



Appeal Decision

by S A Hanson BA (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 July 2021

Appeal Ref: APP/J3720/X/21/3267039

Bidford Grange, Bidford on Avon, Warwickshire B50 4LY

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Jack Broadhurst against Stratford on Avon District Council.
 - The application (Ref.20/02267/LDE) is dated 18 August 2020.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which an LDC is sought is described as: Planning permission has been lawfully commenced within the meaning of Section 56(4) of the Act, notwithstanding all pre-commencement conditions have not been discharged.
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Decision

1. The appeal is dismissed.

Procedural matters and background

2. The appeal is against the Council's failure to make a decision within the prescribed period on the application for an LDC to determine if planning permission pursuant to application 13/00789/VAR¹ (the 2013 permission) has been lawfully commenced within the meaning of Section 56(4) of the Act.
3. The Council determined that on the basis of the application form and the submissions, the application was made pursuant to s191(b) and the appropriate fee should be based on whether any operations which have been carried out in, on, over or under land are lawful.
4. However, the appellant takes the view that the application was made pursuant to s191(c) to determine whether the development that has been undertaken has lawfully commenced planning permission 13/00789/VARY, notwithstanding the non-compliance with the provisions of conditions 4, 7, 9 and 15. The appeal is made on the basis that the requirements of these conditions do not go to the 'heart of the planning permission' for the approved development.
5. The Council assert that the application was not validated because of the dispute over whether the application was pursuant to s191(b) or s191(c) and the correct fee that needed to be paid with the application.

¹ Variation of condition 2 (approved drawings) of planning permission 12/00147/FUL (Change of use from part golf course (D2) to holiday complex (sui-generis). Erection of 25 log cabins (letting purposes) and associated new internal access roads, car parking and landscaping.) to substitute revised log cabin designs (623/02 and 04) and amend site layout plan (623/08). Approved by notice dated 21 June 2013

6. Regardless of the relevant provision and fee implications, if any of the conditions not complied with were true conditions precedent then any works of commencement, being operations, were not lawful. I shall determine the appeal accordingly.

Main Issue

7. It is clear from the evidence provided within the Council's appeal submissions that had it made a decision on the application it would have been a refusal. The Council took the view that pre-commencement conditions attached to the permission had not been discharged and that the conditions were considered true conditions precedent. However, since the Council has not determined the application, the appeal is against its deemed refusal, hence the main issue is whether that deemed refusal would have been well founded.

Reasons

8. The appellant's statement provides that following the approval of the 2013 application development commenced by way of an operation in the course of laying out or constructing a road, and that road was completed at the end of 2013. Further to these works, one of the approved log cabins was constructed during 2014. Despite these claims, the Council considers that insufficient evidence has been provided to demonstrate that a material commencement has occurred.
9. The operations relied upon were capable of being 'material operations' for the purposes of s56(4) of the 1990 Act, but there is no dispute between the main parties that four of those conditions (4, 7, 9 and 15) were not discharged by the Council and remain outstanding.
10. The Council referred to the following relevant case law in support of its position. The *Whitley*² case determined that a planning permission cannot be judged to have been implemented if commenced in contravention of a condition attached to the permission prohibiting the commencement of development. The *Whitley* principle has been refined by the *Hart*³ judgement, which held that it is necessary for the condition both to be expressly prohibitive of commencement of development and to go to the heart of the permission. Both cases were considered in the *Greyfort Properties*⁴ decision. *Greyfort* approved and refined the approach taken in *Hart*. This judgment makes it clear it is not necessary for the wording of the condition to be expressly prohibitive; it is enough for the condition to be prohibitive in substance or effect. A condition that requires something to be done 'prior to the commencement of development' is capable of being a true condition precedent.
11. Having regard to these judgements, it is necessary in these circumstances to look at the proposal in a staged manner. Firstly, do the conditions require something to be done prior to the commencement of development? If so, do they go to the heart of the planning permission as a matter of judgment and what are the significance of the conditions to the permission? Each condition must be considered on a case by case basis to establish if there is a true condition precedent which goes to the heart of the permission.

² F G Whitley and Sons v Secretary of State for Wales and Clwyd CC [1991] JPL 856

³ R (oao Hart Aggregates Ltd) v Hartlepool BC 2005 EWHC 840 (Admin)

⁴ Greyfort Properties Ltd v Sec. of State for Communities & Local Govt. [2011] EWCA Civ 908

12. From the submissions before me, there is no disagreement between the parties that condition 9, which required details of cycle parking provision to be agreed prior to the commencement of development is not considered a true condition precedent. I concur with this opinion because, although the condition prohibited development to commence, the provision of cycle parking does not go to the heart of the permission as it is manifestly not about the essential subject matter of the permission.
13. The matters related to conditions 4, 7 and 15 are the main issues in dispute in this case.
14. Condition 4 requires that "no development shall take place until a schedule of the material, finish and colour to be used in the construction of the external surfaces of the building(s) here permitted have been submitted to and approved in writing by the District Planning Authority. Development shall be carried out in accordance with the approved details." The reason is to ensure that the external appearance of the development is satisfactory.
15. The first part of this condition is expressly prohibitive of development commencing until details of the external finishes had been approved, but does this go to the heart of the permission? The external finishing materials of the development are an important consideration in terms of ensuring a development is appropriate. This was considered important because of both its rural setting and scale. I acknowledge that reference is made in the design and access statements to the timber cabins being 'natural approved roof finishes local to the area and natural coloured wood stain to the timber walls and frames', but this is not enough to understand how the finished look of these buildings will sit within the landscape.
16. Even though the surrounding area does not have any special protection, it is identified as being within the Avon Valley landscape area which forms part of the Avon Ridgeland designation. Although the Council considered that the development would be "assimilated into the landscape" the fact that condition 4 was included indicates that the external materials were a matter of considerable importance to the Council. So much so, that it precluded development until those details were approved. I also note that the Council refused to discharge the condition in a letter to the appellant dated 26 November 2013 due to insufficient details. In the circumstances of this case, I find that the specification for the external materials was fundamental to the development permitted. Thus, condition 4 does go to the heart of the permission to be a true condition precedent.
17. Condition 7 requires that "notwithstanding the information submitted with the application no works or development shall take place until full details of hard landscaping proposals have been submitted to and approved in writing by the District Planning Authority and these works shall be carried out as approved." The condition required further details for: change in and finished levels, hard surfacing materials, position and design of site enclosures, car parking layout and other vehicular and pedestrian areas.
18. The first part of the condition is expressly prohibitive of development commencing prior to the full details of the hard landscaping proposals being submitted to and approved in writing by the Council. This condition requires that the works approved be completed before the first occupation of any part of the development to ensure a high standard of landscape.

19. Like the consideration of finished external materials for the cabins, the hard landscaping details form a fundamental structural part of a development of this scale. Works including the layout and surface materials for vehicular and pedestrian area, combined with the means of accommodating changes in levels can have a significant effect on the visual impact of the development within the landscape. The reason for the condition is to ensure a high standard of landscape within the development and the Council maintains that due to the scale of the development securing these details prior to commencement is of fundamental importance to the scheme. Such details are an essential component of a development of this scale and prior agreement is wholly appropriate to ensure the development respects the quality and character of its rural setting.
20. Furthermore, I note that the Council refused to discharge condition 7 in a letter to the appellant dated 26 November 2013 due to insufficient details in particular the need for a clarification of surface materials for the road and car parking areas. A further letter from the Council to the appellants dated 26 April 2016 advised that the discharge of condition 7 was again refused because insufficient details concerning street furniture and materials for paving and other hard surfaces. The reason was cited as being the extensive use of Tarmacadam within the hard surfacing in addition to road surfaces which were considered not appropriate in this rural area.
21. Overall, I find that the requirement for the hard landscaping details to be agreed prior to the commencement of development was fundamental to the development permitted. In this respect, condition 7 goes to the heart of the permission and is therefore a true condition precedent.
22. Condition 15 required that "no part of the development hereby permitted shall be commenced within the site until the applicant or agent or their successors in title have secured the implementation of a programme of archaeological work in accordance with a written scheme of investigation which has been submitted to and approved in writing by the District Planning Authority." The reason was to ensure that a proper archaeological evaluation can take place.
23. The Council acknowledged that the works associated with the development would be unlikely to give rise to any significant impact due to excavation works being relatively minimal and the extensive re-modelling of the site as part of the creation of the golf course. However, as the site is in an area of known archaeological interest, a condition was imposed to secure a scheme of archaeological investigation prior to works on site commencing. To require investigation works prior to commencement of development would ensure that appropriate investigation of potential archaeological deposits would be secured.
24. Clearly this condition is expressly prohibitive and can only be properly complied with prior to the commencement of development. To suggest that such issues could be resolved after development has commenced and at which point any assets of historical significance may have been lost or destroyed would invalidate the reason for a scheme of investigation. In these circumstances I am of the opinion that condition 15 does go to the heart of the permission and is therefore a true condition precedent.
25. The requirement for details to be submitted and approved in respect of external materials and hard landscaping is both reasonable and necessary in such circumstances and, moreover, these details are commonly requested by

way of pre-commencement conditions imposed on planning permissions involving new development. In addition to the reasons attached to the individual conditions, the decision notice also highlights, in its conclusion, the reason for granting permission was, amongst other matters, subject to the imposition of conditions requiring use of appropriate materials and hard landscaping to help assimilate the chalets into the landscape.

26. Overall, I consider that the operations undertaken did not serve to begin the development.

Conclusion

27. For the reasons given above and having regard to all other matters raised, I conclude that the Council's deemed refusal to grant an LDC was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act as amended.

S A Hanson

INSPECTOR