
Appeal Decision

Site visit made on 3 November 2016

by P N Jarratt BA DipTP MRTPI

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

Decision date: 11 November 2016

Appeal Ref: APP/D0840/X/16/3150710

Land rear of Dozmary, Tors View Close, Tavistock Road, Callington, Cornwall, PL17 7DY.

- 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 William Wills against the decision of Cornwall Council.
 - The application Ref PA16/01107, dated 29 January 2016, was refused by notice dated 6 April 2016.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is that a lawful start has been made to planning permission PA13/09067.
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Preliminary matters

1. Although the address on the application for the LDC refers to Land rear of Dozmary, Tors View Close, Tavistock Road, Callington, Cornwall, PL17 7DY, the site is described as land rear of Reay and Welwyn, Tors View Close, Tavistock Road, Callington on the relevant planning permission.
2. The application was submitted for a certificate of lawful proposed works for the balance of works following the commencement works of the laying of mains or pipes. The Council however registered the application as an existing development. I have determined the appeal on the basis that s192(1)(b) is the most appropriate. Notwithstanding the different approaches, the question is whether the permission has lawfully commenced in the light of the conditions attached to the permission and the laying of the pipes on site, such that the developer can complete the proposed development.

Planning history

3. Planning permission PA13/04334 was granted in August 2013 for two three-bedroom dormer dwellings. Planning permission PA13/09067 for the variation of Conditions 4 and 10 on decision notice PA13/04334 was granted on 11 December 2013. Both permissions imposed a condition (at condition 3) which relates to the remediation of the site. The condition states:

The development other than that required to be carried out as part of an approved scheme of remediation must not commence until criteria 1 to 2 have been complied with. If unexpected contamination is found after development has begun, development must be halted on that part of the site affected by the unexpected contamination to the extent specified by the local planning

authority in writing until criteria 3 has been complied with in relation to that contamination.

Criteria 1: Submission of Remediation Scheme

A detailed remediation scheme to bring the site to a condition suitable for the intended use by removing unacceptable risks to human health, buildings and other property and the natural and historic environment must be prepared, and approved in writing, by the local planning authority. The scheme must include all works to be undertaken, proposed remediation objectives and remediation criteria, timetable of works and site management procedures. The scheme must ensure that the site will not qualify as contaminated land under Part 2A of the Environmental Protection Act 1990 in relation to the intended use of the land after remediation.

Criteria 2: Implementation of the Approved Remediation Scheme

The approved remediation scheme must be carried out in accordance with its terms prior to the commencement of the development other than that required to carry out remediation. The local planning authority must be given two weeks written notification of commencement of the remediation scheme works. Following completion of measures identified in the approved remediation scheme, a verification report that demonstrates the effectiveness of the remediation carried out must be produced, and is subject to the approval in writing of the local planning authority.

Criteria 3: Reporting of Unexpected Contamination

In the event that contamination is found at any time when carrying out the approved development that was not previously identified it must be reported in writing immediately to the local planning authority. An investigation and risk assessment must be undertaken, and where remediation is necessary, a remediation scheme must be prepared in accordance with the requirements of criteria 1, which is subject to the approval, in writing, of the local planning authority. Following completion of measures identified in the approved remediation scheme a verification report must be prepared, which is subject to the approval in writing of the local planning authority in accordance with criteria 2.

4. The reason for the condition is stated as:

To ensure that risks from contamination to the future users of the land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors in accordance with section 11 of the National Planning Policy Framework.

5. An LDC application PA 14/05394 which related to planning permission PA13/04334 was refused in 27 February 2015 on the basis of the failure to comply with condition 3.
6. This LDC appeal is in respect of PA13/09067.

Main issue

7. I consider that the main issue is whether the Council's decision to refuse to grant a lawful development certificate was well-founded.

Reasons

8. In brief the appellant considers that the work commenced with the laying of underground mains or pipes but the Council believes that for the development lawfully to commence both criteria one and two of condition 3 must be discharged.
9. I note that the letter to the appellant's agent enclosing the decision notice and dated 11 December 2013 points out that if conditions have been included that must be complied with before the commencement of development and this is not done, the development cannot be validly commenced.
10. The appellant states that the commencement of works consisted of the laying of underground mains or pipes under Section 56(4)(c) and that evidence of those works was provided by a completion certificate dated 4 March 2014 (which I assume to be under the Building Regulations), although the appellant has not submitted a copy in evidence.
11. At my site inspection I found that the site had been cleared and fenced. Three covered drainage inspection chambers were visible; one of which had been constructed prior to the planning permission the subject of this appeal; and two new chambers, one of which was sited differently to that shown on the Proposed Site Plan 998/10 (date stamped 2 October by Cornwall Council). The plan is annotated with 'Proposed drains to be connected to commence on site contaminated land assessment as per condition 3 and to form Beneficial Commencement.....' (sic). However, a statement to this effect does not override the requirements of pre-commencement conditions or the interpretation of Section 56.
12. Section 56 sets out the considerations relevant to when a development can be considered to have begun for the purposes of the Act. This shall be taken to be the earliest date on which any 'material operation' comprised in the development begins to be carried out. 'Material operation' at Section 56(4) includes at (c) 'the laying of any underground main or pipe to the foundations or part of the foundations to the building or to any such trench as is mentioned in paragraph (b)'. Section 56(4)(b) refers to 'the digging of a trench which is to contain the foundations, or part of the foundations, of a building'.
13. There was no visual evidence on site that any foundation trench had been dug or that the underground pipe or main extended to any foundation or part foundation of either of the proposed buildings. Indeed, Proposed Site Plan 998/10 does not show any connection to the proposed buildings.
14. Turning to the requirements of condition 3, it is common ground that criterion 1 has been met. The approved scheme of remediation required under criterion 2 has not been undertaken but the appellant sets out various submissions in support of his case. However, I do not consider that any of these overcome the need to satisfy both criteria 1 and 2 before development commences in view of the considerations set out below.

15. The reason for the condition is clearly set out in the decision notice. Its purpose is to protect end users of the site but also to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other off-site receptors. Whilst the appellant may take the view that the type and level of contaminants found did not require the scheme also to address the protection of those working on the site, this is not a tenable position to take in view of the wording of the condition. The appellant is wrong to assert that the purpose of the condition is met provided that the works are done prior to occupation of the proposed dwellings, as this ignores the clear and unambiguous wording of condition 3.
16. The Soil Contamination Survey dated 23 December 2009 is not just restricted to clean capping but also requires a granular anti-dig layer and two geotextile membranes. I note that the laying of drains and digging of trenches for foundations would be at a lower level than the 700mm top layer but the appellant's assertion that it would make no sense to have these 's56 works' done after clean capping of part of the site. While this might be the case, the argument misses the point. The condition requires the remediation works to be done prior to the commencement of development. This should not have been ignored.
17. The appellant considers that condition 3 is not a true condition precedent that goes to the heart of the development and that failure to comply with the triggers in condition 3 is purely a matter of timing, rather than the absolute prevention of development after a certain point in time, which the appellant says is the proper test of a condition precedent. Notwithstanding the appellant's views, in respect of the appeal site it is necessary to ensure that the site as a whole is suitable for the proposed development and until the site is clear of contamination, which is achieved through the implementation of the remediation scheme required under criterion 2, the condition clearly states that the development should not commence.
18. If the appellant had an issue with the wording or requirements of condition 3, an application under Section 73 for modification or discharge of the condition could have been made, but the appellant chose not to follow this course of action.
19. I have had regard to the case law referred to by the appellant. Following the principle in *FG Whitley & Sons v SSW* [1990] JPL 698, in this appeal the drainage works cannot be said to be lawful as they contravene condition 3. This is not an insignificant breach but one that relates to the fundamental public health related issue of site contamination and remediation which I consider as a matter of fact and degree goes to the heart of the permission, having regard to *R(Hart Aggregates Ltd) v Hartlepool BC* [2005].
20. Whilst the drainage work would ordinarily satisfy the requirements of a 'material operation' as set out in Section 56, in this case the drainage works are in breach of condition 3 of the decision as the remediation works required under criterion 2 have not been carried out. Condition 3 is a true condition precedent which expressly states '*The development other than that required to be carried out as part of an approved scheme of remediation must not commence until criteria 1 to 2 have been complied with*'.
21. Although planning permission reference PA13/09067 does not expire until 11 December 2016, for the appellant to demonstrate that a material start to the

development has already occurred, the onus of proof to do this is on the appellant and the standard of proof is the balance of probability. This has not been achieved on the basis of the evidence before me.

Conclusion

22. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a lawful start having been made to planning permission PA13/09067 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

I dismiss the appeal.

P N Jarratt

INSPECTOR