



Appeal Decision

Site visit made on 1 February 2022

by Zoë Franks Solicitor

an Inspector appointed by the Secretary of State

Decision date: 18 February 2022

Appeal Ref: APP/E2001/X/21/3282885

49 Coniston Way, Goole, East Riding of Yorkshire, DN14 6JL

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Kevin Pullan, Kremer Properties Limited against the decision of East Riding of Yorkshire Council.
 - The application reference 21/00598/CLE, dated 8 March 2021, was refused by notice dated 30 April 2021.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is C3 – Dwellinghouses, to determine that a lawful start has been made to approved applications re 13/00931, 17/00144, 17/30449/Cond, 19/30072.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of development on the LDC application is '*C3 - Dwellinghouses, to determine that a lawful start has been (sic) to approved applications re 13/00931, 17/00144, 17/30449/Cond, 19/30072*' and the decision notice determined whether the development was lawful on that basis.
3. The description of development on the Appeal Form is slightly different as it is described as '*Certificate of lawful existing development for site under approval reference 13/00931, 17/00144 as built access road off Ivy Park Road DN14 6JL*' but I have used the description from the decision notice in this appeal for consistency.
4. Submissions made for the appellant state that the application for the LDC was made under 191 and 192 of the 1990 Act seeking confirmation that there had been the lawful commencement of the works meaning that the proposed completion (and therefore full implementation of the permissions) would be lawful.
5. As set out above, the application form only referred to whether there had been a lawful start of the approved applications, but if this were found to be the case it would then follow that the Outline Permission was still extant and that further development to implement it in accordance with the Reserved Matters and details approvals would be lawful.

Main Issue

6. The main issue is whether the Council's refusal to issue the certificate of lawfulness was well-founded. The development is lawful if no enforcement action can be taken in respect of it, and provided it does not contravene the requirements of any enforcement notice then in force¹. No evidence has been submitted regarding an enforcement notice in relation to this site at the time of the application.

Planning history

7. The planning applications and consents most relevant to this appeal are:
- i) 13/00931 ('the Outline Permission') dated 28 May 2014, for residential development;
 - ii) 17/00144 ('the Reserved Matters Permission') dated 23 August 2017, for erection of 138 dwellings following the Outline Permission;
 - iii) 17/30449/CONDET/STRAT dated 2 January 2018, for the approval of details required by conditions;
 - iv) 19/3072/CONDET dated 3 July 2019, for the approval of details required by conditions; and
 - v) 19/02307/STVAR ('Variation of Conditions Appeal') for variation of Conditions 7, 8, 9 and 27 and removal of condition 10 and 20, refused on appeal (APP/E2001/W/20/3253110) dated 13 April 2021.

Conditions

8. The appellant is seeking to prove that the Outline Permission and the Reserved Matters Permission have been lawfully commenced and that they remain extant. The Council accepts that operations which constitute development under the permissions were begun in the terms set out in section 56 of the 1990 Act prior to the consents lapsing (i.e. prior to 23 August 2019 which was 2 years from the approval of reserved matters under Outline Permission).
9. The Council accepts that the excavation of the land and laying down of hard core in the location of the access road has been undertaken as shown on an approved plan on the Reserved Matters Permission. However, the Council argues that there are pre-commencement conditions on the Outline Permission which had not been satisfied prior to those works being undertaken making them unlawful. I agree that material operations as described by section 56 of the 1990 Act and which were part of the development described in the permissions have taken place, and that the matter to be determined in this appeal is therefore whether those works were in breach of any conditions precedent.
10. The appellant's case is that the works undertaken on the site implemented the Outline Permission which is therefore still extant, notwithstanding that they accept that some of the conditions were true conditions precedent and had not been fully discharged (although the appellant's position in relation to this appears to have changed during the course of the appeal). The submissions from the parties have particularly concentrated on Condition 8 of the Outline

¹ Section 191(2) of the 1990 Act.

Permission, but both agree that there are other conditions precedent (namely Conditions 10 and 27 which also relate to drainage).

11. The appellant has advanced several arguments regarding how the permission has been implemented without the formal discharge of the conditions precedent. Firstly, the appellant argues that *'the condition has been discharged meaningfully and substantially, and to that extent, what would remain of the condition would not justify enforcement action, which impacts on the reasonableness and proportionality of enforcement.'* Whilst the appellant accepts that Condition 8 was not fully discharged, they argue that its requirements had been substantially fulfilled through the provision of information such as approved Drawing 4/003 Rev A ('the Drainage Layout Plan'), and this means that the Council would not be able to take enforcement action.
12. The Reserved Matters Permission included the Drainage Layout Plan as an approved plan, and the informative states that any pre-commencement conditions on the outline consent require a separate discharge of condition application to be submitted and agreed before any work commenced on site. The committee report and decision notice itself could not have been clearer, irrespective of what description had been given to the reserved matters application when made.
13. The decision notice for the approval of conditions dated 2 January 2018 was a split decision which stated that that Conditions 8 and 27 required further information/plans to be submitted before they could be approved. The decision notice for the approval of conditions dated 3 July 2019 included an informative which stated that Conditions 8, 10 and 27 had been removed from the submission and that details needed to be submitted to and approved by the LPA prior to the commencement of development. Again, the position regarding these conditions could not have been clearer to the applicant.
14. Much is made by the appellant about the Council's use of the phrase 'finer details' when describing the elements of the drainage arrangements that still needed to be provided and agreed through the discharge of Condition 8. I accept the Council's counter-argument that whilst the proposals had been accepted in principle, the technical details were still required to ensure that the site would be properly drained, and therefore necessary in order to be able to discharge the drainage conditions. I do not therefore find that Condition 8 had been meaningfully and substantially discharged.
15. Secondly, the appellant says that Condition 8 was unlawful in public law terms as it would be an exception to the Whitley principle, and that it can therefore be disregarded when considering whether the permission has been implemented.
16. And thirdly, they argue that it was impossible to comply with the conditions as drafted and that the Council would therefore not be able to take enforcement action. The appellant's case here is that Condition 8 could not be complied with as it would require the discharge of water into a drain where there was evidence of a protected species and would therefore be unlawful (and as a result impossible), and it would also not be possible to make the Internal Drainage Board ('the IDB') accept the discharge as required by the condition.
17. These second and third arguments are addressed below.

Conditions precedent

18. The parties agree that Condition 8 is a condition precedent. It provides:

"No development shall take place until details of the proposed means of disposal of foul and surface water drainage, including any 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."

19. The reason given on the decision notice for the imposition for Condition 8 is 'to ensure that the development can be properly drained and to prevent the increased risk of flooding.'

20. Conditions 10 and 27 require that no development shall take place until a scheme for the provision and implementation of surface water regulation, and the details for a system of perimeter drains to include the IBD dykes have been submitted to and approved by the Council. The parties did not make detailed submissions regarding these conditions and concentrated on Condition 8, but the appellant's case is that the legal analysis provided is equally applicable to any of the pre-commencement conditions going to the heart of the permission.

21. Planning Practice Guidance ('PPG') states that a condition precedent that does not meet the legal and policy tests may be found to be unlawful by the courts and therefore cannot be enforced by the LPA if breached.

22. The inspector in the previous appeal (which sought the variation of conditions 7, 8, 9, and 27 and removal of conditions 10 and 20 from the Outline Permission) found that conditions 8, 10 and 27 were true conditions precedent because they are pre-commencement conditions which go to the heart of the permission. I have come to the same conclusion as the previous inspector and for the same reasons: each of these conditions prohibit the commencement of development until a requirement has been met; and they concern the drainage and water storage arrangements for the site which are fundamental issues and have such significance to the permission that they go to the heart of the matter.

23. The appellant has argued that Condition 8 is 'multi-faceted' and that not all parts of it are fundamental. In particular they argue that there was no need for the timing element i.e. it did not need to be a pre-commencement condition. However, when Condition 8 is read as a whole alongside the reason for its imposition and Conditions 10 and 27, it is clear that the prevention of future flooding and contamination of the watercourses do go to the heart of the permission and that the details needed to be determined prior to the development commencing on site. Indeed this is in accordance with the development plan at the time that the Outline Permission was granted.² The appeal site is surrounded on three sides by existing residential areas, the Council and LLFA made it clear to the appellant that they needed to be satisfied that the proposed development would not increase flood risk to those adjacent

² Policy ENV65 of the Boothferry Borough Local Plan April 1999 required new development to demonstrate adequate means of disposal of foul sewage and surface water.

properties, and it is a matter of fundamental importance. Ensuring that the existing watercourses (including the open drains) did not become contaminated as a result of the development is also part of the proper drainage of the site that needed to be secured prior to any works taking place.

24. It therefore follows that, at the time that these conditions were imposed, they were necessary in the terms set out in the PPG. I am also satisfied that, when imposed, Conditions 8, 10 and 27 met the other of the 6 tests set out in the PPG in that they are relevant to planning, relevant to the development to be permitted, enforceable, precise; and reasonable in all respects. I agree with the Council's case in that, when imposed, these conditions met the legal tests laid down in *Newbury DC v SEE & Others* [1980] 2 WLR 379 as they were imposed for a planning purpose, fairly and reasonably related to the development permitted, and not so unreasonable that no reasonable planning authority properly directing itself could have imposed them.
25. The PPG advises that conditions can enable development to proceed where it otherwise would have been necessary to refuse planning permission. This is evidently the case here, and the conditions regarding the drainage measures were required to make the development acceptable. However, it was open to the appellant to seek to vary the conditions to provide an alternative appropriate scheme if it became evident or preferable to the solution provided in the original conditions.

Condition 8

Watercourse Capacity

26. It is the appellant's case that at the time that the conditions were imposed (and at all times subsequently) it was irrational of the Council to require discharge into the IDB system as there had been a clear objection to this proposed action during the application process, and there is no mechanism to make the IDB take the water. The Council do not accept this argument.
27. A response received from the IDB to the Reserved Matters application in March 2017 (when the Drainage Layout Drawing was subsequently approved which provides for the discharge of surface water into the IDB drains) states '*If the surface water is to be discharged to any watercourse within the Drainage District, consent from the IDB would be required in addition to Planning Permission, and would be restricted to 1.4 litres per second per hectare or greenfield runoff.*' The Council's case is that the IDB did not provide a formal objection which indicated an outright refusal to allow the discharge into their system. Indeed I accept that the response outlined above simply indicates that their permission would be required and that it would be restricted in terms of amount.
28. I do not find the Council's imposition of condition to be irrational as argued by the appellant. Given the responses that it received from the IDB during the applications processes, the Council's imposition of Condition 8 was not so unreasonable that no reasonable planning authority properly directing itself could have imposed it. The appellant did not seek to argue that to be the case at that time, and proceeded on the basis that there would be discharge into the IDB drains with the submission of Drainage Layout Drawing as part of the Reserved Matters Application. As set out above, the Appellant contends that this drawing is part of the information which 'meaningfully and substantially'

discharged Condition 8, and it cannot be the case that the Council's decision to impose Condition 8 was Wednesbury unreasonable if the appellant was also proceeding in the basis that the discharge of water from the site would be dealt in this way. If the appellant did have such concerns at the time, it would have been possible to appeal that particular condition.

29. In addition, the appellant could have applied to vary Condition 8 (and the other drainage conditions) if at any point it became clear to him that it would not be possible to use the IDB system. Both parties have referred me to an appeal decision regarding Hilda Street (APP/E2001/A/13/2198474) where the inspector granted permission for dwellinghouses but with a Grampian condition attached to secure the necessary drainage arrangements before the development could commence. This is a very similar situation to that in this case, and also indicates that the Council's imposition of the conditions precedent relating to drainage was within the range of reasonable actions.

Water voles

30. The appellant also argues that it was not possible to enforce Condition 8 once it was discovered that there was a water vole colony in Southfield Drain which meant that the Internal Drainage Board would not have accepted the discharge of water.
31. This argument is predicated on the fact that the colony of water voles in Southfield Drain (as opposed to the water voles evident in Blenheim Drain) was only discovered in June 2019. However, an email from the IDB on the 2017 Reserved Matters Application states that on 23 March 2017 '*Southfield Drain as it continues to the corner of Mayfield, held several burrows and latrines evidencing a strong water vole (Arvicola amphibious) population*'. There was clearly an awareness of some water vole activity in Southfield drain prior to the granting of the Reserved Matters Application, and it seems probable on balance that the appellant was aware of this at that time.
32. The Council's case is that the presence of the water voles was already known by the appellant and that there was a strategy to move the voles which would allow discharge into the IDB drains. They say that the applicant submitted an Ecology Strategy in May 2017 which was subsequently withdrawn, but which included a strategy for the displacement of water voles if necessary. This being the case, it has not been proven that the presence of the water voles meant that Condition 8 was unenforceable.
33. Even taking the appellant's case at its highest, they state that the discovery of the water voles in Southfield Drain was **after** the works to commence the development were undertaken on site but **before** the expiration of the Outline Permission. The Council cannot give a precise date for the works but believes that they took place around June 2019, which does not contradict the appellant's case.
34. The appellant is arguing that it was the discovery of the water voles which meant it was no longer possible to discharge Condition 8 (in accordance with the previously approved plan Drainage Layout Drawing) . The appellant then seeks to rely on this unenforceability as an exception to the Whitley principle which would mean that enforcement action would be unlawful following principles of public law.

35. However, the appellant is not arguing that this was the case at the date that the conditions were imposed or even at the date that the works were in fact undertaken in breach of pre-commencement requirement of Condition 8. At the time when the works were begun, Condition 8 had not been discharged and based on the appellant's case, they state that they were not aware that there was any potential issue regarding enforceability caused by the presence of the voles in Southfield Drain. The works were in breach of Condition 8 at the time that they were undertaken, whatever the subsequent dispute that arose regarding the voles and enforceability.
36. When the works were undertaken, Condition 8 was not understood by the appellant to be ultra vires. Putting it in the terms expressed in the caselaw³, unlawful operations cannot amount to the commencement of development, and even accepting the appellant's own case, the breach of Condition 8 was unlawful when it happened, irrespective of what was discovered subsequently.
37. In any event, the wording of Condition 8 does not require the surface water to be discharged into the IDB system, and whilst the Drainage Layout Drawing had been approved it could have been varied or the proposed means of disposal of foul and surface water drainage solution altered whilst the permission was still extant.

Reasons

38. If development under a planning permission cannot be built in accordance with fundamental approved plans and details, for whatever reason, the permission cannot be implemented. The statutory framework recognises that there will be instances where changes to a planning permission need to be made, and there are various mechanisms which can be used to achieve this, not least an application under section 73 for the variation or removal of a condition. The appellant did not seek to do this here until very late in the day and the application to vary was not determined until after the Outline Permission had lapsed.
39. There is no reason that enforcement action could not be taken to remedy the breach of planning control (i.e. the works which have been undertaken on site without planning permission due to the failure to comply with the conditions precedent) pursuant to section 172 of the 1990 Act. Nor that it would be irrational or contrary to any other public law principle for the Council to consider it expedient to do so. The Council would not, as argued by the appellant, need to take enforcement action to require compliance with the drainage conditions. The conditions precedent prevent any development pursuant to the permission taking place until the drainage scheme is secured, and enforcement can be taken against any breach of planning control as a result of the failure to comply with these conditions. The planning reasons for the original imposition of the conditions relating to drainage and flooding still exist and there still needs to be an appropriate scheme in relation to this in order to make the development acceptable.
40. For the reasons set out above, I am satisfied that Conditions 8, 10 and 27 are true conditions precedent which accord with legal and policy requirements, and which were not discharged prior to the material operations that were

³ R. (Hammerton) v London Underground Limited [2002] EWHC 2307 (Admin) and Norris v SS and Stoke on Trent CC [2006] EWCA Civ 12 CA (Civ Div)

undertaken on the appeal site. As the works were undertaken in breach of Conditions 8, 10 and 27 they did not lawfully begin the development permitted by the Outline Permission. The Outline Permission has therefore not been commenced and has now lapsed.

Conclusion

41. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of C3 - Dwellinghouses, to determine that a lawful start has been made in respect of the development approved under applications 13/00931, 17/00144, 17/30449/Cond, 19/30072 basis was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Zoë Frank

INSPECTOR