



Appeal Decision

Site visit made on 4 December 2019

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 December 2019

Appeal Ref: APP/X0360/X/19/3227803 429 Reading Road, Winnersh RG41 5HU

- 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 Roy Wood Transits Ltd against the decision of Wokingham Borough Council.
 - The application Ref 180626, dated 5 March 2018, was refused by notice dated 9 July 2018.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is described as "Application relates to works described and approved under planning application reference F/2012/1086 - Demolition of existing workshop/office and erection of 5 new houses."
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application has been submitted in an attempt to demonstrate whether the planning permission (ref F/2012/1086) had been lawfully commenced within 3 years from the date of the decision due to the carrying out of works. It is therefore appropriate to deal with this as a request for a LDC for existing development, under the provisions of s191.
3. A number of submissions from the appellant as well as local people supporting the redevelopment of the site, have referred to the planning merits of the proposed development. However, this is an appeal that relates to the refusal of an application for a LDC and turns on matters of law rather than the planning merits of the development.

Reasons

Background

4. The first condition attached to the decision notice which was issued on 11 December 2012 stated, as is normally the case, that the development should be commenced before the expiry of 3 years from the date of the permission which was 11 December 2012. It was therefore necessary for a material commencement of the approved development to be made by 11 December 2015. There is no dispute between the appellant and the Council

that works had been undertaken which involved the excavation of trenches and pouring of concrete for the footings of a dwelling in accordance with the approved proposed site plan. When I visited, these physical works were still evident. The works were undertaken however before agreement had been reached regarding all matters which required approval prior to the commencement of development, due to various planning conditions that have been imposed.

5. I am referred, amongst others, to the case of *F G Whitley & Sons v SSW and Clwyd CC [1992] JPL 856*, which in simple terms determined that if the development contravenes conditions it cannot be properly described as commencing that authorised by the permission. Subsequently however it has been held that the "Whitley principle" needs to be applied flexibly, recognising that in extensive developments it may be necessary to apply some latitude in terms of timing providing there was no prejudice to the purposes of the conditions.
6. The Council specifically refers to *R (oao Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin)* 179. In that case it was held that a distinction had to 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. Furthermore, I am also referred to *Greyfort Properties Ltd v SSCLG [2011] EWCA Civ 908* which applied both the Hart Aggregates judgment and the principles set out in Whitley.
7. Taking these and other related cases on board, it is necessary in this case to look at the proposal in a staged manner. First of all, can the condition be categorised as a pre-commencement condition? If so, does it go to the heart of the planning permission as a matter of judgment and what is the significance of the condition to the permission? Then, has the work relied upon to commence the planning permission been carried out in breach of that condition?

Application of case law to this appeal

8. The Council has accepted that many of the matters required by prior approval conditions including landscaping (condition 6), boundary treatments (condition 7), drainage details (condition 8), vehicle parking (condition 9) and cycling parking (condition 12) are either not true conditions precedent or satisfactory details were submitted and agreed. I do not disagree with this assessment from the limited information that has been provided.
9. The matters related to condition 13 are the main issues in dispute in this case. This condition states:-

Prior to the commencement of the development, a scheme to deal with potential contamination of the site (including contamination that may arise from demolition works) shall be submitted to and approved in writing by the local planning authority. The scheme shall include an investigation and assessment to identify the extent of any contamination and the measures to be taken to avoid risk when the site is developed. No building shall be occupied until the measures have been carried out in accordance with the approved scheme and a validation report has been submitted to and approved in writing by the local planning authority.

10. The reason for the condition is:-

To protect neighbours (sic) and future occupiers (sic) of the site from the harmful effects of contamination.

11. The condition seeks to prevent any development before a scheme to deal with potential contamination across the site had been agreed. As such this is potentially a condition precedent which prohibits development.
12. The Planning Practice Guidance (PPG) makes it clear that failing to deal adequately with contamination can cause harm to human health, property and the wider environment and can also limit or preclude new development. Although the PPG and the National Planning Framework had not been published when the planning permission was granted, it has been established for many years that historic contamination can preclude development if it cannot be suitably dealt with.
13. Although it is not clear what information the Council had when it dealt with the application, they approved the development rather than refusing it on the basis of the information they had even if that regarding contamination was limited. The tests for planning conditions are also well established. In my view, it would not have been reasonable for the Council to issue a planning permission with a planning condition that could not be complied with if there was a likely risk that a suitably safe development could not be achieved. The Council could have withheld planning permission or refused it due to the lack of sufficient information to satisfy themselves on this matter. My interpretation of the planning permission is therefore that the Council did not consider that contamination was likely to be something that would preclude development entirely.
14. The requirements are clearly significant however. The condition draws attention to the need to not only identify the extent of any contamination but also the measures to be taken to avoid risks from it. It also requires agreement to a methodology for development. Carrying the development out in a particular way may well be significant for the ultimate safety of the prospective occupants as well as the occupiers of existing nearby dwellings. If, for example, the digging and filling of foundation trenches as has occurred in this case compromised the ability to produce a safe development as well as safeguarding adjoining land from additional risks, it could produce an unacceptable development. Put another way, without having the detailed information prior to commencing development, harm could occur that may not always be possible to be undone.
15. As such, I consider that in this case it was clearly necessary for a scheme to be submitted to show what matters needed to be addressed before any work towards the development had commenced. These matters clearly affect the fundamentals of how the development needs to be undertaken and go to the heart of the planning permission.
16. An initial phase 1 contamination report was submitted after planning permission was granted but close to the deadline for commencing development. A phase 2 report is also now available. However, it is for the Council to consider whether the reports adequately address the contamination risks on the site and my remit is confined to whether the works that commenced were an implementation of the planning permission or not. It

has been held that the general rule when construing a planning permission is that its meaning should be apparent on its face since that is the public document available. It should not normally be necessary for somebody looking at the planning application documents to have to look beyond the approved plans and the conditions in order to interpret a planning permission.

17. There are aspects of what the condition in this case requires that would be difficult to undertake including the investigation under the workshop that needs to be used until the appellant company move to another site. Demolishing the building in itself would commence the development in breach of the planning condition. However, it is not clear that ground investigations around the outside of the building would not satisfactorily deal with this matter initially in a way to show development can be carried out safely but with final phasing of final investigations when that initial work has been agreed.

Conclusion

18. The condition is a pre-commencement condition. It goes to the heart of the planning permission in my judgment and raises matters that are significant for the future occupiers of the site and also neighbouring occupiers. The work relied upon to commence the planning permission has been carried out in breach of that condition. Therefore, in light of and taking these matters into account, I consider that the planning permission has not been lawfully commenced or therefore implemented within the requisite period.
19. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the description set out in the header to this decision, 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.

A Harwood

INSPECTOR