
Appeal Decision

Site visit made on 8 August 2023

by Roy Curnow MA BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16th October 2023

Appeal Ref: APP/Q1153/C/22/3310160

Land at SX445 910, East of West Headson Farm, Bratton Clovelly, Devon, EX20 4JP

- 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 Mr Richard Dockett against an enforcement notice issued by West Devon Borough Council.
 - The enforcement notice, numbered 027246, was issued on 3 October 2022.
 - The breach of planning control as alleged in the notice is Without planning permission, the unauthorised gateway access created to land from classified road.
 - The requirements of the notice are (i) Remove the gateway access; and (ii) Re-instate the bank to its previous condition.
 - The period for compliance with the requirements is (i) and (ii) 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The enforcement notice is quashed.

The Notice

2. In its Notice, the Council alleges that “without planning permission” the creation of an “unauthorised gateway” onto a classified road. In the ‘Reasons for Issuing the Notice’, the Council sets out that conditional planning permission was granted for the gateway entrance under the terms of its decision on application 2295/20/FUL. The description of development on the decision notice was “Retrospective application for gate to field for access to livestock”. There is no doubt that the permission related to the gateway that is enforced against.
3. The Council’s concerns revolve around the provision of appropriate surface water drainage arrangements at the gateway entrance. Condition 5, of five attached to the decision, reads as follows: “Within 2 months of this decision, a detailed drainage plan shall be submitted to and agreed in writing by the Local Planning Authority. This shall demonstrate how surface water run off will be directed away from the highway and include a timetable for its implementation. Works shall be carried out in accordance with the agreed details, and retained and maintained as such thereafter”. The reason given for the condition was: “To prevent surface water run off from entering the public highway and causing a hazard to vehicles”.
4. Following my visit to the site, I wrote to the parties, briefly rehearsing these aspects of the planning permission and opining that the access was not

unauthorised, as alleged in the Notice. It had clearly been authorised by reason of planning permission 2295/20/FUL. I set out that there might well have been a breach of condition 5, but that this was not a matter that I could correct without injustice to the Appellant. I suggested that the Council withdrew the Notice, setting out that its powers under s176 of the Act might allow it to issue a new Notice.

5. As the Council said in its response, the gateway access had been unlawfully created. However, the Council subsequently granted planning permission for its retention. From that point on, it was no longer an unauthorised development without planning permission.
6. The Council went on to describe condition 5 as “vital” and is “at the heart of the permission”. It considers that without compliance with the condition, the permission is null and void. This is why, it says, the Notice alleges that the “unauthorised development” has been carried out “without planning permission”. It considers that the only available option would be to reinstate the bank that was removed to allow the formation of the gateway access.
7. Settled case law regarding the concept of conditions going to the heart of a permission is set out in *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC, 840 (Admin), which is referred to in the Appellant’s response to my email. In this judgement, 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.
8. Condition 5 allowed 2 months for the matter to be resolved and did not preclude the development taking place beforehand. It is clearly the former type of condition referred to by the judge. Given the retrospective nature of the application and the issue that the condition sought to address, a condition precedent of the type discussed in *Hart* probably could not have been applied. As the Appellant says, the Council had the options of refusing planning permission on the grounds of a lack of information on this drainage issue, or to proceed straight to enforcement action to remedy the breach. This is not said by way of criticism of its approach, but merely as an observation. That it sought to find a way forward is to its credit, but it might not have been appropriate given the importance it attaches to the matter.
9. This is not to say that condition 5 is not important; it clearly is. Paragraph 55 of the Framework sets out that planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions. Paragraph 56 sets out the 6 tests that need to be satisfied by a condition. I have no doubt that the condition meets these tests. That the Council sees compliance with condition 5 as being vital should be the case with any condition attached to a planning permission, otherwise they should not be attached.
10. However, non-compliance with the condition does not render the planning permission a nullity. The result is a breach of planning control, but not in the manner that the Council alleges.
11. There is nothing in the Council’s arguments that leads me to change the position I set out in my email to the parties. As the development is authorised and has the benefit of planning permission, the Notice is hopelessly ambiguous

and uncertain. It is fundamentally defective and, in my view, could not be corrected without prejudice. As the Council would not withdraw the Notice, I have no alternative than to find it a nullity.

Conclusion

12. For the reasons given above, I conclude that the enforcement notice does not specify with sufficient clarity the alleged breach of planning control. It is not open to me to correct the error in accordance with my powers under section 176(1)(a) of the 1990 Act as amended, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances, the appeal on the grounds set out in section 174(2)(a) (f) and (g) of the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered.

Roy Curnow

Inspector