The Planning Inspectorate

Appeal Decision

Site visit made on 23 June 2021

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 13 August 2021

Appeal Ref: APP/K5600/C/20/3259399
402-416 King's Road, London SW10 0LJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Ms Shabina Khanam against an enforcement notice issued by The Council of The Royal Borough of Kensington & Chelsea.
- The enforcement notice was issued on 13 August 2020.
- The breach of planning control as alleged in the notice is the carrying out of development purportedly pursuant to lapsed planning permission (ref: PP/13/04914 / APP/K5600/A/13/2210526).
- The requirements of the notice are:
  i. Cease development purportedly pursuant to lapsed planning permission (ref: PP/13/04914 / APP/K5600/A/13/2210526); and
  ii. Make good and return the site to its condition prior to the commencement of the piling and excavation works carried out purportedly pursuant to lapsed planning permission (ref: PP/13/04914 / APP/K5600/A/13/2210526); and
  iii. To remove any construction materials, paraphernalia and equipment (including for the avoidance of doubt the scaffolding and platform currently in situ) relating to the unauthorised development from the site (including any resulting construction materials, paraphernalia and equipment relating to the carrying out of Step ii) above)
  In carrying out Step iii) you are required not to remove any earth/rubble/spoil from the site which has been excavated from the site as part of the unauthorised excavation and piling works, this debris is to be used to fill-in the excavated area and used in returning the site to its former levels (pursuant to Step ii) above).
- The period for compliance with the requirements is 28 days.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with variations.

Application for costs

1. An application for costs was made by Ms Shabina Khanam against The Council of The Royal Borough of Kensington & Chelsea. This application is the subject of a separate Decision.

Procedural Matters

2. The Council has issued two different enforcement notices under reference ENF/20/02555, both of which relate to the same property and were issued on the same date 13 August 2020. The Council's evidence covers both enforcement notices that were served, but it is clear to me from the appellant's initial documents that the enforcement notice to which this appeal relates is the one where the alleged breach of planning control as set out in paragraph 3 is

"Without planning permission, the carrying out of development purportedly pursuant to lapsed planning permission (ref: PP/13/04914 / APP/K5600/A/13/2210526)" and that is the basis upon which I have determined this appeal.

3. On 20 July 2021 the Government published its revised National Planning Policy Framework which represents the Government's up-to-date planning policies for England and how they should be applied. Both main parties were given the opportunity to comment on the relevance of the revised Framework to their cases.

4. Since the service of the notice the London Plan 2016 has been replaced with London Plan, The Spatial Strategy for Greater London, March 2021 (the London Plan 2021) which was published on 2 March 2021. I have taken account of the replacement development plan document in the determination of the current appeal.

Background

5. It is my understanding that conditional planning permission was granted on appeal on 27 February 2014 for the demolition of an existing garage followed by the erection of a single storey plus basement, two bedroom dwelling with associated landscaping on the appeal site. Various conditions were pre-commencement conditions; namely conditions 3, 7, 8, 9, 10, 14 and 17. In addition, condition 8 states that no demolition works should be undertaken until a demolition method statement has been submitted to and approved in writing by the local planning authority. Condition 15 requires that in cases where contamination is shown to exist, no development shall commence until a remediation method statement to address the results of a preliminary risk assessment report/site investigation scheme has been submitted to, and approved by the local planning authority. Condition 16 provides that the approved remediation method statement must be carried out prior to the commencement of development other than that required to carry out remediation and a verification report shall be submitted to and approved in writing by the local planning authority prior to the commencement of development other than that required to carry out remediation.

6. A non-material amendment to the approved scheme was refused in August 2014 and a further application to vary the approved drawings to alter the location of the bin and cycle storage space was approved in April 2015.

7. In June 2015 the Council's attention was drawn to works having commenced on site and subsequent investigations confirmed that there was no building on the site which was being levelled. The developer was informed that pre-commencement conditions needed to be discharged. It is my understanding from the evidence before me that no further site works were undertaken and no details were submitted to the Council pursuant to the conditions attached to the approved planning permission (ref: PP/13/04914 / APP/K5600/A/13/2210526). In February 2016 the Council served a Breach of Condition Notice alleging that conditions 3, 7, 8, 9, 10 and 14 had not been complied with and to cease all work until approved in writing by the local planning authority.

8. Between September 2015 and December 2017 conditions 3, 7, 8, 9, 10,14 and 17 were discharged by the Council. The 18 December 2017 decision to

discharge condition 14 states that, with regard to condition 15, a sufficient site investigation and quantitative risk assessment with the remediation method statement will be required to discharge condition 15 in order to ensure that the decision-making process that led to the remediation strategy is clearly set out and accords with the development plan. The decision also states that condition 16 (verification report) cannot be discharged as a prior to commencement condition and it is recommended that advice be sought in amending the condition to prior to occupation before development works commence on site. This latter statement is somewhat confusing since the Council were aware that development had already commenced on the site.

9. The appellant argues that all pre-commencement conditions have been discharged other than conditions 15 and 16, and with respect to condition 16 the Council has confirmed in writing could not be treated as a pre-commencement condition. The appellant also contends that the permission was lawfully implemented when demolition works were undertaken.

10. Condition 15 has not been discharged and, although the documentation submitted to the Council on 25 August 2017 with reference to application CON/17/05489 was submitted with a Phase II report, the Council explained at the time that the report was inadequate and did not accept its conclusions. The Council has stated that no document submitted to the Council has ever sufficiently dealt with the requirements of condition 15 and the Council has never discharged it. There is further evidence before me that no application has ever, in fact, been made to discharge that condition nor has sufficient information been submitted to allow the Council to discharge it.

The appeal on grounds (b) and (c)

11. Ground (b) is that the breach alleged in the enforcement notice has not occurred. In order to succeed it would need to be demonstrated that the carrying out of development purportedly pursuant to the approved planning permission had not occurred on the land at the time the notice was served. For the avoidance of doubt this should not be confused with the appeal on ground (c) which is that the matter alleged does not constitute a breach of planning control; for example because permission has already been granted.

12. In F G Whitley & Sons v SSW & Clwyd CC [1992] JPL 856, the Court of Appeal held that the only question, when deciding whether development was begun in accordance with a planning permission, is whether the development was permitted by the permission with its conditions. If the development was in contravention of a 'condition precedent', it cannot properly be described as commencing in accordance with the permission. This is the 'Whitley principle'. Cases sometimes arise – particularly where the planning permission is in danger of lapsing – where there is a dispute over whether the permission was begun in breach of 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 – as opposed, for example, to requiring that something is done before occupation. It must have such significance to the permission that it goes to the heart of the permission as a matter of judgment. If the tests are met and the condition is a condition precedent, the next question will be whether the works were carried out in breach of that condition. If the answer is yes, it is then necessary to

consider whether any exceptions to the Whitley principle apply so that it can be found that the planning permission was lawfully commenced.

13. Woolf LJ held in Whitley that it is not necessary to try to determine whether or not the relevant condition is properly capable of being classified as a condition precedent – on the basis that what had taken place was development without PP and a breach of condition, and so enforcement action of some kind could be taken. 527. However, in R (oao Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin), Sullivan J held that a distinction had to be drawn between a condition which required some action to be undertaken and one that expressly prohibits any development taking place before a particular requirement has been met. He found that a condition will only be a condition precedent where it expressly prohibits the commencement of development and goes to the heart of the planning permission. If both tests are satisfied, the Whitley principle applies and there would be development without permission. Otherwise, there would merely be a breach of the condition.

14. Where the prior demolition of buildings was part of the total works necessary to undertake the development, and this was carried out by a builder and was the type of operation normally carried out by a builder, and the planning permission specifically authorised the demolition, those works of demolition should be taken as the start of the point at which development had begun in accordance with the planning permission.

15. The appellant agrees that condition 15 has not been discharged and the wording of the condition clearly prohibits the commencement of development in particular circumstances where it is found that contamination is found to be present. Since the Phase I Geo-Environmental Preliminary Risk Assessment by Environmental Protection Strategies Ltd (EPS) dated 13 December 2017 identified contamination at the site the appellant was advised that further site investigation was required to establish the nature and extent of contaminants. Such further investigation and evidence has not been provided to the Council pursuant to condition 15. Development pursuant to the planning permission is prohibited until such time as a requirement has been met and if such requirement has not been met development has occurred outside the scope of the permission. In addition, as a matter of planning judgement, the condition goes to the heart of the planning permission in that it is fundamental to the development permitted. Consequently, condition 15 to be a condition precedent and, irrespective of any views previously expressed by the appellant or the Council, the appellant's failure to discharge it makes the development unlawful.

16. Therefore, the appeal on grounds (b) and (c) must fail.

The appeal on ground (a)

17. The ground of appeal is that planning permission should be granted for what is alleged in the notice. In this case the alleged breach of planning control is the carrying out of development purportedly pursuant to a lapsed planning permission. My decisions with respect to the appeal on grounds (b) and (c) effectively confirm that the breach of planning control alleged has occurred since the appellant's failure to discharge particular conditions precedent render the development unlawful.

18. S177(1) only allows for the grant of planning permission for the whole or part of the matters and that implies that permission cannot be granted for more than the partially implemented development. Another grant of planning permission would be required to complete the development which the original permission approved. Therefore, taking account of the evidence before me, the main issue is whether the development carried out is a potential risk to human health and other sensitive receptors.

19. In the light of the evidence presented it is clear to me that in order to grant permission for the matters the subject of the enforcement notice condition 15 of the original permission would need to be discharged which relates to the relevant contaminated land issues. The appellant has submitted a Phase II Environmental Assessment (Reference UK15.1777c) in order to address the requirements of condition 15 relating to contamination. The report is intended to supplement the previous Phase 1 Geo-Environmental Preliminary Risk Assessment (Reference UK15.1777b) Issue 2 which the Council has accepted for the discharge of Condition 14. An initial phase of intrusive site investigations was completed in June 2016 but the information provided was considered to be insufficient by the Council to assess the contaminant linkages with the preliminary risk assessment.

20. The latest report presents the findings, conclusions and recommendations of two phases of intrusive environmental assessments undertaken in June 2016 and November 2017. I have noted that the requirements of condition 15 include a Remediation Method Statement to address the results of the Preliminary Risk Assessment and Site Investigation Scheme. The latest Phase II Environmental Assessment covers a summary of intrusive investigations, findings, an appraisal of the findings including human health, controlled waters and soil gas assessment, followed by a discussion of the findings and environmental recommendations. The report states that no further environmental assessment is required. No impacts from existing soil quality are considered to present an obstruction to the residential development of the site and it is anticipated that any risks can be suitably managed through a combination of relatively common remedial actions and control measures.

21. However, the evidence submitted to date fails to meet the full requirements of Condition 15 in that it falls short of providing a detailed Remediation Method Statement setting out how a preferred remediation option has been chosen and how remediation should be implemented. In the absence of such detail condition 15 cannot be discharged and consequently there is insufficient evidence that the development carried out is not a potential risk to human health and other sensitive receptors.

22. As such it conflicts with Policy CE7 of the Local Plan for the Royal Borough of Kensington and Chelsea adopted 11 September 2019 (the LP) which states that the Council will consider the potential risks of contaminated land and will ensure it is adequately mitigated before development proceeds.

The appeal on ground (f)

23. The ground of appeal is that the steps required by the notice to be taken exceed what is necessary to achieve the purpose. The purposes of an enforcement notice are set out in s173 of the Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). Since the notice requires the cessation of development and making good and

returning the site to its condition prior to the commencement of piling and excavation works, the purpose is to remedy the breach.

24. With respect to the requirements of the notice the appellant argues that, in terms of contaminated land, it would be far more detrimental to require the appellant to undertake further ground works to rectify what has already occurred. In response to this concern the Council proposes that an alternative solution would be to carry out the appropriate environmental testing and agree an appropriate remediation solution prior to the appellant carrying out any further remediation works. The Council suggests that amendments should be made to the enforcement notice to achieve an appropriate balance between restoring the status quo in amenity terms whilst maintaining appropriate levels of public safety with particular reference to the potential effects of contaminated land.

25. The Council's suggested alternative wording for the requirements of the notice includes the provision of a clean cover to be placed over the potentially contaminated debris which should remain in place until the debris has been tested and assessed for levels of contamination. In addition, no remediation work should take place until a method statement to carry out these works has been agreed. The latest evidence presented by the appellant confirms that no further environmental assessment is required and that any risks associated with ground contamination can be dealt with by remedial actions and control measures. The remediation options and the proposed method for carrying out the development have not been submitted. I have taken account of the Council's suggested alternative wording and also the appellant's comments with respect to the suggested changes. In the light of these comments and the evidence before me I agree that the wording of the requirements of the notice should be revised to take account of the concerns of both main parties with respect to the potential risks associated with ground contamination.

26. Given the fact that the latest evidence indicates that no further environmental testing is required and that the risks can be dealt with by suitable remedial actions and control measures, the amended wording should reflect this whilst managing the potential risks associated with site works whilst not being over-onerous with respect to the appellant's required actions.

27. Therefore, with respect to the appellant's concerns that it would be more detrimental to require the carrying out of further ground works to rectify what has already occurred, the appeal on ground (f) succeeds in part.

The appeal on ground (g)

28. The ground of appeal is that the time given to comply with the requirements is too short. The 28 days given seems to me to be a short period of time to undertake the requirements of the notice. The six month compliance period suggested by the appellant is excessive given the risks associated with the development that has taken place to date. However, given the amendments I am suggesting to the requirements I consider four months would strike an appropriate balance and would not place a disproportionate burden on the appellant. To this limited extent the appeal on ground (g) succeeds.

Formal Decision.

29. I hereby direct that the enforcement notice shall be varied by:

a) The deletion from paragraph 5 of requirements ii) and iii), including the paragraph worded "In carrying out Step iii) you are required not to remove any earth/rubble/spoil from the site which has been excavated from the site as part of the unauthorised excavation and piling works, this debris is to be used to fill-in the excavated area and used in returning the site to its former levels (pursuant to Step i) above)." and the substitution therefor of the words:

ii) Subject always to Steps iv and v below and in accordance with the remedial method statement approved by the Council in accordance with Step v below, to make good and return the site to its condition prior to the commencement of the piling and excavation works carried out purportedly pursuant to lapsed planning permission (ref: PP/13/04914 / APP/K5600/A/13/2210526); and

iii) Subject always to Steps iv and v below and in accordance with the remedial method statement approved in accordance with Step v below to remove any construction materials, paraphernalia and equipment (including for the avoidance of doubt the scaffolding and platform currently in situ) relating to the unauthorised development of the site (including any resulting construction materials, paraphernalia and equipment relating to the carrying out of Step ii) above); and

iv) Prior to undertaking Steps ii and iii above to cover any excavated earth/rubble/spoil on site with a clean cover and not to move or remove any of these materials until such time as a remedial method statement has been agreed; and

v) Prior to undertaking Steps ii and iii above to submit to the Council for its consideration a proposed remedial method statement setting out how the recipient of this Notice will achieve Steps ii and iii above for the Council's consideration and approval.

and

b) The deletion from paragraph 6 of the words "28 days" and the substitution therefor of the words "four months" as the time for compliance with the requirements.

Subject to these variations the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act as amended.

A A Phillips

INSPECTOR