
Appeal Decision

Site visit made on 2 June 2020

by K Stephens BSc (Hons), MTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 08 July 2020

Appeal Ref: APP/W1850/C/20/3245115

Land at Dukes Walk, Leominster, Herefordshire HR6 8AE

- 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 Martin Rohde against an enforcement notice issued by Herefordshire Council.
- The enforcement notice, numbered E/2019/003061/ENN, was issued on 13 December 2019.
- The breach of planning control as alleged in the notice is *without planning permission the erection of two semi-detached houses (in approximate position marked with a cross on the attached plan)*.
- The requirements of the notice are:
 - i. Demolish the pair of semi-detached houses, as shown on the (attached) plan and marked with a cross.
 - ii. Remove from the land all building materials and rubble arising from compliance with point (i) above.
 - iii. Restore land to former condition before breach took place by levelling the ground and re-seeding with grass.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Town and Country Planning Act 1990 as amended. The prescribed fees have been paid within the specified period. Hence the application for planning permission deemed to have been made under section 177(5) of the Act, as amended, falls to be considered.

Decision

1. It is directed that the enforcement notice be varied by:

- *Deletion of "6 months" and substitution with "9 months" as the period for compliance.*

Subject to these variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended

Background

2. Outline planning permission¹ and subsequent reserved matters² were granted for a detached 1½ storey dwelling, as shown on the submitted elevation plan³. There is no dispute between the parties that the outline planning permission did not commence and hence has lapsed.

¹ LPA Ref: DMN/102446/O dated 25 November 2010

² LPA Ref: DMN/111443/RM dated 25 July 2011

³ Drawing No.1055-2 in Appendix C of Appellant's Statement

3. Even though the outline had lapsed, the appellant proceeded to construct a pair of semi-detached dwellings on the site. A retrospective planning application was submitted and planning permission was refused⁴. The elevation plans are submitted in Appendix D of the appellant's statement. At the time of my visit the dwellings were largely complete externally.

Appeal on Ground (a) and the Deemed Application

4. The appellant has made an appeal on ground (a) – that planning permission ought to be granted for the matters alleged in the notice.
5. The main issues are:
- Whether the proposal would preserve or enhance the character or appearance of the Leominster Conservation Area (CA),
 - The effect of the proposal on the living conditions of existing occupants of neighbouring properties and of future occupiers of the appeal properties with particular regard to privacy,
 - The effect of the proposal on the River Wye Special Area of Conservation.

Character and appearance

6. The site lies to the rear of buildings that front Etnam Street in the centre of Leominster. It also lies within Leominster CA, which is a designated heritage asset. The site sits between Dukes Walk, a pedestrian public right of way, and a public car park accessed off Etnam Street alongside 73 Etnam Street and 2 Dukes Walk. Beyond the site to the north is Grange House, a three storey red brick building now converted to flats.
7. The Council has not submitted a CA appraisal. From my visit I saw that the site clearly lies within Leominster's historic centre, which includes the remains of the old Priory, together with the main historic street frontages. Etnam Street is wide and contains some fine period buildings showing restrained grandeur. Apart from a small number of shops and a car showroom, Etnam Street is predominantly residential. There are a number of listed buildings nearby including the timber framed Chequers Inn at the entrance to the car park, but new development nearby is also apparent. There is a mix of brick and render façades, as well as tile and slate roofs. The pattern of burgage plots behind properties on Etnam Street is easily apparent from the public car park, where the backs of properties are visible, and extensions and outbuildings can be seen to get progressively lower. In my view, the significance of the CA is architectural and historical, stemming from Leominster's economic and social development as one of the county's main market towns, much of which is still legible in the townscape today.
8. The proposal is for a pair of 2-storey, 3-bedroom, semi-detached dwellings. They are brick built with a pitched slate roof. The orientation of the building along the length of the plot broadly reflects the linear burgage plot layouts.
9. Views of the dwellings from Etnam Street are somewhat limited, as they are set behind the frontages of Etnam Street. However, the proposed dwellings are prominently sited and clearly visible from both the Etnam Street public car park,

⁴ LPA Ref: 192798 dated 22 November 2019

and from Dukes Walk alleyway, which links Etnam Street to the public park 'The Grange' to the north. There is a modern property adjacent to Grange House, but this is seen in a different context and does not occupy the same type of burgage plot as the appeal site.

10. I observed on site that the eaves and ridge height of the proposed dwellings are higher than the adjacent property 2 Dukes Walk. As a result, this has created a building of excessive mass and bulk, which is at odds with the prevailing burgage form of development.
11. Furthermore, the incongruous pattern of numerous narrow slit uPVC windows and the deep white plastic fascia and bargeboards are not characteristic. Whilst I observed that Grange House and the property adjacent had white facias and bargeboards, and some properties on Etnam Street had black painted bargeboards, they are generally not a prevailing feature.
12. Overall, I find the proposal is of an uncharacteristic and inappropriate form of development that poorly reflects its surroundings and which causes harm to the significance of the CA. The proposal would neither preserve or enhance the character or appearance of the CA, as is required by Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.
13. Whilst the harm to the significance of the CA would be less than substantial, paragraph 193 of the National Planning Policy Framework (the 'Framework') requires "great weight" to be given to the conservation of a designated heritage asset. Paragraph 196 of the Framework also requires me to weigh the harm against any public benefits.
14. There would be some public benefit from the provision of two small dwellings conveniently located in the centre of Leominster, when the Council does not have a 5 year housing land supply. It would also see the development of previously developed land as a form of sustainable development.
15. I understand the dwellings occupy a similar footprint to the previously approved single dwelling, and I saw that the dwelling was of a prevailing brick and tile construction. I note the Council has no issue with the black plastic guttering, and I have no reason to take a different view.
16. I acknowledge that the site has been previously deemed suitable for a single dwelling of the design approved in the Reserved Matters scheme. I am also aware that the Council would likely support⁵ in principle a single dwelling of a similar design to that already approved, should a new planning application be submitted and subject to a satisfactory phosphate situation on the River Lugg. However, such schemes are not before me and therefore do not represent a material 'fall-back' position. Hence direct comparisons are not possible, and I must consider the appeal proposal on its own merits.
17. I find the considerations advanced above, alone or in combination, do not amount to public benefits sufficient to outweigh the identified harm to the CA. Accordingly I find the development is contrary to Policies SD1, LD1, LD4 and SS6 of the Herefordshire Local Plan Core Strategy (the 'Core Strategy') and Policies LANP3 and LANP14 of the Leominster Neighbourhood Development Plan (the 'LNDP'). It would also be contrary to LNDP Policy LANP15. On the enforcement notice LNDP Policy LANP14 is written twice. But it is clear to me

⁵ Email dated 8 January 2020 in Appendix B of the appellant's Statement

from the Council's Delegated Report and the reading of the policy itself that this is a typographical error and LANP15 was intended. These policies collectively seek to ensure new development is of an appropriate design for its context, including taking account of burgage plots, and protects, conserves and where possible enhances heritage assets and protection of an area's character and local distinctiveness. The development would also be contrary to the advice in the Framework of creating high quality buildings and places.

Living conditions

18. The proposal has first floor windows on both south and north end elevations. These presumably serve bedrooms, although no floor plans have been submitted.
19. The first floor windows in the south elevation face directly towards the first floor window of the rear of 2 Dukes Walk, which I understand to be a first floor flat although it appeared empty at the time of my visit. Being in such close proximity to each other, this would allow mutual and direct overlooking into habitable rooms. Even taking into account that there are generally increased levels of overlooking in urban areas, the privacy of both future occupiers of the proposed dwelling and the occupiers of 2 Dukes Walk would, in my view, be affected to an unacceptable degree. As a result it would harm their respective living conditions.
20. Views towards the rears of other properties on Etnam Street would be oblique and separation distances much greater such that there would not be significant overlooking to a level that would harm living conditions of occupants.
21. There is a similar arrangement of first floor windows on the north elevation that face towards the flats in Grange House. Some windows directly face each other, whilst others are more oblique. However, there is a greater separation distance between these facing windows such that I am satisfied there would not be significant overlooking as to reduce mutual privacy to an unacceptable degree.
22. The first floor elevation windows in the proposed dwellings present a materially different situation to the rooflights that featured in the previously approved scheme. They were located in the roof slopes orientated towards the public car park and Dukes Walk and hence not directly facing towards windows of existing properties. In addition, the outlook and angle of view from the rooflights would be mainly directed skyward. The rooflights, therefore in my view, would not have caused overlooking of neighbouring properties.
23. The appellant has suggested a condition to obscure glaze the end elevation windows. To do this to windows serving habitable rooms would provide a poor standard of amenity that would create an oppressive outlook for occupiers of these rooms and harm their living conditions. Therefore, such a condition would not be appropriate mitigation against the harm.
24. To conclude on this main issue, I find the proposed dwellings would harm the living conditions of both future occupiers of the proposed dwellings and occupiers of 2 Dukes Walk. Accordingly the development is contrary to Policy SD1 of the Core Strategy and Policy LANP15 of the LNDP. These seek to ensure that development safeguards, and is sensitive to, the amenity and privacy of existing and proposed residents. The development would also be contrary to the

advice in paragraph 127 (f) of the Framework which encourages a high standard of amenity for existing and future users.

Special Area of Conservation

25. The site falls within the catchment of the River Lugg, a tributary of the River Wye, and which in turn is within a sub-catchment of the River Wye Special Area of Conservation (SAC), which is a European designated site and afforded protection⁶. The catchment is currently failing its conservation status due to high phosphate levels and is in an 'unfavourable condition'.
26. Policy SD4 of the Core Strategy expects new development not to undermine the achievement of the water quality targets for the rivers in the county. The policy goes on to set out a series of measures. Developments are expected in the first instance to connect to the existing mains waste water infrastructure network. However, where this option would result in nutrient levels exceeding conservation objectives targets, proposals will need to fully mitigate the adverse effects of waste water discharges.
27. Paragraph 176 of the Framework states that SACs should be given the same protection as habitats sites. Paragraph 175 sets out the principles that local Councils should apply to planning applications affecting habitats and biodiversity. If significant harm to biodiversity cannot be avoided, mitigated against or as a last resort compensated for, then planning permission should be refused.
28. Following a court judgement⁷ in 2018, known as the 'Dutch Nitrogen Case', Natural England (NE) has advised there is scientific doubt that the River Wye's Nutrient Management Plan can provide adequate mitigation. As a result, it has advised the local planning authority, as the competent authority, that where a designated European site is failing its water quality objectives and is therefore classed as being in an 'unfavourable condition', there is limited scope for new development that may have additional harmful effects, and hence not to grant any planning consents or other permissions that could make the existing phosphate levels status worse or stop it improving.
29. The development would connect foul water to the mains sewer and surface water to a soakaway. The Council has undertaken an Appropriate Assessment and finds that, whilst most foul flows would be via the local mains sewer, there would still be some phosphates in the water discharged post-treatment and therefore there is a potential pathway for additional phosphates to reach the River Wye. This would not achieve the required 'betterment' to the failing SAC.
30. The appellant considers the Council's concerns are exaggerated and the effects from the development would be "too small to cause any significant harm". It may be the case that new housing may be possible within Leominster, provided it is designed to ensure that phosphate levels in the SAC will not be increased.
31. As a way forward to deal with any potential adverse impacts of the development, the appellant has suggested a condition be imposed requiring the submission of details of foul and surface water before the dwellings are occupied. However, as there is a known problem with high levels of phosphates

⁶ Conservation of Habitats and Species Regulations 2017

⁷ Coöperatie Mobilisation Joined Cases C-293/17 and C-294/17

already adversely affecting a protected European habitat site, it is necessary to establish drainage principles 'up front' rather than leave them to a condition. A condition would be particularly problematic in this instance as the dwellings have already been constructed and the condition could not even be a 'pre-commencement' requirement of the development. Furthermore, the appellant has not submitted any substantial evidence to demonstrate that such a condition could be complied with. In addition, there are no details of the proposed measures to mitigate any adverse effects of waste water discharge into rivers, particularly in light of the Council's existing concerns.

32. Therefore, I do not have sufficient certainty and am not persuaded that the development will not increase phosphate levels or that suitable or adequate mitigation has been proposed or can be achieved. Accordingly, the development would be contrary to Core Strategy Policies LD2 and SD4. These will not permit development that will harm sites of European importance or undermine water quality objectives, as already described above.
33. I accept that under the previous planning permission a dwelling could have been erected and occupied, even if the phosphate levels had worsened in the meantime. However, that permission has lapsed and is not a fall-back position and I must assess the proposal on the matters before me at this current time. The site may be previously developed land and the Council does not have a 5 year housing land supply, but these factors do not, in my view, outweigh the likely harm to the SAC.
34. In determining this appeal, it would fall to me, as the competent authority in this case, to undertake the Habitats Regulations Appropriate Assessment. However, as I am dismissing the appeal for other reasons, I do not need to consider or pursue this matter further

Other Matters

35. A number of objections from third parties raise a series of other concerns about the proposal. But in view of the main issues and reasons for issuing the enforcement notice, there is no need for me to address these in the current decision.

Conclusion on ground (a) and the deemed planning application

36. The proposed development would not accord with the development plan and there are no material considerations which outweigh this finding. Accordingly, for the reasons given above, the appeal on ground (a) fails.

Appeal on ground (f)

37. The appeal on ground (f) is that the requirements of the notice exceed what is necessary to remedy any breach of planning control, or to remedy any injury to amenity that has been caused by any such breach.
38. An enforcement notice is required to set out the steps required by the local planning authority in order to achieve wholly or partly the purposes set out in Section 173(4) of the 1990 Act. Therefore, when an appeal is made on ground (f) it is essential to understand the purpose of the notice.
39. The steps required to be taken are to demolish the said dwellings, remove all associated materials and restore the land to its condition before the breach

took place. The purpose of the notice is therefore to remedy the breach of planning control. The requirements of the notice do that.

40. The Council has advised the appellant⁸ that issues with phosphate levels in the River Lugg catchment are envisaged to be 'temporary' and that work is on-going to find a solution which will allow the restrictions to be limited. In light of this, the appellant regards demolition to be excessive. Instead he suggests a condition could be imposed to stipulate that the dwellings shall not be occupied until the current moratorium on no new houses is lifted.
41. As already mentioned above, due to the SAC status of the River Lugg and its catchment it is necessary, in this instance, to establish drainage principles up front. I have no indication of the likely timescale for the phosphate levels to be restored to acceptable conservation levels. This uncertainty would result in the possible likelihood of two dwellings being built but not being able to be occupied for an unknown period of time. This is an unsatisfactory situation.
42. Moreover, this suggested 'lesser step' would not result in the demolition of the dwellings, and hence would not remedy the breach of planning control. And there is no fall-back extant planning permission that could be resorted to.
43. Consequently, the requirements of the notice are not excessive and the appeal on ground (f) fails.

The appeal on ground (g)

44. Ground (g) is that the period specified for compliance with the notice falls short of what is reasonable. The notice specifies 6 months. However, the appellant suggests that 12 months is needed because of the extensive and expensive nature of the work that will require time to plan, finance and implement.
45. The appellant has not supplied any evidence or documentation to substantiate this claim. For example, the appellant has not submitted a schedule of works or a timetable of the various demolition stages to demonstrate that 12 months will be needed. Nor have I been presented with any costings of the demolition works to indicate how expensive it would be.
46. I find there is no compelling evidence as to the appellant's personal or financial circumstances to persuade me that 12 months is necessary. In the absence of any other evidence to the contrary and for the reasons above, I find the 6 month compliance period is a reasonable time with which to comply with the notice.
47. However, the recent Covid-19 outbreak has had a profound effect on all areas of life in the UK. The situation is fluid and it is uncertain how long the various restrictions and 'lockdown' associated with the pandemic will last, even though some restrictions are gradually being lifted. As a result of the restrictions, there may be delays in being able to demolish the dwellings.
48. Taking into account the current various restrictions and uncertainty surrounding their relaxation or lifting, I consider a further 3 months' extension would be appropriate. Therefore, under the current circumstances a reasonable period for compliance would be 9 months. Under s176(b) of the Act, I will vary the notice accordingly.

⁸ Email dated 8 January 2020

49. Section 173A(1)(b) provides that local planning authorities may waive or relax any requirement of an enforcement notice and, in particular, may extend any period specified in accordance with s173(9). That would be entirely a matter for the Council subject to normal procedures for reviewing the decisions of an administrative body.

50. The appeal on ground (g) therefore succeeds in part.

Conclusion

51. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the deemed application.

K Stephens

INSPECTOR