



Appeal Decision

Hearing Held on 8 October 2019

Site visit made on 8 October 2019

by Katie Peerless Dip Arch RIBA

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

Decision date: 21 October 2019

Appeal Ref: APP/J1860/C/18/3208050

Malvernbury, 61 Abbey Road, Malvern, WR14 3HH

- 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 JChill Properties against an enforcement notice issued by Malvern Hills District Council.
 - The enforcement notice, numbered E/15/00053/PHY3, was issued on 22 June 2018.
 - The breach of planning control alleged in the notice is failure to comply with condition No 16 of a planning permission Ref 09/01679/FUL granted on 30 May 2012.
 - The development to which the permission relates is '*Conversion to form 8 apartments, 3 Town Houses and 1 Coach House with associated access and car parking.*'
The condition in question is No. 16 which states that: '*The SuDS drainage scheme submitted as part of this application to control surface water run-off shall be carried out as an integral part of the development hereby approved and be completed and operational before any of the dwellings hereby approved are completed and first occupied. The surface water attenuation shall have sufficient volume to cater for the optimum rates and volumes of surface water run-off produced by the critical duration 1 in 100 year return period storm event + 30% climate change allowance, compared with the site in its existing undeveloped form, without causing flooding to properties and restricting surface water discharge from the development to not more than 6 litres per second. The preferred route for the restricted surface water discharge off-site is by gravity via the existing drain, or its replacement, to the public sewer in College Road, by agreement between the Developer and Severn Trent Water Limited. None of the dwellings hereby approved shall be first occupied until details confirming adherence to the above requirements has been submitted in writing to, and approved by, the Local Planning Authority. The excavations within the site necessary to provide the required storage volume shall be inspected by an officer of the Local Planning Authority and the excavations shall not be backfilled until the dimensions of those excavations have been approved in writing by the Local Planning Authority. The Local Planning Authority shall be given at least 7 days' notice of the date upon which the excavations are available to be inspected.*'
 - The notice alleges that the condition has not been complied with in that the approved SuDS scheme has not been carried out on site.
 - The requirements of the notice are: '*Implement the SuDS drainage scheme (Copy attached to the Enforcement Notice) submitted as part of planning application 09/01679/FUL and as referred to in the Surface Water Drainage Assessment, Version 1.0 prepared by RAB consultants dated October 15th 2010. Ensuring that the surface water attenuation has sufficient volume to cater for the optimum rates and volumes of surface water run-off produced by the critical duration 1 in 100 year return period storm event + 30% climate change allowance, compared with the site in its existing undeveloped form as well as restricting surface water discharge from the development to not more than 6 litres per second.*'
 - The period for compliance with the requirements is 2 calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be varied by the inclusion of the following words in the requirements of the notice:

'either' after 'Implement' and

'or the scheme referred to in the Surface Water Drainage Assessment, Version 2.0 prepared by RAB consultants dated 24th July 2019 provided that a root protection scheme in respect of that proposal has previously been approved by the Council.' after '2010' and

'in respect of the 2010 scheme and not more than 2 litres per second in respect of the 2019 scheme.' after '6 litres per second'.

It is also directed that the time for compliance is extended to 9 calendar months. Subject to these variations the appeal is dismissed and the enforcement notice is upheld.

Main Issues

1. I consider that the main issues in this case are:
 - on ground (b): whether the alleged breach of planning control has occurred as a matter of fact
 - on ground (f): whether the requirements of the notice exceed what is necessary to remedy the breach of planning control and
 - on ground (g): whether the time for compliance with the notice is reasonable.

Site History

2. Planning permission was granted in 2012 for the conversion of an existing care home on the appeal site into self-contained flats and the construction of 4 new build houses on the surrounding land. The flats have been completed and are now occupied but, apart from some ground works, the houses have not been constructed.
3. The appellants have been seeking to vary the permission to allow for the re-positioning of the houses and which would mean that a different drainage scheme to the one originally approved would be installed. For this reason, the appellants are resisting the requirement to install the scheme referred to in condition 16 of the 2012 permission.
4. Although planning permission for the revised scheme has not yet been granted, I was told at the Hearing that the outstanding matters, which include a method to protect the roots of an oak tree on the site, are hopefully close to being resolved. I was also told that once a suitable way of protecting the tree had been agreed, the Council would have no objections to the rest of the revised drainage proposals put forward in connection with latest scheme.

Reasons

Ground (b)

5. The appeal on ground (b) claims that the requirement of the condition to complete the drainage scheme *'before any of the dwellings hereby approved are completed and first occupied'* has not been breached because the flats in the existing building are not 'dwellings' as such and are not therefore caught by it. There is no dispute that the flats are occupied and the scheme referred to in the condition has not been implemented in full.

6. However, the appellants maintain that the choice of the word 'dwellings' was deliberately used by the Inspector who granted the permission on appeal to make clear that the condition refers only to the new build element of the scheme. This would mean that there was no reason to require the drainage proposals to be implemented in respect of the existing building. They say that there was no change to the external areas around the building and that the drainage for the flats runs into the existing system so there would be no need to impose a condition relating to it.
7. The Council considers that the Decision imposes other conditions, which are also required to be discharged before the occupation of the 'dwellings' and that these cover matters such as landscaping, access and parking provision that clearly relate to both the new build and converted units.
8. There are several definitions of 'dwelling' cited by both parties with the appellants considering that the terms 'dwelling' and 'dwellinghouse' are interchangeable. The Town and Country Planning (General Permitted Development) Order 2015 distinguishes between 'dwellinghouses' and flats for the purposes of granting permission for some forms of development and the Town and Country Planning (Use Classes) Order 1987 restricts the maximum number of persons in a 'dwellinghouse' to 6, other than when the occupants form a single household. However, I consider that neither of these definitions are directly applicable to the issues in this case.
9. The Building Regulations include flats within the definition of 'dwellings' and the Town and Country Planning Act 1990 (as amended), in s171B, treats flats as 'dwellinghouses' for the purposes of immunity from enforcement action after a period of 4 years. However, these interpretations are not directly related to the clarification of a planning condition and there is no definitive meaning of the word included for this purpose in planning legislation.
10. I consider that, in this instance, the word should be given its ordinary meaning which includes 'a place of residence' and this would then include both a house and a flat. The flats are self-contained individual units and it seems to me that, had the previous Inspector specifically wanted to distinguish between the residences created by the conversion of the existing property and those included in the new buildings, he would have specifically done so in an unambiguous manner. The fact that he did not, combined with the use of the word 'dwellings' in the other conditions noted above, which I consider relate to all the residential units, leads me to conclude that there is no reason to find that condition 16 does not apply to the flats. The appeal on ground (b) consequently fails.

Ground (f)

11. This ground of appeal claims that the requirements of the enforcement notice exceed what is necessary to remedy the breach of planning control and the Council points out that the breach is the failure to comply with the condition and the requirement of the notice does not require anything more than compliance. The appellants have not demonstrated any lesser steps that would remedy the breach and an appeal on this ground does not therefore succeed. However, the appellants made clear that they sought only to avoid having to implement a scheme that would be redundant if and when planning permission were to be granted for the revised proposal.

12. The Council did not object in principle to a variation of the requirements of the notice to include the alternative of implementing the latest drainage scheme¹ that would serve the revised layout, instead of the scheme specified in the existing condition. However, as referred to in previous paragraphs, the Council was concerned that the scheme does not yet include an agreed method of protecting the roots of the mature oak tree.
13. It seems to me that this would be a sensible way forward that would not prejudice either party provided the scheme would not be implemented until the root protection system objections were resolved. The Council would have the security of knowing that a drainage scheme would be required within a defined time scale and, if the latest scheme can be agreed, the appellants would not have to implement a scheme that they now considered to be redundant. I therefore propose to vary the notice accordingly whilst including this safeguard.
14. I note that the South Worcester Land Drainage Partnership is seeking to secure a surface water discharge rate from the development of not more than 2 litres per second rather than the 6 litres per second specified in the existing condition. As this is one of the changes to the agreed design parameters included in the 2019 report, I will therefore also include this in the revised requirements, for the avoidance of doubt.

Ground (g)

15. The appellants ask for the time for compliance to be extended from 2 months to 9. They note that work on site has ceased for some considerable time and there is no contractor immediately available to carry out the works. They also point out that, to date, there has been no problem with surface water run-off during the time the flats have been occupied.
16. The Council is concerned to ensure that a scheme to discharge the outstanding condition is implemented as soon as possible but I consider that it would be difficult to organise the manufacture and installation of the bespoke attenuation tank, which is proposed to be sited beneath the new town houses, within a 2 month time scale. Time will also be needed to agree the root protection system and to issue a planning permission for the revised scheme. I therefore consider that an extension to 9 months is warranted as I consider this would allow enough time for these matters to be finalised and completed.

Conclusions

17. For the reasons given above I conclude that a reasonable period for compliance would be 9 months, and I am varying the enforcement notice accordingly, prior to upholding it. The appeal under ground (g) succeeds to that extent. Otherwise I shall uphold the enforcement notice with a variation to include the possibility of implementing the alternative drainage scheme.

Katie Peerless

Inspector

¹ Hearing Document 1

APPEARANCES

FOR THE APPELLANT:

Neil Pearce BA (Hons) Dip TP MRTPI Appellants' agent

FOR THE LOCAL PLANNING AUTHORITY:

Aaron Black BSc (Hons)	Planning Enforcement Officer Malvern Hills District Council
Bob Hughes	South Worcester Land Drainage Partnership
Simon Rowles	Case Officer Malvern Hills District Council

INTERESTED PERSONS:

RR Cole Local resident

DOCUMENTS

- 1 RAB Surface Water Drainage Assessment, Version 2.0 dated 24th July 2019