

Appeal Decisions

Hearing Held on 15 January 2020

Site visit made on 15 January 2020

by K Savage BA MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 February 2020

Appeal A Ref: APP/T0355/W/19/3235880

Missanda, Wells Lane, Ascot SL5 7DY

- 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 Pipeline Worldwide SA against the decision of Council of the Royal Borough of Windsor and Maidenhead.
 - The application Ref 18/03634, dated 14 December 2018, sought approval of details pursuant to Conditions Nos 2 and 3 of planning permission Ref 15/02893, granted on 4 February 2016.
 - The application was refused by notice dated 14 June 2019.
 - The development proposed is construction of 2 detached dwellings following demolition of existing dwelling and outbuildings.
 - The details for which approval is sought are:
 - Condition No 2: Scheme for mitigation of effects of the development on the Thames Basin Heaths Special Protection Area
 - Condition No 3: Samples of external materials
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Appeal B Ref: APP/T0355/W/19/3235884

Missanda, Wells Lane, Ascot SL5 7DY

- 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 Pipeline Worldwide SA against the decision of Council of the Royal Borough of Windsor and Maidenhead.
 - The application Ref 18/03705, dated 19 December 2018, sought approval of details pursuant to conditions Nos 4, 5, 6, 7, 8, 9, 10, 12, 13 and 16 of planning permission Ref 16/03736, granted on 21 February 2017.
 - The application was refused by notice dated 14 June 2019.
 - The development proposed is construction of 2 detached dwellings following demolition of existing dwelling and outbuildings as approved under planning permission 15/02893 without complying with condition 20 (approved plans) to replace approved plans to allow for 2 No. rear dormers and 3 No. side roof lights.
 - The details for which approval is sought are:
 - Condition No 4: Finished slab and floor levels
 - Condition No 5: Tree protection measures
 - Condition No 6: Details and method statement for retaining wall
 - Condition No 7: Siting and design of walls, fencing and other means of enclosure
 - Condition No 8: Details of proposed underground utilities
 - Condition No 9: Details of hard and soft landscaping works
 - Condition No 10: Construction Environmental Management Plan
 - Condition No 12: Details of sustainability measures
 - Condition No 13: Location of water butt
 - Condition No 16: Construction Management Plan
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Decisions

1. Appeal A is allowed and details are approved pursuant to Conditions 2 and 3 attached to planning permission Ref 15/02893, granted on 4 February 2016, in accordance with the application Ref 18/03634, dated 14 December 2018 and the details submitted with it.
2. Appeal B is allowed and details are approved pursuant to Conditions 4, 5, 6, 7, 8, 9, 10, 12, 13 and 16 of planning permission Ref 16/03736, granted on 21 February 2017, in accordance with the application Ref 18/03705, dated 19 December 2018 and the details submitted with it.

Preliminary Matters

3. The application forms for each case initially sought the approval of details of conditions attached to planning permission Ref 15/02893 (the 'original' permission). However, prior to validation of application Ref 18/03705 (Appeal B), the appellant requested that the application form be amended to instead seek approval of details of conditions attached to planning permission Ref 16/03736 (the 'Section 73' decision). The Council's decision notices duly reflect the specific approval of details sought by the appellant. Whilst the Council's description of development in respect of application Ref 18/03705 also refers to the original permission, this is done in the context of identifying the Section 73 decision as deriving from that original permission and I do not infer from this any implicit assessment by the Council of 'both' sets of conditions under each application, and the Council has stated it did not do so. Accordingly, I have considered Appeal A as relating to Conditions 2 and 3 of the original permission, and Appeal B as relating to Conditions 4, 5, 6, 7, 8, 9, 10, 12, 13 and 16 of the Section 73 permission.
4. Application Ref 18/03705 (Appeal B) also initially sought approval of details of Conditions 15, 19 and 20 of planning permission Ref 16/03736, but the appellant asked that these be withdrawn from consideration during the application process. Therefore, I have not had regard to these conditions.
5. At the Hearing, the parties indicated a clear intention to agree and complete a Section 106 Agreement addressing the payment of Suitable Alternative Natural Greenspace (SANG) and Strategic Access Management and Monitoring (SAMM) contributions to address the requirements of Condition 2 under Appeal A, though this could not be completed by the close of the Hearing due to the practicalities of drafting and obtaining all necessary signatures. Accordingly, I afforded the parties the opportunity to complete an agreement, which I have subsequently received and address within my reasoning below.

Background and Main Issues

6. The original planning permission was granted on 4 February 2016. The Section 73 decision was subsequently granted on 21 February 2017. The applications now subject to the appeals were made in December 2018, prior to the expiry of the time limit for commencement of both permissions on 4 February 2019. Following the submission of these applications, and in the days before the expiry of the permissions, the appellant notified the Council that it intended to commence development on site by digging a trench. A site record notice was submitted to confirm what works had taken place. The Council acknowledges that these works are sufficient to constitute a material start to the

development; however, it concluded that the work carried out is in breach of Condition 2, which it regards as a 'condition precedent' requiring details to be approved before commencement of development. As a consequence, the Council considers the development undertaken is unlawful.

7. The Council refused both applications in June 2019, after the expiry date of the permissions. With the exception of Condition 2 under Appeal A, which was refused on the basis that an acceptable scheme of mitigation had not been provided, the Council's decision notices confirm that all of the details submitted pursuant to the conditions are acceptable. However, each of these conditions was refused on the basis that the relevant permissions had expired and, as a result, the conditions were of no effect and so the details sought by them could not be approved.
8. Given this background, the **main issues** in both appeals are firstly, whether the details submitted can still be approved, and if so, whether the details submitted would satisfy the conditions imposed.

Reasons

Whether details can be approved

9. The Council takes the view, informed by its interpretation of various court judgements, that development in breach of a 'condition precedent' renders the entire permission unlawful, and that later compliance with conditions would not allow the permission to be lawfully implemented.
10. The appellant argues, with similar reference to legal authorities, that the Council has misunderstood the legal principles and case law applying to breaches of 'conditions precedent' and that the acknowledged unlawful commencement of development does not prevent later approval of details sought by the conditions.
11. Both parties refer to the 'Whitley Principle', which arises from a 1992 decision of the Court of Appeal¹. That decision laid down a general rule that operations carried out in contravention of conditions cannot be described as commencing the development authorised by the permission, and therefore constitute a breach of planning control, so that they are unauthorised and unlawful.
12. However, the same decision outlined an exception to the rule, whereby later approval of details for which approval had been sought *prior* to the unauthorised commencement would mean that works carried out could be taken as having validly commenced within the time limit. The timeline of events in this case aligns with this exception.
13. On my reading of the evidence, the Council does not appear to have taken account of the original exception in the *Whitley* case, which expressly allows for the potential later approval of details submitted in advance of an unauthorised start, and for the later approval of the details to render the commencement of development lawful.
14. Subsequent case law referred to by both parties has introduced further refinements to this exception, including the issue of whether a condition

¹ FG Whitley & Sons v Secretary of State for Wales (1992) 64 P&CR 296

precedent 'goes to the heart of the planning permission'². The Council stated at the Hearing that it only considered Condition 2 of the original permission to be a condition precedent. I have heard and read the extensive evidence put to me by the parties in respect of whether Condition 2 is a condition precedent and whether it is necessary for me to reach a judgement on that question.

15. The appeals have ultimately been made against refusals to grant consent, agreement or approval to details required by a condition of a planning permission. They are not related to enforcement matters or the refusal to issue lawful development certificates. On the evidence put to me, I see no legal reason why I cannot consider the details of the conditions at this stage, pre-commencement or otherwise. Should the details submitted prove to be adequate in addressing the matters covered by the relevant conditions, it would then be for the Council to decide whether approval of the details would necessarily remedy any unlawful commencement of works, or whether the permission would remain unlawfully commenced because details of any condition regarded as a condition precedent were not approved in time.
16. Therefore, on the basis of all of the evidence I have heard and read, I can see no bar in legal terms to my considering the details of the conditions now.

Acceptability of details submitted

Appeal A - Condition 2

17. Condition 2 states that no development shall take place until a scheme for the mitigation of effects of the development on the Thames Basin Heaths Special Protection Area (the SPA) has been submitted to and approved in writing by the Local Planning Authority. It adds that the scheme shall provide for the delivery of SANG and towards SAMM. A further requirement of the condition relates to the physical delivery of SANG, which is not relevant to the present case.
18. The Council's position is that the condition should be fulfilled by means of a planning obligation securing financial payments towards off-site SAMM and SANG, initially discussed in the form of a Section 111 Agreement. However, by the time the Council refused the application, a completed agreement was not before it. I heard argument from the appellant, based on principles established in *Flintshire*³ that the condition was discharged 'in substance' on the basis of email correspondence from the appellant agreeing to enter into a legal agreement, and the Council sending a draft wording to the appellant. However, there was no signed agreement in place at the time the Council made its decision, nor any realistic prospect of one given the dearth of correspondence in the matter in the preceding weeks. The version of the agreement signed by the appellant is incomplete, as the Council had not signed it and thus was not bound by its terms.
19. Subsequently, the appellant has submitted a signed unilateral undertaking at the appeal stage. However, at the Hearing, the appellant conceded that there were errors in the drafting of the undertaking, such that it would not have had the intended effect of securing the payments towards SAMM and SANG. This

² R (on the application of Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin) ("Hart Aggregates"); later applied in Bedford Borough Council v SSCLG and Aleksander Stanislaw Murzyn [2008] EWHC 2304 (Admin) and other cases

³ R v Flintshire County Council and Another Ex Parte Somerfield Stores Limited [1998] P.L.C.R. 336

aside, the obligation submitted is unilateral and as such would not bind the Council to spend the SAMM and SANG contributions on relevant mitigation measures. That is not to suggest that the Council may not spend the contributions appropriately, however, when asked at the Hearing, the Council stated that it could not point to a published source setting out such a process. I can envisage a situation where an authority determining a planning application which is also responsible for implementing the mitigation could satisfy itself that a sufficiently robust link exists between effect and mitigation. However, I am the competent authority under the Regulations in respect of this appeal and the submitted obligation does not give me the required certainty that adverse effects on the SPA would be avoided.

20. Perhaps cognisant of this, the parties have submitted a signed Section 106 agreement following the close of the Hearing. This agreement would secure payment of the SAMM and SANG contributions sought by the Council, and binds the Council to delivering the mitigation. Having regard to the scale of the development, its location relative to the SPA, and the guidance of the Council's SPD, I am satisfied that the Section 106 agreement would provide appropriate mitigation for the effect of the proposal on the integrity of the Thames Basin Heaths Special Protection Area, and would accord with saved Policy NRM6 of the South East Plan (2009), which requires adequate measures to avoid or mitigate any potential adverse effects on the SPA. The details submitted are therefore adequate to satisfy the condition.

Appeal A – Condition 3 & Appeal B – Conditions 4, 5, 6, 7, 8, 9, 10, 12, 13, 16

21. Notwithstanding the Council's position regarding the expiry of the permissions, the decision notices concluded that the details of each of these conditions were acceptable in each case. The parties confirmed to me at the Hearing that this was still common ground between them. None of the evidence before me indicates that the details are unacceptable in respect of any of these conditions, and therefore I have no reasons to reach different conclusions on the acceptability of the details themselves. Accordingly, I find that the details submitted for Condition 3 of planning permission Ref 15/02893, and Conditions 4, 5, 6, 7, 8, 9, 10, 12, 13 and 16 of planning permission Ref 16/03736, are adequate to satisfy the conditions.

Conclusion

22. For the reasons set out above, I conclude that there is no bar in principle to the consideration of the details submitted, but that it would be for the Council to decide whether approval of these details would necessarily remedy any unlawful commencement of works.
23. In respect of the details submitted, I conclude that the details in respect of every condition for which approval is sought, under both Appeal A and Appeal B, are acceptable and can be approved. Both appeals are therefore allowed.

K Savage

INSPECTOR