



Appeal Decision

Site visit made on 13 April 2021

by Mr W Johnson BA(Hons) DipTP DipUDR MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 April 2021

Appeal Ref: APP/E2001/W/20/3253110

Land north of 49 Coniston Way, Goole DN14 6NL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 (the Act) for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Mr Kevin Pullan of Kremer Properties against the decision of East Riding of Yorkshire Council.
- The application Ref 19/02307/STVAR, dated 17 July 2019, was refused by notice dated 14 January 2020.
- The application sought planning permission for outline-residential development (renewal of planning permission 02/04149/OUT) without complying with conditions attached to planning permission Ref DC/13/00931/STOUT/STRAT, dated 28 May 2014.
- The conditions in dispute are Nos 7, 8, 9, 10, 20 and 27 which state that:
 - (7) The site shall be developed with separate systems of drainage for foul and surface water on and off site;
 - (8) No development shall take place until details of the proposed means of disposal of foul and surface water drainage, including details of any balancing works and off-site works have been submitted to, and approved by the Local Planning Authority. This shall include provision for site drainage during the construction stage to ensure that there is no increase in flood risk to neighbouring properties or risk of pollution of adjacent watercourses. The scheme shall be implemented before the construction of impermeable surfaces draining to this system, unless otherwise agreed in writing with the Local Planning Authority;
 - (9) Unless otherwise approved in writing by the Local Planning Authority, there shall be no piped discharge of surface water from the development prior to the completion of the approved surface water drainage works and no buildings shall be occupied or brought into use prior to completion of the approved foul drainage works;
 - (10) No development shall commence until a scheme for the provision and implementation of a surface water regulation system, including pumping station provision and surface water storage, including displacement of any flood storage area by virtue of building construction, has been submitted to and approved in writing by the Local Planning Authority. Such a scheme shall be implemented prior to the construction of any impermeable surfaces draining to the system unless otherwise agreed in writing with the Local Planning Authority.
 - (20) No development shall take place until details of the proposed floor levels of the building(s) in relation to the existing and proposed levels of the site and the surrounding land have been submitted to and approved in writing by the Local Planning Authority. Those details shall include both cross-sections through the site illustrating the relationship of the levels with existing adjoining land levels and building profiles and a site survey illustrating the relationship of existing and proposed levels on this site and adjoining land. The building(s) shall then be constructed with the approved levels.
 - (27) No development shall take place until details for a system of perimeter drains around the site and a timetable for implementation have been submitted to and approved in writing by the Local Planning Authority. The details submitted shall include a scheme to increase the capacity of the existing Internal Drainage Board dyke on the northern and eastern boundaries of the site, the creation of a new dyke on the south side of the development and the creation of a French Drain on the western boundary of

the site connecting to the Boards existing dyke. All works shall be implemented in accordance with the approved details and will thereafter be adopted by Goole and Airmyn Internal Drainage Board. The storage capacity of all new dykes within the site shall be agreed with the Local Planning Authority.

- The reasons given for the conditions are:
 - (7) This condition is imposed in the interest of satisfactory and sustainable drainage.
 - (8) This condition is imposed to ensure the development can be properly drained and to prevent the increased risk of flooding.
 - (9) This condition is imposed to ensure that no foul or surface water discharges take place until proper provision has been made for their disposal.
 - (10) This condition is imposed to prevent the increased risk of flooding.
 - (20) This condition is imposed to ensure that there is a satisfactory relationship between the proposed development and existing properties/surroundings and avoid potential conflict with existing residential amenities/privacy. Ground levels are required to ensure that neighbouring properties are not adversely affected by the difference in levels and surface water run-off.
 - (27) This condition is imposed to prevent flooding on the site and in the surrounding area.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. This appeal is to consider and determine the above planning application to vary conditions no's 7, 8, 9 and 27 and remove conditions no's 10 and 20. The lawful status of the planning permission does not fall to be considered as part of this particular appeal. I have dealt with the appeal on this basis.

Main Issue

3. The main issue of this appeal is whether or not the conditions can be varied and removed as requested, having regard to the Act and other material considerations.

Reasons

4. The site subject of the appeal has a planning history dating back to 1986. However, the first outline planning application¹ (the original permission) for residential development was approved on 19 April 2010. A further outline planning application (the outline permission) was then submitted renewing² the original permission, approved on 28 May 2014. Time limits were imposed for the submission of the reserved matters application and for the commencement of development at conditions no's 2 and 3 respectively on the outline permission. In total, 42no. conditions were imposed on the outline permission.
5. A reserved matters application³ (the reserved matters application) included an informative listed on the decision notice, advising the appellant, that the pre-commencement conditions imposed on the outline permission would require a separate application to be submitted and agreed before any work commences on site. Following the approval of the reserved matters application on 23 August 2017, 2no. applications were submitted to satisfy the pre-commencement conditions.

¹ 02/04149/OUT

² DC/13/00931/STOUT/STRAT

³ DC/17/00144/STREM/STRAT

6. The first application⁴ to satisfy the pre-commencement conditions is listed on the decision notice as being received by the Council on 15 September 2017 and its decision notice was dated 2 January 2018. This did not include conditions 7 and 9 as they are positively worded and did not require anything to be submitted prior to commencement or occupation. The decision notice sets out that a split decision was reached and identified the conditions that had been approved and those which had been refused. In relation to this appeal, the first application included conditions no's 8, 20 and 27, all of which were refused on insufficient information to demonstrate that no harm would occur from surface water run-off, an increase in flood risk and to the living conditions of neighbouring occupiers, amongst other things.
7. A second application⁵ was submitted and subsequently approved by the Council on 3 July 2019 concerning the remaining pre-commencement conditions. However, the Council advised through Informatives no's 2 and 3, on its decision notice that conditions no's 8, 10 and 27 are not included with this approval, and will require a further submission. It also states that condition no. 20 cannot be satisfied until the drainage issues are resolved. The application subject of this appeal was then submitted.
8. The main parties agree that the development should have commenced by 23 August 2019. Additionally, the Council acknowledge the works undertaken on the site, such as the importation of material, amongst other things, which I also observed off Ivy Park Road during my site visit. However, the Council consider that the planning permission has expired due to pre-commencement conditions imposed on the outline permission not being satisfied before 23 August 2019. The appellant disputes the expiry of the planning permission and considers the scheme to be extant.
9. My attention has been drawn to 2no. applications for a Lawful Development Certificate⁶ that have been submitted to the Council. However, on the evidence before me, no decision has been made on these applications. In considering a condition precedent, the first matter to consider will be whether the condition should be so described. It must prohibit the commencement of development until a requirement has been met and it must also have such significance to the planning permission that it goes to the heart of the planning permission as a matter of judgment.
10. A number of judgments have been referenced by the main parties, which I have had regard. The Council have made particular reference towards *Per Sullivan J in R (On the application of Hart Aggregates Ltd) v Hartlepool BC* (2005) EWHC 840, which the appellant also acknowledges. Additionally, amongst the various judgments⁷ referenced by the appellant, I consider that *Whitley v Secretary of State for Wales* [1992] 3 PLR 72 is of particular relevance to the case before me. Although, I accept that the courts have in subsequent cases applied the *Whitley* principle flexibly, as in some of the other judgments submitted by the appellant.

⁴ DC/17/30449/CONDET//STRAT

⁵ 19/30072/CONDET

⁶ 21/00598/CLE and 20/03448/CLE

⁷ *Ouseley J, Hammerton v London Underground Ltd* [2003] JPL 984; *Barratt Homes Ltd v Dŵr Cymru Cyfyngedig [Welsh Water] (No 2)* [2013] EWCA Civ 233; *R (oao) Prokopp v London Underground Ltd* [2004] Env LR 8, [2003] EWCA Civ 961 and *Ian Norris v Secretary of State and Stoke on Trent City Council* [2006] EWCA Civ 12 CA (Civ Div).

11. In this instance I acknowledge the misgivings in some of the wording of the conditions subject of this appeal, the concerns raised by the appellant surrounding the six tests⁸ and the assertion that no enforcement action has been taken by the Council. In this particular case, I find that condition no's 8, 10, 20 and 27 are clear that their requirements needed to be satisfied before the approved development went ahead. Accordingly, they must all be categorised as constituting pre-commencement conditions. Whilst, therefore, a judgement as to whether the conditions goes to the heart of the permission is more finely balanced in the case of condition no. 20, I consider that condition no's 8, 10 and 27 penetrate the heart of the outline permission and thereby represent a condition precedent in this instance.
12. As such, Section 73 does not apply if the planning permission was granted subject to a time limited commencement condition and that time period has expired without the development having begun. In the absence of a Lawful Development Certificate confirming that the development has been lawfully implemented, the permission appears to have lapsed during the application process, which is now subject of this appeal. Consequently, in the absence of substantive evidence to the contrary, it is not possible to 'remove' or 'vary' a condition attached to a lapsed permission.
13. Taking into account the representations/comments received from the main parties and on the balance of probabilities, there is significant uncertainty surrounding the time period imposed by condition on the outline planning permission and its likely expiration. Consequently, there can be no appeal to vary and remove the requested conditions. In this case, no further action can be taken on the appeal, considering the above. However, even if, the problematic issue surrounding the time period of the outline permission was not evident, I find that the comments to the appeal scheme from statutory consultees, particularly those from Yorkshire Water and the Lead Local Flood Authority surrounding drainage to be notable factors of considerable importance that would be afforded significant weight in the determination of this appeal, given the location of the site in Flood Zone 3.

Other Matters

14. I have had regard to various other matters raised by the appellant including, amongst other things, the Council's 5 year housing land supply, but this factor does not form part of my decision. It is also obvious that the site has complex drainage issues, especially since Water Voles, an internationally protected species, have been detected by the Goole and Airmyn Drainage Board in the Southfield drain and Long Lane drain. I have also noted his comments about the way the Council handled the application. Nonetheless, given my findings above, these matters do not alter or outweigh my conclusion on the main issue.

Conclusion

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

W Johnson

INSPECTOR

⁸ PPG Paragraph: 003 Reference ID: 21a-003-20190723