



Penderfyniad ar yr apêl

Ymchwiliad a gynhaliwyd ar 05/06/01

Appeal Decision

Inquiry held on 05/06/01

gan/by Robert Gardener BSc(TownPlan) MRTPI

Arolygydd penodwyd gan Cynulliad
Cenedlaethol Cymru

an Inspector appointed by the National
Assembly for Wales

Dyddiad/Date

05 -07- 2001

Appeal Ref: APP/M6825/X/00/1050150

Site address: Land at Lletty Mawr, Pantllyn, Llandybie, Ammanford

- 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 lawful development certificate .
- The appeal is made by David Allan Rees against the decision of Carmarthenshire County Council.
- The application (Ref. E/02215), dated 7 June 2000, was refused by the Council by notice dated 20 July 2000.
- The application was made under section 191(1)(b) of the 1990 Act as amended.
- The existing development for which a Certificate of Lawfulness was sought is a dwelling.

Summary of Decision: The appeal is dismissed.

Procedural Matters

1. At the Inquiry an application for costs was made by Mr Rees against the Council. This application is the subject of a separate Decision.
2. I have set out the terms of the application and the development for which a Lawful Development Certificate (LDC) is sought as stated on the application forms completed and submitted to the Council. Notwithstanding that those specifically related to s191 of the 1990 Act, which concerns existing development, a letter dated 7 June 2000 which accompanied the application explained its purpose as seeking a 'Certificate of Lawfulness for a Proposed Development'. The Council's Notice of Refusal compounded the confusion since it described the application as being in respect of a 'Certificate of Lawfulness for an Existing Use - Dwelling' and specified that the decision was made under s191 of the 1990 Act.
3. There is no dwelling on the site of the appeal. The question posed by the application, for reasons which I explain in greater detail in due course, is whether it would be lawful for a bungalow previously granted planning permission to be erected on the land. As agreed by the Council and the appellant at the Inquiry, that constitutes a proposed development and places the application within s192. Both parties accepted the description of the development as I saw it. In such matters there is a particular need for setting out the intended development precisely. I shall therefore treat the application for a LDC as being in respect of:

'The proposed erection of a bungalow in accordance the terms of the grant of outline planning permission [Ref. 18172/90] dated 25 February 1992 and the subsequent Approval of Reserved Matters [Ref. 19170/92] dated 10 March 1992, and the plans submitted therewith.'

4. A number of plans were submitted with the application for the certificate. The purpose of a number of them could not be explained. However, it is apparent that the appeal site is that on which the planning permission was granted and the certificate, if granted in accordance with the description now adopted, would apply only to that site insofar as it remains capable of development.

Background

5. I set out the following background material as agreed.
6. The Outline Planning Permission was granted by the Dinefwr Borough Council on 25 February 1992 and was for the erection of a dwelling on the appeal site, part of a field adjoining the family home Lletty Mawr. Although the land is in open countryside the Council accepted that the proposal, which was to be occupied by the appellant's son, fulfilled its policy of meeting local needs set out in the, then, emerging Dinefwr Local Plan. The occupation of the bungalow was not restricted by planning condition but was secured by a s106 Obligation completed on the same date.
7. The Outline Planning Permission set out the usual requirement that Approval of Reserved Matters was to be made within 2 years and that the development was to be begun within either 5 years of the date of the outline or 2 years of the final Approval of Reserved Matters, whichever was the later. The permission would otherwise expire. In this case the reserved matters were identified as being the siting and design of the building and means of access thereto. A requirement for landscaping was dealt with separately. Condition 4 stated:

‘No development shall take place until there has been submitted to and approved by the Local Planning Authority a scheme of landscaping for the entire site which shall include indications of all existing trees and hedgerows on the land, and details of any to be retained together with measures for their protection on (sic) the course of development’.
8. Application Ref. 19170/92 was in fact made before the outline planning permission was granted but nevertheless was eventually treated as seeking approval of the reserved matters. The application was approved and was specifically for the erection of a bungalow. The scheme was shown on a number of drawings including a Site Plan at 1:500. Condition 3 of the Notice of Approval was essentially the same as Condition 4 of 18172/90 set out above.
9. Together with constructional details and sections, the same set of drawings, including the Site Plan, were submitted to the Council on 17 March 1992 as part of an application for a new bungalow made under the Building Regulations. The pre-printed forms were addressed to the Director of Planning. The plans were stamped and signed as Approved by the Director of Planning together with the Notice of Passing of Building Plans (Ref. 19376/92) on 16 April 1992 and addressed to the appellant.
10. A trench was excavated along the line of the rear wall of the bungalow early in March 1995 and inspected by a Building Control Officer of the Council on 8 March 1995. His file notes show that the trench was some 1000mm deep by 600mm wide. By reference to the approved plan, it was about 17.8 m. long. The officer returned to the site on 16 March 1995 to inspect concrete which had been poured into the trench. It also appears that the position of the bungalow was pegged out. No other construction work on the bungalow was carried out.
11. In September 1995 the appellant applied to the Council to lift the restriction on the occupation of the proposed dwelling covenanted in the s106 Obligation. However, the application (Ref. 581/95) was withdrawn before a decision was made.

12. Even so, the plot was offered for sale in the belief that the terms of the s106 Obligation allowed the dwelling to be occupied by others who could satisfy the local needs criteria. Potential purchasers submitted an application for outline planning permission to the Council in May 1997 for a different dwelling (Ref. E/00534). By that time the local needs policy had been reviewed but in any event it was considered that the application did not fulfil a local need and was refused as unacceptable development in the open countryside.
13. The appellant's marriage had broken down some time before this and he had left Lletty Mawr in 1996. As part of the divorce proceedings and settlement, which are on-going, the continued existence of the 1992 planning permission was investigated with the Council during 1998 and 1999 and extensive correspondence entered into. The Council's view was that the planning permission had lapsed which was in due course confirmed by its decision in respect of the application for the LDC subject of this appeal.
14. The Council had given 3 reasons in the correspondence prior to the formal decision, one of which referred to the restricted occupancy imposed by the s106 Obligation. Any influence that that consideration might have had on the Council's initial responses was not included in the reasons given not to grant a LDC and it was confirmed at the Inquiry that it is not relevant to the grant or otherwise of a certificate. However, the Council stressed that should a certificate be granted in the terms now agreed any development carried out pursuant to the 1992 permission would remain subject to the s106 Obligation.

Reasons

15. The Council does not deny that works to form part of the foundations of the approved bungalow were carried out in March 1995, within the time limits imposed by the 1992 planning permission. It also accepts that the works themselves were sufficient to constitute a material operation for purposes of s56(2) of the 1990 Act, more specifically of the nature described at s56(4)(b). However, it considers that there are 2 unresolved issues which invalidate these works as proper commencement of the development which would otherwise preserve the planning permission. These are:
 - (a) That condition (4), and subsequently condition (3), are conditions *precedent*, that is, they required the approval of the Council of a landscape scheme *before* any development was to be commenced. It is the Council's position that no such scheme was submitted, let alone approved, so that the works undertaken in 1995 were unlawful.
 - (b) That in any event the works were undertaken solely to preserve the planning permission without intent to continue the development to completion, referred to as a "colourable" implementation.
16. Although I have identified the Council's reasons for not granting a certificate, in such matters the onus of proof is on the appellant and the test to be applied is that of the balance of probability.

Issue (a), the landscape conditions

17. The appellant approaches this issue from 2 directions. The first refers to the exact terms of the condition(s). There are no trees on the site and while there is a frontage hedge, the layout shown on the 1/500 Site Plan approved with the reserved matters made it clear that it would need to be removed in its entirety. Accordingly, the requirements of the condition in this respect were not relevant and there was no need for a landscaping scheme. The second is that the Site Plan, as well as showing the removal of the frontage hedgerow, indicated all existing

hedges and small trees on or near the site, the intention to form a turning and parking area at the front of the bungalow and, elsewhere, lawns and vegetable garden. This, it is suggested, comprised the required landscaping scheme and was approved as part of the reserved matters. Alternatively, the same scheme was subsequently approved by the Director of Planning, albeit as part of the consideration of the application under the Building Regulations.

18. It is apparent that a 'standard' condition was used which did not reflect the precise circumstances of the site. I accept, as did the Council at the Inquiry and, in my view, conceded in earlier correspondence, that Condition (3) should have clarified that the details shown on the Site Plan were not acceptable. Indeed, that would now be the practice of the Council. Nevertheless, I consider that the condition was sufficiently precise to establish that the Council, notwithstanding the 'landscaping' shown on the Site Plan, required a different scheme to be submitted. I have allowed for the fact that the appellant is not practised in such matters but he was professionally advised at the time. Bearing in mind the countryside location of the site and the intention to remove extensive lengths of hedgerow, I do not consider that the requirement to carry out landscaping 'in the interest of visual amenity' would have come as any surprise.
19. For similar reasons, I cannot accept that the approval of Building Regulations, albeit by the Director of Planning, could reasonably have been construed as having discharged the requirement of condition (3) or any of the other conditions of the Approval of Reserved Matters. That is particularly so since the only indication of any 'landscaping' of the site was that included on the same Site Plan on which a decision had been made only a week before. Moreover, there was nothing presented which suggested that this plan was submitted on 17 March 1992 for the purpose of meeting the requirement of Condition (3) and nothing from the Council which suggested that it had treated it as such.
20. As the appellant suggests, it was open to the Council to instigate enforcement proceedings against the foundation works which could have been on the basis of unauthorised development or failure to comply with the terms of the condition. Either option was available. However, this is a discretionary power and since the works went no further I agree with the Council's suggestion that it would not have been expedient to pursue the matter at that time.
21. I have followed the general rule established in the case of *F G Whitley & Sons v. Secretary of State for Wales* (1992) that if the operations concerned contravene a condition precedent they cannot be taken to have commenced the development authorised by the permission. I have also had regard to the need for the principle to be applied with common-sense and with regard to the facts of the particular case, *R. v. Flintshire County Council, ex p. Somerfield Stores Ltd* [1998]. In this instance I am satisfied that no action had been taken by the appellant which could reasonably be recognised as seeking to satisfy the condition. Indeed, it was conceded that he had not asked for a landscape scheme to be prepared following the Approval of Reserved Matters. The requirements of the condition had not been met when the foundations were partially constructed in March 1995 so that what occurred then was a breach of development control and cannot be taken to have been a lawful commencement of the authorised development. None of the 4 recognised exceptions to that principle arising from *Leisure Great Britain plc v. Isle of Wight Council* [1999], referred to at the Inquiry apply to this case.
22. The appeal fails on this issue.

Issue (b), the intention to complete the development

23. There has been no further work to erect the bungalow beyond that undertaken in March 1995. The appellant explains that by the fact that through the breakdown of his marriage he had left the house and site in 1996. The application for the bungalow to be released from the terms of the s106 Obligation also suggests that the need to provide for his son had passed and, coupled with attempts to sell off the plot it can be reasonably assumed that there has been no on-going intention to complete the development. That may not of course have been the case when the process of erecting the bungalow was commenced in March 1995.
24. The appellant could not recall or offer any explanation why the limited foundations were laid when they were. It does not appear to have related to any other event. The requirement to house his son, from which the exceptional local need had arisen, was not then apparent since he had taken up a post in Oxford, albeit on a limited 2-year contract. It was said that there was no confusion that the later expiry date of the outline planning permission, 25 February 1997, was that which applied rather than the earlier date of 10 March 1995, being 3 years after the Approval of the Reserved Matters. If that is so, there would have been no urgency to commence the development to preserve the permission.
25. The fact that only the single trench was dug and laid with concrete was said to be because of lack of funds to do more. However, the contractor involved had had to take a tortuous and difficult route with his digger onto the site rather than open up a new entrance to the road as the permission allowed. Nor could it be explained why the available funds were not used to complete the excavations of the whole layout of the bungalow, since it had been pegged out and the digger was already there, rather than dig a solitary trench and incur the cost of importing concrete. No other materials were ordered nor were any other works undertaken either then or since.
26. Notwithstanding that the change in the appellant's personal circumstances soon after offer adequate explanation as to why the works went no further at that time, I can well appreciate the Council's scepticism that it was ever intended to complete the development. Be that as it may, the current view, from *Riordan Communications Ltd. v. South Bucks District Council*, is that the subjective test of intention is not a relevant consideration. In this instance, the Council accepts that a material operation had taken place pursuant to the approved development which met the provisions of s56(4)(b).
27. The application for a LDC does not fail on this issue.

Conclusions

28. For the reasons given above and having regard to all other matters raised, I am satisfied that the Council's refusal to grant a LDC in respect of the proposed erection of a bungalow in accordance with the terms of the grant of outline planning permission [Ref. 18172/90] dated 25 February 1992 and the subsequent Approval of Reserved Matters [Ref. 19170/92] dated 10 March 1992, and the plans submitted therewith, was well-founded and I shall exercise accordingly the powers transferred to me in section 195(3) of the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991.

Formal Decision

29. In exercise of the powers transferred to me, I dismiss the appeal.

Information

30. Particulars of the right of appeal to the High Court are enclosed for those concerned.

A handwritten signature in cursive script, appearing to read 'A. Cardene', followed by a horizontal line.

Inspector

PLANS

Plan A The appeal site

Plan B Plan showing extent of foundations laid March 1992 (Council, agreed by Appellant)



Penderfyniad ar gostau

Ymchwiliad a gynhaliwyd ar 05/06/01

Costs Decision

Inquiry held on 05/06/01

gan/by Robert Gardener BSc(TownPlan) MRTPI

Arolygydd penodwyd gan Cynulliad
Cenedlaethol Cymru

an Inspector appointed by the National
Assembly for Wales

Dyddiad/Date 05 -07- 2001

Costs application in relation to Appeal Ref: APP/M6825/X/00/1050150

Site address: Land at Lletty Mawr, Pantllyn, Llandybie, Ammanford

- The application is made under the Town and Country Planning Act 1990, sections 195, 320 and Schedule 6 and the Local Government Act 1972, section 250(5).
- The application is made by Mr David Alan Rees for a full award of costs against Carmarthenshire County Council.
- The inquiry was in connection with an appeal against the refusal of certificate of lawfulness for the erection of a dwelling.

Summary of Decision: The application fails and no award of costs is made.

The Submissions for the appellant

1. The appellant acknowledges that an award of costs does not necessarily follow the event. However, this matter has been on-going for sometime. A clear timetable was set down for the appeal by The Planning Inspectorate. The Council's statement was to be submitted by 21 February 2001. In the event, it was not received until 28 March 2001.
2. The appellant had been obliged to enter into correspondence with the Inspectorate reminding it of the need for the Council's statement. He had been informed that the Inspectorate had no means of enforcing the timetable on the Council or on any other party to the proceedings. Consequently he was obliged to prepare his own statement without the benefit of the Council's evidence in less time than the timetable had allowed. It was unreasonable of the Council not to have followed the timetable set.
3. Insofar as the costs incurred, the appeal is related to on-going divorce proceedings between the appellant and his former wife. The District Judge of Swansea County Court has refused to progress those proceedings until it is determined whether the appeal plot has planning permission or not. While the appellant has public funding for the divorce proceedings he has to finance the cost of the appeal himself. The costs incurred are of extreme relevance to him.

The Council's response

4. The Council apologised for the lateness of its statement. There was nothing sinister in the delay, it simply reflected the workload of the officer involved. The late submission of a statement need not amount to unreasonable behaviour. Previous correspondence had set out the Council's position and reasons. The statement held no surprises in that regard. Moreover, the appellant had incurred no additional costs as a result. He had had to prepare a statement in any event and no expenditure had been wasted. There may have been a couple of telephone calls chasing up the statement but the costs involved were *de minimis*.
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Conclusions

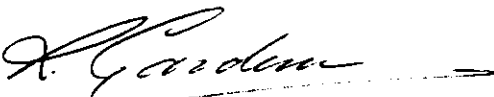
5. I have considered this application for costs in the light of Circular 23/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.
6. Failure to meet the timetable set for the various stages of the appeals procedure cannot be condoned. Indeed, Circular 23/93 at Annex 2 warns that both parties to an appeal are expected to comply with the normal statutory procedural requirements. It also points out, however, that a failure to comply with the Inquiries Procedure Rules may occasionally be excusable and not amount to unreasonable behaviour such as could lead to an award of costs.
7. In this case, the Council's views had been made clear in the prolonged correspondence which had taken place before the application for a LDC was made. The reasons given not to grant the certificate accorded with and confirmed its earlier position but on fewer grounds. The statement once presented added nothing new. On the other hand, since its case had already been expressed and required no further preparation, I see no justifiable reason for not having met the time-table set. Moreover, the appellant could not have been certain of the situation until the Council's evidence was received. It is probable that the delay in the submission of the Council's statement added to the uncertainty and stress which the appellant was experiencing in his domestic affairs and is to be regretted. However, in such appeals the onus of proof is on the appellant and preparation of his own evidence need have been delayed.
8. In fact, no delay in the appeal proceedings did occur nor did it prove necessary for the appellant to prepare additional evidence, for instance, to rebut the late statement of the Council. The Inquiry took place on the allotted day and there was no evidence whatsoever that extra costs were incurred or that any expenditure undertaken proved to be unnecessary because of the Council's actions. As mentioned at the Inquiry, and clearly stated in Circular 23/93, that is a pre-condition for an award of costs to be made even if the behaviour of one or other party to an appeal can be shown to have been unreasonable.
9. Therefore, whether the Council's actions might have been unreasonable or not, no wasted expenditure was incurred in this matter, irrespective of its relationship to the on-going divorce proceedings. I consider that unreasonable behaviour resulting in unnecessary expense, as described in Circular 8/93, has not been demonstrated and I therefore conclude that an award of costs is not justified.

Formal Decision

10. In exercise of the powers transferred to me, I refuse the application for an award of costs.

Information

11. A separate note is attached setting out the circumstances in which the validity of this decision may be challenged by making an application to the High Court within 6 weeks from the date of this decision.



Inspector