



Appeal Decision

Hearing held on 5 June 2024

Site visit made on 5 June 2024

by Robin Buchanan BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 August 2024

Appeal Ref: APP/A1910/W/24/3337121

Motocross Track, Shootersway, Berkhamsted, Hertfordshire HP4 3TY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 (as amended) for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Simon Newell against Dacorum Borough Council.
 - The application Ref is 23/02475/ROC.
 - The application sought planning permission for removal of a tower mast and associated cabins, relocation of two storage containers into a building with accommodation facilities at first floor and construction of a swimming pool building without complying with conditions attached to planning permission Ref 4/02425/18/FUL.
 - The conditions in dispute are No.5 which states:
No demolition or development shall take place until a Written Scheme of Investigation has been submitted to and approved by the local planning authority in writing. The scheme shall include an assessment of significance and research questions; and:
 1. *The programme and methodology of site investigation and recording*
 2. *The programme for post investigation assessment*
 3. *Provision to be made for analysis of the site investigation and recording*
 4. *Provision to be made for publication and dissemination of the analysis and records of the site investigation*
 5. *Provision to be made for archive deposition of the analysis and records of the site investigation*
 6. *Nomination of a competent person or persons/organisation to undertake the works set out within the Written Scheme of Investigation*and No.7 which states:
The Bunkhouse facility should be limited to children attending Motorcross curriculum with accommodation use for one teacher parent/guardian
 - The reason given for condition No.5 is:
To ensure that the development does not adversely affect scheduled ancient monuments or other nationally important sites and monuments; in accordance with Saved Policy 118 of the Local Plan (2004)
and for condition No.7 is:
To ensure the facility remains ancillary to the use of the site in order to prevent the development from being severed in order to provide self-contained dwelling unit, since this would be contrary to the provisions of Policies CS5 and CS12 of the Core Strategy (2013).
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Decision

1. The appeal is dismissed and planning permission is refused for removal of a tower mast and associated cabins, relocation of two storage containers into a building with accommodation facilities at first floor and construction of a

swimming pool building without complying with conditions attached to planning permission Ref 4/02425/18/FUL.

Preliminary Matters

2. Appeal application 23/02475/ROC was made under s73 (the AA). This procedure allows planning permission to be granted for development of land without complying with conditions subject to which a previous permission was granted. In this case the appellant seeks modified wording for conditions No.5 and No.7 of planning permission 4/02425/18/FUL (the PP). The Council did not issue a decision for the AA. It has provided what would have been its officer report as part of its appeal case, including a recommendation to refuse the AA.
3. The main parties agree that two buildings relevant to the PP have been erected on the site, which is in the Green Belt – as referred to at the hearing, a larger building A and a smaller building B. This development was started before the AA was submitted. The upper floor of building A, a proposed bunkhouse, is internally incomplete
4. The main parties disagree about whether these buildings are in accordance with the description of development in the Council's decision notice for the PP or that in the PP (and AA) application forms. Additionally, if as built they are as shown in the plans approved in condition No.2 of the PP and whether this development is entirely within the PP site, which is the same as the AA site¹. Also, whether the PP has lapsed or is extant and whether condition No.5 or No.7 can be modified; either because works for these buildings started in breach of condition No.5 (which the Council says is a pre-commencement of development condition precedent and no longer capable of being discharged) or started after the expiration of the 3 year time limit specified in condition No.1 so without planning permission. The Council also considers that in light of the above, s73(4) means s73 does not apply and on that basis the AA is not valid, albeit that it registered the AA and entertained it for a period of time.
5. Although these matters are in dispute, whether this development on the site is lawful, and the status of the AA with regard to any of the circumstances outlined above, is reserved for the lawful development certificate (LDC) process. In this regard there is a pending decision by the Council on an LDC application for building B². In this appeal s73(2) requires only consideration of what conditions a grant of planning permission should be subject to on the planning merits.
6. No plans were submitted in the AA for building A or building B as built, including in layout or siting. Nor did the AA seek modification of condition No.2 of the PP to alter the approved plans to reflect the development that has been carried out. Accordingly, and in the absence of clarity in this appeal about the extent of any material variation from the PP, there is no application for retrospective planning permission to be determined under s73A. At the hearing the Council reiterated that the appellant submit a planning application to seek to 'regularise' this development, including so that the implications of conditions No.5 and No.7 could be considered afresh by the Council, amongst other things in the context of building A and building B already on the site.

¹ Defined by the red line in drawing number 4637 LOC 100

² Ref 23/02549/LDE

7. At the hearing the appellant sought to raise concerns about the wording of condition No.8 of the PP, which relates to the installation of a swimming pool 'standpoint' at the site. This is not within the scope of this appeal because the AA is concerned only with conditions No.5 and No.7.

Background and Main Issues

8. Condition No.5 relates to archaeology. It includes that no development shall take place until a Written Scheme of Investigation (WSI) has been submitted to and approved by the Council in writing. This condition lists what should be in the WSI, including a programme and methodology of site investigation and recording. The appellant considers that condition No.5 was not intended, and should not apply, to the whole site and other development in the PP (including building A and building B), just the part still to be developed with a swimming pool building. Modified wording for condition No.5 is sought to reflect this.
9. Condition No.7 relates to use of the bunkhouse. It limits occupation of this overnight stay accommodation to children being taught to ride and maintain motocross motorcycles as part of a curriculum, including responsible adults. Though not in the wording of this condition it is common ground it means as part of a GCSE school PE syllabus. The appellant additionally wants to use the bunkhouse for children learning these skills through private tuition. Also, when not in that use, for occasional overnight stay by a person for site security to replace a dilapidated caravan previously used for this purpose. Modified wording of condition No.7 is sought to reflect this.
10. The main issues in this appeal are therefore whether conditions No.5 and No.7 are necessary, having regard to the reasons given for them and matters that emerged during the appeal process, including at the hearing.

Reasons

Condition No.5

11. The site and development in the PP is located in an area of archaeological significance. It includes stretches of a Bronze or Iron age feature known as Grim's Ditch, parts of which are a Scheduled Monument (the SM) and by definition a designated heritage asset³ of national importance.
12. Before the Council granted the PP, Hertfordshire County Council (HCC) advised that there was considerable potential for prehistoric remains given the proximity of the proposed development to Grim's Ditch. Also, a possibility that it may impact on the SM itself. HCC considered that the development should be regarded as likely to have an impact on heritage assets of archaeological interest and set out four provisions that would need to be made.
13. These included investigation and recording of any archaeological features prior to the commencement of groundworks associated with development on the site in the area of a proposed swimming pool building. Another was for archaeological monitoring and recording of all other groundworks elsewhere on the site associated with the rest of the development, including building A and building B. These two provisions were therefore mutually exclusive and describe what HCC considered a WSI would need to address. Details of these

³ National Planning Policy Framework (NPPF) Annex 2: Glossary

- provisions were to be secured in the WSI by two conditions recommended by HCC and one became condition No.5.
14. Consequently, none of the four provisions, including relating to the swimming pool part of the site, were themselves the WSI. Furthermore, although the provisions distinguish between different parts of the site, condition No.5 did not. It categorically sets out that 'no development' (ie whatsoever) 'shall take place' (ie on the site) until a WSI had been submitted to and approved by the Council in writing.
 15. The appellant did not at the time agree to the pre-commencement of development form or terms of condition No.5, though did not pursue an appeal against the imposition of this condition within the requisite period. There is no apparent reason why the discrepancy between the appellant's description of the proposed development and that used in error by the Council in its decision notice (which amongst other things omitted reference to building B) would have prevented such an appeal. The wording of condition No.5 is before me and I have considered the appeal on its planning merits.
 16. There are clearly practicalities to carrying out the development on the swimming pool part of the site or in confirming some details of a WSI in this area. This includes because it is partly occupied by a mobile telecoms mast, ground equipment cabins and foundations which would need to be removed. However, an email from the appellant's consultant, Albion Archaeology⁴, and an email from HCC⁵ both relate to what was described in the HCC provision for this part of the site, not to a WSI approved under condition No.5.
 17. As discussed at the hearing, condition No.6(i) of the PP (also recommended by HCC) anticipates that the development shall take place in accordance with the WSI approved by condition No.5, not with regard to, or that which is described in, the HCC provisions. There is no apparent reason why a WSI could not have been a composite document or suggested a phased approach to investigation of archaeology and development at the site or could still be, whereas on plain reading condition No.5 is not a phased condition.
 18. Part of the site was subject to archaeological investigation when the appellant was granted planning permission for an ancillary clubhouse building in 2010. A single page 7 extract from a contemporary report by Albion Archaeology records no archaeological features in trenches and negligible archaeological potential in a 'potential development area'.
 19. However, there is no objective evidence, such as a copy of the whole report or a plan, to suggest that these conclusions applied to the whole of that site or even if it did, that it was the same site as the PP and AA site. Nor to confirm that the presence of made-up ground or services meant there was no archaeology in the part of the site where building A and building B are now located. That report anyway preceded the HCC advice to the Council about the more extensive than proposed development at the site and on different parts of it (than the clubhouse) that led to the PP.
 20. HCC submitted a holding objection to some of the proposed modified wording of condition No.5. This advice is on the basis that the Council otherwise considered the main thrust of the change sought to be acceptable in principle,

⁴ 2 February 2024

⁵ Embedded in an undated email extract from the Council to the appellant

which it doesn't. No archaeology report or WSI was submitted with the AA or as part of the appellant's appeal case. At the hearing the appellant confirmed that he had not taken advice from Albion Archaeology about the AA when it was submitted or specifically about the proposed development in the PP or condition No.5 until the current appeal.

21. I have no reason to doubt that in good faith the appellant relied on the HCC provision relating to the swimming pool part of the site and what he believed exchanges of emails or his previous archaeology report meant; including that he considered the Council's (and HCC's) focus was on this part of the site and was the only part of the site potentially important for archaeology. However, this is not borne out by the balance of the evidence before me. Furthermore, and in any event, the HCC provision relating to the rest of the site, including where development for building A and building B has now taken place, stands alone from the provision relating to the swimming pool part of the site and is embodied in the requirement for a WSI under condition No.5.
22. There was at least a significant risk of potential adverse impact on important archaeology if any of the development in the PP was carried out in the absence of an approved WSI. There was therefore a clear justification for condition No.5 to be applied to the whole site and because the requirements of the condition, including the timing of compliance, were fundamental to the development permitted in order to safeguard nationally important archaeology. There is no evidence that the PP would have been granted without condition No.5 and no compelling argument that it was, or should be, limited in scope to only parts of the site as the appellant contends. No WSI has been submitted or approved by the Council in writing under condition No.5 for the development or part of the site containing building A and building B.
23. To grant planning permission in these circumstances in this appeal, with the modified wording of condition No.5 sought by the appellant, would also condone the carrying out of development in breach of condition No.5 and potential consequential harm to archaeology. Moreover, despite that some development has taken place there is no evidence that it has completely obliterated important archaeology and other parts of the site (including than the swimming pool part and that occupied by building A and building B) remain undeveloped. Condition No. 5 therefore still serves a useful planning purpose.

Condition No.7

24. At the hearing, the Council indicated that subject to a final form of modified wording of condition No.7, including to reflect an incidental or ancillary use and not a permanent dwellinghouse, it accepted the principle of using the bunkhouse for a person to provide occasional overnight site security for an immediate in-person presence and deterrent in addition to existing alarms and cameras. I have no reason to find otherwise and consider that it would be possible for the Council to monitor compliance with such a condition.
25. The Council also accepted, in principle, broadening use of the bunkhouse for general motocross training of children under private tuition. The size of the permitted bunkhouse limits how many people could use this accommodation at once, whether for school or private use. However, the written and oral submissions by the main parties provide only an outline of the motocross use of the site. There is no objective evidence about the details or extent of permitted uses or activity at the site and whether temporary or permanent, nor

the terms of a personal permission referred to at the hearing by the appellant – such as copies of relevant decision notices, descriptions of development, wording of conditions or any planning obligation or plans.

26. The appellant does not have insurance for competitions at the site, so there are no spectators other than teachers, parents or guardians of children. But there is no apparent guarantee, such as a condition or planning obligation, that this would always be the case. Moreover, conditions can anyway be challenged, including by any new owner or operator of the site who might intend to use it in a different way to the appellant. This could otherwise be in a way not restricted by relevant planning history, especially if there is no relevant condition or planning obligation to give greater certainty about existing or future use of the site.
27. Consequently, while the Council also indicated at the hearing that it did not have an in principle objection to general training of any children at the site, I share its concern that it is not clear in this appeal if this wider use would result in a significant intensification of use at the site, including beyond that which may already be possible under relevant planning history. For example, in the number of people at the site at any one time (not those just staying overnight) or activity and use over a more extended period of the day or year, including out of school term times or at weekends and beyond half-term daily sessions.
28. In the absence of evidence to the contrary, I consider that such increased activity could potentially materially affect traffic generation to and from the site and on the local road network or affect noise and general disturbance arising from such activity on the site or in travel to and from the site along nearby residential roads. While the Highway Authority did not object to the AA, these were matters of concern to some interested parties when the PP was granted. In these circumstances condition No.7 therefore still serves a useful planning purpose.

Other Matters

29. The NPPF confirms that heritage assets (such as a Scheduled Monument) are an irreplaceable resource and should be conserved in a manner appropriate to their significance. Great weight should be given to the asset's conservation irrespective of whether any potential harm from development amounts to substantial harm, total loss or less than substantial harm to its significance. The NPPF also includes that new buildings or material changes in the use of land in the Green Belt to provide appropriate facilities for outdoor sport or recreation, which preserve the openness of the Green Belt and do not conflict with the purposes of including land within it, is not inappropriate development. It also seeks to ensure that development functions well, has safe and suitable access, mitigates significant impact on the transport network and avoids unacceptable impact on highway safety, with a high standard of amenity for existing occupants, in this case of nearby dwellings and other road users.
30. The site is within a zone of influence of the Chiltern Beechwoods Special Area of Conservation (the SAC). This European site is protected due to habitat or species important for nature conservation. Amongst other things, the SAC is vulnerable to an increase in disturbance from recreational activities as a result of an increase in visitors to the area. Since I intend to dismiss the appeal for other reasons, even if modified conditions No.5 or No.7 did not adversely affect

the integrity of the SAC by virtue of increased activity at the site there is no need for me to consider the SAC any further. This is because it would not affect my decision or therefore alter the outcome of the appeal.

Conclusion

31. I consider that conditions No.5 and No.7 are necessary having regard to the reasons given for them with regard to (respectively) the objectives of Policy 118 of the Local Plan April 2004 for important archaeological remains, and Policies CS5 and CS12 of the Core Strategy September 2013 for small-scale development in the Green Belt and site design, including having regard to safe and satisfactory means of access and disturbance to surrounding properties due to potential intensification of use at the site.
32. I am also satisfied that both conditions are relevant to planning and to the development permitted by the Council. As well, that they are precise, enforceable and reasonable in the context of these local development plan policies and relevant national planning policy.
33. Accordingly, for the reasons set out above, I find that planning permission should be granted with the same conditions as those subject to which the previous planning permission 4/02425/18/FUL was granted. The appeal is therefore unsuccessful.

Robin Buchanan

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

- Simon Newell
Appellant

FOR THE COUNCIL:

- Patrick Doyle BA (Hons), MSc
Principal Planning Officer, Dacorum Borough Council
- Kirsty Shirley
Lead Planning Officer, Dacorum Borough Council (observing)
- Rachael Payne
Trainee Planning Officer, Dacorum Borough Council (observing)

DOCUMENTS

- Drawing Number A2 4637, dated 13.05.24 described as 'canopy B comparison drawing as built to as approved' (ie building B)