The Planning Inspectorate

Appeal Decision

Hearing Held on 7 & 8 November 2017

Site visit made on 8 November 2017

by Sukie Tamplin DipTP Pg Dip Arch Cons IHBC MRTPI

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

Decision date: 16 November 2017

Appeal Ref: APP/J1860/X/3171996
Mythe Bridge House, Ledbury Road, Tewkesbury, Worcestershire GL20 6AA

- 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 Mrs Patricia Curtis against the decision of Malvern Hills District Council.
- The application Ref 17/00020/CLE, dated 6 December 2016, was refused by notice dated 13 March 2017
- The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is confirmation that permissions 13/00077/FUL & 15/00173/S73 have been lawfully implemented.

Summary of Decision: The appeal is dismissed.

Background and procedural matters

1. Mythe Bridge House is located next to the Grade II* Mythe Bridge and the appeal site comprises land both to the north and south of the road bridge and land underneath the bridge itself. The existing house and the land around it have a direct frontage to the River Severn and are sited within the functional flood zone of this major river. The ground floor of the house and the immediate garden is significantly below the level of Ledbury Road, the road leading up to the bridge. Close and to the rear of the house on the north side is an area of lawn, planting and seating areas. To the east and thus towards the river the land appears to fall and at the time of my visit this area was rough lawn.

2. There is pedestrian access between the land to the north and that to the south under the narrow arches that support the western end of the bridge. The land to the south side appeared, on the day of my visit, to be dominated by development and associated paraphernalia associated with the junior rowing club, which is run by Mr Curtis. I saw 4 pontoons in the river which are secured to the land, a trailer with rowing boats which appeared to be ready for immediate use, and a large lockable container used for the storage of more boats and associated paraphernalia. In addition there are various other boats kept outdoors either in the process of construction, or simply being stored. It seems that there are 15 boats in current use. There was also a large volume of what appeared to be aluminium sheets within a workshop building.

Mr Curtis said these had been purchased in order to construct pontoons albeit that he was currently reviewing this.

3. The south side also accommodates a former mobile classroom which is currently being converted apparently for future residential use. Adjacent to this is a 'shepherds hut' and a breezeblock structure which accommodates the boiler for the converted classroom and next to this, an oil storage tank. Finally there is a second portable unit described by the appellant as a 'laundry', this is located next to a long established building originally approved as an industrial unit and now used as a workshop.

4. The evidence is that the house was inundated by flood water in 2007 and there was significant damage to the ground floor. Consequently the appellant applied for and obtained planning permission dated 30 September 2013 reference 13/00077/FUL, (the 2013 permission) for a replacement dwelling. In 2015 planning permission was obtained for a variation of the approved scheme which gave permission for the re-siting of the proposed dwelling to a position 1m to the north, reference 15/00173/S73 (the 2015 variation). Both permissions were subject to a condition (No.1) that said development must be commenced not later than 30 September 2016. The proposed replacement dwelling corresponds approximately with the footprint of the existing house but will be raised by about 1.6m above the floor level of the existing house.

5. The land subject of the appeal before me does not correspond with that given planning permission in 2013 and 2015. This is because it also includes a substantial gravelled area to the north-west. This land is not in the appellant's ownership but she has access rights across it and it appears to be used as an additional parking area in association with Mythe Bridge House.

6. During the Hearing the appellant said that the permission which had been implemented was the 2013 permission. Subsequently, following the site visit, the appellant revised this and said that it was the 2015 variation that had been implemented. However she said that this was not of significance because the works relied upon could be in furtherance of either permission.

7. In order to succeed on appeal it is necessary for the appellant to demonstrate, that the decision of the Council was not well-founded. The test is the balance of probabilities. Although the onus of proof falls on the appellant the Courts have held the evidence of an appellant should not be rejected simply if it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable, and her evidence alone is sufficiently precise and unambiguous, that is enough[1].

8. Planning merits form no part of my considerations which must be determined on the lawfulness or otherwise of the development.

9. At the commencement of the Hearing I requested copies of various documents including a copy of the approved drawings for the 2013 permission and the 2015 variation. I also received copies of the documentation submitted with an application for discharge of conditions received by the Council on 30 September 2017, reference 16/01380/CCO, (the DOC application). These and other documents submitted at the hearing are listed at the end of my decision.

[1] *Gabbitas v SSE and Newham LBC* [1985] JPL 630

10. Both parties were represented by Counsel and exceptionally, and in the light of the significant number of Court Judgments relied upon, Counsel was given the opportunity to put questions to participants at the Hearing and to make legal submissions. This approach was agreed by the parties.

11. The Council conceded that the works in themselves are of sufficient quantity to meet the requirements of Section 56(2) of the Act[2]. This says that development of the land shall be taken to be initiated by material operations including demolition, the laying of pipes and any operation in the course of laying out an access. The thrust of the Council's argument is thus whether or not the works comprise, in the light of the terms of the permissions and the associated conditions, an authorised material operation which is pursuant to the permissions.

Main Issue

12. The main issues in this appeal are whether the works or development undertaken, prior to 30 September 2016 comprise:

    - Material operations which are part and parcel of the approved scheme; and/or
    - Material operations permitted by the conditions attached to the permissions.

Reasons

Material operations

13. The appellant relies on 5 material operations which she says commenced the permission. These were set out in her Hearing statement and comprise:

    a) The installation of a Bio-pure sewage treatment works;

    b) 'Moling' of service ducts under the road;

    c) The provision and occupation of temporary living accommodation on the south side of the road;

    d) The provision of a site access for heavy vehicles and plant including the laying of a new hard-core surface to facilitate site access by heavy vehicles and plant; and

    e) Commencement of the demolition of the existing dwelling including the stripping of roof tiles and the removal of some internal fittings.

14. Court judgments have confirmed that works to implement a permission can be very minor but they must be for the purpose of carrying out the development subject of the relevant permission, *Malvern Hills DC v Secretary of State for the Environment* [1993] 46 P &CR 58 (*Malvern Hills*).

The land subject of the application

15. The land subject of the application for a Lawful Development Certificate (LDC) does not correspond with that of the 2013 and 2015 permissions. It is as a matter of fact, larger and also includes land not in the ownership of the

[2] Town and Country Planning Act 1990 as amended

appellant. None of the plans listed as approved for the 2013 permission and the 2015 variation show any land south of Ledbury Road, though it does appear that this land was shown on the location plans submitted at the time and appears to be within the appellant's ownership.

16. Paragraph 39(2)(c) of the Town and Country Planning (Development Management Procedure) England Order 2015, says that an application for an LDC must be accompanied by a statement setting out the applicant's interest in the land, the name and address of any other person known to the applicant to have an interest in the land and whether any such other person has been notified of the application. An area of land, to the west of Mythe Bridge House, is within the LDC appeal site but is not, as a matter of fact, within the appellant's ownership. There is no evidence before me that the owner, or any tenant of the land has been notified.

17. Consequently no certificate could be granted for this part of the appeal site.

Use of the land

18. As I have noted above the land on the south side of the Ledbury Road is used as a base of a junior rowing club operated by the appellant. Mr Curtis said that the club was very successful and his rowers had won many events. In evidence in connection with an earlier appeal on the land in January 2017[3] (the 2017 appeal), final comments from the appellant said the junior rowers had pre and post rowing requirements including changing facilities, WCs and shelter. The Inspector opined in paragraph 14 of his decision that "I cannot rule out the possibility that the planning unit is in a mixed use as a base for a rowing club and for residential".

19. That appeal decision post-dates the relevant date for the purposes of the appeal before me. However in the light of the evidence which said that this use (the rowing club) has intensified since about 2012, on the balance of probabilities, this use of the land was also taking place on and before 30 September 2016.

20. As I have noted above, there are about 15 boats in regular use and I saw the layout of the site to the south of Ledbury Road is dominated by rowing activity. Mr Curtis and up to 3-4 coaches are employed, although involvement of other coaches may be intermittent. Moreover, although Mr Curtis initially told the Hearing that the newest portable building on the site was not in use and it was a 'laundry' intended solely for residential purposes, he significantly revised this position at the site visit. I saw that there are two toilet cubicles and a cabin with a urinal. In addition there are washbasins fitted and some plumbing connections which I was told were for the purposes of 2 washing machines. The fixtures and fitting are not complete but the sanitary facilities are used by rowers and the unit is connected to the new sewage plant.

21. At the time of the 2017 appeal an unauthorised building was in use as a shelter and waiting facilities for rowers and their parents. A 'shepherds hut' now offers an alternative location for this purpose.

22. Mr Curtis conceded that a rowing club use is taking place on the land and this is unauthorised and requires planning permission; it appears that an application to the Council is imminent. But it is not the role of this decision to

[3] Appeal reference APP/J1860/C/16/3155342 dated 13 January 2017

adjudicate whether or not the land on the south side of Ledbury Road is in a mixed use or indeed is part of the residential curtilage. Notwithstanding this, as a matter of fact, there is significant evidence of a non-residential use and development on the south side of Ledbury Road. Thus use or development of this land which is shown to be development which also serves a non-residential use would not be incidental to the enjoyment of the dwelling house as such[4].

a) The Sewage Treatment plant

23. Condition 2 of both the 2013 permission and the 2015 variation lists the approved plans and these only approve works to the north of Ledbury Road. Indeed the bundle of approved plans does not show that the land to the south of the road was part of either application. However it is not disputed that land to the south is within the appellant's ownership. Irrespective of this the appellant conceded that no development had been approved south of Ledbury Road.

24. Drawing Nos. 2010/878/08 (e)[5] (2013 permission) and 010/36/01/15 (2015 variation) show the approved layout of the site. Both plans show the same location for a proposed treatment plant to the west of the existing and proposed house within an area of lawn to the north of the Ledbury Road. There is nothing on the plans or application forms to suggest that the approved location for the sewage treatment plant was 'indicative' as is now suggested by the appellant.

25. Mr Curtis explained that the land to the north of Ledbury Road is lower than that to the south and because of that, in times of flood, any plant located on the approved siting would be overwhelmed and stop working. He said that there had been problems with the existing septic tank because the pump had burnt out because of water inundation.

26. Consequently he had installed a sewage treatment plant on higher land to the south of Ledbury Road approximately 20m to the south east of the approved location. It is a matter of fact that the sewage treatment plant is in use and this includes treatment of waste from facilities used by the rowing club. Thus whether or not the land is in the curtilage of Mythe Bridge House, the use of the sewage tank is not solely for a purpose incidental to the dwellinghouse as such. It does not therefore benefit from permitted development in Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). Neither is it on land which is shown on the approved plans for the 2013/2015 permissions. The appellant accepted that planning permission was probably necessary for the sewage treatment works and that she had not applied for any such permission.

27. Consequently, as a matter of fact, the sewage plant, as installed, is unauthorised and cannot be relied upon as a material operation demonstrating the implementation of either permission.

[4] Thus is unlikely to benefit from permitted development rights in Part 1 of Schedule 2 of the Town and Country Planning(General Permitted Development) (England) Order 2015 (the GPDO)
[5] Listed as 2010/878/108 (d) in Condition 2 on the 2013 permission, which the Council concedes was a typographical error

b) 'Moling' of service ducts under the road

28. At the site visit I was shown that the main utilities for the house are all located to the south of Ledbury Road. This includes the water main, the pole carrying the electricity supply and the telephone connection. Consequently at least some of the main services are carried beneath the road by cables and pipes and in some cases by cables passing through the arches of the bridge. Mr Curtis said that this arrangement was unsatisfactory and as a consequence two holes had been 'moled' under the road in order to carry the services, within flexible pipes, directly to the north side.

29. The appellant says that the service ducts are required for:

    1. A significantly higher capacity electricity supply cable for the new dwelling

    2. 4 new telephone cables

    3. Main water supply for the new dwelling

    4. Pipes to dump excess heat from the solar panels into the sewage plant

    5. Oil supply for the new dwelling; and

    6. Armoured cable containing twelve wires for a security system.

30. I have no reason to doubt that the present provision of services via cables laid on the surface of the ground, or even trenched across the bridge is less than ideal. The tubes are not currently in use although that with the largest diameter has already been connected with the (unauthorised) sewage plant. As I have noted above, no development has been approved on the land to the south of Ledbury Road and it is far from clear whether the pipes are intended to overcome the current unsatisfactory arrangement of utility connections for the existing house or for the proposed house, the rowing club or even all of these. Mr Curtis suggested that the ducts or tubes were for the proposed house only but I was also told that the existing house is now connected to the sewage plant.

31. The appellant confirmed that the proposed house would only have 3 permanent residents and in these circumstances a sewage treatment plant with a capacity to cope with 14-22 people, seems surprising at best. Moreover a container for the purposes of storage of oil for domestic fuel would need planning permission if it was sited to the south of Ledbury Road, and there is no evidence that this has been obtained. I acknowledge that the appellants may have visitors at times and this indeed was reported to the Hearing. But the purpose of the ducts is at best ambivalent because the suggested use is not proportionate in scale given that the permissions were for a single dwelling house; in any event planning permission is required for associated structures such as the sewage treatment works and the oil storage container and other works intended to be located on the land to the south. As was confirmed in the 2017 appeal, the appellant cannot rely on the GPDO, even if it is argued that the works are incidental to the dwelling house as such. This is because development on the south side of the Ledbury Road would be situated on land forward of a wall forming the principal elevation of the original dwellinghouse.[6]

[6] Paragraph 11 of APP/J1860/C/16/3155342 dated 13 January 2017

32. In these circumstances it remains uncertain what the purpose of these tubes/ducts is, or whether they are authorised or approved. The evidence provided is at best ambiguous. I shall return to this below.

c) The provision and occupation of temporary living accommodation on the south side of the road.

33. The appellant's Hearing statement says in terms that living accommodation has been provided on the south side of the Ledbury road and it is occupied by Mr & Mrs Curtis.

34. However from what I saw the conversion of the former classroom is unfinished and Mr and Mrs Curtis also confirmed that they continue to occupy the original house on the north side of the road.

35. Consequently this has no bearing on my decision other than it is an example of the inconsistent evidence that was before me.

d) The provision of a site access for heavy vehicles and plant including the laying of a new hard-core surface to facilitate site access by heavy vehicles and plant.

36. The 'site access' comprises a longstanding area of hard-core located to the west of the land which has planning permission for a replacement house. The access is not in the appellant's ownership but she has access rights over it. The land is owned by a neighbour and is used as an access to the farmland hereabouts. It is also used as a public right of way. As I have noted above there is nothing before me that demonstrates that the owner of this land was notified of the application for the LDC.

37. Evidence was given to the Hearing that the surface of this land had become worn out, full of potholes and waterlogged in times of rain. I also heard that the surface of this area requires renewal every few years partly because of the damage caused by the passage of tractors to the adjoining fields.

38. Two invoices were submitted in evidence however one appears to be a correction of the first as they have the same date, 22 September 2016, the same invoice number and both specify the same work. It appears that the initial invoice was corrected to include the moving of waste soil and stone. The description of the work is "construction of new road to new building" but does not specify where the work was undertaken nor which building is referred to. The appellant also said that land drains were installed as part of this work but there is no documentary evidence of this before me.

39. I saw that the area is already becoming colonised by grass, which the appellant suggested was inevitable because the surface was renewed in September 2016, more than a year prior to my visit. In contrast the gravel surface or yard on the south side of Ledbury Road was clean, dry and almost weed-free, but I was told that that had been installed over 10 years previously. I find this contrast to be surprising and it suggests that one or other statement is inaccurate.

40. However if I were to accept the appellant's suggestion that the works took place on the north side, this did not amount to the provision of a new access, let alone a 'new road'; because that access was long standing and required and received regular maintenance. I therefore conclude that the works to renew

the surface did not, on the balance of probabilities, amount to a material operation which was part of the implementation of any permission for a replacement house on the adjacent land. In any event, as a matter of fact, these works did not comply with Condition 4 of the 2013 permission or the 2015 variation, which says that the access, turning area and parking facilities shall be constructed as shown on the approved plan. The 2013/2015 permissions do not authorise any works outside the approved site, let alone any on third party land.

e) Commencement of the demolition of the existing dwelling including the stripping of roof tiles and the removal of some internal fittings.

41. Mr Curtis said that demolition of the original building had commenced and tiles had been stripped from the roof and internal fittings including a boiler, a towel rail and some light fittings had been removed. Of these only the alleged removal of the roof tiles comprises external work and could, in certain circumstances amount to demolition. Alterations to a boiler, light fittings and a towel rail are matters of maintenance which are common to domestic properties and thus as a matter of fact are not works of demolition. In any event they were undertaken whilst the house was occupied and the 'temporary accommodation' was unfinished (as it still is).

42. However, in terms of the roof the Council provided 'streetview' photographs taken in 2009 and 2010 and these show that the tiles were stripped from part of the lower roof by 2010 and thus well before the permissions were granted. Mr Curtis conceded that following severe rains in 2007, he removed the tiles and replaced them with a temporary membrane. Thus as a matter of fact no demolition of the original dwelling took place prior to 30 September 2016.

The Invoices

43. The appellant has provided invoices to show that works have been undertaken on the site. The invoices in connection with the installation of the sewage works give the rowing club as a contact address. This is also the case for the crane hire for the delivery of the mobile classroom, the stoning of the "new road to new building" and a significant amount of electrical work. In contrast the invoices which are described as being in connection with conversion of the classroom for use as 'temporary accommodation' for the duration of works being undertaken are addressed to PJ Curtis T/A Woodside Developments.

44. The appellant explained that the rowing club email address was her personal email address, and that Woodside Developments was the name of a company that had been sold about 5 years ago. The appellant also suggested that the invoices confirmed that the work undertaken was for a 'new build' but I note that almost all of these included VAT at the standard rate and thus I give this little weight.

45. Whilst I note the appellant's explanation, the invoices do, on the balance of probability, suggest that many works undertaken on the land south of the Ledbury Road involve works in connection with the rowing club use and it has not been demonstrated that these works comprise the commencement of the 2013/2015 permission for a new dwelling.

Conclusions on material operations:

46. The evidence before me is that no works have been authorised on the south side of Ledbury Road for over 5 years and this is conceded by the appellant. In that time it appears that the rowing club has become firmly established on that land. There has been no demolition of the existing house and the 'new access' is at best maintenance of a long established access outside the site for which planning permission was granted in 2013 and 2015.

47. None of the works relied upon have been expressly permitted either by the 2013 permission or the 2015 variation. However the Council accepts that differences between the approved plans and the operations need not be fatal to the capability of operations to be effective in commencing development (*Spackman v Wiltshire CC* [1979] 33 P&CR 430).

48. In turn the appellant said, relying on *Commercial Land* and *Aerlink*[7]*,* that it is necessary not to simply rely on the differences between the works undertaken and the planning development authorised, but any consideration must also focus on the similarities and whether they were substantially usable for the proposed development. There are two limbs to this, firstly, were the works undertaken as part of the 2013/2015 permissions and secondly if they were, whether such works are lawful and therefore usable?

49. In regard to the first, there have been works on land within the appellant's ownership, in particular the installation of the sewage treatment works. However this sewage treatment plant is serving both the existing house and facilities for the rowing club. It has a capacity of 14-22 persons and thus is far in excess of what is necessary to service the proposed house. It is, quite simply, disproportionately large for the purposes of a single dwelling house even if it has some 5-6 bedrooms; the appellant confirmed that the house would be permanently occupied by 3 persons.

50. In these circumstances and in view of the expansion of the rowing club, it seems to me that the current purpose is to provide facilities for the rowing club and to replace the facilities serving the existing house. Hence unlike the circumstances in *Thayer*[8]*,* there are other reasons for the works relied upon by the appellant.

51. I have taken account of the appellant's explanation of the suggested purpose of the ducts. However there is an absence of supporting evidence, such as any documentation from the utility companies or building regulations inspections. The appellant said that she was intending to put in full plans for building regulations purposes, but had not done so. Thus it seems, although building regulations approval would be necessary, there has been no inspection of the works relied upon, and as a matter of fact, none of this work has been approved.

52. Moreover the use of these ducts for service connections also relies on infrastructure such as an oil tank and the sewage plant for which there is no planning permission (or building regulation approval). Taking all these factors together and the various facilities in use for a non-residential use, together with inconsistent verbal evidence, I cannot reliably conclude that the works

[7] The Queen on the application of Aerlink Leisure Limited v the First Secretary of State and Three Rivers District Council
[8] Thayer v Secretary of State for the Environment [1992] JPL 264

that have been undertaken are related to the implementation of permissions for a replacement house. Equally plausible explanations are that they will facilitate the provision of services to the existing house and/or are in furtherance of the development of a successful rowing club.

53. In any event the appellant accepts that planning permission would be required for works on the south side of Ledbury Road and no such planning permission has been granted. As a general premise works that are not authorised cannot be relied upon to demonstrate the lawfulness of a material operation. Thus even if, for example, the sewage treatment plant or service ducts could potentially be substantially useable for the proposed development the appellant cannot rely on these unauthorised works to demonstrate that the 2013/2015 permissions have been implemented. The appellant has drawn my particular attention to the Court Judgment in *High Peak Borough Council v Secretary of State of the Environment and Courtdale Developments Limited* [1981] JPL 366. But I do not find the circumstances in this appeal to be similar to those in the cited case because there is no suggestion that works have been undertaken and then reversed.

54. Looking at the claimed material operations, whether separately or as a whole, the purpose of the works is ambivalent and in my judgment could not be seen as "an unequivocal act pursuant to the planning permission"[9]. Moreover, for the reasons I have given the works do not benefit from deemed permission granted by the GPDO or an express planning permission and thus are unauthorised. Thus the material operations on the land are not, on the balance of probability, authorised or part and parcel of the approved schemes.

Conditions

55. Both permissions were subject to a number of conditions, of which four expressly prohibit any development prior to the submission and approval of certain details. These are as follows:

- Condition 3 (both permissions) requiring samples and trade descriptions of external facing and roofing materials to be submitted and approved.
- Condition 5 (both permissions): requiring a programme of historic building recording to be submitted and approved.
- Condition 9 (2013 permission, renumbered (8) on 2015 variation) requiring Finished Floor levels (FFL) to be submitted and approved.
- Condition 10 (2013 permission, renumbered (9) on 2015 variation) requiring a Flood Evacuation Management Plan to be submitted and approved.

56. Condition 5 of the 2013 permission was discharged in September 2016, but is outstanding for the 2015 variation. However it is not at issue between the parties.

57. An application for the partial discharge of Condition 3 was submitted on 18 August 2107 but remains outstanding. The Council says that this is because various samples are awaited and have not been provided.

[9] *Staffordshire County Council v Riley* [2002] PLCR 5 [2001] EWCA Civ 257, as reported in Commercial Land Ltd/Imperial Resources SA v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 1264 (Admin) (*Commercial Land*)

58. On the 30 September 2016, the appellant submitted an application for the discharge of conditions, 3, 9(8) and 10(9). This also remains un-determined.

59. The parties agree that the conditions listed above are pre-commencement conditions and to date, other than Condition 5, they have not been formally discharged. Paragraph 21 of the Appellant's appeal statement concedes that works undertaken in breach of true pre-conditions are unlawful and therefore cannot be relied on as commencing development under the permission[10] (*Greyfort*) except in certain specified circumstances. Thus, as a starting point, whether or not material operations have taken place, development is unlawful in the absence of the discharge of pre-commencement conditions unless specified circumstances apply. I shall consider these in turn.

Details required by condition previously agreed?

60. In essence the appellant's position is that the requirements of the pre-commencement conditions have already been met because the details required were part of the plans approved in 2013/2015.

61. However the Council said that neither the information submitted with 2013/2015 applications nor the Discharge of Condition (DOC) applications in August and 30 September 2016 was adequate. The Council said that in particular, that it was necessary to consult the Environment Agency (EA) about Finished Floor Levels and that the reported informal conversation between the appellant and the EA was not binding and in any event there was no evidence of any purported agreement. The submission of details on the date that the permissions expired did not allow for any consultations with the EA and thus the Council could not be sure that the development would be safe.

62. In terms of a flood evacuation management plan it is the case, that a 'route' was submitted and approved in 2013/2015, but the condition requires a management plan and this has still not been provided. Given the history of severe and regular flooding associated with the River Severn which adjoins the site, the requirements of such a condition are entirely proportionate and reasonable. It was suggested at the Hearing that the appellant is familiar with the procedures that should be followed in the event of flooding, and I have no reason to doubt this. However a planning permission goes with the land and I must also consider future occupiers, visitors and perhaps tenants.

63. Turning to the materials to be used, the conditions specifically asked for samples and trade descriptions and given that the house is adjacent to a Grade II* listed structure this is proportionate and necessary. I was provided with a bundle of material submitted to support the 30 September 2016 DOC application by the appellant and the Council. The appellant said the information supplied stipulated colours and finishes but accepted when challenged by the Council that various annotations to the submitted information had been added at the Hearing. In the absence of these, the Council indicated that the supplied information was inadequate.

64. Consequently, there is no evidence that the details have been previously approved or that the Council would be prepared to waive them. Thus the circumstances before me are materially different from that reported in *R v Flintshire CC Ex P Somerfield Stores Ltd* [199] PLCR 336 (*Flintshire*). In that

[10] *Greyfort Properties Ltd v Secretary of State for Communities and Local Government and Torbay Council* [2011] EWCA Civ 908 (*Greyfort*)

case the Council agreed that the formal discharge or approval of the conditions should be waived. There is no such agreement in the appeal before me.

Do the pre-commencement conditions go to the heart of the permissions?

65. It seems to me that the answer to this is very short. The appeal site is in the functional flood zone of what is probably the largest river in the country and which has a history of regular and severe flooding events. In the light of expected climate change such risks will continue and intensify and thus measures to ensure the future safety of occupants must be an essential and integral part of permission for development.

66. Secondly the site is adjacent to a Grade II* heritage asset where decision makers have a duty to have special regard to the desirability of preserving its setting.

67. I thus conclude, as a matter of fact, given this context, pre-commencement conditions 3, 9 (8) and 10 (9) go to the heart of the permission. As in *Greyfort* the Local Planning Authority is entitled to treat the ground floor levels of the building as a matter of sufficient importance to justify the inclusion of a condition prohibiting the commencement of any work on the site before the levels were agreed.

Any other exceptions?

68. *Greyfort* quoting *Whitley and Sons v Secretary of State for Wales* [1992] 64 P&CR 296 (*Whitley*) notes that there may be exceptions to the general principle that operations contravening conditions cannot be properly described as commencing the development authorised by the permission. It is thus necessary to consider whether any of these apply to the appeal before me.

69. In the light of *Whitley* the appellant says that because the DOC applications were submitted prior to the expiry of the permissions she can rely on work done before the deadline and in accordance with the scheme. But those circumstances rely on an **approval** (my emphasis) that is subsequently given. Given that the Council say that the information provided in the DOC application was not satisfactory this exception cannot be relied upon.

70. Similarly exceptions relied on in *Agecrest v Gwynedd County Council* [1998] JPL 325 and *Flintshire* do not apply because it appears that there is no realistic likelihood that the Council will subsequently approve the DOC applications; indeed it categorically said that in respect of the two conditions relating to the risk of flood that these would be refused.

71. The third exception, relying on the cases of *R (Prokopp) v London Underground Ltd* [2004] EWCA Civ 961 and *Norris v First Secretary of State* [2006] EWCA Civ 12, is whether there has been an irrationality or an abuse of power on behalf of the Council. The gist of this point is that it would not be expedient to take enforcement action in respect of any alleged material operations that are claimed to have taken place. The Council, said that, whether or not enforcement action should be taken in respect of the claimed works, misses the point. This is because what is at issue was whether enforcement action would be expedient in terms of the construction of the house without complying with the pre-commencement conditions. Given that I have already agreed that the conditions go to the heart of the permission and that there is no reasonable

expectation of their approval, this premise appears to be entirely logical and thus I do not agree that this exception applies.

72. In any event it is surprising at best that the main DOC application was not put in until the date of expiry of the permission. The Council had written to the appellant in advance to remind her that these were outstanding. She had access to professional advice and in these circumstances should have been aware of the terms of the permissions.

Conclusions on conditions

73. The parties agree that works undertaken in breach of a true pre-condition are unlawful and therefore cannot be relied on as commencing development under the permission. Nevertheless the Courts have held that there are limited exceptions to this general premise. However for the reasons I have noted above, I find that none of these apply to the appeal before me. Thus as a matter of fact conditions 3, 9(8) and 10 (9) are conditions precedent and any development that has occurred is not authorised and is thus unlawful.

Overall conclusions

74. As a matter of fact various operations have been undertaken on the appeal site and these appear to have taken place prior to the expiry of the permissions on 30 September 2016. But from the evidence before me, I am unable to conclude that those works are unequivocally pursuant to the 2013/2015 permissions.

75. Even if I had accepted the appellant's view that they comprised part of the works to facilitate the proposed house, these works are unlawful because no work is authorised prior to the discharge of conditions that go to the heart of the permission. In coming to this view I have taken note of all the Court Judgments relied upon by the parties, but these do not persuade me that the appeal benefits from any of the exceptions to the general principle set out in *Whitley* and later endorsed in *Greyfort*, amongst others.

76. Consequently, for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use of development in respect of confirmation that permissions 13/00077/FUL & 15/00173/S73 have been lawfully implemented 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

77. The appeal is dismissed.

Sukie Tamplin

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Celina Colquhoun	Counsel
Patricia Curtis	Appellant in person
Brian Curtis	Appellant's husband
Kenneth Gorman	KPG Design Associates

FOR THE LOCAL PLANNING AUTHORITY:

Howard Leithead	Counsel
Gillian McDermott	Planning Officer, Malvern Hills District Council
David Jones	Enforcement Officer Malvern Hills District Council

DOCUMENTS

1 Comments on appellant's appeal Statement Malvern Hills District Council: Submitted in accordance with timetable, July 2017, but not cross copied
2 Officer Delegated report for 15/00173/S73
3 Officer Delegated report for 15/00893/S73
4 Opening submissions on behalf of the appellant
5 Opening submissions on behalf of Malvern Hills District Council
6 Correspondence between the parties regarding the alleged lapse of planning permission, October 2016
7 Decision and approved plans for 13/00077/FUL
8 Decision and approved plans for 15/00173/S73
9 Application and correspondence for discharge of (part) Condition 3 reference 16/01166/CCO
10 Appellant copies of material submitted with discharge of condition application, conditions 3, 9 and 10 submitted 30 September 2016 reference 16/01380/CCO
11 Council copies of material submitted with discharge of condition application, conditions 3, 9 and 10 submitted 30 September 2016 and related correspondence reference 16/01380/CCO
12 Closing submissions on behalf of Malvern Hills District Council
13 Summary closing submissions on behalf of the appellant
14 Bundle 15 No. Court of Appeal and High Court Judgments relied upon by both parties, compiled by the Council.