



Appeal Decision

by H W Jones BA (Hons) BTP MRTPI

an Inspector appointed by the Welsh Ministers

Decision date: 15/05/2024

Appeal reference: CAS-01555-F0R9K6

Site address: Llanerchydol Hall, Welshpool, Powys, SY21 9PQ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr M. J. Barrett against the decision of Powys County Council.
 - The application (ref: 21/1055/CLP), dated 7 June 2021, was refused by Notice dated 14 July 2021.
 - The application was made under section 192(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 described on the Notice of Decision as: "Application for Certificate of Lawfulness for a proposed use (Section 192) in order to establish that planning approvals M14760 (outline) and M20115 (reserved matters) have been lawfully commenced and remain extant and that the development of 4 dwellings on the plot known as Site A can proceed".
 - A site visit was made on 18 April 2024.
 - This decision supersedes that issued on 19 October 2022 following the order of the High Court that the case be remitted for re-determination.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. In his judgment ([2023] EWHC 2503 (Admin)) HHJ Jarman ordered that this case be remitted to another Inspector so that enquiry could be carried out on one specific issue. That issue, which formed the basis of the successful ground of challenge, being whether the disputed condition goes to the heart of the permission such that it constituted a true condition precedent.
3. In advance of carrying out my site visit the main parties were given the opportunity to provide further comments on the case, but no representations were received. I have therefore determined the case on the basis of the evidence before the previous Inspector and the subsequent judgment of the Court.

4. Noting that the appellant's description of development as set out in the application and appeal forms differs from that set out in the Council's Notice of Decision, I have determined the appeal on the basis of the Council's description given that it is that decision which forms the basis of the appeal. The parties have previously confirmed that they are satisfied that no prejudice would arise from taking such an approach.

Background

5. There is no dispute over the planning history of the site. The most relevant decisions are an outline planning permission ref: M14760, dated 4 July 1988 and the associated reserved matters approval ref: M20115, dated 21 September 1990. The former permitted 16 dwellings on 3 sites, of which the appeal site is one (referred to as 'Site A').
6. The Council explains that the outline application was approved on the basis that the housing would provide 'enabling development' which would subsidise the renovation/development of the nearby listed building, Llanerchydol Hall and its grounds/outbuildings. At that time the site was, and continues to be, located within the open countryside as defined by local planning policy, including the most recent iteration, the Powys Local Development Plan (2011-2026). The enabling benefits of the scheme were deemed to justify permitting the development in conflict with the local and national policy restraint on new residential development in the countryside.
7. Condition 2 of the outline permission required the approval of those identified matters reserved "before any development is commenced". Those matters comprised:
 - a) The siting, design and external appearance of the proposed buildings or other structures to be erected on the site's, including fences, walls and other means of enclosure;
 - b) details of the access arrangements including car parking and vehicle turning areas;
 - c) details of the landscaping of the site, including the size and species of all proposed planting and any existing species to be retained. The scheme shall include tree and hedge planting along the South and east boundaries of Site A and the North and South boundaries of Site C referred to on plan 14760/A attached to this consent, as well as the new site entrance off the A490 road."
8. The condition also stipulated 2 time limits: firstly, application for reserved matters approval was to be made to the Council not later than 3 years from the date of the permission; and secondly, the development must be begun not later than the expiration of five years from the date of the permission or within the expiration of two years from the final approval of all reserved matters, whichever was later.
9. Reserved matter application M20115 was submitted within the required 3 year time limit. The application form indicated that it sought approval of all reserved matters including landscaping. It was accompanied by a drawing that outlined a broad scheme of landscaping for the site but did not provide details of species and size of all the existing species to be retained planting nor of any of the proposed planting, as required by the condition.
10. The Council's decision on the reserved matters application expressly confirms the discharge of reserved matters a) and b) as well as 2 other conditions, but omits reference to reserved matter c), landscaping. The appellant avers that the omission of a reference to 2c) was in error. Even if that were the case it is clear that the effect of the decision notice is to exclude 2c) from the approval. An informative note contained in the decision notice indicates that the Council intended to exclude reference to landscaping given its reference to a "landscaping scheme for this area" as one of 2 outstanding matters still to be agreed before permission could be implemented.

11. The other outstanding matter identified in the informative note was access onto the A490 in accordance with condition 10. It might be argued that there is some tension between this position and the approval of reserved matter 2b), however the latter would seem to be focused on the site and its connection to the private road whereas the former is concerned with off site works. It has also been pointed out that there were other matters in addition to condition 10 that needed to be agreed before commencement of development. However, these considerations do not alter my view, based on the reading of decision notice M20115, that it does not discharge the need to secure approval of landscaping details. That is the finding of HHJ Jarman. There is no suggestion that such approval was obtained via any other application or written request.

Main Issue

12. This is whether the Council's decision not to issue an LDC was well-founded.

Reasons

13. There is no dispute that works which purported to commence development were undertaken prior to the expiry of the relevant time limit set out in Condition 2 (these include the provision of passing places on the access road, undertaking drainage connection and provision of telecommunications cabling). Therefore, and given my findings in the background section above that condition 2c) has not been discharged, the crucial question in establishing whether the certificate ought to be granted is whether those works had been lawfully undertaken such that the permission has been commenced and thus is capable of being lawfully implemented. To establish this, it is necessary to establish whether part c) of Condition 2 is a condition precedent.

14. The relevant principles drawn from a series of judgments in relation to conditions precedent are summarised by HHJ Jarman. To establish whether a condition is a true condition precedent there are 2 tests that must be satisfied. In relation to the first test, whether the condition is prohibitive, the Judge confirmed that the wording "before any development is commenced" is prohibitive in substance.

15. Thus, I turn to the second test, which is the issue that has been remitted for my consideration, that is whether condition 2c) goes to the heart of the permission. To establish this, legal authority requires that I undertake a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context.

16. The appeal site lies in an attractive and extensive parkland setting. It is accessed by a long private lane that provides access to the imposing and historically important Llanerchydol Hall which sits within an enclosed curtilage in proximity to the appeal site such that they both are readily visible from the access road that serves them. The road also serves several other properties, mostly residential in use.

17. The appeal site abuts a high wall which encloses an historic walled garden. The site is prominently positioned in relation to the access road which splits near the site with one arm located in front of the site and the walled garden and the other extending to the side and the rear of the site to serve a cluster of dwellings. At present the site is heavily vegetated and includes mature shrubs and trees which form part of the attractive landscaping which characterises the surroundings.

18. The subject condition requires details of the approved development to be agreed before any work commences. Whilst most of those reserved matters were discharged by the approval of submitted details the matter of landscaping has not been approved even though some details were included in the application.

19. In light of the attractive setting and the nature of the site the treatment of the spaces around the proposed built form is a crucially important element of the proposed development. The scope to retain existing vegetation and provide additional landscaping that might soften the visual impact of the introduction of new buildings into a mature parkland setting is an important consideration that ought to be addressed prior to the commencement of development.
20. I am mindful that the reserved matters application was accompanied by drawing number L25, at a scale of 1:500, dated 30 July 1990 showing the site outlined in red and including the access road to it. The submitted copy of the plan is of poor quality but is sufficient for my purposes. It shows the layout of the proposed four dwellings and the new foul sewer connection to the mains. It also shows areas of hard surfacing comprising a mix of bitumen macadam, block paving and gravel. It also identifies the canopies of existing trees to be retained, annotating the species of some, as well as an existing boundary hedge. In terms of new planting, the drawing shows the position of 6 proposed trees positioned within vegetation gaps along one boundary.
21. Given the detailed requirements of condition 2c) and the nature of the site and surroundings, I consider the level of detail of proposed planting falls significantly short, both in detail and in its extent, of what might be considered an adequate scheme for such a sensitive site. For instance, it is not clear how the area most visible from the point of access would be treated other than for the retention of existing trees and hedge. This is an important vantage point where the landscaping might be expected to reflect the formal, ornamental planting that is evident in the immediate vicinity. Whilst the absence of details of the type and height of the 6 trees proposed in the gaps is a matter that could be readily addressed, that is not the extent of the planting that would be expected along this boundary. It would have been reasonable for the Council to require greater depth of vegetation to ensure more effective screening to supplement the proposed tree planting. The areas of open space around the approved built form allows scope for such provision and for other planting.
22. The inadequacy of the information provided with the reserved matters means that the acceptability in principle of a landscaping scheme has not been established. It was reasonable of the Council to expect details of a comprehensive scheme which would assist in integrating the proposed development into its attractive and sensitive rural setting to be secured before development commenced. Indeed, I consider that this is a case where the Council would not have been content to permit the development without securing a means of determining the acceptability of such details before the development could proceed. That the Council may have permitted other phases of the overall development to be undertaken in advance of approving landscaping details does not alter my findings on the importance of this matter in this case. Moreover, it would seem to have been in the interests of the developer to secure an adequate understanding of what may be expected by the Council in terms of the extent of landscaping works before embarking on the implementation of those details that have been approved.

Conclusion

23. For the foregoing reasons, I find that given the nature of the proposed development, the site and its visual context that the matter of the landscaping of the site is of such significance that the development should not be permitted without securing an acceptable scheme. Such details ought to have been approved prior to any development commencing. Therefore, condition 2c) goes to the heart of the planning permission. As it is prohibitive and was not discharged within the prescribed timescales, permission M14760 and the associated reserved matters approval M20115 do not remain extant and cannot lawfully be implemented. Accordingly, and having regard to all other matters

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raised, I find that the Council's decision not to issue an LDC was well-founded and I shall dismiss the appeal.

H W Jones

INSPECTOR