

Appeal Decision

Site visit made on 15 February 2017

by Jean Russell MA MRTPI

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

Decision date: 03 April 2017

Appeal Ref: APP/P3420/X/16/3159466

Plot 40, Land Adjacent to Woodbury, off Snape Hall Road, Whitmore Heath, near Newcastle, Staffordshire, ST5 5HS

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Timothy Cooper and Mr Arthur William Cooper against Newcastle-under-Lyme Borough Council.
 - The application ref: 16/00395/PLD is dated 12 April 2016.
 - The application was made under section 192(1)(b) of the 1990 Act as amended.
 - The development for which a LDC is sought is the erection of a single dwelling with all associated site work.
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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 proposed operation which is considered to be lawful.

Preliminary Matters

2. The Council has indicated that, had it made a decision on the application subject to this appeal, it would have refused to grant a LDC. I wrote to the parties to give them an opportunity to comment on judgments cited in my reasoning below. I have taken account of the representations received.

Main Issue

3. The main issue for this appeal is whether any planning permission (PP) has been granted, is extant and is capable of implementation for the proposed erection of a single dwelling with all associated site work on the appeal site.

Reasons

4. The appeal site lies within a designated Green Belt, but nevertheless surrounded by post-war dwellings set in spacious plots. The properties were built following grants of planning permission for residential development near to the village of Whitmore.

Planning Permission ref: NNR780

5. PP ref: NNR780 was granted on 16 September 1953 for the development of land for housing at Whitmore Common, in accordance with the accompanying plans. The Council has submitted what it considers to be the only approved plan; dated 3 June 1953, it identified 28 unnumbered housing plots.
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6. NNR780 was granted subject to two conditions, with no. 1) being that 'before any development is commenced, details of the proposed development shall be submitted to and approved by the local planning authority'. Thus, I agree with the Council that NNR780 is an outline PP to all intents and purposes; that the word 'outline' does not appear in the decision notice does not alter that finding¹.

Planning Permission ref: NNR1378

7. PP ref: NNR1378 was granted on 18 December 1956 for the erection of dwellinghouses at Whitmore Heath in accordance with accompanying plans. The drawings ref: 807/1/13A and 807/1/9G identified 40 rather than 28 plots, with nos. 1-28 marked as 'already developed' and 31-40 as 'now to be developed'. However, the land defined as Plots 31-40 was also within the site shown on the plan dated 3 June 1953 and so approved for housing development under NNR780.
8. In a memorandum dated 23 November 1994, the Council's Head of Legal and Administrative Services advised that '*application TP1378 was intended to be a submission of reserved details in respect of the earlier outline permission of the 16th September 1953*' – because the submitted plans referred back to NNR780. The appellants cited that and later advice from the Council in support of this appeal.
9. However, condition no. 2) imposed on NNR1378 was that 'no development shall be commenced until details of the proposed development have been submitted to and approved by the Local Planning Authority'. The Council now holds that NNR1378 is a separate outline PP. I agree – and that the approved plans showed little except a different division of land subject to NNR780 adds weight to that assessment.

Are NNR780 and NNR1378 Extant?

10. Condition no. 1) imposed on NNR780 and condition no. 2) on NNR1378 did not set a time limit for the submission of details. However, the *Town and Country Planning Act 1971* imposed retrospective time limit conditions on PPs granted prior to 1969. NNR780 and NNR1378 would only be extant if at least one reserved matters application had been made pursuant to each, approved and implemented by then.
11. The majority of dwellings built in this area appear to have been built in accordance with applications that were not definitively made pursuant to NNR780 or NNR1378. However, the application ref: NNR1849 was expressly made pursuant to NNR780. It was approved on 2 July 1959 after works had begun².
12. The officer's report indicated that NNR1849 was made pursuant to NNR1378. The Council now suggests that the report would be more reliable than the application form – but the latter included an unambiguous reference not only to '780' but also the date of that PP. The report did not state that, let alone why, the Council then considered the application inaccurate. The *decision* relating to NNR1849 must be deemed to be an approval of what was applied for, and so NNR780 will be extant.
13. NNR1378 is also extant because an application ref: NNR1689 was made pursuant to it for a single storey dwelling and garage at 'Plots 39, 40' – and it was approved on 2 July 1958 and implemented. It follows that dwellinghouses could still be built on any remaining plots approved under NNR780 or NNR1378, but only after the submission and approval of details – through 'reserved matters applications' – in

¹ The concept of outline planning permission was introduced in the *Town and Country Planning General Development Order 1950* and the *Development Charge Applications Regulations (SI 1950/728)*.

² The application ref: NNR1002 was made pursuant to NNR780 and approved on 9 December 1954, but the Council has no record of implementation. The application ref: NNR1419 was made pursuant to NNR780 and is believed to have been approved on 15 January 1957, but the Council does not have a copy of the decision.

accordance with the conditions imposed on those outline PPs³. It cannot be said that NNR780 or NNR1378 has authorised any 'associated site work'.

Woodbury and the Appeal Site

14. As noted above, the application ref: NNR1689 was made pursuant to NNR1378 and in respect of land identified as 'Plots 39, 40'. Since the scheme involved the erection of one dwelling, the Council plainly authorised the development of those two plots as a single residential property. Plots 39 and 40 were shown on the NNR1378 plans (807/1/13A and 807/1/9G) as to be divided by a line running north east-south west. The bungalow proposed under NNR1689 was to be sited across that line. It was built as approved and is named Woodbury.
15. The area of land forming Plots 39 and 40 under NNR1378 was also shown as forming two plots on the drawing dated 3 June 1953, approved under NNR780. On that plan, however, the unnumbered plots were to be divided on an approximate north-south basis. Woodbury was not approved pursuant to NNR780, but it stands nevertheless so that it is contained within what would have been the plot on the eastern side of the line shown on the plan dated 3 June 1953.
16. This LDC appeal concerns land described as 'Plot 40', and that can only be a reference to the annotation on the plans subject to NNR1378. However, the 'site edged red' on the 1:1250 A4 plan submitted with the LDC application correlates, as a matter of fact and degree, with the plot to the west of Woodbury (or east of a bend in Snape Hall Road) as shown on the plan dated 3 June 1953. The site has no buildings upon it, although it was to be used as part of the garden at Woodbury.

Case Law

17. The appellants claim that NNR780 is a grant of PP for the erection of a dwelling on the appeal site. The Council accepted in its statement of case that *'the siting of Woodbury appears to correlate more accurately with the way the two plots on this bend of Snape Hall Road are depicted under NNR780'*. Nevertheless, the Council also argues that, because Woodbury was permitted pursuant to NNR1378 and so as to straddle the plot line shown on plans 807/1/13A and 807/1/9G, *'any outline planning permission for a dwelling on plot '40' was extinguished...and results in there being no permission that is capable of being implemented.'*
18. It was held in *Pilkington v SSE* [1973] 1 WLR 1527 that there can be any number of permissions covering the same area but if 'PP/A' is implemented, making it physically impossible to implement 'PP/B' in accordance with the terms of PP/B, then PP/B cannot be implemented. It was later held in *Pioneer Aggregates (UK) Ltd v SSE* [1984] 2 All ER 358 that a PP which is capable of being implemented cannot be abandoned but, where there are two mutually inconsistent permissions, implementation of one prevents that of the other.
19. It was clarified in *Prestige Homes (Southern) Ltd v SSE & Shepway DC* [1992] JPL 842 that *Pilkington* does not apply where there is no physical impossibility of carrying out permitted works. There is a difference between 'incompatibility' and 'inconsistency'. Where it is physically possible for PP/B to be implemented, mere incompatibility with PP/A does not render PP/B incapable of implementation.
20. The appellants argue that it would be physically possible to build a dwelling on the site; I agree in principle. NNR1689 has been implemented on 'Plots 39 and 40', pursuant to NNR1378, but the appeal relates to open land which corresponds to a separate plot as approved under the extant NNR780.

³ *Town and Country Planning (Development Management Procedure) (England) Order 2015* (SI 2015/595)

Condition no. 2 imposed on NNR780

21. The Council contends that, following the construction of Woodbury, NNR780 could not be implemented on the appeal site in accordance with condition no. 2) imposed upon it, which was that 'the requirements of the County Surveyor as indicated on the plan shall be complied with'.
22. The appellants have cited *R v SSE ex parte Slough BC* [1995] JPL 1128, where it was held that if a PP is clear on its face, it should not be interpreted in the light of the application or plan; mere reference to a plan is not enough to incorporate it into the PP without clear words to that effect. Prior to and since that judgment, however, the Courts have established that if a PP does refer to the application or a plan, that document may be used as an aid to construction. Extrinsic evidence may also be admitted to resolve any ambiguity⁴.
23. It has further been held that a planning condition needs to be construed in the context of the PP as a whole, and in a common sense way, so that it can be given a sensible meaning if possible. A condition should be considered with the reason for its imposition, so that its purpose and meaning can be understood⁵.
24. I find that condition no. 2) does include 'clear words' which seek to tie NNR780 to 'the plan'. However, neither the Council nor I can discern any requirements of the County Surveyor that might be indicated on the drawing dated 3 June 1953. The decision notice relating to NNR780 sets out one reason for the conditions imposed: 'to preserve the amenities of the neighbouring area'. Whether or not this reason relates to condition no. 2) as well as 1), it does not describe the requirements.
25. The Council has provided a copy of the contemporaneous officer's report pertaining to NNR780. It stated that: '*the County Surveyor approves the scheme in principle subject to the later submission of details of the proposed development and the method of disposing of surface water from the estate. He has indicated on the Plan improvement lines on the County Roads and visibility splays at the junction of the proposed estate road with such roads.*' I shall take account of this extrinsic evidence as an aid to interpreting NNR780 and construing condition no. 2).
26. While the Council has not confirmed this, it seems likely from the various plans, reports and decision notices relating to Whitmore that Snape Hall Road is a County Road and the 'estate roads' described in condition no. 2) would include the accesses constructed to serve new dwellings. It could have been anticipated that the housing approved under NNR780 would serve to increase traffic and turning movements on Snape Hall Road, necessitating improvements to the carriageway, plus the provision of visibility splays at new junctions.
27. But even if all of those suppositions are correct, there is no evidence as to where Snape Hall Road was to be upgraded. Neither the plan dated 3 June 1953 nor the officer's report tells me where any 'estate road' *serving the appeal site* would join Snape Hall Road, or what splays would be required at any such junction – and yet it is clear that the County Surveyor had no objections to the NNR780 plan, which showed the appeal site and land to the west as two housing plots.
28. I have interpreted condition no. 2) so as to give it a sensible meaning and indeed assist the Council. However, there is still no evidence to support the Council's assertion that the construction of Woodbury has made it physically impossible to undertake the works required by the County Surveyor, or therefore implement NNR780 in accordance with its terms and conditions on the site.

⁴ *Slough Estates v Slough BC* [1969] 21 P&CR 573; *Wood v SSCLG* [2015] EWHC 2368 (Admin)

⁵ *Dunnett Investments Ltd v SSCLG & East Dorset DC* [2016] EWHC 534 (Admin), [2017] EWCA Civ 192

29. Moreover, condition no. 1) imposed on NNR780 requires the submission and approval of details 'before any development is commenced...' From this and the absence of relevant information on the plan dated 3 June 1953, it is plain that any reserved matters application for the erection of a dwelling would need to include details of the access to the site – and the application would need to be approved before the access is laid out. Details of the method of disposing surface water would also be submitted with the reserved matters.
30. I cannot speculate as to whether a reserved matters application could or would be made with acceptable access or any other details; this appeal is concerned with lawfulness and not planning merits. I find that the implementation of NNR1689, approved pursuant to NNR1378, would not make it physically impossible to implement NNR780 in accordance with its terms and conditions on the appeal site.

Other Matters

31. In the 1994 memo and a letter dated 26 January 1995, the Council indicated that NNR780 was only for the construction of dwellings in 'not less than one acre plots'. On 30 October 2015, the Council sent an email indicating that NNR780 could not be implemented on the site because it is less than one acre. However, plots sizes were not mentioned in the description of development or the conditions imposed on NNR780. It cannot be construed as a grant of PP strictly for the development of one acre plots – and the Council did not raise this issue in its statement of case.
32. Mature trees on the appeal site are protected by a Tree Preservation Order (TPO). The Council accepted in a letter dated 18 May 2015 that, because the TPO was made after the grant of NNR780, the outline PP would 'take precedence' and development of the site with minimal tree loss could be acceptable. I do not know if the Council is still of that view and, again, I cannot speculate as to whether any reserved matters application would be acceptable in practice.
33. In *Prestige Homes*, however, it was held that an extant PP was not incapable of being implemented, even though that would cause a loss of trees in breach of a condition imposed on a separate and previously implemented permission. I find that the same principle applies here, and the TPO on its own would not make it physically impossible to implement NNR780 on the appeal site.
34. An application ref: 99/890/FUL was previously made for a three bedroom detached dwelling on the appeal site; the Council recommended approval⁶. The Council also advised, as late as 18 May 2015, that the outline PP ref: NNR780 remained extant such that the principle of residential development is established on the site; a reserved matters application form was enclosed with the letter.
35. However, the Council was not bound by its previous comments when it considered this LDC application. The advice given in 1999 and 2015 was based on the 1994 memo which indicated that NNR1378 was approved pursuant to NNR780. The Council has now correctly revised its view to be that NNR780 and NNR1378 are separate outline permissions. That said, there is no contradiction in my agreeing that Woodbury was permitted pursuant to NNR1378, and yet also finding that NNR780 could still be implemented on the appeal site.

Conclusion

36. Where a LDC is sought, the onus of proof is on the appellants and the standard is the balance of probabilities. If there is no evidence to contradict or otherwise make the appellants' version of events less than probable, and their evidence alone is

⁶ The application 99/890/FUL was then withdrawn for reasons unrelated to this appeal.

sufficiently precise and unambiguous, an LDC should normally be granted. The appellants' claim that PP has been granted for the development of land for housing on the appeal site is unambiguous. It is supported by the evidence before me and case law that I must take into account.

37. The appeal site is described as Plot 40 and it formed part of the land which was developed in accordance with the application NNR1689 made pursuant to PP ref: NNR1378. However, the site is also open land that corresponds to a housing plot identified on the plan dated 3 June 1953, approved under the separate PP ref: NNR780, which remains extant. There is no evidence that the implementation of NNR1689 would make it physically impossible to implement NNR780 on the site.
38. For the reasons given, and on the balance of probabilities, I conclude that NNR780 is an extant outline PP for the development of land for housing, and it is capable of implementation on the appeal site. The Council's deemed refusal to grant a LDC for the erection of a single dwelling was not well-founded.
39. However, I also find that PP has not been granted for 'all associated site work' and the Council's deemed refusal to grant a LDC was well-founded in respect of that element of the proposed development. Under s193(4)(b) of the 1990 Act, where a LDC application specifies two operations or other matters, a LDC may be granted for all, some or one of them. The appeal should only succeed in part. I will exercise accordingly the powers transferred to me under s195(2) of the 1990 Act.
40. It does not follow from this decision that the appellants could simply proceed to erect a dwelling on the land. Since NNR780 remains extant, it follows that the Council could – without prejudice – take enforcement action against any breach of condition imposed on that PP. The LDC granted will pave the way for the appellants to submit a reserved matters application in accordance with the conditions imposed on NNR780, and with details of the access to and scale, layout, appearance and landscaping of the proposed dwelling. Any such application would need to be determined on its merits.

Jean Russell

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that, on 12 April 2016, the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended) for the following reason:

Planning permission ref: NNR780 was granted on 16 September 1953 for the development of land for housing at Whitmore Common, in accordance with the accompanying plans. The land described in the Second Schedule and shown edged in black on the plan attached to this decision was identified as a housing plot on the approved drawing dated 3 June 1953.

Planning permission ref: NNR780 was granted subject to conditions that (1) before any development is commenced, details of the proposed development shall be submitted to and approved by the local planning authority; and (2) the requirements of the County Surveyor as indicated on the plan shall be complied with. No time limits were set out for the submission of details. An application ref: NNR1849 was made pursuant to planning permission ref: NNR780, approved on 2 July 1959, and implemented. Planning permission ref: NNR780 is therefore extant.

The land described in the Second Schedule was included within 'Plots 39 and 40' identified on the plans refs: 807/1/13A and 807/1/9G subject to planning permission ref: NNR1378. Plots 39 and 40 were developed in accordance with an application ref: NNR1689 which was made and approved pursuant to the extant planning permission ref: NNR1378. Yet it would not be physically impossible to erect a dwelling on the land in accordance with planning permission ref: NNR780 and its terms and conditions, and thereby subject to the submission and approval of a reserved matters application.

Signed

Jean Russell

Inspector

Date: 03 April 2017

Reference: APP/P3420/X/16/3159466

First Schedule

The erection of a single dwelling

Second Schedule

Land at Plot 40, Land Adjacent to Woodbury, off Snape Hall Road, Whitmore Heath, near Newcastle, Staffordshire, ST5 5HS

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful on the certified date and 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 operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any 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.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 03 April 2017

by **Jean Russell MA MRTPI**

Land at: Plot 40, Land Adjacent to Woodbury, off Snape Hall Road, Whitmore Heath, near Newcastle, Staffordshire, ST5 5HS

Reference: APP/P3420/X/16/3159466

NOT TO SCALE

