ADVICE

Introduction

1.1 I am asked to advise Glyndwr District Council and Mr. and Mrs. Pierce as to whether any of the following planning permissions granted in respect of the land belonging to Mr. and Mrs. Pierce remain extant:-

9/1796 Outline planning permission for residential development.

4/275 Planning permission for retail development.

4/2006 Detailed planning permission for residential development.

1.2 In addition to my original instructions dated 23 June 1995, I received some further information in the conference on 8 August 1995 and in papers sent to me on 11 August 1995.

2. General principles

2.1 An outline permission must be granted subject to 2 conditions. First that an application for approval of all reserved matters must be made within 3 years (or some other specified time limit) and second, that the development must be begun by whichever is the later of 5 years from the grant of the outline consent or 2 years from final approval of reserved matters (or some other

specified time limit) (see section 92 of the Town and Country Planning Act 1990). It is important to note that "reserved matters" refers only to those items specified in Article 1(2) of the Town and Country Planning (General Development Procedure) Order 1995 (and in the equivalent provisions which preceded it).

2.2 It is also important to note that the two requirements in section 92 are separate in that different consequences are specified for a failure to comply with either one of them. An application for approval of a reserved matter submitted out of time is treated as one as not made in accordance with the terms of the permission; accordingly the planning authority has no jurisdiction to determine it (section 93(4)(b) - which derives from section 43(7)(b) in the 1971 Act). Development commenced after the expiry of the time limit in section 92(2)(b) is not authorised by the permission and is liable to enforcement (section 93(4)(a)).

2.3 However, there can, additionally, be some linkage between these 2 requirements if a condition is imposed prohibiting development from starting until reserved matters are approved. I will deal with that aspect in more detail below.

3. Planning Permission 9/1796

3.1 On 3 July 1973 outline planning permission was granted for development of land for residential purposes and construction of the means of access. The site was shown outlined in red on the Ordnance Survey extract included in my papers. Condition 1 required approval to be obtained in respect of "siting, design and external appearance of any proposed building, the siting and design of the proposed access."

3.2 It is clear from the papers that detailed approval was not obtained under consent 9/1796 for any housing layouts or designs within the time limit set by condition 2 or indeed thereafter. On the other hand, on 8 April 1975 approval was given (ref. 4/420) to the estate roads as a reserved matter under 9/1796. Condition 3 of that approval required further drainage details to be submitted. I understand that those details have not been submitted. However, the condition does not require the approval of the planning authority to such details and does not set any time limit for their submission to the authority, whether before development is started or otherwise. Therefore, I do not think that condition 3 of the approval dated 8 April 1975 affects the question of whether 9/1796 remains extant.

3.3 There are 4 main issues to be addressed:-

(i) Has work been carried out which is capable of constituting commencement of the development authorised by 9/1796?

(ii) Was that work genuinely for the purpose of carrying out the development?

(iii) What is the effect of condition 1 of the consent granted on 3 July 1973?

(iv) What is the effect of section 93(4)(b)?

I will deal with these points in that order.

3.4 As to point (i), I think there is sufficient evidence to show that the works were capable of constituting a commencement of development for the purposes of condition 3. In Thayer v. Secretary of State for Environment [1991] 3 P.L.R. 104 the Court of Appeal emphasised that the planning authority should not be concerned with whether the work was sufficient in extent (save in cases where the de minimis rule might be said to apply) but with whether the work related to the permission in question. In that case 12 feet of a boundary hedge was removed to provide an opening and some surface earth was removed to enable a driveway to be formed. It was held that these works fell within what is now section 56(4)(d) and constituted a "material operation" for the purposes of the start of the development. It is also worth noting the view of Willis J. in Spackman v. Secretary of State [1977] 1 All ER 257 that an error made by a contactor as to the location of

the works will not necessarily prevent them from being treated as an implementation of the permission if the landowner had intended that the development authorised by the planning permission should be carried out and had given instructions to the contractor to that effect. In the present case, Mr. Pierce states that the boundary hedge was removed at the location of the site access, the base and foundation of the estate road was extended from adjoining land forming part of the Lodgevale Park Estate across the boundary and into the Pierce's land and water, electricity and sewerage services were extended into the site. Both Mr. Pierce and Mr. Parrish state that in 1975 topsoil was stripped for a distance of about 150 yards along the route of the main estate road which had been approved under reference 4/420. In physical terms these works constituted "material operations" in relation to the estate roads approved as a reserved matter under 9/1796.

3.5 Point (ii) raises the question whether the landowner had, at the time the works were carried out, a genuine intention to carry out the development as opposed to doing the works simply to keep the permission alive (Hillingdon LBC v. Secretary of State [1990] JPL 575). In that case it was said that an Inspector had correctly considered the question on a negative basis, namely had it been shown that at the time of the works the development would not be built. In the present case, the District Council has not questioned the intentions of Mr. and Mrs. Pierce and this aspect has not been specifically

covered in the affidavits or statement. I assume that if it were thought necessary, the appropriate evidence could be obtained. Certainly, both the Thayer and Hillingdon cases show that it is not a difficult requirement to meet. It is also worth noting that in both Spackman and Malvern Hills D.C. v. Secretary of State (1983) 46 P & CR 58 (per Watkins LJ at p. 72) it was suggested that the commencement provisions in what is now section 56 of the 1990 Act should be construed benevolently and not strictly against the landowner. In the present case the relevant works were carried out towards the beginning of the lifetime of the permission and the owners were fairly active in seeking an approval for a detailed layout of the whole or substantial part of the site. In addition the owners entered into an agreement for sale with an adjoining developer who was to carry out the development of the site and, when that fell through, the clients secured the construction of an access to that developer's land and the appropriate legal rights, before trying to sell the land for housing purposes to the Council. I have seen no material to question the genuineness of the owners' intention to have the approved development carried out.

3.6 I now deal with point (iii). In general it is well accepted that a start of part of an approved development constitutes an implementation of the whole permission, unless the permission itself requires phases of the development to be treated separately for the purpose of the statutory time limits (see R. v.

Secretary of State ex parte Percy Bilton (1975) 31 P & CR 154 and the express power in section 92(5)). Indeed, in the Percy Bilton case it was recognised that a substantial outline permission might be followed by approval of details in stages as each part of the scheme is built. In that case the Divisional Court was willing to treat the building of part of the development (pursuant to approved details for that part) as an implementation of the whole permission, despite the imposition of a condition on the outline consent that details of siting were to be approved before any development was commenced. I doubt whether that view can now be regarded as an accurate statement of the legal position generally applicable in the light of more recent decisions in the Court of Appeal, particularly Oakimber D.C. v. Elmbridge B.C. (1991) 62 P & CR 594. There it was held that the effect of a condition that certain details were to be approved before any development took place was that until all the specified details had been approved no development could be carried out which could constitute a "material operation"; any such development would be in breach of condition and unlawful.

3.7 However, in the present case Oakimber should be distinguished because of the unusual wording of condition 1 in the 1973 consent. That condition only provides that building operations are not to start before certain details are approved. Normally, conditions of this kind would refer to "development" rather than "building operations". Section 336(1) of the 1990 Act (and section

290(1) of the 1971 Act) make it clear that the formation or laying out of a means of access to a highway is an "engineering operation", not a building operation. A fortiori, the same would apply to the estate roads. On that basis the timing of the estate roads and/or means of access is not controlled by condition 1 and they could have been carried out lawfully before the siting, design and external appearance of the buildings was approved. Clearly the design of the estate roads had to be approved before they were constructed, otherwise there would be no means of telling whether the roads built were approved within the scope of the permission, but that does not present a problem here; that consent was obtained. Given that the works in relation to the estate roads were sufficient in themselves to constitute a commencement of development under section 56 and that condition 1 of the 1973 consent did not apply to those works, it follows that in this particular case the failure to obtain a detailed approval for the remaining matters specified in condition 1 has not resulted in the permission lapsing.

3.8 On the basis I have set out above, it follows that condition 3 and section 92(2)(b) have been satisfied; the development permitted by 9/1796 was started in time. I now turn to deal with point (iv), the effect of section 92(2)(a), condition 2 and section 93(4)(b). It is clear that the permission is extant, but no details of housing have been approved under that consent within the limit set by condition 2. If such details were now to be submitted, they would be

caught by section 93(4)(b) and the Council would have no jurisdiction to entertain the application. However, that does not mean that the permission has lapsed or is incapable of being implemented. Instead the High Court has confirmed that an application can be made under section 73 of the 1990 Act to vary the time limit in condition 2 so as to enable details to be submitted (R. v. Secretary of State for the Environment ex parte Corby D.C. - Pill J., 8 February 1994).

4. Planning permission 4/275

4.1 On 12 February 1975 the District Council granted outline permission for retail development and construction of means of access on land shown edged in red on the 1:2500 plan which accompanied the application. In addition to standard conditions imposing time limits for the submission of reserved matters and the start of development, condition 1 provided that approval of siting, design and external appearance of any building and the siting and design of the proposed access should be obtained "before any building operations are commenced". On 9 March 1976 the Council approved "details of self-service shop and the means of access and parking facilities submitted in accordance with the terms of....4/275..." (Ref. 4/1009). In this instance it appears that all the matters reserved were approved and that the effect of section 93(4)(b) does not have to be considered. It is clear from the decision

notice that the Council did approve the means of access (which should also be taken to include egress for service vehicles) and therefore I have assumed that the plan dated February 1986 is in fact the approved plan; it is the only such plan I have seen which shows access arrangements to the shop.

4.2 Mr. Pierce has stated that in July 1977 he personally stripped top soil and reduced the level of the land for the purpose of constructing the bell-mouth and access from the estate road into the retail site in the position shown on the plan approved under 4/1009. In my view, such works are more than de minimis and are capable of constituting a commencement of the development for the purposes of section 56 of the 1990 Act and condition 3 of the consent 4/275. The necessary detailed approvals appear to have been obtained in accordance with condition 2. It has not been suggested that the works were not genuinely intended to be for the implementation of the consent and I have seen no evidence to indicate that they were carried out simply to keep the permission alive. On that basis, the consent for the retail development remains extant. Although the implementation of that permission prevents reliance upon 9/1796 for carrying out residential development within the area of the retail site only, consent 9/1796 remains extant as explained in section 3 above on the whole of the housing area which lies outside the retail site.

5. Planning permission 4/2006

5.1 On 5 April 1977 an application was made for housing development which was described as both an application for approval of reserved matters under 9/1796 and an application for full permission. That application was clearly out of time in relation to condition 3 of the consent dated 3 July 1973. As matters then stood the Council were correct to treat that particular application as seeking a full planning permission. Indeed, the approval granted on 14 June 1977 was for a full planning permission. The application site was shown edged in red on the site plan numbered 7 enclosed with the application.

5.2 The consent in June 1977 gave approval (inter alia) to the road layout within the site. Mr. Pierce states that in July 1977 he removed topsoil and reduced the level of the land along the altered route of the main estate road leading from the Lodgevale Park development in accordance with the approved layout drawing LFC10. He also states that in 1977 or 1978 the foundations were dug for a pair of type A houses in the position (shown on plan LFC10) of the first plot to the south of the estate road as seen from the boundary with the Lodgevale Park estate. In my view works of this kind are sufficient to constitute "material operations" for the purposes of section 56 and condition 1 of the 1977 consent.

5.3 The District Council has not suggested that at the time when the works to which I have referred were carried out the landowners did not intend to complete the development and I have seen no evidence to suggest that the owners merely intended to keep the permission alive.

5.4 Conditions 2, 3 and 4 of the 1977 consent required details of certain matters to be submitted for approval, but did not specify a time limit for submission. The consent did not specify that the development could not be started until those matters had been approved. Therefore, the fact that those details have not been submitted does not affect the question of whether the permission is still extant. Condition 7 required certain drainage and road construction details to be submitted for approval "prior to site works commencing" but did not require approval of those details to be obtained before the site works started. It is not entirely clear what is meant by "site works", but it is significant that the draftsman used that expression rather than "development", which had been referred to in earlier conditions. On the information I have seen I think that "site works" refers to infrastructure matters rather than to the house units. On that basis and because of the digging of foundations for 2 houses (see para. 5.2 above), I think that consent 4/2006 remains extant. The 1977 consent plans did show a site reserved for shopping, so that permissions 4/2006 and 4/275 are compatible. I also think that permissions 4/2006 and 9/1796 are compatible, given that no detailed layout has yet been

approved under 9/1796. The fact that 4/2006 remains extant provides a strong argument in favour of allowing an application under section 73 to vary condition 2 of the 9/1796 to enable the outstanding details to be submitted. The 2 housing consents would remain compatible so long as any details submitted under 9/1796 show (i) the same house types on the plot in 4/2006 for which foundations have already been dug and also (ii) the same overall layout of plots. Subject to that, there would be no need to decide which of the two housing consents should be progressed until a decision is in fact made about which house types should in fact be built on individual plots. Indeed, approval could be sought for more than one scheme, each with different house types.

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