Planning Appeals Commission

Appeal Decision

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Appeal Reference:	2023/L0012
Appeal by:	Greenbay Apartments Ltd
Appeal against:	Refusal of a Certificate of Lawfulness of Proposed Use or Development
Development:	Commencement of development in the form of construction of foundations and the establishment of sight lines to satisfy conditions 1 and 2 on planning permission X/2008/1064/F
Location:	84 Warren Road, Donaghadee
Planning Authority:	Ards and North Down Borough Council
Application Reference:	LA06/2022/0521/LDP
Procedure:	Hearing on 24th July 2024
Decision by:	Commissioner Diane O'Neill, dated 9th August 2024

Decision

1. The appeal is dismissed.

Reasons

2. The main issue in this appeal is whether the development has commenced in accordance with planning permission X/2008/1064/F prior to its expiration.

3. Section 170 of the Planning Act (Northern Ireland) 2011 makes provision for the issuing of a certificate of lawfulness for a proposed use or development. Section 170(1) states that if any person wishes to ascertain whether any proposed use of buildings or other land or any operations proposed to be carried out in, on, over or under land, would be lawful, that person may make an application for the purpose to the appropriate council specifying the land and describing the use or operations in question. The application was made in accordance with Section 170 of the Act and was refused on 28th September 2023. This appeal was made under Section 173 of the 2011 Act.

4. Full planning permission X/2008/1064/F was granted on 21st July 2010 for the demolition of a former car home and the development of 26 2-bedroom apartments in three blocks with associated landscaping and car parking. Condition 1 of the planning permission stated that the permitted development was to begin before the expiration of 5 years from the date of the permission.

5. The Council accepted that the laying of foundations on the appeal site occurred prior to the planning permission expiring. However, one pre-commencement condition (condition 2) was applied to the planning permission. Condition 2 of planning permission X/2008/1064/F stated that the vehicular access, including

visibility splays and any forward sight line, shall be provided in accordance with the approved plans, prior to the commencement of any works or other development hereby permitted. The reason stated was to ensure that there is a satisfactory means of access in the interests of road safety and the convenience of road users. The Council argued that in order for the development undertaken to be lawful, the requirements of the pre-commencement condition have to be met in accordance with the approved plans before the expiration of the planning permission and prior to the foundations being laid. Until pre-commencement conditions have been satisfied, the Council consider that a planning permission cannot be considered to have been lawfully commenced.

6. DfI Roads inspected the appeal site on 29th June 2022 to assess whether or not the access had been constructed in accordance with condition 2. They advised the Council that the approved access had not been constructed in accordance with the approved plans as the road speed sign and electricity pole remain in the location of the approved access/visibility splays and are physical and visual obstructions. They considered that the presence of the speed sign within the location of the approved access road means that vehicles accessing/egressing the appeal site would be left with no alternative but to take evasive action to drive around it into the oncoming traffic to evade collision. The electricity pole was considered to obstruct visibility as it is located within the area for the visibility splays. The Council highlighted that it did not appear that the approved access was utilised by construction vehicles as orthophotography (circa 2016) showed the long-established existing access in use at the time the foundations were laid. As the site was only acquired by the appellant in 2021, they were not aware of which access was used when the foundations were laid. The Council acknowledged that while there is no requirement on construction vehicles to use the approved access, they considered that the use of the established access serves to demonstrate that the approved 'access' is likely to be unsafe for vehicular use.

7. In addition to the concern in relation to the presence of the telegraph pole and speed sign, the Council stated that the radii of the access has not been developed. While the appellant argued that the visibility splays and forward sight line are in place, the Council considered that there would first need to be an access developed for this to be the case. Although part of the boundary wall was removed, the Council did not accept that some minor ground works, including replacing footpath slabs with concrete and part of the grass verge with gravel within the general position of the approved access, constitutes the development of the approved access. Despite the works undertaken, they were concerned that pedestrians on the footpath seeking to cross the approved 'access' may not perceive it as an access as there is no kerb defining the radii or noticeable road surfacing works and no real indication that the works undertaken form an access. They considered that the 'access' poses a safety risk for pedestrians; this view was shared by DfI Roads. Should a Certificate of Lawfulness for a Proposed Use or Development be granted, they considered that there would be no legal requirement for the appellant to complete the vehicular access as approved as those works undertaken would be deemed lawful and acceptable. They stated that enforcement action could therefore not be taken to rectify the currently unsafe access.

8. As Condition 2 was stipulated for road safety reasons, the Council therefore considered that it goes to the heart of planning permission X/2008/1064/F and

should therefore be complied with. In light of the non-compliance with condition 2, the Council considered that the foundations laid on site are unlawful.

9. Condition 3 stated that the area within the visibility splays and any forward sight line shall be cleared to provide a level of surface no higher than 250mm above the level of the adjoining carriageway before the development is occupied. The appellant considered there to be an inconsistency and a tension between conditions 2 and 3 of planning permission X/2008/1064/F. They considered that condition 3 does not require the removal of the telegraph pole or speed sign until prior to the development being occupied. The Council's position however is that condition 2 required the implementation of the access before the other works occurred and as it is not in place then condition 3 cannot be fulfilled.

10. The Whitley principle (*Whitley & Sons Co Ltd v Secretary of State for Wales (1992) 64 P & CR 296*), which has some limited exceptions which do not apply in the current appeal, asserts that for a planning permission to be lawfully implemented, the developer must ensure that any pre-commencement conditions are complied with. The Whitley principle was further examined in *Hart Aggregates Ltd v Hartlepool BC [2005] EWHC 840 (Admin)* where the court ruled that this principle does not apply to all conditions but only to those which go to the heart of the permission. *Greyfort Properties Ltd V SOS for Communities and Local Government (2011) EWCA Civ 908 (2012)* endorsed the Hart Aggregates approach in terms of the need to avoid an unduly rigid application of the Whitley principle where it would produce absurd results that are contrary to the underlying purpose of policy or legislation. The parties also referred to *River Faughan Anglers Ltd v Derry City and Strabane District Council [2018] NIQB 87* which also reinforces against an overly rigid or literal application of the Whitley principle. This latter case is however distinguishable from the current appeal. It related to two inter-related planning applications, involving the same planning applicant and agent, lodged within days of each other and subjected to almost identical suites of planning conditions. However, one planning condition on the first planning approval dated 2nd March 2009 required that the vehicular access be provided prior to the commencement, operation or any works or other development permitted whereas the second planning approval dated 11th March 2009 employed the terminology '…prior to the commencement or occupation or any works or other development hereby permitted'. The wording of the two conditions was not found to be identical, giving rise to obscurity and ambiguity. The judgement stated that this 'consideration alone divests both conditions of the clarity necessary to be classified conditions precedent'. Furthermore, it was added that any attempt to rationalise the difference in wording would be beset with speculation. The court therefore rejected the discrete attack on the lawfulness of the 2011 works.

11. Irrespective of the laying of foundations, pre-commencement condition 2 of planning permission X/2008/1064/F requires that the vehicular access, including the visibility splays and any forward sight line, shall be provided in accorded with the approved plans. Whilst the conditions did not stipulate details such as the surfacing and materials to be used in constructing the access, the approved parking plan drawing received by the Council on 3rd September 2009 annotated the need for the 8m radius at the access point, new dropped kerbs, that the telegraph pole and speed sign were to be resited clear of the sightline and the existing entrance was to be closed up to the satisfaction of the then DRD Roads Service. Although the appellant argued that the drawings are not as detailed as

one would expect if submitted today, I accept DfI Roads' position stated at the hearing that most drawings which they assess are still of a similar standard and that it is expected that radii would be kerbed without the defining product having to be specified. It was suggested by the appellant at the hearing that demarcating the radii of the access with paint as opposed to kerbs would be sufficient however, even if it was, this was not done.

12. I am not persuaded that the presence of the 11m long pavement surfacing is a significant betterment for pedestrians. Despite the presence of a drop kerb along the edge road and its positioning, the removal of a substantial section of the roadside wall and lack of noticeable distinction in the surfacing materials contributes to there being little awareness that this is indeed a vehicular or pedestrian access point that has to be negotiated. This would materially impact road safety by posing a hazard for those crossing the access point or entering/exiting the site. At the hearing it was also acknowledged by the appellant that the required visibility splay of 4.5m x 90m to the south-east of the opening is not in place with 3.35m x 90m being provided when account is taken for the telegraph pole. I accept that the presence of the gravel stones along the opening could pose a further potential hazard should they fall onto the public road and that DfI Roads would be liable for any claim/s if anyone was injured due to their presence.

13. Paragraph 4.1 of Development Control Advice Note 15 (2nd Edition) Vehicular Access Standards states that the retention of a single slender pole or column may be permitted at the discretion of the Council as long as visibility is not materially affected. It is acknowledged that the appeal site is located where the pedestrian footpath is of a generous width. However, although the speed sign is slender, where the appeal site is located vehicular traffic would be preparing to transition from 30mph to 40mph on a relatively straight stretch of an A Class road. It was argued by the appellant that the telegraph pole sits behind the radii however DfI Roads presented persuasive evidence that the pole could hinder visibility of a motorcycle for those emerging from the site onto this busy road where traffic is increasing in speed.

14. Although the speed sign is to be moved at a future date, it is still within the area where the access is to be located. The appellant calculated at the hearing that there would be approximately 7.4m and 4.7m either side of the speed sign along the access opening. The access driveway would however only be 4.8m wide and the radii is not in place. The sign would be within the side of the access where a vehicle would enter the site. Despite being slender, I accept DfI Road's argument that the positioning of the sign could require a vehicle to drive around it into oncoming traffic exiting the site. The appellant accepted at the hearing that, with the sign in place, the new access would prevent the two-way flow of traffic entering and exiting the site. This would compromise road safety. A larger vehicle seeking to enter the site may also have to cross the middle of the Warren Road carriageway. It is acknowledged that there is a chevroned central area in the middle of the carriageway however traffic travelling in either direction along the Warren Road would not anticipate such a manoeuvre. This would materially compromise road safety causing a slowing of traffic and potentially rearend shunts of vehicles along the Warren Road. The appellant suggested that the existing and new accesses could both be utilised and that drivers of large vehicles could check with the site manager as to which access to use prior to entering the site.

However, this could result in such vehicles blocking the A Class Warren Road as the hard-shoulder area is on the other side of the carriageway. The long-established access to the site is also of quite a restrictive width, is adjacent to a neighbouring property's entrance and the development was not approved to have two access points.

15. Numerous planning appeal decisions were also presented by the appellant. In appeal 2020/E0007 however the approved access was substantially complete with most of the required work carried out in accordance with the approved plans and it was evident as an access. It was also for a farm dwelling located along a lightly trafficked road in the countryside which is not comparable to an urban residential development. The level of obstruction of the telegraph pole along the narrow, lightly trafficked rural road was judged not to be so great to lead to the conclusion that the approved access had not been provided or was dangerous to the point of being entirely unacceptable. In fact, in 2020/E0007 the Commissioner found that the use of the word 'shall' is standard in conditions requiring something to be done and did not concur that it was advisory in nature or open to flexible interpretation. Appeal 2021/A0154 related to the variation of a condition in relation to the construction of a right turning lane. In this appeal the parties agreed that the need for the right turning lane would arise from the occupation of the houses rather than their construction. The road improvements would still be implemented before construction of further dwellings and well in advance of what would be required under supplementary planning guidance when 30 dwellings are occupied. The access arrangements in place were found to be more than adequate to accommodate construction vehicles. DfI Roads accepted that the requisite visibility splays had been provided at the new entrance. The proposal was therefore judged not to be detrimental to road safety.

16. Case 2018/E0031 related to an appeal against an enforcement notice where it was concluded that discrepancies in the work undertaken compared to the approved plans was insignificant and did not go to the heart of the planning permission. Planning appeal 2019/E0046 related to a tension between an outline planning permission and reserved matters planning permission with it being determined that the latter imposed a more stringent timescale for the completion of the access works than what was stated at the outline planning permission stage. The access in that appeal was said to have been governed by specified conditions in the outline planning permission which had been complied with. The main issue in Appeal 2022/E0003 was the protection of trees and hedgerows on the appeal site. The outline planning permission had no conditions attached requiring their retention. There was a lack of coherence and clarity in the relevant drawings in terms of the identification of any trees or hedges to be retained. The Reserved Matters planning permission did not require a tree survey to ascertain if any development or foundations would adversely impact on the root protection zones or crown spreads of the relevant trees. Given that there was another condition requiring the retention of the natural boundaries of the appeal site the condition was found to be unnecessary. The Commissioner was also satisfied that the access was completed in accordance with the relevant condition and works in relation to the erection of the building were undertaken prior to the expiry of the relevant planning permissions.

17. Planning appeal 2022/E0015 related to the development of two dwellings with one of the main issues relating to the protection of trees. It was found that a planning

condition was not triggered as underground services did not pass through the tree protection area risking damage to the trees. It was also concluded that the relevant planning conditions did not expressly prohibit any development taking place before the required actions were carried out. Another planning condition was found to be imprecise and unreasonable, not meeting the legal tests for a condition. The protected trees remained unaffected by the previous building works within the appeal site. In appeal 2022/E0016 the Commissioner was satisfied that the required visibility splays were in place prior to the commencement of the development. It was concluded that the works would only become necessary after the use of the site for touring caravans became operational and it was only then that a road safety issue would occur. It was found that there was no express prohibition on development taking place prior to the method of sewerage disposal being agree in writing and consent to discharge being granted. Also, the planning condition in question was subject to a granted Section 54 planning application. In my view, all these cases are distinguishable from the subject appeal.

18. Although it was argued that it was not conditioned that the access should be retained in perpetuity and that enforcement action could not be taken if for example it was removed or obstructed during the construction period, these are scenarios that have not arisen. What enforcement action is taken, should they occur, is a matter for the Council. I do not agree that the occupation of the development, referred to in condition 3 of planning permission X/2008/1064/F, would be the trigger for the provision of the vehicular access including the visibility splays. Rather, condition 3 ensures the clearance of the visibility splays and forward sight distance.

19. Given the road safety implications identified in this appeal, I consider that condition 2 is a true condition precedent which goes to the heart of planning permission X/2008/1064/F and has not been sufficiently complied with. I do not accept that this can be satisfactorily resolved directly with DfI Roads at a later date or by the erection of signage stating that construction is occurring on site. As per paragraphs 5.66 and 5.67 of the Strategic Planning Policy Statement, as this matter can be addressed by the fulfilment of the imposed planning condition, a planning agreement is not considered to be appropriate in this instance. At any rate, the appellant's suggestion at the hearing of a planning agreement only related to the removal of the speed sign and not to the other aspects of concern. My approach is similar to that adopted in appeal 2020/E0039 raised by the Council whereby it was also found that as the vehicular access and visibility splays were not provided in accordance with the planning approval prior to the foundations being excavated, the pre-commencement conditions had not been discharged and the permissions had not been commenced lawfully. I do not accept that the Whitley principle has been applied in an 'over-rigid, overly literal' manner by the Council. As pre-commencement condition 2 has not been discharged, the planning permission has therefore not lawfully commenced.

20. Accordingly, I am satisfied that the Council's refusal of this Certificate of Lawfulness of Proposed Use or Development is well founded, and the appeal is dismissed.

COMMISSIONER DIANE O'NEILL

List of Documents

Planning Authority (Ards and North Down Borough Council):-	Statement of Case PA 1
Appellant (Donaldson Planning-agent):-	Statement of Case A 1

List of Appearances

Planning Authority (Ards and North Down Borough Council):-	Ms Gail Kerr Ms Emma Farnan Mr Jason Killen (DfI Roads)
Appellant:-	Mr William Orbinson QC Mr David Donaldson (Donaldson Planning) Mr Brian Speers (solicitor) Mr Colin Magee (appellant) Mr Mark Hardy (Donaldson Planning)