The Planning Inspectorate

Appeal Decisions

Site visit made on 18 September 2018

by Paul Dignan MSc PhD

an Inspector appointed by the Secretary of State

Decision date: 28 November 2018

Appeal A: APP/H1840/W/18/3194535
Land south of Ox Orchard, known as Pleasure View, Powers Lane, Ombersley, WR9 0HN.

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for consent, agreement or approval to details required by a condition of a planning permission.
- The appeal is made by Mr P Doran against the decision of Wychavon District Council.
- The application dated 1 June 2017, sought approval of details pursuant to conditions No. 4 and No. 5 of planning permission Ref. APP/H1840/W/16/3154453, granted on 27 February 2017 on appeal against the refusal of application Ref. W/15/02125/CU dated 10 August 2015.
- The development proposed is the material change of use of land to use as a residential caravan site for one gypsy family, including laying of hardstanding erection of amenity building and improvement of access.
- The details for which approval is sought are: materials and method of construction of hardstanding, including finished ground levels; external materials of the amenity building; external lighting; boundary treatments; measures for the protection of trees during construction; refuse and bin storage; foul and surface water drainage; provision of an area of habitat suitable for badgers; and a timetable for implementation of the scheme (referred to as the Site Development Scheme).

Appeal B: APP/H1840/C/18/3189653
Land south of Ox Orchard, known as Pleasure View, Powers Lane, Ombersley, WR9 0HN.

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr P Doran against an enforcement notice issued by Wychavon District Council.
- The enforcement notice, numbered ENF/17/0538, was issued on 20 October 2017.
- The breach of planning control as alleged in the notice is the erection of a wall shown marked as a continuous red line on the attached plan ("the Wall") along the southern boundary of the Land.
- The requirements of the notice are Reduce the height of the wall between points A and B on the attached plan to 1.0 metre in height above ground level.
- The period for compliance with the requirements is 1 month.
- The appeal is proceeding on the grounds set out in section 174(2)(c) and (f) of the Town and Country Planning Act 1990 as amended.

Decisions

Appeal A

1. The appeal is dismissed and the details submitted pursuant to condition No 4 attached to planning permission Ref. APP/H1840/W/16/3154453, granted on 27 February 2017 on appeal against the refusal of application Ref. W/15/02125/CU dated 10 August 2015, are not approved.

Appeal B

2. The appeal is dismissed and the enforcement notice is upheld.

Application for costs

3. In respect of Appeal B, an application for costs was made by Mr Doran against Wychavon District Council. This application is the subject of a separate Decision.

Appeal A

4. The appeal concerns a formerly open piece of land alongside the access road to a cluster of existing dwellings. Planning permission was granted on appeal[1] in February 2017 for the change of use of the appeal site to use as a residential caravan site for one gypsy family, including laying of hardstanding, erection of amenity building and improvement of access. The permission was subject to a number of conditions. Condition 4 states:

The use hereby permitted shall cease and all caravans, structures, equipment and materials brought onto the land for the purposes of such use shall be removed within 28 days, of the date of failure to meet any one the requirements set out in (i) to (iv) below:

i) within 3 months of the date of this decision a scheme for: the materials and method of construction of the area of porous hardstanding shown on the approved plans including proposed finished levels; the external materials of the amenity block; the boundary treatments including tree, hedge and shrub planting (incorporating details of species, plant sizes, proposed numbers and densities); measures for the protection of the retained protected trees during the course of the development; details of any proposed and existing external lighting; the disposal of sewage and drainage of surface water in accordance with the submitted Water Management Statement; refuse and bin storage; and the provision of an area of habitat suitable for badgers at the western end of the site (hereafter referred to as the site development scheme) shall have been submitted for the written approval of the local planning authority and the said scheme shall include a timetable for its implementation.

ii) within 11 months of the date of this decision the site development scheme shall have been approved by the local planning authority or, if the local planning authority refuse to approve the scheme, or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.

[1] Appeal Ref. APP/H1840/W/16/3154453

iii) if an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted site development scheme shall have been approved by the Secretary of State.

iv) *the approved scheme shall have been carried out and completed in accordance with the approved timetable.*

5. The following reason was given for imposing this condition:

"57. A condition requiring the submission of a scheme of development is necessary in order to ensure a number of outstanding matters. The purpose of condition 4 is to require the appellant to comply with a strict timetable for dealing with these outstanding matters of detail which need to be addressed in order to make the development acceptable. The condition is drafted in this form because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of planning permission it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matters because the development has already taken place. The condition therefore provides for the loss of the effective benefit of the grant of planning permission where the detailed matters in question are not submitted for approval during the time set by the condition, approved (either by the local planning authority or by the Secretary of State on appeal), and then implemented in accordance with an approved timetable. Should the requirements of the condition not be met in line with the strict timetable, then the planning permission falls away.

58. The method of construction and materials of the porous hardstanding (including proposed finished levels) and protection measures for the retained trees are required as part of the scheme of development in the interests of safeguarding protected trees and the character and appearance of the surrounding area, and also to ensure the satisfactory drainage of the site and to protect the living conditions of nearby occupiers. Details of the materials of the amenity block and boundary planting are also required in the interests of the character and appearance of the site and its surroundings. The control of external outdoor lighting is required in the interests of the character of the surrounding area, protected species, the living conditions of nearby occupiers and to avoid light pollution.

59. A scheme for the disposal of sewerage and surface water drainage in accordance with the submitted Water Management Strategy is required to ensure the site is adequately drained and to reduce the consumption of water. Details of refuse and bin storage are necessary to ensure that adequate means of waste disposal are provided and in the interests of the character and appearance of the area. The provision of an area of habitat suitable for badgers on the western part of the site is also required as part of the site development scheme in the interests of wildlife protection and biodiversity enhancement."

6. The application for the approval of the site development scheme also sought approval of Condition 5, which required the submission of a schedule of maintenance of proposed planting. However, the appeal is solely concerned with the failure to approve the details required by a Condition 4.

7. The Council states that it did not determine the application due to insufficient information being submitted, despite attempts to elicit further details. It has indicated that if it had proceeded to a decision it would have refused to approve the details as submitted and discharge Condition 4. In effect, the appeal is seeking approval for the submitted details.

8. The appeal site is a roughly rectangular piece of ground, the long axis being east-west. It is bounded by the access road on the eastern and southern sides, and by residential and agricultural land on the northern and western sides. The northern boundary has a row of mature oak trees that are protected by a Tree Preservation Order (TPO). The land slopes generally from the north-east corner towards the south west, a pre-development site survey indicating a fall across the site of over 7m from the north-east corner to the south-west corner.

9. The application to discharge the condition included a site layout plan, Drawing No 2975/02/A which showed the siting of the amenity building and the static and touring caravans, along with boundary treatments, external lighting positions, a sewage treatment plant location, bin store siting and a badger habitat area. It also purported to show finished ground levels. On the copy of Drawing No 2975/02/A submitted with the appeal no finished ground levels were clearly marked, but I could see some barely visible text. I sought clarification from the appellant's agent and I was subsequently provided with an annotated version showing levels at 3 points across the site, one near the entrance gate, one about mid-way across the site near the northern boundary, and one at the western end of the site.

10. The site development scheme is required to show the finished levels of the porous hardstanding shown on the approved plans. The approved plans include the plans numbered PBA/02 Block Plan, which shows the site layout including the locations of the caravans, the amenity block and the porous hardstanding and PBA/03, which overlays the root protection areas (RPAs) of the TPO trees on the site layout.

11. Condition 3 requires that "The caravans, amenity block, and area of hardstanding shall be sited in accordance with drawing number PBA/02 Block Plan." Drawing PBA/02 shows the touring caravan, mobile homes and amenity block sited towards the southern boundary of the site, along with the area of porous hardstanding. Of the three proposed finished levels shown on Drawing No 2975/02/A, two appear to be located close to the northern edge of the area of porous hardstanding shown on the approved plans, but given the sloping nature of the site that is entirely unsatisfactory and falls well short of what might reasonably be expected. Of more concern however, is that the layout shown in the site development scheme is very different to that shown on the approved drawing, and there is considerable operational development shown that is not a part of the approved scheme.

12. Drawing No 2975/02/A shows the proposed static caravan sited alongside the northern boundary and the touring caravan in the north-eastern corner, both well inside the indicted RPAs for the TPO trees. The plan also indicates the retention of "existing area of hardcore" and shows a retaining wall towards the western end of the site with a level difference of 2.5m either side of the proposed wall. It appears from the appeal decision letter that at the time of the hearing the use had commenced and some works had already taken place on the site. The Inspector was asked by the appellant to consider the appeal on the

basis of works already undertaken rather than the application plans. At that time the eastern part of the site had been entirely laid to hardstanding. She found that considering the appeal on the basis of amended plans based on works already undertaken would be directly at odds with the "Wheatcroft Principles[2]". She declined to determine the appeal other than on the basis of the application plans, and it is clear from her decision that there was no element of planning permission for works already carried out.

13. The site development scheme required to be submitted in accordance with condition 4 implicitly refers back to condition 3, but the differences in layout and the extent of operational development, including land level changes which, although not adequately detailed can be readily inferred, between what was approved and what is shown on Drawing No 2975/02/A are so substantial in my view as to amount to materially different developments. It follows therefore that the details submitted simply do not address the requirements of condition 4.

14. Lighting, drainage, badger habitat and fencing are the other matters considered by the Council to have been unsatisfactorily detailed. A proposed badger friendly grassed area is shown at the western end of the site as required, but the lighting, drainage and fencing details are inadequate. The light details comprise four locations marked on the plan and an indication that bulkhead lights fitted with 60w bulbs would be fitted, but there is nothing to indicate control over lighting times and no indication of any lights associated with the living accommodation. Regarding drainage, product details for a sewage treatment plant were provided and a location shown on the plan along with a land drain running parallel to the proposed retaining wall. However, the site management plan should also include details of roof drainage, disposal of greywater if different to sewage, a commitment to maintaining the treatment plant in accordance with the manufacturer's instructions, such as annual de-sludging, and provide evidence of site capacity to accept discharge. The council's concerns about boundary treatment are due to the height of the fencing and its proximity to the roadside. On the height issue, there is nothing to prevent the Council approving fencing above 2m high as part of the approval of details in a condition attached to an express planning permission. Placement of the southern boundary fence further back from the roadside edge so as to enable hedge and shrub planting to better integrate the development into its surroundings would have been preferable.

15. Although not specifically raised by the Council, I would also find difficulty in accepting the stated measures for protecting the trees along the northern side of the site. The site development scheme seems to indicate that trees would be protected by virtue of being at a higher level and behind a retaining wall, but no consideration is given to development, including vehicle parking and manoeuvring areas, that is likely to be within the RPAs. The approved plans showed relatively minor incursions into the RPAs and the supporting information, which I consider to be incorporated in the planning permission, states that the hardstanding and driveway would occupy far less than 20% of the RPA of any tree, the maximum allowed by BS 5837:2012 *Trees in relation to design, demolition and construction – Recommendations*.

16. Condition 4 was imposed to enable the Council to ensure that development implemented in accordance with conditions 2 and 3 would safeguard protected

[2] Bernard Wheatcroft v Secretary of State for the Environment [1982] P & CR 233

trees, the character and appearance of the surrounding area, protect the living conditions of nearby occupiers, ensure the satisfactory drainage of the site safeguard protected species and avoid light pollution. What was submitted fails to provide sufficient detail to enable the Council to be satisfied that all of these legitimate planning objectives, all underpinned by development plan policies, would be achieved, but in any case the scheme submitted is materially and fundamentally different to what was approved. It well established in planning law that a condition cannot be used to make fundamental changes to a development, and in this case the scheme also departs materially from condition 3, to which it is essentially subservient. The requirements of the condition have not been met and accordingly I am unable to discharge it. The appeal must therefore be dismissed. The consequence of this is that the use permitted must cease and all caravans, structures, equipment and materials brought onto the land for the purposes of that use must be removed within 28 days. In effect the benefit of the planning permission is lost, but this was fairly explained in the original appeal decision.

Other Matters

17. At the site visit it was evident that considerable works had been done, including the erection of a substantial retaining wall, part of which is the subject of Appeal B and the enclosure and laying of hardstanding of the western end of the site which was supposed to be laid to grass as badger habitat. However, I have determined this appeal solely on the basis of the planning permission granted and the documents provided for the purposes of condition 4.

Appeal B

18. A retaining wall has been built along about two thirds of the southern perimeter of the site, returning thereafter across the site. The enforcement notice concerns the part of the wall along the southern perimeter which is adjacent to the access road to the residential properties to the west. The wall effectively enables the site to be taken to a much more gentle slope than its natural ground level, hence it starts as a low wall towards the eastern end, becoming gradually higher. At its western end it is about 3m high. Walls can be development permitted by the GPDO[3], but where a wall is constructed adjacent to a highway used by vehicular traffic it needs express planning permission if it is more than 1m above ground level.

19. The first ground pleaded is ground (c), which is that the development is not a breach of planning control. The first argument on that ground was that the wall could have been considered as part of an application before the Council at about the time the notice was issued that sought to vary some of the conditions of the planning permission the subject of Appeal A above. The wall was not part of the Appeal A permission, and the application to vary its conditions was refused in any case. The second argument made is that the wall is not more than 1m above the ground on its inside, that is the soil retained by it. However, it is generally accepted that the height of a wall for the purposes of the GPDO should be taken from the natural ground level at the time the wall was erected, which would be the height at its base on the highway side. I see no reason to take a different approach in this case. The erection of the wall is development that requires planning permission, in the absence of which the appeal on this ground must fail.

[3] The Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015 No. 596)

20. The second ground of appeal is ground (f), which in a case such as this is that the requirements exceed what is necessary to remedy the breach of planning control. The notice requires that the wall be reduced to 1m in height above ground level to bring it in line with that allowed as permitted development. The appellant has suggested that the wall be reduced in height to the minimum required to retain the soil behind, but that would not remedy the breach, and in any case requires consideration of the planning merits, which cannot be done where no appeal has been made on ground (a) and the deemed planning application fee has not been paid. In the absence of any suggested or obvious alternatives which would remedy the breach, the appeal on this ground must also fail.

Paul Dignan

INSPECTOR