



Penderfyniad ar yr Apêl

Ymchwiliad a gynhaliwyd ar 28/02/12
Ymweliad â safle a wnaed ar 28/02/12

gan Iwan Lloyd BA BTP MRTPI

Arolygydd a benodir gan Weinidogion Cymru

Dyddiad: 20/06/12

Appeal Decision

Inquiry held on 28/02/12
Site visit made on 28/02/12

by Iwan Lloyd BA BTP MRTPI

an Inspector appointed by the Welsh Ministers

Date: 20/06/12

Appeal Ref: APP/H6955/X/11/2160288

Site address: Ruabon Business Park, Adjacent to A483, Ruabon, Wrexham LL14 6TE

The Welsh Ministers have transferred the authority to decide this appeal to me as the appointed Inspector.

- 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 Wynnstay Farming Company Ltd against the decision of Wrexham County Borough Council.
- The application Ref RUA P/2010/0847, dated 16 September 2010, was refused by notice dated 4 February 2011.
- The application was made under section 191(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 access works representing 'engineering operations' in accordance with details approved in respect of permission 2003/1484.

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the existing operation which is considered to be lawful.

Procedural Matters

2. It was agreed at the inquiry that the closing oral submissions of the Appellant could be sent in writing after the close of the inquiry. The Council was sent a copy of this written submission and has confirmed it has no further comments to make.

Matters of agreement

3. The appeal site is approximately 23ha of agricultural land, situated to the south of Ruabon and bounded by the A539 and the B5605.
4. The planning history of the site is agreed between the parties. The relevant planning entries for the site are detailed as follows, excluding those applications which were withdrawn. Outline planning permission (ref: RUA 6/23477) was granted in 1995 for a Business Park B1 Use (high technology manufacturing, research and development and prestige offices). A variation of condition no. 2 of outline planning permission 6/23477 to allow a further 3 year period for reserved matters to be submitted was granted in 1997, under ref: RUA CB01467.

5. Further, under ref: RUA P/2000/0418, what is described as a relaxation of condition no. 2 imposed under planning permission Code No. CBO1467 was granted on 31 July 2000, to allow an extension of time for the submission of reserved matters. This outline planning permission required the submission of the reserved matters by 31 July 2003, and imposed 14 planning conditions.
6. Outline planning permission (ref: RUA P/2003/0058) was granted on 10 March 2003. This was described as the variation of conditions nos. 2 and 3 imposed under outline planning permission Code No. P/2000/0418 to allow a further 3 years within which reserved matters may be submitted and a further 5 year period for commencement of development. However, the only condition on this grant of planning permission limited the submission of reserved matters to 1 year. The expiry of the time for submission of the reserved matters was the 10 March 2004. Commencement of the development had to take place before 10 March 2008.
7. The disputed reserved matters application (ref: RUA P/2003/1484) for Business Park B1 use (High Technology, manufacturing, research and development of prestige offices) was received on 24 December 2003, and approved on 6 June 2005.
8. The 'access works' specified in the LDC description was carried out in April 2010. It is accepted that if decision notice RUA P/2003/1484 was a grant of planning permission, the 'access works' constitute development as defined by Section 55, and a material operation as defined by Section 56 of the Act. If decision notice, RUA P/2003/1484 was a grant of planning permission then the 'access works' being initiated before the expiry of the permission on 6 June 2010, would have constituted the implementation of the planning permission for the business park development and that planning permission would be extant.
9. It was agreed at the inquiry having regard to the fore-going matters, there was no other impediment to the implementation of the disputed planning permission, such as the need to approve details pursuant to planning conditions on this permission prior to the commencement of the development. The parties agreed that all condition precedents have been approved prior to the commencement of development.
10. There was also no dispute that outline planning permission RUA P/2003/0058 incorporated the conditions from the earlier outline planning permission RUA P/2000/0418. Authority for this is set out in *R Reid*¹.

Main Issue

11. This is whether there was a planning permission in place for the works when they were carried out.

Reasons

12. It is agreed between the parties that the proper interpretation of decision notice RUA P/2003/1484 is a matter of law, and it is not a question of fact and degree using the balance of probabilities test.
13. If the Appellant's proposition is correct that decision notice RUA P/2003/1484 is in substance, and in form, a grant of planning permission, then it would read as a stand-alone decision quite separate from the outline planning permission. In the case of a

¹ R (Reid & S A D Reid Motors) v SOST&LG [2002] EWHC 2174 Admin

decision for reserved matters this should read as an approval with direct reference back to the outline planning permission. In effect a composite or a multi-staged approval.

14. In this case decision notice RUA P/2003/1484 does not refer to the outline planning permission in the description of the application. It describes it as 'Business Park B1 use (High Technology, manufacturing, research and development of prestige offices). There is no reference here to an outline planning permission, or that it is an application for reserved matters in accordance with a condition on the outline planning permission.
15. The first reference to the possibility that it is a reserved matters application appears further down before the set of planning conditions - the words 'Particulars of decision Approval of reserved matters'. It is not clear whether these words are in the operative part of the permission, although no submission either way is made on this point. The words 'in pursuance of its power under the Acts and Orders referred to below, the County Borough Council as Local Planning Authority, hereby determines your application in accordance with the particulars and plans comprising the application', appears in the top left hand corner of the document.
16. Perhaps the proper construction of the document should have combined the decision to approve with the appropriate description of the development in pursuance of the outline planning permission with particular reference to the application, its date, and the plans submitted with it. There is no magic formula to the governing words as set in *Ashford*². However, the Appellant makes no significant point to challenge the Council's contention that the words at the head of the page are governing words in relation to 'incorporation' of the application. The Appellant's contention is that there is no need to look at extrinsic evidence to interpret decision notice RUA P/2003/1484, because in substance it is a planning permission when comparing it with the outline planning permission.
17. What could be regarded as compelling about this line of argument is the suite of planning conditions and the reasons for the conditions. Condition no. 1 is a five year implementation of the development imposed to comply with Section 91(3) of the Act, the statutory provision which relates to full planning permissions. The Council accepts that this and others imposed go beyond those which could properly have been imposed in accordance with the principle set in *Newbury*³. The Council's witness agreed with the factual comparison of the conditions imposed on decision notice RUA P/2003/1484 and the outline planning permission submitted by the Appellant. It is agreed between the parties that Condition no. 4 is unnecessary since it repeats what is already imposed on the outline planning permission. This was a condition restricting the uses to Class B1 of the Town and Country Planning (Use Classes) Order 1987. However, if decision notice RUA P/2003/1484 could be construed as a planning permission, and stand-alone from the outline, then condition nos. 1 and 4 would be appropriate and consistent with the grant of a planning permission.
18. Condition no. 5, a phasing condition should not have been imposed on a reserved matters approval unless it was on the outline planning permission. Authority for that

² R v Ashford BC ex parte Shepway DC [1999] P. & C.R. 12

³ R v Newbury DC, ex parte Stevens and Partridge [1992] 3 PLR 34

is set out in the case of *Powergen*⁴. The Council seeks to claw back the point that phasing arguably did relate to the matters reserved, since the Appellant suggested two new conditions at that time. However, a planning permission cannot be fettered by considerations of what an Appellant might be thinking, since it is the document itself that must be relied upon.

19. Condition no. 6 refers to a detailed renewable energy scheme to be submitted to the local planning authority. The Council contend that this raised considerable debate at the time of the application, but holds the view that it could easily relate to matters of design and layout. In my view, the terms of the condition lacks precision since it only requires the Appellant to submit details, it does not need to be approved or implemented in the final scheme. The condition has no effect.
20. Condition nos. 8, 9 and 12 seek financial contributions towards transport infrastructure. In my view, these are clearly inappropriate for any reserved matters and planning permissions. I would agree with the Council that they are not determinative. However, they may be an indication of the Council's attempt to comprehensively deal with the application consistent with that of a planning permission. Condition no. 13 (increases the number of exclusion zones), conditions nos. 14 and 15 (expands on the archaeological conditions) over those imposed on the outline planning permission. These conditions derogate from the outline planning permission.
21. A fair and objective reading of decision notice RUA P/2003/1484 leads to a conclusion that in substance it appears as a grant of planning permission. It also appears as a stand-alone grant of planning permission without particular reference to the outline planning permission. There is one reference in the particulars of decision to an approval of reserved matters; this contradiction with the remainder of the document is considered further below.
22. The Council asserts that the planning conditions are outwith the power of the local planning authority on a reserved matters application and are unenforceable or could have been removed on appeal. No appeal or application to remove the conditions had been made. In relation to the issue of severance of the planning conditions, I consider it would be impractical. As the Appellant suggests such a degree of removal of the conditions would leave the decision with an unknown end, such that it would be difficult to envisage whether the outcome of the development would be that which Members of the Council and interested parties had contemplated. The interests of the Council, the Appellant and local residents may well be prejudiced by that exercise.
23. The alternative argument by the Council is should severance of the planning conditions not be possible, then the whole decision is void. That position was ultimately retracted in preference for the point on severance of the planning conditions. The Appellant's response was that would leave the reserved matters application undetermined and therefore it would not yet have expired. The power to invalidate a planning permission is discretionary, having regard to factors such as the scale of detriment or hardship to the parties, whether the decision would be detrimental to good administration and the length of delay in bringing proceedings. I consider that these factors are likely to prevail in this case, in particular the question of hardship to the Appellant and the length of delay, to the effect that the

⁴ R v Leicester CC ex parte Powergen [2001] 81 P. & C.R. 5

discretionary power would be unreasonable in these circumstances. These points are immaterial if the Appellant's proposition is correct.

24. There is no dispute between the parties that the law distinguishes between planning permissions and reserved matters approvals. The Appellant's point is that there is a different starting point to the end point. That is, the application started as reserved matters, but what came out of the process is the grant of planning permission. Further it is claimed that it is not necessary to examine the extrinsic material to resolve the ambiguity, because in substance the decision was a full planning permission. The contradiction between the label on the decision and the substance of the decision favours the conclusion that it is a grant of planning permission.
25. The Council indicate that construing decision notice RUA P/2003/1484 in this way involves stepping outside of the normal rules, and that such an exception can only be on the basis of ambiguity as in principle 4 of *Ashford*. That is, 'if there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity'. A distinction is also made as to how far beyond the application one can look at extrinsic information such as the committee report, the publicity for the application and in *Slough*⁵, the correspondence. Authorities for these are set out in *Polehill*⁶, *Ashford and Slough*. The Council's assertion is that if it had unilaterally amended the application from reserved matters to full planning permission then it would have exceeded its powers, and explains that the case of *Cardiff Corporation*⁷ is not an authority for that principle. That case contemplated a full planning permission to reserved matters. Furthermore, there is also the public interest test to consider when contemplating such a significant change as in *R. (British Telecom)*⁸ and *Henry Boot Homes Limited*⁹.
26. Both parties have reviewed the extrinsic material, but I agree with the Appellant that the contradictions are apparent in the committee report, the publicity and the consultation letters, which favours either side's argument. I am therefore not persuaded they square the contradictions. The Appellant questions whether it is correct to view the series of decisions as errors or should we look at the substance of what has been achieved. The *Davenport*¹⁰ authority indicates that 'a mature system of law, however, is concerned with substance rather than form, justice rather than technicality'. The concern that a reduction or increase in the scale of an application which alters its remit in terms of lawfulness is dealt with by the authorities of *Wheatcroft*¹¹ and *Breckland*¹². In these cases, as in *Henry Boot Homes Limited*, the code of planning control provided the public with the right to be informed and to

⁵ *Slough Estates Ltd v Slough BC* [1971] AC 958

⁶ *Polehill Garden Centre Ltd v SoSE* [1998] JPL 1070

⁷ *Cardiff Corporation v SOS of Wales* [1971] 22 P. & C.R. 718

⁸ *R. (British Telecom) v Gloucester CC* [2001] EWHC Admin 1001

⁹ *Henry Boot Homes Limited v Bassetlaw DC* [2002] EWCA Civ 983

¹⁰ *Davenport v Lord Mayor and Citizens of the City of Westminster* [2011] JPL 1325

¹¹ *B Wheatcroft Ltd v SOS for the Environment* (1982) 43 P. & C.R. 233

¹² *Breckland DC v SOS* (1993) 65 P. & C.R. 34

object. In this case, it is apparent that extensive publicity was undertaken and was advertised as a 'major development' and not as if it was reserved matters.

27. I therefore would concur with the Appellant that if decision notice RUA P/2003/1484 is construed as a planning permission then the public was consulted as if it were a full planning permission. Their interests could not be said to have been prejudiced.
28. The contradiction between the application and decision notice RUA P/2003/1484 in my view should be resolved by looking at the substance of the issued document. In doing so, the substance of the whole document leads to conclusion that it should be construed as a freestanding planning permission. The label is but one reference which contradicts the remainder of the whole, the substance of which reads, having considered the description, the conditions and the reasons for them, as a grant of planning permission. In addition, the planning permission, on its face, has no discernable connection with the outline planning permission to which it should have referred.
29. I note that the Council's point that it was a departure to the development plan, but that does not go to the issue of its lawfulness. I also note the examples of other reserved matter applications issued in the same year, but these can be differentiated from this case since they were connected to their respective outline planning permissions.
30. I conclude that there was a planning permission in place for the works when they were carried out. Decision notice RUA P/2003/1484 is a grant of planning permission which was lawfully implemented prior to the expiry of the planning permission and is therefore extant. The development in accordance with planning permission RUA P/2003/1484 may lawfully be completed.
31. I conclude that the Council's decision to refuse to grant a LDC was not well-founded. I will exercise the powers transferred to me under Section 195(2) of the 1990 Act as amended and issue a Certificate accordingly.

Iwan Lloyd

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT PROCEDURE)
ORDER 1995: ARTICLE 24

IT IS HEREBY CERTIFIED that on 16 September 2010 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

Decision notice RUA P/2003/1484 was a grant of planning permission which was lawfully implemented prior to the expiry of the planning permission and is extant.

Signed

Iwan Lloyd

Inspector

Date

Reference: APP/H6955/X/11/2160288

First Schedule

Operations comprising the construction of an access road to serve the development of Ruabon Business Park in accordance with planning permission RUA P/2003/1484.

Second Schedule

Land at Ruabon Business Park, adjacent to A483, Ruabon, Wrexham LL14 6TE shown edged red on the plan attached to this certificate

NOTES

1. This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).
2. It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date

and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

3. This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

Plan

This is the plan referred to in the Lawful Development Certificate dated:

by Iwan Lloyd BA BTP MRTPI

Land at: Ruabon Business Park, adjacent to A483, Ruabon, Wrexham LL14 6TE

Reference: APP/H6955/X/11/2160288

Scale: Not to Scale

