



Appeal Decision

Site visit made on 14 May 2024

by S D Castle BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 June 2024

Appeal Ref: APP/D0840/W/23/3326109

Greenacres, Trevenen Bal, Cornwall, Helston TR13 0PP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 (the Act) for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr and Mrs Lobb against Cornwall Council.
 - The application Ref PA23/01239 dated 13 February 2023, was refused by notice dated 13 June 2023.
 - The application sought planning permission for extension of time application for the erection of a detached pool house without complying with condition 9 attached to planning permission Ref PA11/03413, dated 23 June 2011.
 - The condition in dispute is No 9 which states that: The development hereby permitted shall be carried out in accordance with the plans listed below under the heading "Plans Referred to in Consideration of the Application".
 - The reason given for the condition is: For the avoidance of doubt and in the interests of proper planning.
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Decision

1. The appeal is allowed and planning permission is granted for the erection of a detached pool house at Greenacres, Trevenen Bal, Cornwall, Helston TR13 0PP in accordance with the application, PA23/01239, dated 13 February 2023, without compliance with condition No 9 previously imposed on planning permission Ref PA11/03413 granted on 23 June 2011, but subject to the new conditions set out in the Schedule to this decision.

Application for costs

2. An application for costs was made by Mr Stephen Lobb against Cornwall Council. That application is the subject of a separate decision.

Background

3. Planning permission¹ was first granted in 2008 for the erection of a detached pool house at the appeal site. An extension of time for the commencement of the 2008 permission was granted in 2011² (the 2011 permission). The appellants assert that a material start of the development was made in accordance with condition 1 of the 2011 permission and that the permission remains extant. The Council contends that the 2011 permission has expired and therefore an application under s73 relating to that permission cannot be granted.

¹LPA ref:PA08/00985/F

²LPA Ref: PA11/03413

4. The appellants are seeking the removal of Condition 9 of the 2011 permission to allow for a building of a substantially different design to be granted permission. The appellants have submitted a new set of drawings for approval that would allow the proposed finished building to conform with the partially complete building currently on the site. The Council contends that the amendments proposed are so significant as to be beyond the scope of what is allowed by s73 of the Act.
5. The Council's refusal reason states that a s73 application cannot, as set out in s73(5) of the Act, be used to prolong the life of a planning permission. Whilst the Council's assertion in this regard is technically correct, the appellants' proposals do not seek an extension of time. As such, concerns relating to this particular matter cannot form a valid reason for refusal. I appreciate that the description of the proposal would be confusing, but it is standard practice for applications under s73 to refer back to the original permission's description.

Main Issues

6. In light of the above background, the main issues are:
 - whether the 2011 permission remains extant; and
 - whether the amendments proposed are within the scope of s73 of the the Act.

Reasons

Whether the 2011 permission remains extant

7. The first condition of the 2011 permission is the standard time limit, stating that the development hereby permitted shall be begun before the expiration of 3 years from the date of the permission granted 23 June 2011.
8. What constitutes a start of development is set out in s56 of the Act. For the purposes of implementing a planning permission, the relevant date is the date on which a "material operation" is carried out. According to s56(4), in sub-section 2, a "material operation" includes:
 - (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);*
9. Case law³ has established that the threshold for what is deemed to be material operations is low. The appellants have provided a letter from a Building Control Surveyor that indicates that part of the foul water drainage for the erection of a detached pool house was laid at the site by 20 June 2014. Such works represent a material operation, and the Council does not dispute that the works were carried out by 20 June 2014. The letter represents substantive supporting evidence that the works were undertaken in the construction of a detached pool house, thereby indicating a material start to the 2011 permission.

³ Malvern Hills DC v SSE & Barnes and Co [1982] JPL 439

10. Whilst there is only very limited information before me regarding whether a lawful material commencement of the 2011 permission occurred, the Council has not provided any substantive evidence to contradict or otherwise make the appellants' version of events less than probable. S56 sets an objective test and the intention of the person carrying out the development is not relevant.
11. As such, the evidence before me, on the balance of probabilities, indicates that the permission ref PA11/03413 has been lawfully commenced and remains extant.

The scope of s73 of the Act

12. Applications under S73 of the Act allow for a grant of permission for the development of land without compliance with conditions subject to which a previous permission was granted. In *Finney v Welsh Ministers & Others*⁴, the Court held that an application under s73 may not be used to obtain a permission that would require a variation to the terms of the 'operative' part of the planning permission, i.e., the description of the development for which planning permission had originally been granted. *Finney* established that it is beyond the powers under s73 to amend a condition that would result in a conflict between it and the description of development.
13. The Planning Practice Guidance (the PPG) states⁵ that the submission of a new planning application under s70 of the Act is needed where proposed modifications to a permission are fundamental or substantial. In *Armstrong v Secretary of State*⁶, however, the Court held that there is nothing in the legislation that limits a s73 Application to minor material amendments, or to amendments which do not involve a fundamental variation, provided there is no conflict with the operative part of the permission.
14. There are undeniably significant material differences between the current proposals and those approved by the 2011 permission. Nevertheless, the current proposals accord with the broad description of the 2011 permission as a detached pool house. There is no conflict with the operative part of the 2011 permission.
15. The Act must be interpreted in accordance with relevant case law. As such, considering the above recent case law, notwithstanding the provisions of the PPG, the amendments proposed are within the scope of s73 of the Act.

Other Matters

16. The Council's refusal reason and supporting submissions do not raise other planning policy concerns with regards to the proposals. I have had regard to the representations received objecting to the proposals. The frustrations expressed regarding the current building's ongoing construction failing to comply with the approved details of the 2011 permission are wholly understandable. The Council did not conclude, however, that the issues raised in the representations would amount to reasons to justify withholding planning permission. Furthermore, the Council did not conclude that the development would fail to comply with the development plan when taken as a whole. I have

⁴ *Finney v Welsh Ministers & Others* [2019] EWCA Civ 1868

⁵ Paragraph: 001 Reference ID: 17a-001-20140306 (Revision date: 06 03 2014)

⁶ *Armstrong v Secretary of State for Levelling-Up, Housing and Communities* [2023] EWHC 176 (Admin)

been provided with no substantiated evidence which would prompt me to disagree with the Council in these regards.

Conditions

17. I have considered the appellants' and Council's suggested conditions against the requirements of the Framework and with reference to the PPG. Given the development has already commenced, it is not necessary to include the standard implementation condition. A condition is attached to define the plans in the interest of clarity. A condition to ensure the development is not used as a separate unlawful use is necessary. In the interests of proper drainage and pollution control, conditions relating to foul and surface water management are necessary.

Conclusion

18. For the above reasons, I allow the appeal subject to the conditions in the attached Schedule.

S D Castle

INSPECTOR

Schedule of conditions attached to Appeal Decision
Appeal Ref: APP/D0840/W/23/3326109
Greenacres, Trevenen Bal, Cornwall, Helston TR13 0PP

- 1) The development hereby permitted shall be carried out in accordance with the following plans: 837/A3/01 Rev A, 837/A2/03 Rev B, 837 A2 14, and 837/A2/15 Rev A.
- 2) The building hereby permitted shall be used only for purposes incidental to the residential use of the dwelling identified as Greenacres on the approved plans.
- 3) The building hereby permitted shall not be first used or occupied until sewage disposal works serving the development have been completed in accordance with details submitted to and approved in writing by the local planning authority.
- 4) The building hereby permitted shall not be first used or occupied until surface water disposal works serving the development have been completed in accordance with details to be submitted to and approved in writing by the local planning authority.