



Appeal Decision

Site visit made on 11 November 2020

by Roy Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 December 2020

Appeal Ref: APP/V1505/X/19/3234377

Land to the north of Tesco, Mandeville Way, Laindon, Basildon

- 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 M Shibl, Reliant Building Contractors Ltd, against the decision of Basildon Borough Council.
 - The application Ref 19/00719/LDC, dated 7 May 2019, was refused by notice dated 4 July 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 "Carrying out of works to construct 3 metres of road kerb as part of the access, approved under planning permission reference 15/01550/VAR dated 21st June 2016, this permission having varied a previous permission - 13/00474/FULL dated 2nd March 2015. 15/01550/VAR - Variation of condition 2 of 13/00474/FULL to allow slight adjustment to the access together with setting back the dwelling on plot nos. 1 and 20. 13/00474/FULL - Erection of 20 No. houses (11 no. x three bed, 9 no. x four bed), with associated road, parking areas and alteration to existing Tesco access road" .
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Decision

1. The appeal is dismissed.

Procedural Matter

2. Planning permission was originally granted on 2 March 2015 for development which included the erection of 20 houses (ref 13/00474/FULL). This permission was subject to 32 planning conditions. The permission was later varied by way of a further planning permission, dated 21 June 2016, relating to the siting of the access and dwellings (15/01550/VAR).
3. There is no evidence before me to indicate that the originally imposed planning conditions were inconsistent with and did not continue to operate in relation to the latter planning permission, or that the deadline for the commencement of the development, as set out in Condition 1 of the original permission, did not continue to apply to the latter permission. With the exception of revised approved plans, my approach has therefore been to treat the planning conditions imposed in relation to the original permission as continuing to relate to the latter permission.

Main Issue

4. The main issue is whether the access related works at the entrance to the development were constructed in breach of 'conditions precedent' attached to planning permission 15/01550/VAR, such that the permission for the erection of 20 houses was not therefore lawfully commenced, the permission now having lapsed.

Reasons

5. Under planning permission 13/00474/FULL (and later 15/01550/VAR), Condition 1 required the commencement of development within 3 years of the date planning permission was granted, that is by 2 March 2018. Though the details of the development have not been checked on site, the Council recognised, within the officer report, that the construction of the junction at the site entrance and the adjoining kerb may have constituted what would normally be regarded as a material operation, marking commencement of development before this date. It says however that certain 'conditions precedent' have not been formally discharged by the Council, meaning that the permission was not lawfully commenced and has now lapsed.
6. It is settled case law¹ that it is necessary for a condition to be both expressly prohibitive of commencement of development before a particular matter is approved (or in requirement of a particular matter to be approved before commencement of development) and also to go to the heart of the permission in order for it to constitute a 'condition precedent'. A failure to discharge such conditions would result in development without planning permission.
7. The Council has not explicitly cited which planning conditions it considers to be conditions precedent, although it has said in the officer report that a number go to the heart of the permission, such as those dealing with site levels and mitigation measures to resolve contaminated land matters. Having regard to the aforementioned case law, it is possible for a condition to require something to be done before the commencement of development but for the subject matter of the condition not to be so significant as to strike at the heart of the permission. The question therefore is whether it can be said any of the pre-commencement conditions imposed were of such significance that they went to the heart of the permission.
8. It seems to me that conditions attached to the planning permission requiring details to be agreed with the Council regarding external building materials (No 3); boundary treatments (No 4); a landscaping scheme (No 6); tree protection (No 7); access road and driveway materials (No 8); refuse and recycling facilities (No 10); a wheel cleaning facility (No 30); the reception and storage area for building materials (No 31) and a traffic management plan (No 32) were all pre-commencement conditions. However there is no information before me that would lead me to consider that failure to comply with these conditions, before the commencement of development on site, would be so significant as to go to the heart of the permission.
9. These conditions are not therefore true conditions precedent. I note from email correspondence that the Council had confirmed to the appellant that detailed information submitted in relation to a majority of the aforementioned

¹ *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin) and *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908

conditions was acceptable², but in any event the failure to formally discharge these particular conditions did not, in my view, lead to unlawful commencement of the permission.

10. However it seems to me that Condition 5, which required the agreement of various finished levels within the development; Condition 11 which required contamination on the site to be investigated and if necessary remediated and monitored; Condition 20 which required details to be agreed of highways, including levels and gradients and Condition 28 which required details to be agreed of how surface water would be controlled in relation to the highway are all of fundamental importance to the scheme, when also considering the reasons for their imposition, which dependent on the condition included residential and visual amenity and highway safety.
11. I acknowledge that the appellant has reasoned that with regard to Condition 11 the site was found to contain little or no risk of contamination; in terms of Condition 20 that the highway layout was approved on the basis of needing to be in accordance with approved submitted plans; and with regard to Condition 28 that there was nothing to suggest a problem in principle with the drainage of the site. However these points do not account for the requirements of some of the conditions, such as finished levels and gradients, and in any event do not alter my view that the conditions in question covered matters that were of fundamental importance that go to the heart of the permission. I find that these conditions (Nos 5, 11, 20 and 28) were therefore true conditions precedent.
12. There is no dispute that these conditions precedent have not been formally discharged by the Council. Whilst Condition 11, in particular, contains a caveat allowing development to proceed not in accordance with the requirements of the condition, subject to the Council's agreement, there is no information before me to suggest that the Council formally agreed to any such relaxation. It is therefore key to the determination of this appeal whether it can be said that there are reasons that would justify an exception to the conditions precedent not being discharged having caused the planning permission to have lapsed.
13. The appellant's case is that an application was made on 20 October 2017 to discharge all relevant conditions, and that from subsequent dialogue with the Council, it was allowing work to proceed. I acknowledge the principle established in case law that if there is a condition requiring an approval before a given date, and the developer has applied by that date for the approval, which is subsequently given so that no enforcement action could be taken (albeit after the commencement deadline), then the work done before the deadline and in accordance with the scheme ultimately approved can amount to a start to development³.
14. Taking each of the aforementioned conditions precedent in turn, with regard to Condition 5, the Council wrote to the appellant to confirm that details provided of the finished floor levels of the dwellings were acceptable⁴. However there is no indication as to whether the levels of the roads, driveways and parking areas would have been acceptable, as also required by that condition. Whilst

² Email from Principal Planning Officer – dated 9 January 2018

³ *F G Whitley and Sons v SSW and Clwyd CC [1992]*

⁴ Email from Principal Planning Officer – dated 9 January 2018

the Council wrote in terms of the details being sufficient, some of the requirements notably around agreement of road levels, overlapped with the requirements of Condition 20, which were expressly confirmed by the Council to be outstanding.

15. Condition 11, specifically part 11C, required the approved remediation scheme to be carried out and then the effectiveness of that remediation to be confirmed to the Council in a verification report and subsequently agreed, before the commencement of development. I acknowledge that it is evident the Council confirmed, by letter, that mitigation measures in respect of residual asbestos appear to have been satisfactorily dealt with⁵. Furthermore, although the officer went on to confirm that, to complete the land contamination verification process, there was still an outstanding requirement to demonstrate that fill materials for gardens and landscape areas were satisfactory, an email of the same date indicated that there was "no need to do anything further at present..."⁶. This comment could reasonably be taken as a clear indication that the Council was inclined to relax its position on Condition 11C, in terms of the finalisation of the verification report, although this does not appear to have been formally communicated. Indeed I am not persuaded that it would have been expedient for the Council to hold up the development just for this reason, when it would be possible to agree details of the backfill materials at a later date.
16. However, notwithstanding this, it is evident from earlier correspondence, though still dating from long after the commencement deadline, that remediation works in relation to asbestos and the production of a related verification report, for submission to the Council, remained outstanding⁷. It therefore seems to me that no report confirming the effectiveness of site remediation had been submitted to the Council as required by Condition 11C, before the commencement deadline. Accordingly this shortcoming would fail to meet the aforementioned exception in *Whitley*.
17. Part 11D of the condition is concerned with the reporting of unexpected contamination found during the course of development. Accordingly it has to be accepted that it would be impossible to meet the pre-commencement requirements of the wording to this specific part of the condition.
18. Part 11E of the condition is worded so as to require a monitoring and maintenance scheme for the remediation to be agreed. There is no information before me to indicate whether this requirement was fulfilled. However, on the balance of probability it would be reasonable to conclude that the Council would also have relaxed the deadline regarding this element, in light of its apparent stance regarding backfilling, as set out earlier.
19. In respect of Conditions 20 and 28, it would appear that further information was requested by the Highway Authority. No evidence has been provided that the requested information was submitted or that the Council, as a result, found the details of the respective requirements to be acceptable and was therefore in a position to discharge either of these conditions.

⁵ Letter from Principal Environmental Health Officer – dated 27 July 2018.

⁶ Email from Principal Environmental Health Officer – dated 27 July 2018

⁷ Email from Principal Environmental Health Officer – dated 20 June 2018

20. I am therefore unable to conclude, from the evidence and information before me, that the details submitted by the appellant pursuant to Conditions 5, 11C, 20 and 28 would have been sufficient for the Council to discharge these conditions by the time of the planning permission deadline. Accordingly, I find that the development has not been validly commenced.
21. In such circumstances the appellant seeks to rely on the principle that it would be an abuse of power or irrational for the Council to take action to prevent the development from proceeding. The basis for this claim is that a) the Council accepted receipt of s106 monies, which fell due following commencement; b) that dialogue between the appellant and Council continued after the implementation of works until April 2019, without the issue of the expiry of the permission having been raised and c) there was dialogue between the respective solicitors representing the parties regarding a development agreement.
22. In this regard I have some sympathy with the view that progress in dealing with the requirements of Condition 11 had reached a position where it appears unlikely (at least at the present time) that the Council would have considered it expedient to enforce against the developer in relation to this matter. However, drawing all of the above considerations together, I do not reach the same conclusion in terms of the outstanding requirements regarding levels, gradients and drainage matters embodied in Conditions 5, 20 and 28. It seems to me that none of the aforementioned occurrences would have been inconsistent with the Council finding the permission to have lapsed, having reviewed the case. Nor, in my view, does the payment of funds to the Council pursuant to the requirements of the s106 agreement, in itself, have any influence on the question of abuse of power or irrational behaviour. Whilst it is unfortunate that the case has been allowed to progress under these circumstances, it would have been open to the appellant to apply for a lawful development certificate much earlier than was the case.
23. In the absence of evidence to suggest that it would not be expedient to do so, in the context of Conditions 5, 20 and 28, I am unable to conclude that the Council would abuse its powers or act irrationally by preventing the development from proceeding. These considerations do not therefore overcome the above findings in respect of these conditions.
24. I therefore conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of "Carrying out of works to construct 3 metres of road kerb as part of the access, approved under planning permission reference 15/01550/VAR dated 21st June 2016, this permission having varied a previous permission - 13/00474/FULL dated 2nd March 2015. 15/01550/VAR - Variation of condition 2 of 13/00474/FULL to allow slight adjustment to the access together with setting back the dwelling on plot nos. 1 and 20. 13/00474/FULL - Erection of 20 No. houses (11 no. x three bed, 9 no. x four bed), with associated road, parking areas and alteration to existing Tesco access road" at Land north of Tesco, Mandeville Way, Laindon, Basildon 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