



Appeal Decision

Site visit made on 2 February 2021

by Guy Davies BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 April 2021

Appeal Ref: APP/J0405/W/20/3255259

Land off Stone View, Oving HP22 4HJ

- 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 approval of details required by a condition of a planning permission.
 - The appeal is made by Rectory Homes Limited against Buckinghamshire Council – Aylesbury Area.
 - The application 19/03899/ADP, dated 25 October 2019, sought approval of details pursuant to condition 1 of planning permission AR/477/59, granted on 9 February 1960.
 - The development proposed is the construction of an internal development road and layout for the erection of 12 bungalows and 10 dwellinghouses and provision for the erection of 30 garages at Stoneview, Oving.
 - The details for which approval is sought are: reserved matters approval for details relating to the height, size, design and external appearance of 8 bungalows and 10 dwellinghouses, together with associated parking, a cul-de-sac road and landscaping in accordance with outline consent AR/477/59.
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Decision

The appeal is dismissed.

Preliminary Matters

1. During the course of the application the former Aylesbury Vale District Council merged with other councils to form Buckinghamshire Council. Buckinghamshire Council is now the local planning authority for the purposes of the appeal. It is also the successor to the former Buckinghamshire County Council referred to in condition 1 of AR/477/59.
2. The Council has stated that had it been in a position to determine the application, it would have been refused for the following reasons:
 - 1) *The 1960 outline permission has not been validly implemented and accordingly is no longer extant. For that reason, the LPA consider it is not possible to make a further reserved matters application in respect of the remainder of the development permitted by the 1960 outline permission.*
 - 2) *Had the above overriding reason for refusal concerning the 1960 outline permission not being extant not applied, the LPA would have continued to assess that the scale and design of the dwellings would fail to adequately reflect the character of the existing dwellings along Stone View. Furthermore, the proposed dwellings, due to their scale and design, would represent a visually prominent intrusion into the countryside, resulting in significant harm to the character of the surrounding Quainton-Wing Hills*

Area of Attractive Landscape, with no opportunity to mitigate such harm through satisfactory landscape screening/planting due to the scale and design of the proposed dwellings. In addition the proposed development would fail to promote the effective use of land given that it would not safeguard or improve the environment nor would it maintain the prevailing character and setting of this part of the settlement or secure a well designed development. Due to the proposed design of the dwellings and hard surfacing, the development would not result in a biodiversity net gain, nor demonstrate a satisfactory drainage system based on SuDS principles. The mix of the proposed dwellings would not be in accordance with the HEDNA and no affordable housing units would be provided. The proposal is therefore contrary to Aylesbury Vale District Local Plan Policies RA8, RA14, GP2, GP35, GP38, and GP45, emerging Vale of Aylesbury Local Plan Policies BE2, D4, H1, H6a, NE4, and I4, and the aims of the NPPF.

Main Issues

3. The main issues are:

- Whether the 1960 outline planning permission granted under AR/477/59 is still extant.
- If so, the effect of the reserved matters details on the character and appearance of the area, biodiversity net gain and drainage of the site.

Reasons

1960 planning permission

4. The dispute between the parties on this issue turns on the interpretation of condition 1 of outline planning permission AR/477/59. The condition states:

- (1) *The approval of the County Council shall be obtained to the height, size, design and external appearance of the buildings before the development is commenced.*

Reason:

- (1) *To ensure that the character of the houses and bungalows to be erected is in keeping with the character of the neighbourhood.*

5. The appellant has provided a legal opinion¹ arguing that condition 1 allows development to be approved and implemented in phases, in the sense that the wording of the condition can be read as meaning details must be approved in relation to each of 'the buildings' before 'the development' of those buildings takes place. The Council has put forward a different interpretation of the condition in its statement of case². It argues that the wording of the condition should be read as meaning that details of all 'the buildings' need to be approved before any of 'the development' is commenced. Oving Parish Council has provided a legal opinion³ obtained in relation to an earlier application⁴ but relevant to this case as well, which takes a similar view to the Council.

¹ Sasha White QC, 3 July 2017 and 17 November 2020

² Buckinghamshire Council, Statement of Case, November 2020 and Final Comments, 30 November 2020

³ Richard Harwood QC, 4 May 2017 and 22 July 2017

⁴ 16/00967/APP

6. Attention has been drawn in submissions to case law relating to the interpretation of reserved matters conditions. There are cases that support the appellant's interpretation allowing phased development⁵ but also more recent cases that reach a different conclusion and support the Council's interpretation requiring all reserved matters to be approved before any development commences⁶.
7. Of these cases, I have only been given the *Powergen* judgements in full. However, as these are among the most recent cases, including a judgement by the Court of Appeal, I place weight upon them. In those cases, it was held that the literal and natural interpretation of a condition for the approval of reserved matters required all details to be submitted before any of the development could begin. The wording of the reserved matters condition in *Powergen* differs from that used in condition 1 of AR/477/59 but the interpretation of 'the development' as meaning the whole of the development granted permission is directly applicable.
8. The appellant has argued that the differing legislative context in which the 1960 permission was granted, prior to the introduction of section 73 of the Town and Country Planning Act 1990, should lead to a more flexible interpretation of the condition. I disagree. I consider it necessary to interpret the condition based on the most recent case law. I see no good reason in this case to depart from the authority reached in the *Powergen* cases.
9. In contrast to *Powergen*, previous decisions on the site support the interpretation of condition 1 as allowing phased development. A reserved matters application AR/100/60 for 4 bungalows at the western end of the site was approved in 1960 and subsequently implemented (now known as 1-4 Windmill Bungalows). The Council at that time accepted the submission of details for part of the site and approved them without any indication that it would prevent the subsequent approval of details and implementation of development on the remainder of the site pursuant to the outline permission.
10. A Certificate of Lawfulness for residential development on part of the site was granted on appeal⁷ in 2001 on the basis that the reserved matters approved under AR/100/60 partly implemented outline planning permission AR/477/59. The development of 1-4 Windmill Bungalows took place before the retrospective time limits introduced by Schedule 24 of the Town and Country Planning Act 1971 applied and the balance of the outline permission was held to remain in force. While the Certificate of Lawfulness applies only to part of the site, it is implicit in the reasoning of the Inspector that he considered the continuing validity of the outline permission to be applicable to the whole of the site.
11. In a more recent appeal for residential development on the site⁸, the Inspector found that on the basis of the previous planning history the 1960 outline permission was extant and the remaining dwellings could be built out, subject

⁵ R v SSE ex p Percy Bilton Industrial Properties Ltd [1976] 31 P&CR 154 and Heron Corporation Ltd v Manchester City Council [1978] 1 WLR 937

⁶ *Powergen UK plc v Leicester CC* [2000] 80 P&CR 176 and [2001] 81 P&CR 5, and *Henry Boot Homes Ltd v Bassetlaw DC* [2002] EWCA Civ 983; [2003] 1 P&CR 23

⁷ APP/J0405/X/01/1062093

⁸ APP/J0405/W/18/3193945

to details being submitted and approved. He attached small weight to it as a fallback position.

12. There is conflicting evidence in this case in terms of case law and the planning history of the site. Based on all that I have read, I consider the most natural and straightforward interpretation of the wording of condition 1 of AR/477/59 is that 'the buildings' means the buildings subject of the application, and 'the development' means the development for which planning permission was granted. On that interpretation the condition requires approval of details of all the buildings before any of the development is commenced. This is consistent with the interpretation taken in *Powergen* and essentially the same as that argued by the Council and Oving Parish Council.
13. I have had regard to the reason for the condition, which is to ensure that the character of the houses and bungalows is in keeping with the character of the neighbourhood. The reason itself is ambiguous in that it could be taken as meaning that the details of all the buildings need to be considered together to determine whether they are in keeping with the neighbourhood, or alternatively it could be taken as meaning that the purpose of the condition would be achieved by approving the details of individual buildings on a phased basis. I do not consider that the reason helps one way or the other in interpreting the condition.
14. I recognise that interpreting condition 1 in the manner set out above contrasts with the decision of the former County Council in 1960, and the Inspectors in the 2001 and 2018 appeal decisions, who concluded that the outline planning permission was extant. However, based on the appeal decisions provided to me, the question of the interpretation of condition 1 was not explicitly before them for determination in the manner that it is in this appeal. It is also the case that the interpretation of conditions for prior approval has changed over time as the result of case law. Whereas earlier cases accepted partial approval of reserved matters, the later cases, in particular *Powergen* in both the High Court and Court of Appeal, have taken a more literal view. I have placed greater weight on the latter case law.
15. Even though I have found that condition 1 of AR/477/59 has not been complied with, it is necessary to consider whether carrying out the development would fall within an exception to the general principle that implementation of a planning permission must be in accordance with its conditions. For the purposes of this appeal, the question is whether it would be irrational for the Council to take enforcement action were development to be commenced⁹.
16. Given my conclusion on the first issue, it follows that 1-4 Windmill Bungalows were built without the benefit of full planning permission, notwithstanding the decision of the Council at the time, because the pre-commencement condition had not been discharged in full. However, these buildings are now well over four years old and therefore immune from enforcement action. In my view, it would be irrational to take enforcement action against their construction.
17. In relation to the Certificate of Lawfulness on plots 5-8 (part), section 192(4) of the Town and Country Planning Act 1990 provides that: *The lawfulness of any use or operations for which a certificate is in force under this section shall be*

⁹ Whitley & Sons Co Ltd v SSW [1992] 64 P&CR 296

conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness. My conclusion that the 1960 planning permission was not lawfully implemented is relevant to determining such lawfulness and is a material change since the 2001 appeal decision on the Certificate of Lawfulness. Since the operations described in the Certificate of Lawfulness have not begun, in my view they could now be subject to enforcement action.

18. The remainder of the development could also be subject to enforcement action. I see no reason why it would be irrational for the Council to take enforcement action were development to commence on the site, other than in relation to 1-4 Windmill Bungalows. It would be entitled to base its judgement on whether enforcement action was expedient on current planning policies and considerations, which are clearly different to those which existed in 1960.
19. I conclude that condition 1 on outline planning permission AR/477/59 should be interpreted as requiring the approval of details of all the buildings prior to commencement of development. The partial approval of details for the 4 bungalows under AR/100/60 did not therefore amount to a lawful implementation of the outline planning permission. The retrospective time limits introduced by Schedule 24 of the Town and Country Planning Act 1971 consequently apply to the outline planning permission. The time limits for approval of reserved matters in line with the 1971 Act have long since expired.
20. I also conclude that it would not be irrational for the Council to take enforcement action against the development were it to be implemented, other than for 1-4 Windmill Bungalows.
21. It follows that outline planning permission AR/477/59 is no longer extant.

Reserved matters

22. Given my conclusion on the first issue, it is no longer possible for a reserved matters application to be determined in relation to outline permission AR/477/59. I have therefore not assessed the suitability of the detailed plans submitted.

Other Matters

23. An agreement was made in 1984 under Section 52 of the Town and Country Planning Act 1971 preventing use or development of the site for purposes other than agriculture. The agreement is still extant. The question of whether it continues to have a legitimate planning purpose and is enforceable is a separate matter for resolution between the Council and landowner, and is not a matter for determination as part of this appeal.

Conclusion

24. I conclude that the appeal should be dismissed.

Guy Davies

INSPECTOR