The Planning Inspectorate

Appeal Decision

Inquiry Held on 2 October 2018, 22 January 2019 & 18-19 July 2019

Site visits made on 1 October 2018 & 17 July 2019

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 5th August 2019

Appeal Ref: APP/J3720/W/18/3194609
Bidford Grange, Bidford-on-Avon B50 4LY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant consent, agreement or approval to details required by a condition of a planning permission.
- The appeal is made by Mr D Broadhurst against the decision of Stratford-on-Avon District Council.
- The application Ref DISC/00293/17, dated 23 June 2017, sought approval of details pursuant to condition No 3 of a planning permission Ref 90/01355/FUL, granted on 21 December 1995.
- The application was refused by notice dated 31 July 2017.
- The development is a golf clubhouse and leisure facilities serving both Bidford Grange Hotel and a new golf course.
- The details for which approval is sought are facing materials to be used on the external walls and roof.

Decision

1. The appeal is dismissed.

Procedural Matters

2. The Inquiry was opened on 2 October 2018 and immediately adjourned as the appellant's witness could not attend due to unavoidable personal circumstances. When the Inquiry resumed on 22 January 2019 it was adjourned once more as the appellant's advocate was unwell. No evidence was heard on either occasion. All evidence was heard when the Inquiry resumed on 18 and 19 July 2019. As the parties disagreed on matters of fact, oral evidence at the Inquiry was given on oath.

3. Due to the legal complexities involved in the case I agreed that closing statements could be submitted in writing in accordance with an agreed timetable. This allowed each party opportunity to make final comments before the Inquiry was closed in writing on 29 July 2019.

4. At the request of the appellant, and with the agreement of the Council, an accompanied site visit was undertaken the day before the Inquiry was first opened. This enabled me to familiarise myself with the site ahead of the Inquiry. A further accompanied site visit was undertaken the day before the Inquiry resumed in July 2019.

5. When planning permission was granted on 21 December 1995 for a golf clubhouse and leisure facilities ('the 1995 permission') the decision was issued

pursuant to reference S90/1355. The same planning permission is subsequently referred to under reference 90/01355/FUL. I shall use the latter.

6. The 1995 planning permission was granted subject to several conditions. In 2017 the appellant made an application to the Council which was intended to discharge condition 3. This condition requires approval of external facing materials. The Council refused the application on the basis that the condition cannot be discharged because the planning permission has expired. The appeal has been brought against that decision.

7. The Council contends that the appropriate route to establish the status of the planning permission is for the appellant to apply for a Lawful Development Certificate (LDC) under section 191/192 of the 1990 Act rather than an appeal against the refusal to discharge a condition.

8. An LDC application was not the only option available to the appellant. The Council's letter of 31 July 2017 set out details of the application for discharge of conditions and clearly stated that it was "refused" and gives the reasons for that refusal. It amounted to a decision to refuse to discharge the condition. A right of appeal arose under section 78(1)(b) of the Act against the Council's decision, hence validation of the appeal by the Planning Inspectorate. It so happens that in order to decide whether or not the condition should be discharged necessarily involves establishing if it was still capable of being discharged. This depends on whether the permission was implemented and subsists. There is no reason to prevent that determination being made. Indeed, it is pivotal to the Council's reasoning and which led to the appeal.

9. When the application was made and decided samples of external materials had not in fact been submitted. Only a list of the intended materials was provided. After the Inquiry opened samples were submitted to the Council. The materials are acceptable to the Council if the permission is found to remain extant. This overcame one of the main issues before the Inquiry of whether or not materials had been submitted in accordance with condition 3 and should be approved.

Main Issue

10. There remains one main issue of whether or not the 1995 permission was lawfully implemented and subsists or whether it has expired.

Reasons

Background

11. The development granted planning permission on 21 December 1995 was for a golf clubhouse and leisure facilities serving both Bidford Grange Hotel and a new golf course.

12. A separate planning permission[1] was granted on 10 October 1991 ('the 1991 permission') for an eighteen-hole golf course, golf school and practice putting green. Both applications had been submitted around the same time. The 1995 permission depended upon the golf club and thus the Council wished to ensure that the golf course development was built out first before issuing permission for the leisure facility.

13. It is undisputed that the 1991 permission was implemented in full prior to the

[1] Pursuant to Council ref: 90/00830/FUL

issue of the 1995 permission. Indeed, the golf course opened some time over the summer of 1992. Other development has taken place at Bidford Grange. Aside from the hotel and golf course there are holiday lets and residential dwellings and various other permissions.

14. The land which was subject to both the 1991 and 1995 permissions has now been sub-divided and falls within separate ownerships, albeit within the same family. Neither the hotel nor the golf course as currently laid out belongs to the appellant and they are under separate management arrangements.

15. Condition 1 of the 1995 permission required development to begin not later than the expiration of 5 years from the date of the permission[2]. The appellant contends that development had already commenced by the time the permission was issued on 21 December 1995. As such, it is argued that the permission still subsists and the development can continue.

Whether the 1995 permission was part retrospective

16. It is the appellant's primary case that the 1995 permission was a hybrid planning permission for both retrospective and prospective works which was commenced. The retrospective works involved the demolition of existing agricultural buildings and the creation of a ghost island junction and associated works ('the access works'). It is argued those works amounted to implementation of the 1995 permission under section 73A of the 1990 Act which allows planning permission to be granted for development carried out before the date of the application.

17. *Lawson Builders Ltd and others v SSSLG*[3] established that a planning permission can be granted for a hybrid of retrospective and prospective planning permission. In *Lawson* it was common ground that some of the works described in the application were already complete. Furthermore, in granting permission, the Inspector had ensured that the conditions imposed reflected the fact that works had already started.

18. In this instance the evidence indicates that the Council was unaware of any works undertaken pursuant to the application prior to the date of issue of the permission in 1995. The Officer's report provides no record of those works. The permission does not refer to any retrospective works. Indeed, the conditions attached to the 1995 permission are all worded as though development had not commenced. They require actions to be taken before commencement of the development rather than within a period after the grant of permission as would be anticipated had the development been partly retrospective.

19. At the Inquiry the appellant's advocate sought to draw comparisons with the 1991 permission which included a condition requiring development to be commenced within 5 years despite the Planning Officer's report making clear that works to the golf course had already commenced. The condition must have been imposed by mistake. It was suggested that it was a fair assumption that a similar condition (no 1) in the 1995 permission must also be included in error. However, these are separate applications albeit there is a link between the schemes as is apparent from the description of the 1995 development. A mistake on one does not mean the same mistake was repeated on the other.

[2] i.e. before 21 December 2000
[3] [2015] EWCA Civ 122

20. It was also argued for the appellant that a further eight conditions were imported into the 1995 permission for development that had already taken place. The appellant's agent suggested that this was most likely a symptom of the Council having copied and pasted conditions from the 1991 permission.

21. It is accepted by the Council that the lack of reference to any retrospective development is not fatal in its own right. I agree. It is the accumulation of circumstances which do not lend support for this being anything other than a prospective permission.

22. If the application had changed in nature before determination then it might reasonably be anticipated that the applicant would seek to amend it, but that did not happen. When the planning permission was granted, it would have been open to the applicant to point out that the permission should have been part retrospective. There is no evidence that the Council's attention was drawn to any works already undertaken in relation to the application. Nor is there any record of the Council being notified that some of the conditions were impossible to satisfy if development had indeed commenced or of the appellant following up with an application to vary those conditions.

23. None of these things happened during the application process or the life of the permission. It was not until many years later in May 2016 that an application[4] was made to vary and/or remove conditions attached to the 1995 permission on the basis that it was partly retrospective.

24. All these factors point firmly towards a permission that was prospective in nature rather than partly retrospective.

Whether development was begun

25. My attention turns to whether as a matter of fact development was begun pursuant to the 1995 permission. For the purposes of the 1990 Act, development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out (section 56(2)).

26. Section 56 is an objective test and the intention of the person carrying out the development is irrelevant. Even works undertaken solely with the objective of keeping a permission alive, when the developer has no intention at that time to proceed, can suffice to initiate development comprised in the permission. It is evident from case law that very little is needed in terms of the extent of works.

27. The application site for the 1995 permission comprises the land where the clubhouse would be built along with the associated car parking and tennis courts. All other land within the same ownership was excluded including the existing main access which would serve the development.

28. There are two strands to the appellant's arguments that development had already begun in relation to (i) works of demolition and (ii) the access works.

Demolition works

29. The appellant has produced aerial photographs to demonstrate that agricultural barns in existence in 1985 were partially demolished by March 1992. The

[4] Application ref: 16/01749/VARY dated 25 May 2016

photograph dates are undisputed. The barns were in the space earmarked for the clubhouse building. One barn remains albeit in a renovated state.

30. The 'demolition of buildings' only became included within the definition of 'building operations' under section 55 of the 1990 Act on 27 July 1992[5]. Prior to that date, the demolition of a building was not regarded as a 'building operation' amounting to 'development' for which planning permission was required under section 57.

31. Similarly, it was not until 27 July 1992[6] that 'any work of demolition of a building' was included within the statutory definition of a 'material operation'. Up until then, such works did not constitute a material operation capable of commencing development under section 56.

32. The parties disagree on whether demolition works needed to enable the clubhouse to be built were 'comprised in the development' under section 56.

33. The appellant relies upon the judgment in *Field v FSS and Crawley BC*[7] where planning permission had been granted for the demolition of cottages and erection of bungalows. Only the demolition works had taken place. The case concerned whether the demolition works sufficed for the development to have begun at a time when the demolition of buildings was not considered to be a 'specified operation' to begin development.

34. The case is authority that where the prior demolition of buildings is part of the total works necessary to undertake the development, and it was carried out by a builder and was the type of operation normally carried out by a builder, and the planning permission specifically authorised the demolition, then those works of demolition can mark the commencement of the permission.

35. The parties agree that demolition works *could* amount to development before 27 July 1992. The issue is whether they did in this case.

36. The Planning Officer states in the first committee reports of April and September 1991 that "*the proposal entails the demolition of the existing agricultural building at the site*….". I note that reference is made to a building in the singular. The appellant's advocate suggested this was a mistake as there was more than one barn. The other possibility is that it was deliberate and refers to the sole remaining barn. There is no information either way.

37. It is not known who undertook the works but given the substantial size of the barns it is work of a type most likely undertaken by a builder. However, no mention is made of demolition within the description of development in the decision or elsewhere within the application. In contrast, the permission in '*Field'* explicitly included 'demolition' within the description of development. Despite this key distinction I am invited to conclude that demolition was part of the development by necessary implication.

38. It is clear from *Field* that an act of demolition preparatory to re-development can suffice to commence that development in circumstances where the permission being implemented has specifically included permission for the demolition (whether or not required).

[5] By virtue of section 13(1) of the Planning and Compensation Act 1991
[6] By virtue of Schedule 7, paragraph 10(2) of the Planning and Compensation Act 1991.
[7] [2004] QBD173

39. Whilst demolition of the barns was needed before the development could proceed it is not included within the description of development permitted in the 1995 planning permission. Therefore, the demolition works cannot be said to be specifically authorised by the permission.

40. The appellant submits further that in any event the demolition works would have required operations carried out by a builder in order to effect them. As such, it is argued they qualify as 'development' under Glidewell LJ's category d) from *Cambridge City Council v Secretary of State for the Environment*[8] as cited in *Field*. Category d) is the proposition that demolition works of a particular type or scale may be 'operations normally undertaken by a person carrying on business as a builder.' This is in reference to the meaning of 'development' within the provisions of the 1990 Act.

41. In principle demolition works can amount to building operations. The Council's witness acknowledged that the demolition of the barns was likely to involve building operations undertaken by a builder. Nonetheless, they were still not 'comprised in the development' for development to be taken to be begun under section 56. Indeed, when viewed objectively such works cannot have been done in accordance with the 1995 permission when it made no mention of demolition. There is no uncertainty on the face of the permission.

42. Furthermore, it is simply not known when the demolition works were undertaken. Both parties' witnesses agreed that the only evidence of the time when demolition took place is the aerial photograph from March 1992 which shows the barns partially removed. It can also be seen that wider works were underway to build the golf course. The aerial photograph from 1985 shows the barns in place. Demolition could have started any time between those dates. It could have been for purposes totally disconnected to this development.

43. An explanation proffered by the Council was that removal of sections of the original barns was undertaken to facilitate a change of use to a workshop/store and the creation of a greenkeeper's compound. No permission was sought for such use, but the compound is apparent in an aerial image from 1999. A letter from the planning agent acting in November 2002 on a scheme involving removal of the 'existing workshop' described as a 'traditional steel framed and clad workshop' reinforces that the barn was in use as a workshop. The Council's witness surmised that another reason could be to tidy the site pending the opening of the golf course.

44. Whether the demolition was for these other purposes is speculative. The Council argues that the works must genuinely be done for the purpose of carrying out the development[9]. Later authorities have preferred to apply an objective approach of whether what has been done was in accordance with the relevant planning permission.

45. Taking that objective approach, I find that there is insufficient evidence as a matter of fact to draw the conclusion that the works were undertaken in accordance with the 1995 permission.

46. There is no evidence before me that demolition of the barns carried on after 27 July 1992 when the statutory definitions of 'development' and 'material operation' changed to include works of demolition. Even if they had, the same

[8] [1992] 3 P.L.R

[9] As per Thayer v SSE [1992] JPL 264 & Malvern Hills Dc v SSE [1982] J.P.L. 439

issue would arise over the works not being 'comprised in the development' for development to have begun. By the time of issue of the 1995 permission demolition works would be permitted development[10] and so express planning permission would not have been needed.

47. It follows that I cannot be satisfied development was begun pursuant to the 1995 planning permission by virtue of the act of demolition of the barn/s.

The access works

48. The 'ghost island junction' utilised land within the public highway. A 'Highways Agreement'[11] was entered on 12 January 1994 between the developers and the local highway authority. It is expressed to relate to application numbers S90/0830 and S90/1355 pursuant to which the 1991 and 1995 planning permissions, were granted respectively. Schedule 2 secured improvements to the B439 Stratford Road at Bidford-on-Avon to provide a right-hand turning facility at the site access. Clause 3 required those works to commence within seven weeks of the Agreement date. It is not certain, but the witnesses accepted it was likely the works were carried out within that timescale. It is agreed they were undertaken prior to the issue of the 1995 permission.

49. The Highways Agreement was entered for the purpose of securing highways works in connection with the development of land. It recognises that those works were needed for both schemes. As an agreement entered for highways purposes it does no more than provide a mechanism to ensure that the specified works were undertaken should either development proceed.

50. As it was, by the time the Highways Agreement was entered the golf course development was implemented whereas the clubhouse/leisure facility was yet to be granted planning permission. The Agreement could not require highways works to be undertaken before a development had secured planning permission. In requiring the highways works to commence within seven weeks of the date of the Agreement, it is evident that the works must have been undertaken for the golf course development. At the time the Agreement was entered not only was the clubhouse scheme yet to be determined, there was no certainty that permission would be forthcoming.

51. Compliance with the Highways Agreement would satisfy the highways requirements for both schemes, but that is not the same as beginning development under section 56 of the 1990 Act. They are altogether separate.

52. It matters not whether the works were included in any other scheme. What must be looked at is the nature of the works themselves in conjunction with the development applied for and subsequently granted permission.

53. The access works were needed for the golf course development approved by the 1991 permission. A Grampian style condition attached to that permission prohibited any construction works until the ghost island junction had been provided. Clearly, this had been breached as the golf course was complete and in use by the time the Highways Agreement was entered. The highways works were thus required to secure compliance with the 1991 permission which could otherwise have been subject to enforcement action. Further conditions were

[10] Under the provisions of the Town and Country Planning (General Permitted Development) Order 1995
[11] An Agreement made pursuant to sections 38 & 184 of the Highways Act 1980, section 106 of the 1990 Act and section 111 of the Local Government Act 1972 and all other enabling powers.

imposed on the 1991 permission for the upgrade of the existing vehicular access which provided an established lawful vehicular link between the application site and highway.

54. Condition 8 of the 1995 permission provided that the development shall not be occupied until a full standard ghost island junction had been provided on the B439 and for the site access. Conditions 9-15(inc) contained a series of conditions all relating to the vehicular access set out in similar terms to those within the 1991 permission. The application form identifies that the existing access is to be increased to 6m. This simply confirms the means of access. It is not a planning application for the access as it is not included in the description of development applied for or the grant of permission and it is outside the development site identified by the red line. The reason for conditions 8-15 is stated to be "To ensure that a satisfactory form of access is provided."

55. Therefore, the access works were required by condition for both schemes. There is overlap, but they are different schemes authorised by separate permissions rather than a single mixed-use scheme of the Bidford Grange site.

56. It was accepted by the appellant's witness that planning permission can only be granted for 'development' as defined by section 55 of the Act. Furthermore, that planning permission cannot be granted for something that is not within the description. In essence, the description tells you what is permitted, and the conditions limits what is permitted as per *Cotswold Grange Country Park LLP v SSCLG & Tewkesbury DC*[12]*. Wall v Winchester City Council*[13] confirms that the development for which planning permission is granted must be ascertained by interpreting the words in the permission itself.

57. Condition 8 does not require the ghost island junction to be built but prevents the use until the works are provided. It does not give planning permission for those works and the appellant's witness agreed that a condition could not do so. Similarly, conditions 9 onwards do not authorise vehicular access works but impose limits on the way the access must be constructed and used.

58. For the purposes of section 56(2), a 'material operation' includes any operation in the course of laying out or constructing a road or part of a road (section 56(4)). As a matter of fact, the access works comprise the construction of a road or part of a road. Those works are clearly more than *de minimis.* However, the access works can only constitute a material operation for development to be taken to have begun under section 56(2) if those works were 'comprised in the development'.

59. The extensive conditioning of the vehicular access perhaps illustrates its importance to delivery of the scheme, but it does not mean the those works commenced development. It is quite common for conditions to require works outside of the application site.

60. In this regard, the Council draws my attention to an Appeal Decision[14] for land on the north side of Ings Road, Kirton-in-Lindsey. The appeal concerned an application for a lawful development certificate[15] for a proposal to construct 49 dwellings. Outline planning permission had been granted and the case turned

[12] [2014] EWHC 1138 (Admin)
[13] [2015] EWCA Civ 563
[14] Appeal ref: APP/Y2003/X/00/1047990 dated 22 February 2001
[15] Made under section 192(1)(b)

on whether the construction of a new wall and footpath on land outside the appeal site to improve visibility at a junction, constituted commencement of development to keep the planning permission alive.

61. In that case, the Inspector concluded that any improvements in the road junction and road in the vicinity of, but outside the appeal site, could not be regarded as 'comprised in the development' for development to have begun under section 56(2) even though they were material operations.

62. In this case, the highways works were outside the red line application site for the 1995 permission. In fact, they are a considerable distance apart with the golf course lying in between.

63. At the Inquiry it was identified that part of the visibility splays at the bell mouth of the junction appeared not to be solely highway verge, but to include areas on either side of the access within the developer's ownership falling within the blue line shown in the 1995 permission.

64. The appellant argues that the red line site is merely a planning tool used by professionals. However, the Regulations in force at the time of the application required an application to be accompanied by a plan which identifies the land to which it relates[16]. The witnesses agreed that the area outlined in red denotes the application site which is to be developed and the land outlined in blue is other land within the landowner's control. That reflects the position now set out within the national Planning Practice Guidance[17].

65. Section 70 of the 1990 Act allows planning permission to be granted either unconditionally or subject to such conditions as the local planning authority thinks fit. Pursuant to section 72(1), conditions may be imposed for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient *for the purposes of or in connection with the development authorised by the permission*.

66. The appellant emphasises the words in italics, but they do no more than confirm that conditions can be imposed either for the purposes of the development or for purposes connected with it. These sections provide the power to impose conditions on land within the red and blue line land. In this case the pertinent conditions are for purposes connected with the development rather than being part of it. The appellant considers it absurd if works required under a planning permission should not be development for its purposes. However, conditions can legitimately impose measures on other land within the applicant's control without giving rise to enforcement problems.

67. The access works cannot be considered as being 'comprised in the development' within the meaning of section 56(2) when they involved public highway which was not only outside of the development, but also outside of the applicant's control. Even if land within the blue line site was used and the works are subject to conditions, that is not enough to bring the access works within section 56(2) when there is no reference to those works within the

[16] The Town and Country Planning (Applications) Regulations 1988
[17] In the chapter titled "Fees for planning applications" paragraph 017 says the "Site area is defined as the area to which the application relates. This should be shown edged in red on plans accompanying an application, while other land in the same ownership but not being developed should be outlined in blue."

development permitted, they are not within the application site or included on the approved plans.

Conclusion

68. Whilst *Lawson* is authority that planning permission can be granted for a hybrid of retrospective and prospective development there is no substantive evidence that the 1995 permission was a hybrid permission with development having already partly begun.

69. Moreover, the works of demolition and provision of the access works were not comprised in the development to commence development for the purposes of section 56 of the Act.

The Alternative case

70. An alternative case advanced by the appellant relies on the judgment in *Robert Hitchins Ltd v Worcestershire County Council*[18] as authority for the proposition that where two planning permissions comprise in part the same development, development sufficient to implement one suffices to implement the other where the permissions are materially consistent.

71. Both parties make submissions on whether the 1991 and 1995 permissions are mutually consistent. The appellant asserts that there are overlapping elements and the appellant chooses implementation of the 1995 permission.

72. The 1991 and 1995 permissions overlap in terms of the access works. *Hitchins* involved identical schemes where works had commenced on one before the second permission was issued. Unlike *Hitchins*, the first development (i.e. the golf course) and the access works were in fact complete by the time the 1995 permission was issued. Thus, the 1995 permission did not exist at the time of the works for any choice to be exercised over which permission to implement.

73. It is further submitted that works were subsequently undertaken to the access driveway in 1996 which resulted in implementation of the 1995 permission albeit in breach of certain pre-commencement conditions.

74. The works relate to those required to bring the main access which also serves the golf club and hotel up to a suitable standard.

75. In the original application form it is identified that there is an existing means of vehicular access. The answer "*Yes*" is given in response to the question "*Does the proposed development involve the construction of any new vehicular access or the alteration of an existing vehicular access to the site from the highway?*". The details of the proposed width are given as "INCREASED TO 6m". This tells us simply how access will be achieved. No mention is made of the access in the description. Nor is it included within the red line application site or the approved plans. The appellant suggests this was in error as it was integral to the scheme, but that is not the basis upon which the application was submitted or approved. The description and plans are clear on their face. There is no ambiguity in what they provide for. The works were outside of the development permitted and are subject to condition only.

76. The evidence of works after issue of the 1995 permission consists of correspondence from three individuals who worked at Bidford Grange in

[18] [2015] EWCA Civ 1060

differing capacities who talk generically about the access or driveway. An affidavit was also produced from the selling agent in January 1996 confirming that to the best of his knowledge "all planning consents that we had obtained had commenced". None of these witnesses attended the Inquiry to give evidence and their statements are so lacking in detail that they carry very little weight. The evidence does not suffice to demonstrate that works took place after the grant of the 1995 permission even if the view was taken that the works were comprised in the development.

77. In addition, the Council produced a copy of the 1995 approved site layout plan on which the development as exists on the ground was overlaid from the appellant's aerial photograph. It is evident that the section of 'track' claimed to have been upgraded in 1996 is not the same as that shown on the site layout plan. They differ to such a large extent in position and form that it cannot be the access required by the 1995 permission.

78. Consequently, there is no evidence before me that access works were undertaken in accordance with the 1995 permission after it was issued. In the circumstances the *Hitchins* decision does not help the appellant.

Whether there are conditions precedent

79. The Council maintains that even if development had begun pursuant to the 1995 permission, there have been breaches of conditions making the works unlawful. In consequence, the Council says that they would not suffice to keep the permission alive. There is no dispute that there cannot be conditions precedent where there is a hybrid permission. As it is, I have found no evidence to support the 1995 permission being partly retrospective.

80. Aside from condition 3, which is subject of the appeal, the 1995 permission was subject to five other pre-commencement conditions, numbers 4,6,7, 8 and 14.

81. Condition 8 prohibits occupation of the development unless and until the ghost island works are provided. That condition concerns off-site works which as noted above were already complete by the time the permission was issued.

82. Condition 14 required further written approval for details of the design and construction of the proposed means of access. The Council acknowledges this condition was unnecessary as there was an existing drive and other conditions attached to the permission stipulate the specification of the vehicular access.

83. The appellant maintains that conditions 4,6 and 7 were breached, but as they are not conditions precedent the breaches are now immune from enforcement action under section 171B(3) of the 1990 Act. The appellant argues that details of surface water drainage and site levels were in any event shown on the submitted drawings and landscaping details were supplied before issue of the decision. According to the appellant, all that remained under conditions 4,6 and 7 were final details which could be dealt with post-permission.

84. It was established by the Court of Appeal in *F G Whitley & Sons v SSW and Clwyd CC*[19] that the only question to be asked was whether the development was permitted by the planning permission read together with its conditions. If the development contravenes the conditions, it cannot be properly described as commencing the development authorised by the permission. Lord Justice Woolf

[19] [1992] JPL 856

stated that it is not necessary to try to determine whether or not the conditions contained in a planning permission were properly capable of being classified as conditions precedent or otherwise.

85. The *Whitley* principle was considered in *R (oao Hart Aggregates Ltd) v Hartlepool BC*[20] where it was held that a distinction must be drawn between a condition which required some action to be undertaken before development is commenced and a condition which expressly prohibits any development taking place before a particular requirement has been met. Mr Justice Sullivan took the view that even so, it is necessary for the condition both to be expressly prohibitive of commencement of development and to go to the heart of the permission. Only when both tests are satisfied is it a condition precedent to which the *Whitley* principle applies and where the development would be development without planning permission.

86. The Court of Appeal in *Greyfort Properties Ltd v SSCLG*[21] applied both the *Hart Aggregates* judgment and the *Whitley* principle. The judgment makes clear that whilst a true condition precedent must both prohibit development without compliance with it and must also go to the heart of the permission, it is not necessary that the wording itself to be expressly prohibitive. If the substance of the condition is essentially prohibitive in its effect, even though it is only expressed as requiring something to be done "prior to the commencement of development" then it is still capable of being a true condition precedent.

87. Each condition must be considered on a case by case basis to establish if there is a true condition precedent which goes to the heart of the permission.

Condition 4 – surface water drainage

88. Condition 4 provides that "*A scheme for the satisfactory disposal of surface water drainage shall be submitted to and approved in writing, by the District Planning Authority before the development hereby permitted is first commenced. Such an approved scheme shall be completed in all respects prior to the building hereby permitted being first brought into use*."

89. The reason given for condition 4 is "To ensure satisfactory standard of public health". As pointed out by the appellant this reason appears to concern foul drainage provision rather than surface water drainage.

90. It transpired at the Inquiry that in fact nowhere within the plans produced is a surface water drainage layout shown.

91. The informative endorsed on the 1995 permission advises that the site lies adjacent to the River Avon which is a statutory 'Main River'. The application form states merely that it is proposed to dispose of surface water to the River Avon. It is undisputed that the river is prone to flooding in the area. It is plain from the notes at the end of the permission that the National Rivers Authority raised no objection and commented only in relation to the foul drainage and dispersal of chlorine when the contents of the swimming pool are emptied. The inference could be drawn that the Authority was not that concerned about surface water drainage or there may be another explanation. It is not known and so I read little into the lack of comment by the Authority in establishing if the issue of surface water drainage condition was a condition precedent.

[20] [2005] EWHC 840 (Admin)
[21] [2011] EWCA Civ 908

92. As the land slopes the appellant's witness does not envisage a problem in designing a surface water system. Clearly, a solution must be possible otherwise it would not have been reasonable to impose the condition. Under cross-examination the witness agreed that the purpose of the surface water drainage scheme could be to ensure that the volume of water will not cause problems elsewhere along the watercourse. He suggested that development could be commenced without the details which could follow on.

93. Once the building is built or under way it would be too late as the local planning authority would have little or no influence on the measures required. It cannot be known what volume and velocity of water run-off levels there might be. The development involves large areas of hard surfacing from car parking and tennis courts liable to affect surface water drainage and there is no evidence of permeability rates.

94. Given the nature and scale of development and its locality, it seems to me that the condition was drafted requiring details at the outset in recognition of a scheme for surface water drainage being fundamental. It has the effect of preventing use until the approved scheme is brought into first use. From all that I have read and heard condition 4 is in my judgement a true condition precedent going to the heart of the permission.

Conditions 6 & 7 – levels and landscaping

95. Condition 6 provides that "*Notwithstanding the details of the approved plans before the development hereby permitted is first commenced a scaled drawing showing existing levels on the site and proposed finished floor levels of the proposed Golf Clubhouse shall be submitted to and approved in writing by the District Planning Authority. The development shall be undertaken strictly in accordance with such approved drawing.*"

96. Condition 7 required details of a landscaping scheme including the proposed treatment of hard surfaced areas and the retention and planting of trees. The details are to be "*submitted to and approved by the District Planning Authority before the development hereby permitted is commenced*."

97. Whilst acknowledging that ordinarily landscaping would not be regarded as going to the heart of a permission, the Council's witness considers this case to be exceptional and intrinsically linked to levels. She explained that this is a large-scale site which slopes and has different levels. The building may need to be cut into the ground, removed materials deposited somewhere and for the land to be regraded. It may possibly require retaining walls. The scheme is also one where there would be large areas of hard surfacing.

98. Bearing in mind the topography along with the type and scale of development I agree that the issues of levels and landscaping are pivotal to each other.

99. Upon examination of the approved drawings none contain actual levels. The section drawing allows the ridge line of the proposed building to be seen comparative to the adjacent barn conversion. Assuming it is drawn to scale, the second-floor plan also allows the height to be calculated as the floor level and ridge are shown. There was clearly enough information before the Council to reassure its committee that planning permission could be issued.

100. Such scant details would not suffice though to glean how the building would appear in totality, hence the need for the condition. It is not a minor matter,

but one that could impact hugely on how this large building would ultimately appear in its surroundings.

101. I recognise that the position should be assessed on the standards applicable at the time rather than the more stringent requirements of today. It cannot have been lost on the Council when determining the application that this is not a flat site but one that slopes in different directions. In all probability it would necessitate excavation and levelling. There are no finished floor levels and without datum levels there is uncertainty over the potential impact of the development. They are details required upfront.

102. Apart from the treatment of the space between the proposed building and barn conversions, no other details were submitted. This is not a case of merely softening the effect of the development or improving integration with its surroundings. Significant works are likely to be needed which are not peripheral but fundamental to the way that the scheme is delivered.

103. When taking account of all the circumstances I am satisfied that these conditions are prohibitive and do go to the heart of the permission to properly be regarded as conditions precedent.

Conclusion on conditions precedent

104. I find that conditions 4,6 and 7 are conditions precedent. Even if I had accepted that works were undertaken after the 1995 permission was issued, they would have been in breach of conditions precedent. As such, those works would not be capable of commencing development.

Other Matters

105. Various other arguments were advanced by the Council. They include submissions that the severance in land ownership would prevent the golf clubhouse and leisure facilities from "serving Bidford Grange Hotel and a new golf course" as permitted. It is further argued that the use rights attaching to the 1995 permission were extinguished when two subsequent permissions granted in 2012 and 2015 were implemented resulting in an access and cycle track cutting across the proposed car park thereby preventing the approved scheme being built out.

106. Whilst noting these other matters, they do not alter or affect my view that the 1995 permission has not been implemented.

107. My findings have not been influenced by the comments of a planning agent acknowledging that the 1995 permission had expired when permission was sought in 2003 for a scheme encompassing leisure facilities.

Overall Conclusion

108. Having regard to the above and all other matters raised, I conclude that the 1995 planning permission expired without implementation. That being so, the application for approval of external materials is not capable of being discharged and the appeal must fail.

KR Saward

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Mr Michael Rudd	Of Counsel, instructed by the Solicitor to the Council
He called	Tamasine Swan, BSc(Hons), MA,MRTPI Senior Planner

FOR THE APPELLANT:

Gary Moss (Day 1)

Mr M Crook (Day 2)

Mr Daniel Stedman-Jones (Day 3 onwards)	Of Counsel, instructed by MSC Planning Consultants Ltd
He called	Mr M Crook

DOCUMENTS submitted at the inquiry

1 Notice of Inquiry and circulation list.

2 Affidavit of Mr Andrew Granger dated 18 January 2019

3 Aerial image showing part of access track with overlay map

4 Opening submissions on behalf of the Council

5 Letter from MSC Planning Consultants date stamped 9 April 2019 with the submission of materials.