



Appeal Decision

by **M Savage BSc (Hons) MCD MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 7 July 2020

Appeal Ref: APP/C3810/X/20/3245827

Broadlees, Dappers Lane, Angmering BN16 4EN

- 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 Frontier Estates (Mering) Ltd against the decision of Arun District Council.
 - The application Ref A/129/19/CLP, dated 16 September 2019, was refused by notice dated 21 November 2019.
 - The application was made under section 192(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 build out buildings 1-3 under permission A/27/16/PL alongside the care home authorised by A/114/18/PL.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Frontier Estates (Mering) Ltd against Arun District Council. This application is the subject of a separate Decision.

Procedural Matters

3. The appellant provided the Council with a letter setting out the description of development for which a certificate of lawful development is sought. I have used the description provided in the letter but, in the interests of certainty, have substituted dates with reference numbers of the planning permissions.
4. Due to travel restrictions currently in place as a result of the COVID-19 pandemic I have sought the parties views as to whether the appeals can be determined without the need for a site visit. I have received no objection to this approach and am satisfied that the appeal can be determined on the evidence before me.

Main Issue

5. The main issue of the appeal is whether the Council's decision to refuse the certificate of lawfulness was well-founded. This will turn on whether it is possible to lawfully implement permission A/27/16/PL alongside permission A/114/18/PL.

Reasons

6. An application under S192(1)(b) of the Town and Country Planning Act 1990 (as amended)(the 'Act') seeks to establish whether any operations proposed to be carried out in, on, over or under land, would be lawful. S192(2) sets out

that if on application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect. Planning merits form no part of the assessment of an application for a lawful development certificate (LDC) which must be considered in the light of the facts and the law.

7. Planning permission was granted in 2017, reference A/27/16/PL (the '2017 permission') for the erection of 53 care apartments within Class C2, parking, access, footpath, landscaping & other associated works. The permission was accompanied by a S106 agreement. Attached to the planning permission are a number of conditions, including a plans condition (condition 2), a condition regarding the access (condition 5) and a condition regarding the parking (condition 6), amongst others. The appellant sought confirmation that the 2017 permission had been lawfully implemented and a Certificate of Lawfulness was issued in this regard on 15 February 2019.
8. Planning permission A/114/18/PL was granted in 2019 (the '2019 permission') for the demolition and erection of 70 bed care home within Use Class C2 (replacing building 4 approved by A/27/16/PL), access, parking, landscaping and other associated works. The permission was accompanied by a S106 agreement. Attached to the planning permission are a number of conditions, including a plans condition (condition 2), a condition regarding the access (condition 4) and a condition regarding parking (condition 5), amongst others.
9. The appellant states that whilst it would not be possible to build out both schemes, since the 2019 scheme was intended to replace one of the buildings authorised by the 2017 scheme, it would be lawful to build out a composite scheme, comprising buildings 1-3 as authorised by the 2017 permission and building 4, as authorised by the 2019 permission. The appellant asserts that the approach adopted by the Appellant falls within the category of special cases identified by the Court of Appeal in *Pilkington v Secretary of State* [1973] 1 WLR 1527¹ which dealt with overlapping planning permissions and where it was held that 'special cases will arise where one application deliberately and expressly refers to or incorporates another'.
10. The Council, however, refused the application for an LDC and concluded that the development would not be lawful on the basis of conflicting case law and that the planning permissions are not severable. The appellant asserts that there is no principle of law that says that a single parcel of land cannot be developed pursuant to more than one planning permission. Nor is there any principle of law that says that such development will only be lawful if both schemes are built out fully in accordance with their approved plans.
11. Reference in this regard is made to *Pioneer Aggregates* [1985] 1 AC 1932, in which it was confirmed that whether the implementation of one permission would prevent the implementation of another permission will depend on the facts of the case and would require consideration of the terms of the permissions themselves. My attention has also been drawn to *Singh v Secretary of State* [2001] EWHC 1621 (Admin) where it was held that the terms of a particular planning permission may be crucial.

¹ Per Lord Widgery at p.153

12. The building proposed under the 2019 permission is located in roughly the same part of the site as building 4 consented under the 2017 permission and has a similar footprint. There would be differences, however, in terms of the design and layout of the buildings, as well as the layout of the access road, parking, lighting bollard positions, railing around the garden areas and hard and soft landscaping.
13. It is evident therefore, that the two permissions cannot both be built out in their entirety since the area covered by the 2019 overlaps with the 2017 permission. Although the appellant's intention may have been to vary the terms of the 2017 permission through the submission of the 2019 permission, the effect has been the creation of two distinct permissions both with conditions which are not severable from their respective planning permissions.
14. Whilst the wording of the 2019 permission expressly authorises the care home as a replacement for building 4 approved by A/27/16/PL, it does not authorise development outside of the red line boundary. The lawful construction of buildings 1-3, which are authorised by A/27/16/PL, therefore relies on the 2017 planning permission. Since the 2017 permission has been commenced, the appellant cannot implement the development authorised by the 2019 permission without being in breach of Condition 2 attached to the 2017 permission since there is no scope within these conditions to comply with just part of the submitted plans referred to.
15. Furthermore, it would not be possible to comply with Condition 5 attached to the 2017 permission, which states that no part of the development shall be first occupied until such time as the vehicular access serving the development has been constructed in accordance with the approved drawing. Similarly, it would not be possible to comply with Condition 6, which prevents occupation until the car parking has been constructed in accordance with the approved site plan.
16. My attention has been drawn to *Staffordshire County Council v NGR Land Developments Ltd* [2002] All ER (D) 327 (May) where it was held the conditions of a later planning permission could not govern an earlier planning permission. The case in question concerned mineral extraction where it was still practicable and viable within the terms of the original permission to extract clay. As set out above, in this case however, in the event the 2019 permission were built out it would no longer be possible to build out the 2017 permission. The case is therefore not directly comparable to the appeal scheme before me.
17. My attention has also been drawn to *Hillside Parks Limited v Snowdonia National Park Authority* [2019] EWHC 2587 (QB), which reaffirmed the approach set out in *Pilkington and Singh*. Reference is also made within the *Hillside* decision to *F. Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1964) 17 P&CR 111, which was an exceptional case in terms of *Pilkington*, however, the case considered by the courts was not comparable to the scheme before me since it did not prevent the owner from carrying out the independent acts of development authorised by the original permission.
18. The appellant has drawn my attention to the London Borough of Barnet (Brent Cross Cricklewood) Compulsory Purchase Order (No. 3) 2016² and the

² Reference: PCU/CPO/N5090/3199280 Paragraph 21

Inspector's Report regarding the same order³. However, the example cited relates to land which benefited from outline planning permission. The appeal scheme, by contrast, benefits from two full planning permissions. The example cited is therefore not comparable to the appeal scheme before me.

Furthermore, I have considered the appeal on its merits, taking into account the particularities of the permissions granted.

19. I acknowledge that informative notes appended to decision notices do not carry any legal weight and cannot be used in lieu of planning conditions or a legal obligation to try and ensure adequate means of control for planning purposes. Nevertheless, in the event that the appellant implements the development authorised by the 2019 permission, it would no longer be possible to complete the development authorised by the 2017 permission.
20. Whilst over time it may happen that a site is covered by more than one planning permission, as indicated in *Singh*, a development generally must be regarded holistically and, where some parts of it are physically incapable of being implemented (or completed), then the whole development becomes unlawful.
21. Although the 2019 permission makes explicit reference to the 2017 permission, in my view the two permissions cannot sit side by side. The appellant is able to build out one permission or the other, it cannot do both. Accordingly, from the evidence before me, on the balance of probabilities, I conclude that the construction of buildings 1-3 under permission A/27/16/PL alongside the care home authorised by A/114/18/PL would not be lawful.

Conclusion

22. 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 construction of buildings 1-3 under permission A/27/16/PL alongside the care home authorised by A/114/18/PL 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.

M Savage

INSPECTOR

³ Reference: APP/NPCU/CPO/N5090/76927 Paragraph 262