



Appeal Decision

Site visit made on 12 January 2021

by P H Willows BA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 February 2021

Appeal Ref: APP/F2415/W/20/3259402

**Ashgrove and The Oaklands, Uppingham Road, Houghton-On-The-Hill,
Leicestershire LE7 9HG**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr and Mrs H Nanuwa against Harborough District Council.
 - The application Ref 20/00854/VAC is dated 12 June 2020.
 - The application sought planning permission for the erection of two dwellings (revised scheme of 06/00407/FUL) without complying with conditions attached to planning permission Ref 06/00971/FUL, dated 6 September 2006.
 - The conditions in dispute are Nos 2, 3, 4, 5, 9, 10 and 11.
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Decision

1. The appeal is dismissed and planning permission for the erection of two dwellings (revised scheme of 06/00407/FUL) without complying with conditions attached to planning permission Ref 06/00971/FUL, dated 6 September 2006, is refused.

Procedural Matter

2. In order to minimise contact during the pandemic, I was not accompanied by the appeal parties during my site visit and did not enter the appeal site. Consequently, I was unable to see the rear of the appeal property, other than in long-range glimpses. However, there is no dispute regarding the facts of what has been built and viewing the rear of the property was not critical to my decision. The site visit procedure was agreed with the appeal parties beforehand.

The Disputed Conditions

3. The disputed conditions are as follows:
 2. No development shall commence on site until representative samples of the materials to be used externally in the construction of the proposed building(s) hereby approved have been deposited with and approved in writing by the District Planning Authority.

3. The window(s) in the first floor east elevations of plot 1 and plot 2 and the first floor west elevation of plot 1) elevation shall be fitted with obscure glass and shall be retained as such in perpetuity.
 4. Before development commences on site details of the existing and proposed levels of the site including the floor levels of the building(s) to be erected shall be submitted to and approved in writing by the District Planning Authority.
 5. Notwithstanding the details shown on the approved plans working drawings of a scale of not less than 1:20 of all window, door, rooflight or other openings shall be submitted to and approved in writing by the District Planning Authority before development commences.
 9. Before any development is commenced on site a landscape scheme shall be submitted to and approved by the District Planning Authority. This scheme shall indicate the treatment proposed for all ground surfaces, together with the species and materials proposed and their disposition, existing trees and hedges to be retained, and fences and walls to be erected.
 10. The approved landscape scheme shall be carried out during the first appropriate planting season following the date when the development hereby approved has commenced and all planted material shall be maintained and replaced as necessary by the applicant(s) and/or owner(s) of the said land at the time for a period of not less than 5 years from the date of planting.
 11. The development hereby permitted shall not commence until drainage works for the disposal of both surface water and foul sewerage have been carried out in accordance with the details to be submitted and approved by the District Planning Authority in writing.
4. The reasons given for the conditions in the Council's decision are:
2. In order that the property is constructed from materials appropriate to its location and to ensure compliance with Strategy Policy 10 and Environment Policy 1 of the Leicestershire, Leicester and Rutland Structure Plan and Policy EV/11 of the Harborough District Local Plan.
 3. To ensure a satisfactory external appearance and to ensure compliance with Strategy Policy 10 of the Leicestershire, Leicester and Rutland Structure Plan and Policies IN/1 and EV/1 of the Harborough District Local Plan.
 4. It is essential that the District Planning Authority has an opportunity to consider the intended levels of the proposed dwellings in the interests of the overall appearance of the estate and the relationship of the dwellings to each other and to ensure compliance with Policies IN/1 and HS/12 of the Harborough District Local Plan.
 5. To safeguard the privacy and living conditions of the adjoining residents and to ensure compliance with Policies IN/1, HS/8 and HS/12 of the Harborough District Local Plan.
 9. To enable all details to be considered concurrently and to ensure compliance with Strategy Policy 1 and Environment Policy 1 of the Leicestershire,

Leicester and Rutland Structure Plan and Policies IN/1, EV/1 and EV/20 of the Harborough District Local Plan.

10. To enhance the development and safeguard the appearance of the area and to ensure compliance with Strategy Policy 10 of the Leicestershire, Leicester and Rutland Structure Plan and Policies IN/1, EV/1 and EV/20 of the Harborough District Local Plan
11. There are no public foul/surface water sewers available within the vicinity of the site to serve this development.

The Appellant's Proposal

5. The appellants' proposal is that the disputed conditions be replaced as follows:

- 2 The development shall be carried out using the following materials:

Blockley 65mm Red Sienna brick with Rosemary Brindle plain clay roof tiles together with other materials annotated on the plans referred to in condition 4.

- 3 No condition proposed

- 4 The dwellings proposed shall be constructed in accordance with Drawing Nos 4585/01 Rev F and 4585/ASHGROVE/01 Rev C, including in relation to levels as shown.

- 5 Window door rooflights and other openings shall be constructed in accordance with Drawing Nos 4585/DETAILS Rev B and as constructed and shown on 4585/ASHGROVE/02 Rev B for The Oaklands Plot 2, and as shown on 4585/ASHGROVE/01 Rev C for Ashgrove Plot 1.

- 9 The landscaping scheme shown on drawing approved under condition 4 showing the treatment proposed for all surfaces together with species and materials proposed and their disposition, existing trees and hedges to be retained, and fences and walls to be erected shall be carried out in the first appropriate planting season following the date where development of each Plot respectively has been commenced and all planted material shall be maintained and replaced as necessary by the applicant(s) and/or owner(s) of the said plot at the time for a period of not less than 5 years from the date of planting.

- 10 No condition proposed

- 11 The drainage works shown on drawing no. 4585/01 Rev F for the disposal of both surface water and foul sewerage shall be carried out prior to the occupation of Plot 1 and Plot 2 respectively.

Main Issues

6. The Council did not determine the application within the prescribed period and has not provided an appeal statement. However, it has provided some brief notes and various other documents to explain its position. While no concerns are raised regarding the planning impacts of the proposal, the Council considers that the planning permission for the redevelopment of this site (Ref

06/00971/FUL) expired without ever being implemented. If that were the case, then there would be no planning permission and no conditions to consider. On this basis, the Council regards the application as 'technically invalid'.

7. Additionally, I raised with the parties the question of whether section 73 of the Act could be used to make minor material amendments if there is no relevant condition in the original planning permission listing approved plans.
8. With these matters in mind, the main issues are:
 - i) whether planning permission Ref 06/00971/FUL has expired; and
 - ii) whether it is permissible to use s73 to amend the scheme as proposed, having regard to the scope of s73 and relevant guidance.

Reasons

Whether planning permission Ref 06/00971/FUL has expired

9. Planning permission Ref 06/00971/FUL permitted the erection of 2 dwellings and was granted on 6 September 2006. Since then, the Plot 2 dwelling (now called 'The Oaklands') has been built on the site. The other dwelling – 'Ashgrove' – has not been built. Condition 1 required the development to be begun within 3 years. If development did not begin within that 3 year period, the permission will have expired.
10. Deciding whether development has begun requires reference to s56 of the Act. Section 56(2) states that, '*development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out*'. Section 56(4) defines 'material operation', which includes, amongst other things:
 - (a) *any work of construction in the course of the erection of a building;*
 - (aa) *any work of demolition of a building;*
 - (b) *the digging of a trench which is to contain the foundations, or part of the foundations, of a building;*
 - (c) *the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);*
11. In this case there is no suggestion that the development carried out on the site did not commence within 3 years of the grant of planning permission. Rather, the Council's claim is that the development carried out is so different to what was permitted that it was not the permitted scheme that was implemented.
12. Although there appear to be some gaps in the Council's records, both parties regard Drawing No 2006.4.2 Rev A as the plan approved by the planning permission. I have been provided with a copy of this and have approached the appeal on the basis that this is the scheme for which planning permission was granted. It appears that an additional window was subsequently approved by the Council, but that has no material bearing on the matters before me. There is reference to a subsequent plan dated 19 March 2010, but the position regarding this is not clear.

13. There are a number of differences between the approved plan and The Oaklands as built. The house as built is hard up against the boundary to the adjacent Ashgrove plot. At first glance this suggests that the siting has changed, since the approved plan shows the building set well within the boundary. However, the appellant has provided a street scene drawing showing the scheme as built overlaying the scheme as approved. This indicates that the siting of the building is virtually unchanged. Thus, it appears that it is the position of the boundary rather than the building that has changed. I do not regard this as a significant change to the scheme.
14. A list of changes to various dimensions of the house as built has been provided. Unfortunately, there is no accompanying drawing to show which dimensions the changes relate to. However, a general impression of the changes, at least in respect of the front elevation, is shown in the overlay drawing provided by the appellant. This shows a very marked degree of similarity between the approved plans and the house as built. The chimney has also been relocated, but the effect of this on the character and appearance of the house is very limited.
15. In addition to those changes, 2 rear dormer windows and a front porch have been added. These strike me as discrete additions to the property and not fundamental changes to its design. Indeed, the appellant advises that the porch was a later addition, built after the house was completed and occupied. A detached double garage and front boundary wall have also been built, but I regard these as separate developments.
16. Considered as a whole, the changes are minor in my view and the building is recognisable as the building for which planning permission was granted. Given the wide range of matters that can constitute a 'material operation', I am not persuaded that the development can be said not to have begun due to the deviations from the approved scheme.
17. Case law¹ indicates that non-compliance with certain conditions may mean that a planning permission has not commenced. However, this will only be the case where the conditions concerned are 'conditions precedent' which expressly prohibit development taking place before the condition has been addressed and which 'go to the heart of' the planning permission.
18. The position regarding the discharge of conditions attached to planning permission 06/00971/FUL is not as clear as it might be. A number of the conditions have not been discharged or there is significant doubt as to whether they have been. Are any of these conditions precedent?
19. Five of the conditions prohibit development until certain actions have been completed, thus fulfilling one of the characteristics of a condition precedent. These conditions relate to materials, levels, details of openings, landscaping and drainage. However, having looked at the specific requirements of these conditions, and as a matter of planning judgement, none goes to the heart of the permission in my view. Accordingly, these are not true conditions precedent, and non-compliance with them would not mean that the planning permission was not begun.

¹ F G Whitley & Sons v SSW & Clwyd CC [1992] JPL 856; R (oao Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin)

20. For these reasons, I consider that the development permitted by planning permission (Ref 06/00971/FUL) was begun within the 3 years specified in Condition 1. Accordingly, the planning permission did not expire and the application subject to this appeal was not invalid on that basis.

Use of s73 to amend the scheme

21. The purpose of the application under s73 is said to be to regularise all matters relating to both plots. To that end, the appellant proposes some new conditions which make reference to new plans for the scheme. Thus, as well as making various changes to matters required by the conditions of the existing planning permission, the proposal would result in the substitution of a new set of plans in place of the old ones.
22. While it can be permissible to use s73 to amend a scheme, there are limitations to the scope to do so, its fundamental purpose being to consider planning conditions. Section 73(2) states that, 'On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted'. The Government's *Planning Practice Guidance* (PPG) only contemplates minor amendments, and advises that where modifications are fundamental or substantial, a new planning application under section 70 of the Act will need to be submitted. Additionally, and of particular relevance in this case, it also advises that 'Section 73 cannot be used to make minor material amendments if there is no relevant condition in the permission listing the originally approved plans'². While the PPG is guidance rather than legislation, it is an important material consideration.
23. In this instance the original planning permission has no condition listing the approved plans. Accordingly, even if the changes the appellant proposes to the scheme as a whole can be regarded as 'minor material amendments', new plans should not now be substituted via a s73 application as the appellant proposes. I have noted the appellant's view that a 'plans condition' on the original planning permission would not have been appropriate, but that does not alter my view regarding the way s73 should be considered in this case, having regard to the clear guidance in the PPG.
24. I have considered whether the disputed conditions could be removed without replacing them with the conditions proposed by the appellant. However, that would fundamentally change the proposal before me, removing controls over significant aspects of the scheme.
25. The appellant suggests that the advice in the PPG 'is not directly applicable to this appeal situation where there is an extant s73 application that already concerns the substitution of new plans and details for other conditions'. However, it seems to me that this current situation, where there is no 'plans condition' on the original planning permission, is precisely the situation the PPG advice is directed towards. The fact that s73(2)(a) allows a s73 permission to be subject to conditions does not mean that any condition is acceptable.
26. The appellant argues that the requirement in the original planning permission for further details of various matters to be submitted means that 'there was always going to be a disconnect between the details shown in the matters submitted under those conditions and the application plans'. However, I see

² Paragraph: 018 Reference ID: 17a-018-20140306

nothing in those conditions to suggest a requirement for the scheme to be significantly altered, and certainly not to the extent that the appellant now proposes.

27. I conclude that the appeal proposal falls outside the scope of s73. Accordingly, it is not permissible to use s73 to make changes to the development permitted by the existing planning permission as the appellant proposes.

Conclusion

28. For the reasons set out above I conclude that the appeal should be dismissed.

Peter Willows

INSPECTOR