



Appeal Decision

Site Visit made on 19 July 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3 September 2021

Appeal Ref: APP/C3240/C/20/3257032

The Old Brick Yard, Cherrington, Newport TF10 8PQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended ('the Act'). The appeal is made by Mrs Diane Erica Grigsby against an enforcement notice issued by Telford and Wrekin Council.
- The notice was issued on 3 July 2020.
- The breach of planning control as alleged in the notice is:
 - (1) Without planning permission, the unauthorised change of use of the land from woodland to the siting of 2no caravans for residential use and storage of 1no caravan, the siting of 2no steel storage containers and other domestic paraphernalia
 - (2) Without planning permission, the importation of soil and earth for the purpose of raising ground levels and infilling existing pond, the carrying out of excavations and groundworks, the digging of footings, the creation of a vehicular access and erection of metal gated, and installation of a soakaway drainage system
- The requirements of the notice are to:
 - 1. Cease the use of the 2no caravans for residential use
 - 2. Remove the 3no caravans from the land
 - 3. Remove the 2no steel storage containers and any other domestic paraphernalia, including small sheds and marquees etc, from the land
 - 4. Cease the importation of soil and earth on to the site
 - 5. Cease the further raising of ground levels within the area shown marked 'A' on the attached plan, by ceasing the further distribution of soil and earth around the site
 - 6. Remove from the land all imported soil and earth, and return the area shown marked 'A' on the attached plan back to its original condition in terms of its levels and contours
 - 7. When complying with 6 above, ensure that when removing all imported soil and earth from within the root protection area of any trees, that a hand dug method is used and no mechanical machinery is operated within the root protection areas
 - 8. Following compliance with 6 and 7 above, the soil within the root protection areas of the trees will need to be de-compacted to ensure that the trees can continue to perform the gaseous exchange between the soil and the roots
 - 9. Cease the carrying out of excavations and ground works within the area shown marked 'B' on the attached plan, and re-instate the land to its previous condition in terms of its levels and contours by back filling all
 - 10. Remove the footings dug to the rear of the existing brick building and return the land to its previous condition by back filling the footings dug
 - 11. Remove the soakaway drainage system from the land and reinstate the land to its previous condition
 - 12. Remove the gates and associated posts from the approximate location shown marked blue on the attached plan, and permanently block up the vehicular access by replanting a hedgerow of British native hedging mix to include: *Corylus avellana* (Hazel) 20%; *Crataegus monogyna* (Hawthorn) 40%; *Ilex aquifolium* (Holly) 20%; *Acer campestre* 20%
The hedging should be in 2 litre pots, at least 90cm in size and planted at least 3 to 4 per metre
- The period for compliance with the requirements is: Within four months.
- The appeal is proceeding on the grounds set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended.

Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Reasons

2. An appeal under ground (c) is made on the basis that the matters stated in the notice do not constitute a breach of planning control. Case law has established that it is for the appellant to make their case on the balance of probabilities. There are various matters which the enforcement notice alleges constitute a breach of planning control. The main thrust of the appellant's case under ground (c) is that the works which have been carried out are in connection with planning permission which was given by the Local Authority under reference TWC/2014/0718.
3. Planning permission was granted on 26 September 2014, for the conversion of a redundant building to a residential dwelling with a proposed side extension and retrospective consent for a play house, reference TWC/2014/0718. The planning permission was granted subject to a series of conditions, including condition 1, which states '*The development hereby permitted shall be begun before the expiration of three years from the date of this permission*' and condition 2, which states '*Development shall not take place until a scheme of foul drainage and surface water drainage has been submitted to, and approved in writing by the Local Planning Authority...*'.
4. There are two elements to the permission, firstly the conversion and extension of the building and secondly the play house. The conversion and extension of the building is prospective and the play house was retrospective. Condition 1 requires the development to be begun within a specified time-frame and was included to comply with section 91(1) of the Act (as amended) and therefore relates to the prospective element of the development. Condition 2 deals with foul drainage and surface water drainage, which in my view relates to the conversion and extension of the building.

Whether development was begun

5. Section 56(2) of the Act states 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' as (a) any work of construction in the course of the erection 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).
6. Excavations for the proposed side extension, together with concrete in-fill are asserted to have been carried out in August 2016. Although excavations were evident during my visit, a photograph taken by the Council on 11 June 2020 indicates that they were not present at that time. Furthermore, officers of the Council visited the site on 22 October 2019 and state that whilst works to install a drainage system had commenced, no evidence was shown that works to extend the building had commenced. Whilst the excavations would constitute a 'material operation', the evidence points towards the works being undertaken after the expiration of three years from the date of the permission.

7. The appellant states that she paid for the installation of a bore hole domestic water supply in September / October 2014. However, no documentary evidence has been submitted to support this assertion, nor do I have any substantive details of the works undertaken.
8. The appellant advises that mains electricity was installed to the property in August 2015. Whilst an invoice dated 18 May 2015 for the works is provided, I have no substantive details of the works carried out and cannot therefore be sure that they would constitute a 'material operation'.
9. Given the above, it has not been demonstrated, on the balance of probabilities, that the development was begun before the expiration of three years from the date of permission TWC/2014/0718.

Condition precedent

10. It was established in *F G Whitley & Sons v SSW & Clwyd CC* [1992] JPL 856 that if development was in contravention of a 'condition precedent', it cannot properly be described as commencing in accordance with the planning permission, the 'Whitley principle'.

Does Condition 2 prohibit the commencement of development?

11. The first question to ask is does the condition prohibit the commencement of development until a requirement has been met? Condition 2 is worded so as to prevent development from occurring until a scheme of foul drainage and surface water has been submitted to, and approved in writing by the Local Planning Authority. This clearly prohibits the commencement of development until the requirement has been met.

Does Condition 2 go to the heart of the planning permission?

12. The second question is whether the condition is of such significance to the planning permission that it goes to the heart of the planning permission as a matter of judgement. The reason for the condition is stated on the decision notice to be to ensure satisfactory drainage of the site and to avoid flooding.
13. Given the site's rural location, it is highly unlikely that it would be possible to connect to the mains drainage system. Although the building is already in situ, its use for residential purposes would generate foul discharge which has the potential to cause pollution if not adequately controlled. The additional built development is also likely to increase surface water run-off and therefore has the potential to increase risk of flooding.
14. It is essential that the means of dealing with foul and surface water drainage are resolved before works can progress. Consequently, the commencement of development is conditional upon the submission of a scheme of foul drainage and surface water drainage. Such matters therefore, in my view, go to the heart of the permission.

Were the works carried out in breach of Condition 2?

15. Although records of percolation tests were sent to the local planning authority, they do not constitute a scheme of foul and surface water drainage and are therefore not sufficient to meet the pre commencement requirements of condition 2. Furthermore, the tests were carried out on 22 October 2019 and

23 October 2019, well after the expiration of three years from the date of the permission.

16. Whilst the Drainage and Septic tank facilities were installed in 2019, a scheme of foul drainage and surface water drainage has not been submitted to the local planning authority to date. Consequently, even if I were to find the development was begun, any works carried out at the site in relation to the permission would have been in breach of condition 2.

Are there are any exceptions?

17. Case law has established that where a condition has, in substance, been complied with, the principle that the development was undertaken without planning permission may be disapplied. However, for the reasons given above, I have no substantive evidence that any such exception applies in this case.

Conclusion on planning permission

18. For the reasons given above, the appellant has not been demonstrated, on the balance of probabilities, that the development was begun before the expiration of three years from the date of permission TWC/2014/0718. Furthermore, even if works were undertaken prior to the planning permission lapsing, any works would have been in contravention of a condition precedent and so cannot properly be described as commencing in accordance with the planning permission. The planning permission has therefore lapsed and is no longer capable of implementation.

Caravans

19. The temporary use of the caravans is asserted to be in order to comply with the Construction and Design Management Regulations, which require the provision of adequate welfare units in respect of toilet requirements and kitchen facilities / rest areas. The appellant also asserts that there have been several incidents of theft and so it is necessary to have a resident security person on site to prevent further incidents.
20. Part 5, Class A of the GPDO permits the use of land as a caravan site in certain circumstances specified in paragraphs 2 to 10 of Schedule 1 to the Caravan Sites and Control of Development Act 1960 (the 1960 Act). Schedule 1 of the 1960 Act sets out cases where a caravan site licence is not required. Paragraph 9 of Schedule 1 to the 1960 Act states that a site licence shall not be required for the use as a caravan site of land which forms part of, or adjoins, land on which building or engineering operations are being carried out (being operations for the carrying out of which permission under Part III of the Act of 1947 has, if required, been granted) if that use is for the accommodation of a person or persons employed in connection with the said operations.
21. However, since planning permission TWC/2014/0718 is no longer extant, the use of the caravans is not in connection with building or engineering operations being carried for which planning permission has been granted. Consequently, the temporary siting of caravans for residential purposes and storage of a caravan would not be lawful as the development would not comply with Part 5, Class A of the GPDO.

Storage containers and other domestic paraphernalia

22. The appellant states there is a need for the storage of tools and construction equipment. Part 4, Class A of the GPDO permits the provision on land of buildings, moveable structures, works, plant or machinery required temporarily in connection and for the duration of operations being carried out on, in, under or over that land or on land adjoining that land. Development is not permitted if planning permission is required for those operations but is not granted or deemed to be granted.
23. As above, since planning permission TWC/2014/0718 is no longer extant, the siting of the storage containers and other domestic paraphernalia is not in connection with building or engineering operations being carried for which planning permission has been granted. Consequently, the temporary siting of storage containers and other domestic paraphernalia would not be lawful as the development would not comply with Part 4, Class A of the GPDO.

Earthworks

24. Section 55 of the Act sets out the meaning of development, which includes engineering operations in, on, over or under land. From the evidence provided and from my inspection of the site, I find that significant engineering works have taken place. Furthermore, the excavation works were carried out using an excavator, as evidenced by photographic evidence provided by the Council. As a matter of fact and degree, I find that the earthworks carried out constitute engineering operations and are development for the purposes of section 55 of the Act.
25. The appellant asserts that it was necessary to remove some areas of stagnant water from some land depressions. However, since the appellant has not appealed under ground (a), I cannot consider the merits of the works. I have no substantive evidence that the works carried out were permitted development and no other planning permission has been granted which would authorise such works.

Footings and soakaway drainage system

26. The digging of footings and the installation of a soakaway drainage system were carried out in connection with planning permission TWC/2014/0718. However, since the planning permission has lapsed they do not benefit from planning permission and are therefore development for which planning permission is required.

Access and gates

27. Although the appellant has not set out whether the access and gates would be permitted development, I have considered whether it would be development which is permitted by The Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)(GPDO).
28. Since I have found TWC/2014/0718 has not been lawfully implemented and is no longer extant, the site cannot benefit from permitted development rights under Part 1 of the GPDO.
29. Class B of Part 2 of the GPDO permits the formation, laying out and construction of a means of access to a highway, where that access is required

in connection with development permitted by any Class in this Schedule (other than by Class A of this Part). The appellant has confirmed that the gate is linked to a driveway which will connect to the residential dwelling when it is completed. The access is not intended to serve any other use and so would not be development which is permitted under Class B of Part 2 of the GPDO.

30. Class A of Part 2 of the GPDO permits the erection of a gate, subject to certain conditions. Development is not permitted if the height of any gate erected adjacent to a highway used by vehicular traffic would exceed 1 metre above ground level. The gate is adjacent to the highway and exceeds 1 metre in height. It is therefore development for which planning permission is required.
31. Thus, for the reasons given above, I conclude that the matters alleged by the notice are not authorised by planning permission TWC/2014/0718, nor are they permitted development. The appeal under ground (c) must therefore fail.

Conclusion

32. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

M Savage

INSPECTOR