building Regulations requirements. To my mind, condition (4) merely addressed that likely possibility with commendable foresight, without delaying the grant of planning permission unnecessarily.
23. The professional competence of the original surveyors, although not substantiated, is not therefore at issue. Regardless of this, in order to render such a condition unnecessary in the first place I would have expected to see for a proposal on such a site, at the very least, a series of sections through the development running both north-south and east-west, with their positions clearly indicated on contoured plans, showing existing and proposed site levels and intended floor levels. These could then be used to reaffirm or revisit the accuracy of the elevational drawings.
24. It is not reasonable to expect the Council to rely on plans showing contour and spot heights as a basis for piecing together sections for itself. Indeed, condition (4) requests sections and I wholly endorse that requirement. It follows that the missing detail is more extensive than the internal floor levels identified by the Appellant and that I do not share his view that the condition was unnecessary in the light of information already before the Council when it was imposed.
25. I therefore find that, notwithstanding the Council's finding to the contrary, the Appellant has not met the burden of proof in demonstrating on the balance of probabilities that the works subject to the LDC application were sufficient in themselves to constitute a commencement of the development approved in 2012. Moreover, even if I had concluded otherwise, my further finding that condition (4) remains a sound and true condition precedent, non-compliance with which has in and of itself caused the 2012 permission to lapse regardless of operations carried out on site with the aim of keeping it alive, precludes the granting of a LDC.

Conclusion

26. For the reasons given above and on the evidence before me I conclude that the Council's refusal to grant a LDC was well-founded and that the appeal should

fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Formal Decision

27. The appeal is dismissed.

Alan Woolnough

INSPECTOR