



Appeal Decision

Site visit made on 27 October 2020

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 November 2020

Appeal Ref: APP/P2935/X/20/3255643

28 Cuthbert Way, Collingwood Manor, Morpeth NE61 2FQ

- 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 Adam Henderson against the decision of Northumberland County Council.
 - The application Ref 20/01094/CLPROP, dated 2 April 2020, was refused by notice dated 2 July 2020.
 - 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 erection of 1.8 metre high wooden fence.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr Adam Henderson against Northumberland County Council. This application is the subject of a separate Decision.

Main Issue

3. The main issue is whether the proposed development would be granted planning permission by Article 3, Schedule 2, Part 2, Class A of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO).

Background

4. Planning permission was previously granted on appeal in 2014¹ for residential and commercial development, effecting the appeal site and wider area. One of the conditions then imposed required the approval of a detailed landscaping scheme. There were subsequent applications made to and permitted by the Council to vary the terms of the earlier planning permission, including those with the references 14/04108/VARYCO and 15/03957/VARYCO. These permissions each included the following condition (No 7):-

¹ Ref APP/P2935/A/12/2170840

"No dwelling shall be occupied within each phase until a fully detailed landscaping scheme, showing both hard and soft landscaping proposals within that phase (the detailed landscape planting plan must include the planting of locally native trees, shrubs, wildflowers and grasses of local provenance) has been submitted to and approved in writing by the Local Planning Authority. This shall include, where required, the planting of trees and shrubs including a fully detailed planting schedule setting out species, numbers, densities and locations, provision of cross-site wildlife corridor linkages and sustainable urban drainage ponds, provision of screen walls or fences, the mounding of earth, the creation of areas of hardstanding, pathways etc., areas to be seeded with grass and other works or proposals for improving the appearance of the development. The scheme shall be carried out in accordance with the approved drawings not later than the expiry of the next planting season following approval of the scheme, or within such other time as may be agreed in writing by the Local Planning Authority. The landscaped areas shall be subsequently maintained to ensure establishment of the approved scheme including watering, weeding and the replacement of any plants, or areas of seeding or turfing comprised in the approved landscaping plans, which fail within a period up to five years from the completion of the development."

5. It is undisputed that details of an acceptable landscaping scheme were provided in relation to permission 15/03957/VARYCO, the Council confirming in a letter that the relevant condition, No. 7, would be discharged once the development had been completed in accordance with the approved details².
6. It is also undisputed that the landscaping scheme associated with the condition attached to permission 14/04108/VARYCO, was approved by the Council and that the relevant approved drawing number is 5503-93-104, as attached with the appellant's statement³.

Reasons

7. In order for an LDC to be granted under s192, it is necessary for the appellant to show, on the balance of probabilities, that the development would be lawful.
8. Part 2 Class A of the GPDO states that the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure constitutes permitted development, subject to various conditions.
9. Paragraph A.1. of Class A goes on to indicate that, with the exception of specific circumstances relating to schools, development is not permitted by Class A if the structure in question is erected or constructed adjacent to a highway used by vehicular traffic and would exceed a height of 1 metre above ground level. In any other case the height of the structure should not exceed 2 metres above ground level, in order to be permitted development.
10. The parties do not dispute that the site of the proposed fence would not be adjacent to a highway. Therefore the proposed 1.8 metre height of the fence would not conflict with the aforementioned proviso.
11. However, it is important to have regard to Article 3(4) of the GPDO. This states that *"Nothing in this Order permits development contrary to any condition imposed by any planning permission granted..."*. The key question is therefore

² Council Ref 16/02961/DISCON dated 4 May 2017

³ Council Ref 16/00495/DISCON dated 2 June 2016

- whether the erection of the fence, which would otherwise be regarded as permitted development, would be contrary to the requirements of the approved landscaping scheme relating to the earlier permission(s).
12. From the information provided it is unclear precisely which planning permissions the development of specific parts of the housing estate are connected with. Indeed from the Council's documentation there is ambiguity as to whether the approved landscaping plan referred to in its reason for refusal relates to planning permission 14/04108/VARYCO, to 15/03957/VARYCO or to both of these permissions.
 13. However there is no information before me to suggest, for any reason, that the development as constructed is not required to comply with the landscaping scheme approved under drawing number 5503-93-104, or that the relevant landscaping scheme condition is no longer extant.
 14. This drawing clearly depicts an area of 'existing young woodland' to the rear of No 28 Cuthbert Way and adjacent properties. The legend to the plan specifically refers to "Existing retained woodland cover" which appears to relate, in part, to the aforementioned area of young woodland. I therefore conclude, on the balance of probability, that the retention of trees to the rear of No 28 forms part of the approved landscaping details for the wider mixed-use development.
 15. From my visit it was evident that the position of the proposed fence, extending from the rear boundary of No 28, would encroach into the retained woodland area. From the information before me I am unable to conclude, on the balance of probability, that the new fence would not interfere with tree roots resulting in potential damage to or loss of those trees. Accordingly I am not persuaded that the proposed development would not be contrary to the landscaping condition imposed in relation to the previous planning permissions which requires retention of woodland cover. I conclude that Article 3(4) of the GPDO is engaged and the proposed fence would not be permitted development in accordance with Part 2 Class A of the GPDO.
 16. I have had regard to various representations made by the appellant. These include that the area had become waste ground and subject to misuse; that it is not intended to use the land for domestic purposes with the appellant carrying out planting in accordance with the approved scheme; and that there is no specific restriction in place preventing the construction of a fence, such as the formal removal of permitted development rights. However these considerations do not alter the conclusions that I have reached above.
 17. I have also had regard to a previous appeal decision referred to by the appellant in relation to a different site⁴. However in that case the proposed development concerned the issue of curtilage and the planning unit, rather than encroachment into an area safeguarded by planning condition, as in this case. The circumstances of the previous appeal can therefore be distinguished and do not influence my findings in this case.
 18. The Council has referred to the relevance of s193(5) of the Act. This provides that a Certificate does not affect any non-compliance with a condition on a planning permission unless that matter is mentioned in the Certificate. This

⁴ Ref APP/G5180/X/13/2194225

means the LDC procedure cannot be used to circumvent conditions imposed on an existing permission, unless the permission itself is invalid. However the proposed development in this case is distinct from the development to which the relevant condition is attached. Section 193(5) is not therefore applicable in this case.

19. Therefore, for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of erection of 1.8 metre high wooden fence at 28 Cuthbert Way, Collingwood Manor, Morpeth NE61 2FQ 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.

Roy Merrett

INSPECTOR