Re: Copeland Close, Warton.

OPINION

Background

1. I am instructed by North Warwickshire Borough Council ("the Council") to advise about a potential enforcement issue relating to plot 4 on a residential estate at land rear of 1 to 6 Copeland Close, Warton ("the Site").

2. From the planning history of the site, the following is relevant to this advice:

   2.1. 29 April 2015 – outline permission granted for residential development at the site ("the OP"). All matters were reserved apart from access.

   Condition 20 provides:

   > *Prior to the commencement of development a scheme for the disposal of foul and surface waters shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall address and achieve the following matters:*
   >
   > *(d) A fully labelled network drawing showing all dimensions of all elements of the proposed drainage system including an on/offline control devices*
   >
   > *Reason*
   >
   > *To prevent pollution of the water environment and to minimize the risk of flooding on or off the site and to ensure*

that an integrated design solution addresses the water environment.

Condition 26 states:

The approval of reserved matters referred to in condition 1 shall include drawings to show existing and proposed levels, incorporating finished floor levels, eaves and ridge heights for both the proposed development site and on neighbouring land for comparison.

Reason

In the interests of the amenities of the area.

2.2. 26 March 2018 – reserved matters are approved.

With regard to plot 4, plans and elevations were approved (7503_253C). This plan does not show finished floor levels. However, they do show 4800 mm to the eaves from first floor level ("FFL"), and 8000mm from FFL to ridge, so a relatively accurate approximation could be made. Strictly speaking, this plan does not meet the requirement of condition 26. Nonetheless, it has been approved by the Council.

Approved site sections plan (7503_450C) shows that plot 4 includes an AOD of 81m. This plan is scaled and so shows a FFL for plot 4 as 2.2 metres, giving a FFL of 83.2m above AOD.

The same plan shows the height to ridge is 8m, a total height of 91.2m AOD.

2.3. 27 March 2018 – condition 20 is discharged (DOC/2017/0042). The Approved Engineering Plans (ENG_100 P8) show a FFL AOD as 83.90m. If the 8m FFL to ridge is added, then this is a total height of plot 4 of 91.9m AOD.

3. Plot 4 is now constructed, and the developer in their advice from their counsel, says is occupied. It has been constructed in accordance with the Approved Engineering Plans and so sits at 91.9m AOD.

4. It is worth noting at this level, as it is in the Board Report on the withdrawn retrospective planning application (PAP/2018/0716), that the cause of the increase is overall height is not because the buildings are larger, but because the ground levels have increased.

5. I am instructed to advise upon whether the finished floor levels approved through the discharge of the pre-commencement conditions attached to the outline consent, take precedence over the plans approved under the reserved matters approval.

Discussion

Expediency

6. In this instance it is worth examining this case at the potential remedy before examining the detail. Assuming, therefore, that the approved plan in the RMA takes precedence over the plan in the discharge of condition. That being the case, the ground level of 83.90m (as built) is in breach of the approved AOD (83.2m). This would amount to a breach of planning control. If this is correct, would it be expedient to take enforcement action?

7. Section 172(1) TCPA states (my emphasis):

(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them—
(a) that there has been a breach of planning control; and
(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

8. Clearly this is a discretionary power (the LPA *may*…) to issue an enforcement notice. The LPA must consider whether it would be expedient to issue the EN. The expediency test is taken as meaning the balancing of the advantages and disadvantages of the course of action (*R. (Ardagh Glass Ltd) v Chester CC* [2009] Env. L.R. 34 at [47]). The LPA must also have regard to the provisions of the development plan and other material considerations. The consideration of material considerations would be any planning harms that the breach of planning control causes. Plainly the simple breach of planning control, i.e. a technical breach, is not necessarily always going to result in the issuing of an EN because to do so would only clear the first hurdle in s.172. The LPA must go on to consider the planning harm.

9. It is my very strong view, that in these circumstances it would not be expedient to issue an EN. There does not appear to be any planning harm from the breach of planning control, beyond the technical breach assuming it exists. The shading plans show no material change in the impact. This is not a case where the as permitted plans result in no shading of a neighbouring dwelling and the as built shows a principal elevation in shade for significant periods of time.

10. This view is shared by the officer who wrote the Board Report for the withdrawn retrospective planning application. If those instructing me disagree and believe that the as built position does result in planning harm, then plainly the officer who wrote the officer report on the withdrawn application could not write the officer report. The assessment would need to be conducted by a different officer.

11. I stress, that if there is to be a reassessment of the planning harm, then it must be done in accordance with that officer's professional obligations. Given the

shading plans available, an argument that a conclusion of planning harm on the basis of shading is unreasonable, would have a reasonable prospect of success.

12. If an EN is issued, assuming that there has been a breach of planning control which I will address in due course, then the LPA is at risk of legal challenge on the expediency of issuing the EN - *R. (Gazelle Properties Ltd) v Bath and North East Somerset Council* [2011] J.P.L. 702).

13. It is my strong advice, on the evidence I have seen, that assuming there has been a breach of planning control, then it would not be expedient to enforce since there is no material planning harm.

Which plan takes precedence?

14. The issue of which plan takes precedence– the RMA AOD level or the discharge of condition 20 plan – will determine whether there has been a breach of planning control. If it is the former, then there has been a breach. If it is the latter, then there has not.

15. In any event, the answer to this question is entirely academic in light of my advice above.

16. I have seen the advice of Ms Pindham for the developer. On the question of whether there has been a breach of planning control, I reach the same conclusion for slightly different reasons. It is my view that there has been no breach of planning control.

17. The assessment of which plan takes precedence will be based upon three considerations:

17.1. Is there a hierarchy of permissions/approvals between a grant of planning permission, a reserved matters approval and a discharge of condition?

17.2. Does the sequence in which plans were approved matter?

17.3. Should a practical or common-sense approach apply?

18. In response to the first, the simple answer is that they all have a part to play. As seen in the recent judgment of the CoA in *Fulford PC v York Council* [2019] EWCA Civ 1359 at [40]:

> *If a developer were to ask: what development is permitted by the outline permission, the only possible answer is that the permitted development is to be found in the package consisting of the outline permission, any approval of reserved matters, and any subsequent non-material changes.*

19. The outline permission sets the principle for the development with the detail to be agreed as part of the reserve matters approval. Whether plans are approved as part of a reserved matters approval or a discharge of condition is not in itself determinative, provided that they both stay within the boundaries set out in the outline planning permission. Because the approval of reserved matters and the discharge of the condition derive from the grant of outline planning permission, there is no statutory hierarchy between the two.

20. It strikes me that the judgment would be that the Council consider both plans to be acceptable otherwise they would not have consented them. The order in which they were approved is not determinative in this conclusion.

21. As observed by Ms Pindham, the overwhelming direction of travel in the recent judgments of the Supreme Court is to seek to inject a degree of commonsense into the interpretation of planning permissions. This would include the suite of documents that form the permitted development, as set out

above – see *Lambeth LBC v Secretary of State for Communities and Local Government* [2019] UKSC 33 and *Trump International Golf Club Ltd v Scottish Ministers* [2015] UKSC 74.

22. I consider it highly likely that a court would consider that the Council has consented to the amended ground level:

22.1. The discharge of condition plan is a more clear technical drawing that the cross sections.

22.2. It is the later of the consented plans.

22.3. There is no material planning harm in the increased height and so there does not appear a coherent planning reason not to consent the increased height.

22.4. There is nothing to suggest that this was an error on the part of the LPA.

23. Finally, in light of the above, I strongly advise against the making of a breach of condition notice under s.187A TCPA. Whilst there is no expediency test, the decision to serve a BCN is a decision of a public body and therefore open to judicial review. In my opinion the court would very likely find that the issuing of a BCN was unreasonable, in addition to the arguments above:

23.1. Whilst it is in breach of the RMA condition 1, the LPA subsequently consented to the breach of condition plan. Plainly the LPA accepted the change in levels or it would not have approved those plans.

23.2. The approvals of the LPA place the developer in an invidious position since there is no hierarchy in the approved plans. If they build it as approved in the RMA plans, they are in breach of the discharge of condition plans, and vice versa.

24. In my strong opinion there has been no breach of planning control and therefore enforcement action should not be considered.

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1 September 2019