
Appeal Decisions

Site visit made on 9 March 2020

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 23 April 2020

Appeal A Ref: APP/F9498/C/19/3229017

Land at South Croscombe Farm, Lynton in the County of Devon

- 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 James Bryant against an enforcement notice issued by Exmoor National Park Authority.
- The enforcement notice was issued on 12 April 2019.
- The breach of planning control as alleged in the notice is Without planning permission and in the last four years, unauthorised engineering works/excavation work on the Land, as shown in the photographs attached at Appendix A.
- The requirements of the notice are 1. Reinstate the levels of the land in the red lined area with soil so that the reinstated land is level with the adjoining land on either side, as shown in the photographs attached at Appendix B which show the land prior to the unauthorised engineering works taking place; 2. Reseed the land and return the Land to agricultural grassland.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Appeal B Ref: APP/F9498/X/19/3229117

South Croscombe Farm, Lynton, EX35 6JW

- 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 Mr James Bryant against the decision of Exmoor National Park Authority.
- The application Ref 62/41/18/038, dated 12 October 2018, was refused by notice dated 14 February 2019.
- 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 'Material commencement of building works being construction of Agricultural Workers Dwelling ref 62/41/14/005'.

Summary Decision: The appeal is dismissed.

Procedural Matter

1. In the light of the coronavirus/COVID-19 pandemic, both parties' views were sought as to whether the period for compliance in the notice should be extended with regard to any health or other impacts on the appellant and their family; any requirements or implications of the Coronavirus Act 2020 or the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020; and any related regulatory or other Coronavirus/COVID-19 related issues. Comments made have been taken into account and I address this matter under ground (g) below.

Appeal A - the Notice

2. Paragraph 2 of the notice refers to land at 'South Crosscombe Farm'. It would appear from other documentation that this is a typographical error and that the proper address is 'South Croscombe Farm'. The land is also referred to as being edged and shaded red on the plan attached to the notice, whereas it is in fact only edged red. I consider that I can make the appropriate corrections without any injustice.

Background

3. Planning permission was granted on 4 March 2015¹ for an agricultural worker's dwelling on the appeal site (2015 Permission). This was subject to a condition that the development was commenced within 3 years. Engineering/excavation works, intended by the appellant to implement the 2015 Permission, were undertaken prior to the expiry of that 3 year period.
4. The Council submits that those excavation works were undertaken in breach of pre-commencement conditions and so do not represent a lawful implementation of the 2015 Permission. Details submitted by the appellant after the expiry of the 3 year period and seeking to discharge those pre-commencement conditions were not, on the evidence before me, formally approved or refused by the Council.
5. Thus, the Council refused to grant a LDC confirming that a lawful commencement had occurred and issued an enforcement notice in respect of those engineering/excavation works, these being the subject of the present appeals.
6. As the issues which are central to the Appeal A ground (c) appeal and to the Appeal B LDC appeal are closely intertwined, I deal with these together below.

Appeal A - the Appeal on Ground (c) and Appeal B – LDC refusal

7. The appeal on ground (c) seeks to show that the matters which are the subject of the enforcement notice do not constitute a breach of planning control. The appellant's case is essentially that the engineering/excavation works represent a lawful implementation of the 2015 Permission and so are not in breach of planning control.
8. The main issue in respect of the Appeal B LDC appeal is whether the Council's decision to refuse to grant a LDC was well founded. This also will turn on

¹ Reference: 62/41/14/005

whether the engineering/excavation works represent a lawful commencement of the 2015 Permission meaning that it has been implemented within the requisite 3 year period. The burden is on the appellant to make their case on the balance of probabilities.

Reasoning

Whitley judgment

9. Planning permission can only be implemented by operations which are not in breach of planning control. The single question identified in the *Whitley*² judgment was therefore whether the operations in question are permitted by the planning permission read together with its conditions. The consequence is that if the operations seeking to implement the planning permission are in breach of the conditions, they cannot be said to commence the development permitted.
10. Thus, *Whitley* established the principle that development commenced in contravention of a condition requiring the prior approval of details or associated works is development without planning permission. The operation of this principle requires an assessment of whether the conditions in question are properly capable of being classified as conditions precedent.

The conditions

11. The Council has accepted during the course of the appeal that condition 4 of the 2015 Permission is not a condition precedent. Accordingly, there are two conditions on the 2015 Permission which the Council considers to be conditions precedent which were not complied with prior to the engineering/excavation works being carried out. The conditions in question then are:

Condition 5: No development shall take place until there has been submitted to and approved in writing by the Local Planning Authority a scheme of landscaping, which shall include indications of all existing trees and hedgerows on the land, and details of any to be retained together with measures for their protection in the course of the development. The scheme of landscaping shall include details to show the provision of a new earth bank and hedge formed to the south and west of the site for the proposed dwelling and along the south side of the access lane hereby approved. Once approved these works under a scheme of landscaping shall be carried out and completed during the planting season next following the substantial completion of the development hereby approved or during such later season as may be agreed in writing with the Local Planning Authority. Any tree becoming seriously diseased within 10 years from the date on which the scheme shall have been completed shall be replaced with the same species. For the purpose of this condition the expression 'planting season' shall mean the period between 15th September and 15th March.

Condition 6: No development shall take place until details of earthworks have been submitted to and approved in writing by the Local Planning Authority. These details shall include the proposed grading and mounding of land areas including the levels and contours to be formed showing the relationship of the

² *F G Whitley & Sons v SSW and Clwyd CC [1992] JPL 856*

*proposed mounding to existing vegetation and surrounding land form.
Development shall be carried out in accordance with the approved details.*

Analysis

12. Both of these conditions are expressly prohibitive of any development commencing on site prior to compliance with the requirements of those conditions. They are therefore, in form at least, conditions precedent. As to whether they are conditions precedent in substance i.e. whether they go to the 'heart' of the condition, this requires an assessment of whether they relate to details of the development, rather than its fundamental nature.
13. Turning firstly to condition 5, given the location of the appeal site in an exposed location within a National Park, I accept the Council's submission that in this case, landscaping is a very important matter. Indeed, I agree that this is a proper basis for distinguishing the present case from the *Murzyn*³ judgment referred to by the appellant.
14. However, as a matter of fact and degree, I do not find that landscaping is so fundamental to the development authorised that details must necessarily be approved before the main building works could realistically commence. Although undoubtedly of notable importance within a National Park, it seems that failure to comply with the landscaping condition could properly be enforced against as a breach of condition, rather than such failure rendering the whole development unlawful.
15. I acknowledge that the landscaping scheme required to be submitted was to include *'indications of all existing trees and hedgerows on the land and details of any to be retained together with measures for their protection in the course of the development'*. However, there is nothing on the evidence before me to suggest that the appellant was precluded from removing any such trees/hedges prior to the commencement of development and thus prior to this condition coming into effect, and so this aspect does not alter my analysis above.
16. As to condition 6, the development as permitted by the 2015 Permission could not be physically carried out without some form of earthworks. Whilst the approved plans give some details of ground levels, this is somewhat limited including for example, as the Council comments, that the levels from north east to south west are not shown and that no proposed ground levels are shown on the approved plans other than one spot finished ground level height of 259.75 which is indicated.
17. Therefore, approval of proposed earthworks was necessarily required prior to the commencement of development given that it would be integral to the carrying out of the development. Thus, condition 6 represents a 'true' condition precedent. Although the excavation works were apparently carried out to the level shown in approved drawing 1627/310, nonetheless these were carried out in breach of condition 6 as they were carried out prior to approval being given per this condition, and bearing in mind that the approved drawing referred to does not fully detail proposed levels.

³ *Bedford BC v SSCLG & Murzyn* [2008] EWHC 2304 (Admin)

Exceptions to Whitley

18. However, whilst the *Whitley* judgement has outlined the principle that works in breach of a true condition precedent will result in an unlawful development, so too did it establish an exception to this principle, with additional exceptions also given in other case law. The exception established in *Whitley* was in respect of a situation where the application for approval of a scheme was made within time and approval was delayed until after works commenced, but later given.
19. The appellant contends that the present case should operate as an exception to *Whitley* on the basis that details have been submitted and not formally refused by the Council. However, on the evidence before me, it would appear that those details were not submitted prior to the expiry of the requisite 3 year period and further, have not been approved. Thus, the appellant has not shown on the balance of probabilities that the exception stated in *Whitley* is applicable.
20. As to whether 'substantive compliance' is achieved with the condition otherwise, whilst I note the details in the approved drawing 1627/310 related to earthworks, as outlined above, I do not consider that these are sufficiently detailed to amount to a fulfilment of the requirements of condition 6. Thus, this case does not constitute an exception where the pre-commencement condition is complied with in substance but not in form. I do not have details of another apparently like case where similar details were submitted and approved in order to form a comparative assessment.
21. As such, I find that none of the exceptions to *Whitley* are applicable in this case. On the evidence before me, the 2015 Planning Permission has not been lawfully commenced and so has not been implemented within the requisite period.
22. I acknowledge the context and background to the appellant's position and sympathise with this including as regards his co-operation with the Council, his genuine belief that the works had implemented the permission in the absence of professional representation at that time, informal officer advice received as to whether the conditions were conditions precedent, and relating to family issues during the relevant period. I sympathise also in relation to comments regarding the appellant's livelihood and future family home. However, these matters cannot alter the legal assessment above.
23. I conclude then on the ground (c) appeal that the works were carried out in breach of planning control and the appeal on this ground fails. For the same reasons, the Council's decision to refuse to grant a LDC was well-founded.

Appeal A – the Appeal on Ground (f)

24. The appeal on this ground is that the steps required by the enforcement notice go beyond what is necessary. It is appropriate to first consider what purpose(s) that requirement is intended to achieve. This enables a proper assessment of whether the steps required are more than is necessary to achieve that purpose/those purposes.
25. Section 173 of the Town and Country Planning Act 1990 (1990 Act) states two purposes which the requirements of an enforcement notice can seek to

achieve. The first is to remedy the breach of planning control which has occurred; the second is to remedy any consequent injury to amenity.

26. The requirements effectively seek to restore the land to its previous condition and thus to remedy the breach. The reasons for issuing the notice refer to matters of amenity but this is distinct from the purpose of the notice.
27. The appellant contends that reinstatement of the land will require significant amounts of material to be imported given that he has used material resulting from the excavation to reinforce tracks on the wider site. However, reinstatement of the land is not excessive to remedy the breach of planning control resulting from the excavation.
28. That said, the requirements of the notice stipulate that the land be returned to 'agricultural grassland'. On the basis that this part of the requirement relates to the use of the land, it goes beyond what is necessary to achieve the purpose of the notice. The appeal on ground (f) succeeds only to this limited extent.

Appeal A – The Appeal on Ground (g)

29. The appeal on this ground is that the period for compliance specified in the notice falls short of what is reasonable. The period specified in the notice is 6 months. The appellant requests a period of 12 months on the basis that he will need to import significant quantities of materials in order to carry out the reinstatement of the land. In view of the coronavirus/COVID-19 pandemic, the Council confirmed that it would be agreeable to some extension of the compliance period and the appellant has reiterated the request for a 12 month compliance period.
30. Although we are approaching spring/summer months and so hopefully a period of more clement weather, given the large site area that has been excavated, the reinstatement works – in particular the necessity to either import large volumes of materials or to painstakingly retrieve materials that have been used elsewhere – will entail a fairly significant undertaking. Given also that periods of clement weather may be sporadic and are not guaranteed even in spring/summer months, and in view also of the restrictions resulting from the coronavirus/COVID-19 pandemic, I consider that the 12 month period requested would represent a reasonable time for compliance.
31. The appeal on ground (g) therefore succeeds.

Appeal A – Overall Conclusion

32. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and variations.

Appeal A – Formal Decision

33. It is directed that the enforcement notice be corrected by:

- in paragraph 2 of the notice, deletion of the word 'Crosscombe' and substitution of the word 'Croscombe', and deletion of the words 'and shaded'

and varied by:

- deletion of the wording 'and return the Land to agricultural grassland' from requirement 2 in paragraph 5 of the notice; and
- deletion of the words '6 months' in paragraph 6 of the notice and substitution of '12 months'.

34. Subject to these corrections and variations, the appeal is dismissed and the enforcement notice is upheld.

Appeal B – Overall Conclusion

35. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development 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.

Appeal B – Formal Decision

36. The appeal is dismissed.

V Bond

INSPECTOR