



Appeal Decision

Hearing held on 22 February 2022

Site visit made on 23 February 2022

by D Boffin BSc (Hons), DipTP, MRTPI, DipBldg Cons (RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 28 March 2022

Appeal Ref: APP/Y3425/X/21/3275929

Land at Shirleywich, London Road (A51), Hixon, Staffordshire

Easting: 398660 Northing: 325516

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (1990 Act) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr William Harp of Harixon against the decision of Stafford Borough Council.
 - The application ref 20/32217/LDC, dated 24 April 2020, was refused by a notice dated 22 September 2020.
 - The application was made under section 191(1)(b) of the 1990 Act.
 - The development for which a certificate of lawful use or development is sought is whether planning permission 15/22518/FUL, for the construction of a 196 berth narrowboat marina, facilities building, dry dock/workshop, pump out building, car parking, access and landscaping, has begun and can lawfully be completed.
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Decision

1. The appeal is dismissed.

Procedural Matters and Background

2. The application form associated with the LDC application does not state what the description of development, for which an LDC was sought, as section 8 of the form only states '*see attached report*'. A letter dated 12 April 2020 appears to be a covering letter for the LDC application and it states '*it is our view we have provided evidence that works have started on site and that planning 15/22518/FUL is now extant...*'. It was agreed at the Hearing that the appellant is seeking to establish that the development granted planning permission¹ on 20 March 2017 (the 2017 permission) has begun and can lawfully be completed. The 2017 permission was granted for the construction of a 196 berth narrowboat marina, facilities building, dry dock/workshop, pump out building, car parking, access and landscaping. Consequently, that forms the basis of the description within the banner heading above. The address in the banner heading is taken from the application form.
3. It became apparent during the Hearing that the planning application associated with the 2017 permission was considered by the Council's Planning Committee in 2015 (2015 report), when it was deferred, and in 2017 (2017 report) when the decision was made. The Officer's Reports relating to both Planning Committee meetings were provided by the Council at my request. The 2017

¹ Ref: 15/22518/FUL

report indicates that the application had been deferred to request more information on the quantities of soil to be removed and its destination, to respond to the concerns raised by Mr Rice in his letter and to determine existing and proposed ground levels.

4. I also requested the Council provide copies of a screening opinion relating to the need for an Environmental Impact Assessment (EIA) associated with the 2017 permission, the approved plans, decision notice and the hydrological assessments, letters and additional details submitted during the determination of the 2017 permission. Furthermore, I have also been provided with the details submitted in relation to the written confirmation of the discharge of conditions² on the 2017 permission.
5. The appellant raised concerns about; the complexities of the planning system; its associated timelines and the Council's treatment of him; at the Hearing. However, these are matters outside of my jurisdiction in determining this appeal.
6. The site associated with the 2017 permission (the appeal site) lies between London Road (the A51), Trent Lane and the Trent and Mersey Canal. The Pasturefields salt marsh Special Area of Conservation (SAC) and Site of Special Scientific Interest (SSSI) lies on the opposite side of the canal to the south of the appeal site. The canal lies within the Trent and Mersey Canal Conservation Area (TMCCA).

Reasons

7. Section 191(4) of the 1990 Act indicates that if, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, they shall issue a certificate to that effect. In any other case they shall refuse the application. The planning merits of the development are not relevant in this appeal and the issue is whether the Council's decision to refuse to grant the LDC was well founded. My decision rests on the facts of the case, on relevant planning law and judicial authority. The burden of proof is with the appellant and the appropriate test of the evidence is the balance of probabilities.
8. The 2017 permission was subject to 39 conditions and the first condition within the decision notice for that permission states, as is normally the case, that '*the development to which this permission relates must be begun not later than the expiration of three years beginning with the date on which this permission is granted*'. The permission was granted on 20 March 2017.
9. There is no dispute that on 16 March 2020 that Meridan Consult carried out a site inspection with regard to a drainage excavation trench that had been dug between a corner of the proposed amenity building and the first inspection chamber towards the septic tank. The Council have also confirmed that it does not dispute that by that date soil had been stripped back at the proposed access point and along parts of the vehicular access. Moreover, vegetation and a hedge line had been removed/relocated to enable a visibility splay at that access point by that date.

² Ref: 20/32064/DCON

10. I acknowledge that the drainage trench relates to a foul water system that is not part of the works covered by condition 20 of the 2017 permission as that condition relates to surface water drainage. Nevertheless, section 56(4) of the 1990 Act sets out what "material operation" under section 56(2) means and it includes '*the laying of any underground main or pipe to the foundations, or part of the foundations, of a building...*' and '*any operation in the course of laying out or constructing a road or part of a road*'.
11. I observed on site that the drainage trench has been backfilled but either end is marked by a vertical 'pipe'. Furthermore, the hedge line has been moved and the soil scraped back and the area of the proposed vehicular access is clearly apparent at a lower level to the surrounding soil levels. It is more likely than not that the works carried out correlate with the corner of the proposed amenity block and the site access approved as part of the 2017 permission. As such, I find that these works are material operations under section 56(2) of the 1990 Act and that they began within three years of the decision date of the 2017 permission.
12. However, several of the 39 conditions attached to the 2017 permission required details to be submitted to and approved by the Council prior to the commencement of the development. A written confirmation application relating to the discharge of conditions 3, 5, 12, 18, 19, 20, 21, 24, 25, 26, 31, 32, 35, 36 and 39 was received by the Council on the 9 March 2020. That application remains undetermined, it has not been appealed and the fee associated with it has not been returned by the Council. The Council has stated that based on the information submitted with that application it would have refused the discharge of conditions 3, 5, 12, 20, 31, 32 and 35.
13. In the *Whitley*³ judgment Woolf LJ states that '*As I understand the effect of the authorities to which I am about to refer, it is only necessary to ask the single question; are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful. This is the principle which has now been clearly established by the authorities.*' This is known as the *Whitley* principle.
14. The *Whitley* principle was considered in the case of *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin) (*Hart Aggregates*) where it was held that a distinction had to be drawn between a condition which required some action to be taken before a development is commenced and a condition which expressly prohibits any development taking place before a particular requirement has been met. It was further found that it is necessary for the condition to be both expressively prohibitive of commencement of the development and to go to the 'heart of the permission'. Only when both tests were met would it be a condition precedent. A failure to discharge such conditions would result in development without planning permission.

³ *F G Whitley & Sons v SSW & Clwyd CC* [1990] JPL 678; [1992] JPL 856

15. The subsequent Court of Appeal decision, in *Greyfort Properties Ltd v SSCLG & Torbay Council* [2011] EWCA Civ 908; [2012] JPL 39 (*Greyfort*) applied both the *Hart Aggregates* judgment and the *Whitley* principle. It specifically endorsed the need for the condition to go to the “heart of the matter” to be a true condition precedent. It was also held that the wording of a condition need not be expressly prohibitive if its effect was prohibitive in substance and that if this was the case the condition was still capable of being a true condition precedent.
16. Several of the conditions attached to the 2017 permission required some action to be taken before the development was commenced. However, the Council considers that only conditions 5, 12 and 20 can be treated as condition precedents taking into account the judgments above. Based on the evidence before me, including the oral evidence given at the Hearing, I have no reason to disagree that the remainder of the pre-commencement conditions do not go to the heart of the permission.
17. Condition 5 of the 2017 permission relates to a scheme and specification for the construction and operation of the marina basin. The condition begins with the wording ‘*Notwithstanding any information in the application*’. Therefore, on a reasonable reading of those words the condition appears to be stating that despite the information within the planning application relating to the construction and operation of the marina basin a scheme and specification is required for its construction and operation prior to the commencement of the development. The last part of the condition requires the marina to be constructed in accordance with the approved scheme and specification. I consider that, in terms of its wording, this condition is expressly prohibitive in both parts.
18. The next question is whether or not condition 5 goes to the ‘heart of the permission’. It involves an assessment of the significance of the condition. The reason for the condition, as stated within the decision notice, is ‘*To ensure that there is no adverse impact on the Pasturefields salt marsh Special Area of Conservation and Site of Special Scientific Interest; to maintain and enhance biodiversity; and to safeguard the visual amenity of the rural locality*’.
19. Even though the condition contains the wording ‘*notwithstanding any information in the application*’, there is no indication within the 2017 report that the submitted details relating to the sections, extent and proposed contours of the marina basin were in any way unacceptable. Moreover, the condition contains an indication of the details that the scheme and specification was expected to include. These are an appropriate means of lining the basin, a construction and environmental management plan and the proposed operational standards for the use of the marina. In my judgement, it is reasonable to consider that, these latter details are those specifically required by the condition.
20. The 2015 and 2017 reports provide additional information and background as to why the conditions on the 2017 permission were required. The wording of condition 5 within the 2015 report is substantially different to that within the 2017 permission. It is apparent that the wording of condition 5 was amended to take into account the hydrology assessments, spoil calculations and amended drawings that were submitted after the application was deferred.

21. The 2017 report states that more detailed cross sectional plans of the site had been received showing the depth of the basin and the ground levels. With regards to the SAC/SSSI the 2017 report states, amongst other things, that additional information to supplement the original hydrological assessment of the potential impact on the water conditions of the SAC/SSSI has been received. It goes on to state that ...*'there is no groundwater connection between the two sites. The development is therefore considered to have no likely significant effects on the SAC. Natural England concurs with this conclusion, and that conditions covering the submission of details of....a construction and environmental management plan....the lining of the marina and of the operational standards for the use of the marina would be acceptable mitigation'*.
22. The operational standards for the use of the marina clearly relates to the standards that would be put in place to operate the marina once it is in use. Whilst this is of importance these details in themselves would not stop the commencement of the development as a whole as they are details which could be agreed prior to the marina being used.
23. The method for lining the marina basin is not specified within the application. Nonetheless, the hydrological assessments submitted in support of the 2017 permission state that a stilling test is required by the Canals and Rivers Trust to be carried out to test the water-tightness of the excavation before the marina can be linked to the main canal network. It goes on to state that this can also be used to test that the basin is not leaching into the underlying strata and puddle-clay or reinforced concrete could be used to line the marina. The specific method for lining the marina is one of the factors that would ensure that the integrity of the SAC/SSSI is not adversely impacted. However, it is clear that any lining methodology would have to ensure the watertightness of the basin due to the requirements of the Canals and Rivers Trust. Furthermore, there is no reason to believe that a satisfactory lining methodology cannot be provided.
24. Nevertheless, the condition also refers to a construction and environmental management plan (CEMP). In my experience a CEMP details how a construction project would avoid, minimise or mitigate effects on the environment and surrounding area. It requires agreement to a methodology and framework for carrying out the construction of the marina basin. Carrying the development out in a particular way may well be significant for the visual amenity of the area and/or the biodiversity and ecology on the site and within the surrounding area. Given the sensitivity of the surrounding environment without having the detailed information prior to commencing development, harm could occur that may not always be possible to be undone. The marina basin is a substantial part of and the focus of the 2017 permission.
25. As such, I consider that in this case it was clearly necessary for a CEMP relating to the construction of the marina basin to be submitted to show how that construction would be carried out before any work towards the development had commenced. This matter clearly affects the fundamentals of how the development needs to be undertaken and goes to the heart of the planning permission. Consequently, condition 5 of the 2017 permission is, in my judgement, a true condition precedent.

26. Condition 12 relates to hard and soft landscaping works and it also includes the wording '*notwithstanding any information in the application*'. It also states that '*no development shall take place until full details of both the hard and soft landscaping.... have been submitted to and approved...*'. It therefore expressly prohibits any development taking place before that requirement has been met.
27. The reason for the condition is stated to be '*To maintain and enhance biodiversity and to safeguard the visual amenity of the rural locality*'. The 2017 report points out that an overall indicative landscaping strategy for the site shows planting belts, grassed picnic areas, an access route and a seasonally wet wildlife habitat with areas of grass land. It goes on to state that conditions would secure a detailed landscaping scheme. It also indicates that an existing wetland area on the site and the area of Alder trees are identified as important to nature conservation. Part of the mitigation for the biodiversity impacts arising from the development was specified to be in the form of a comprehensive and ecologically informed planting scheme. The hard surfacing would be permeable and would also be integral to the surface water drainage scheme.
28. The site is in close proximity to the SAC/SSSI, mitigation was proposed in relation to the biodiversity and ecological impacts of the scheme and parts of the site are within the TMCCA. Nevertheless, the overall landscaping strategy forms part of the approved plans and it is the detail behind that strategy that is required by the condition. Ensuring that the detail complies with and facilitates the aims of the strategy is not a measure that I would deem affects the fundamentals of how the development needs to be undertaken, nor is it something that needs to be agreed prior to those works taking place. In the circumstances of this case, this is not a matter that goes to the heart of the planning permission. In the light of this and having regard to the judgments set out above, condition 12 of the 2017 planning permission is not a true condition precedent.
29. Condition 20 relates to the submission, approval and implementation of a detailed surface water drainage scheme. This condition expressly prohibits any development taking place before the scheme is submitted and approved. The reason given for the condition is '*to prevent the increased risk of flooding; to improve and protect water quality; to improve habitat and amenity; and to ensure the future maintenance of the sustainable drainage solutions*'.
30. Within the 2017 report it states that the surface water drainage would be by way of soakaways and hard surfaces would be permeable to allow water to drain through. It goes on to indicate that the Lead Local Flood Authority raises no objection subject to a condition securing a detailed surface water drainage scheme. It also states that Natural England considers that the information set out in Pam Brown Associates' letter of 3 January 2017 satisfactorily addresses the points raised previously and that they agree with the submitted information which advocates separating the control of the water quality of surface water runoff and the marina water body.
31. The 3 January 2017 letter from Pam Brown Associates states that '*The control of the chemical quality of surface water runoff (including from car parks and infrastructure) would need to be considered in the proposed design. In previous marina developments, this issue has been addressed by routing the surface water drainage through a 'treatment train'- essentially a series of filters and*

attenuation mechanisms...'. The wording of condition 20 that is within the decision notice is only slightly different to that contained within the 2015 report. The differences relate to the insertion of the wording 'treatment train' within it and it is reasonable to consider that it was inserted to reflect the contents of the Pam Brown Associates letter.

32. Drainage matters require technical solutions and are normally resolved by an appropriate and correct specification. I acknowledge that such information would be desirable prior to the commencement of the development. However, in this case the overall drainage strategy and the likely effects on the SAC/SSSI and flooding had been submitted through the hydrology reports and letters from Pam Brown Associates. As with condition 12 it is the detail behind the overall strategy that is required by condition 20. Ensuring that the detail complies with and facilitates the aims of the strategy is not a measure that I would deem affects the fundamentals of how the development needs to be undertaken, nor is it something that needs to be agreed prior to those works taking place. Furthermore, there is no reason to believe that a satisfactory detailed surface water drainage scheme cannot be provided. In the circumstances of this case, this is not a matter that goes to the heart of the planning permission. In light of this and having regard to the judgments set out above, condition 20 of the 2017 planning permission is not a true condition precedent.
33. Even though I have found conditions 12 and 20 are not true conditions precedents I have found that condition 5 is a true condition precedent. That condition has not been formally discharged by the Council. In such circumstances the appellant seeks to rely on the principle that it would be an abuse of power or irrational for the Council to take action to prevent the development from proceeding.
34. The appellant's case is that an application was made on 9 March 2020 to discharge all relevant conditions, and that the Council informed him that due to the Covid-19 pandemic it was not in the position to discharge the conditions and that a LDC application should be submitted. He also highlights that under section 93A of the 1990 Act (amendments made by the Business and Planning Act 2020) unimplemented planning permissions with time limits for implementation which passed after 23 March 2020 were restored and the time limit extended to 1 May 2021 (subject to Additional Environmental Approval) due to the pandemic.
35. I acknowledge that case law has established that, an exception to the *Whitley* principle is, if there is a condition requiring an approval before a given date, and the developer has applied by that date for the approval, which is subsequently given so that no enforcement action could be taken (albeit after the commencement deadline), then the work done before the deadline and in accordance with the scheme ultimately approved can amount to a start to development. In this regard I have some sympathy with the appellant as the application to discharge the conditions was submitted at a time when the country was about to go into a national lockdown. In addition, the Council appear to have not been prepared to accept any further details in relation to the discharge of conditions application as it considered that '*any new details will be outside the time limit to implement the permission*' even though the application has never been formally determined.

36. However, that application was also submitted only a few days prior to the three year time limit date. Furthermore, even though section 93A of the 1990 Act was introduced it did not apply to the 2017 permission. Moreover, any informal advice that was given by a Council Officer (Mr N Lawrence) cannot later prevent the issue of an enforcement notice if it is found that the development does not have planning permission. This is a well-known aspect of planning law and requires no further elucidation here.
37. Whilst it is unfortunate that the circumstances outlined above hindered the determination of the discharge of condition application, it would have been open to the appellant to appeal the non-determination of that application. In addition, as the application is still to be determined it may be possible for the appellant to formally submit further details in relation to discharging condition 5 of the 2017 permission. The Council outlined at the Hearing that the submission of further details could be treated as being fundamentally different to that submitted and therefore could be determined to amount to a new application. Nevertheless, if those details are submitted and if they are formally accepted by the Council and eventually approved at that stage, in my judgement, an exception to the Whitley principle would then exist.
38. Nevertheless, at the date of the LDC application there is no dispute that the discharge of condition 5 had not been approved. In the absence of evidence to suggest that it would not have been expedient to do so, in the context of that condition, I am unable to conclude that the Council would have abused its powers or acted irrationally by preventing the development from proceeding at that time. These considerations do not therefore overcome the above findings in respect of that condition. Therefore, in light of and taking these matters into account, I consider that it has not been demonstrated that the 2017 permission has been begun and can lawfully be completed.

Conclusion

39. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development, in respect of the description set out in the header to this decision, 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.

D Boffin

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr William Harp – Harixon

Katherine Else – Claremont Planning

FOR THE LOCAL PLANNING AUTHORITY:

Mr Richard Wood – Team Leader

Mr Ed Handley – Senior Planner

DOCUMENTS SUBMITTED AT THE HEARING

Officer Report relating to previous planning application - 13/19607/FUL

Determinations of need for Environmental Impact Assessment

Original Officer's Report - 15/22518/FUL

Deferred Officer's Report - 15/22518/FUL

Pam Brown Associates – Shirleywich Marina Hydrological Assessment June 2015

Pam Brown Associates – Shirleywich Marina and Pasturefields Salt Marsh Salinity Monitoring and Assessment October 2016

Pam Brown Associates – Letter dated 18 December 2015

Pam Brown Associates – Letter dated 3 January 2017

PLANS SUBMITTED AT THE HEARING

Contour Plan

Existing Sections

Proposed Sections

Spoil Calcs