



Penderfyniad ar yr Apêl

Appeal Decision

Ymweliad â safle a wnaed ar 27/08/13

Site visit made on 27/08/13

gan James Ellis LLB (Hons) Cyfreithiwr
Arolygydd a benodir gan Weinidogion Cymru
Dyddiad: 7/11/13

by James Ellis LLB (Hons) Solicitor
an Inspector appointed by the Welsh Ministers
Date: 7/11/13

Appeal Ref: APP/B6855/C/13/2200900

Site address: Land in front of 21 Tycoch Road, Sketty, Swansea SA2 9EE

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

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 ("the Act").
 - The appeal is made by Mrs Nicola Davies against an enforcement notice ("the EN") issued by City and County of Swansea Council.
 - The Council's reference is ENF 13/0008.
 - The EN was issued on 30 May 2013.
 - The breach of planning control as alleged in the EN is the unauthorised erection of a dwelling.
 - The requirements of the EN are
 - (i) Demolish the unauthorised dwelling.
 - (ii) Remove all material, resulting from the demolition of the building, from the land.
 - The period for compliance with the requirements is 9 months.
 - The appeal is proceeding on the ground set out in section 174(2) (c) of the Act. Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act does not fall to be considered.
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Decision

1. The appeal is dismissed and the EN is upheld.

Application for costs

2. An application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Validity of the EN

3. In addition to the ground of appeal under section 174(2) (c) of the Act, the appellant claimed that the EN is invalid. Reference is made in the appellant's statement dated 27 June 2013 to the two breaches in the EN being invalid. Here, mention is made of the location of the building and its height. Arguments in relation to the height and location of the building are relevant to the ground (c) appeal and will be dealt with by me later in this decision. However, the EN clearly and accurately describes those matters which constitute the alleged breach of planning control and it accords with the provisions of section 173(1) of the Act which refers to the contents of an EN. I therefore conclude that the EN is valid on the face of it.

The ground (c) appeal

Main Issue

4. The ground of appeal under section 174(2) (c) of the Act is that there has not been a breach of planning control. The main issue in this case is whether or not the dwelling which has been partially erected on the appeal site has the benefit of planning permission. The ground of appeal is of a technical nature. Consequently, the planning merits or otherwise of the dwelling is not relevant to my decision making. Again, the effect of the EN on the human rights of the appellant and her family is not a matter which I can take into account.

Reasons

5. The Council granted outline planning permission under Ref: 2008/1093 to itself on 23 July 2008 for the construction of one dwelling on the appeal site. All matters were reserved and a number of conditions were imposed. Condition 1 states that approval of the details of the siting, design and external appearance of the building(s) and the means of access thereto and the landscaping of the site shall be obtained from the Local Planning Authority in writing before any development is commenced. Condition 4 goes on to state that the development shall be completed in accordance with the approved plans prior to any part of the development being brought into beneficial use. The Council then sold the appeal site to the appellant and her husband who submitted a reserved matters application to the Council. The reserved matters application under Ref: 2010/1555 was approved by the Council on 10 February 2011 subject to a condition bringing certain windows, doors and openings under the control of the Local Planning Authority.
6. I am told that work on the new dwelling commenced in the summer of 2012 and that it was subsequently drawn to the attention of the Council that the dwelling under construction may not have been constructed in accordance with the approved plans. Following investigation, the Council raised concerns over the height of the building and its location in relation to the existing dwelling at 19 Tycoch Road. The appellant and her husband submitted a further planning application but this was withdrawn prior to determination by the Council. The EN was issued after the application had been withdrawn.
7. The Council is now contending that the dwelling (which has been constructed to first floor level) does not have planning permission because of three factors. First of all, it is said that the reserved matter of landscaping remains as condition 1 attached to permission Ref: 2008/1093 has not been complied with, resulting in the need for a further application to be approved before the building has planning permission. The second factor is that the building is 750 mm above the existing natural ground floor level, and the third is the location of the building is not as shown on the approved plans. I shall now examine each of these factors in turn.

Breach of condition

8. On the face of it, the construction of the dwelling is in breach of condition 1 attached to permission Ref: 2008/1093. However, it is established law that for a breach of condition to prevent the lawful implementation of a planning permission that condition must be a condition precedent. I therefore need to consider whether condition 1 is a condition precedent.

9. Although the condition does not specifically state that: 'Development shall not commence until' etc., I nevertheless consider that it seeks to prohibit development until reserved matters have been approved. However, a true condition precedent must not only prohibit development, but also go to the heart of the permission. No detailed evidence has been submitted by the Council to persuade me that the requirement to submit details of landscaping goes to the heart of the permission. In my experience, there are some forms of development where a condition requiring landscaping will go to the heart of the scheme. Here, however, given that the development is the erection of a single dwelling within an established residential area, I do not consider that the condition goes to the heart of the permission. It follows that I find the landscaping condition in this particular case is not a condition precedent. I therefore conclude that failure to comply with the condition has not resulted in the dwelling being erected without the benefit of planning permission.

Height above ground level

10. The Council contends that the dwelling is 750 mm higher than shown on the approved plans because ground levels have been built up above natural ground level. The appellant takes issue with the Council's measurement and has indicated that prior to the dwelling being constructed the natural ground level existing at that time was reduced by about 300 mm due to the removal of a concrete driveway serving an existing cottage and also topsoil and vegetation. This has not been challenged by the Council and seems entirely plausible to me, leaving a difference in height of about 450 mm.
11. Drawing number F.24.TR.D2 Rev D submitted with the reserved matters application and approved by the Council shows the proposed plans and elevations for the dwelling. The elevations detailed on the drawing show the dwelling rising up above a level. However, there is nothing on the drawing to indicate that the level shown on the drawing is the existing natural ground floor level. Nor is there anything on the drawing to suggest that levels would be raised.
12. The appellant says that the intentions of she and her husband concerning the height of the dwelling were made clear in the Design and Access Statement ("the DAS") which was submitted with the application. I have read the relevant part of the DAS and although reference is made to pedestrian access and steps/ramps to the front door, I nevertheless consider that there is no direct reference to the site of the building being built up to the same height as the pavement forming part of the highway. I therefore give little weight to the appellant's reliance on the DAS.
13. However, whilst noting the Council's contentions, I consider that that the reserved matters application and drawing number F.24.TR.D2 Rev D cannot be interpreted as showing that the dwelling would be constructed at natural ground level. The site is not level and slopes downwards from the road. In my view, if the Council had a concern over the effect of levels, it should have imposed a planning condition requiring details of levels to be submitted and approved before the commencement of development. Such a condition could even have been imposed when reserved matters were approved by the Council pursuant to application Ref: 2010/1555. However, no condition concerning levels was imposed. Against this background, I find that the height of the dwelling does not take it outside the planning permission.

The location of the building

14. The footprint (in terms of floorspace) of the dwelling that has been constructed is the same as that which received planning permission. However, the Council contends that the building has been built closer to the appeal site's boundary with No 19 Tycoch Road than as is shown on the approved site plan (drawing number F24.TR.D1 Rev D) submitted with application Ref: 2010/1555. Information provided by the Council indicates that the north-eastern corner of the dwelling as built is 0.8 metres from the site's boundary with No 19, whereas drawing number F24.TR.D1 Rev D shows a distance of 1.5 metres. Consequently, the eastern flank elevation of the dwelling is 0.7 metres nearer to the rear garden of No 19. The building is also further away from the site's boundary with 25 Tycoch Road (5.07 metres as opposed to 5.0 metres). The Council's information also shows the dwelling as built to be located further back into the site than as shown on the plan, with the north-eastern corner of the building being 16.97 metres from the north-eastern corner of the site, as opposed to 16 metres and the north-western corner of the building being 10.3 metres from the north-western corner of the site, as opposed to 8.75 metres.
15. The appellant also produced information concerning the site. This shows the north-eastern corner of the building to be 2.5 metres from the western flank wall of No 19 and the point at which a line drawn across from the front elevation of the dwelling at its north eastern corner meets the flank wall of No 19 being set back from the north-western corner of No 19 at a distance of 5 metres. It is said that these distances are the same as those shown on the plan.
16. Measurements were also taken on my site visit. In short, these confirmed that the measurements on the ground relied on by both the Council and the appellant were broadly accurate. The Council's measurements were taken within the appeal site whereas the measurements taken by the appellant generally relate to No 19 Tycoch Road which lies outside the appeal site. The measurements indicate to me that drawing number F24.TR.D1 Rev D is inaccurate in a number of respects. It appears that the appeal site is narrower than as indicated on the drawing and that the house at No 19 is further away from that property's boundary with the appeal site than as shown on the drawing. Also, No 19 is set back further into its plot than as shown on the drawing.
17. In my view, when a building with planning permission is to be constructed within a plot (as identified on a site plan) it is incumbent upon the developer/builder to ensure that the building can be accurately located within the plot itself in accordance with the approved plans prior to the commencement of development. This is irrespective of how the building relates to other buildings outside the plot. In this case, although the building the subject of the EN has been located in relation to the house at 19 Tycoch Road as per the approved plans, it does not accord with the location of the approved dwelling within the plot itself. This is evidenced by the dwelling's proximity to the eastern boundary of the appeal site and its set back from the road.
18. I appreciate the appellant's predicament in that the approved site plan is inaccurate in some respects. Nevertheless, given the proximity of the dwelling to the eastern boundary of the appeal site and its set back from the road, I find that the location of the building is not in accordance with the plans approved pursuant to application Ref: 2010/1555. I do not consider the discrepancy between the location of the dwelling as built and that shown on the approved plans to be de-minimis. I find that it is material.

19. The appellant drew my attention to a request made to amend the planning permission and which was accepted by the Council as a minor amendment on 6 August 2012. Correspondence between the appellant's agent and the Council clearly indicates that the amendment was concerned with a photovoltaic system to be installed on the south facing elevation roof and the change of the garage into a games room with a pair of french doors. No reference is made to a change in the location of the dwelling under construction although a revised site plan submitted with the request for minor amendment more accurately shows the location of the proposed dwelling (as constructed) within the plot. However, given that the e-mail exchange did not specifically refer to a change in the location of the dwelling, I do not find that the minor amendment accepted by the Council resulted in an accepted amendment to the location of the dwelling.
20. Moreover, I have already found that the discrepancy between the location in the plot of the partly constructed dwelling and that approved pursuant to application Ref: 2010/1555 is material. Consequently, the location of the dwelling could only be changed through another grant of planning permission being given pursuant to a formal application. Such is not the case here. I therefore give little weight to the revised site plan submitted with the request for a minor amendment.

Other matters

21. The appellant has produced a wealth of evidence concerning the way in which the appeal site has been handled by the Council. This not only refers to planning and enforcement issues but also to the Council as the vendor of the site to the appellant and her husband. These are matters which can be pursued elsewhere. Again, reference has been made to various points, including case law and statute, which may have been relevant to my deliberations if a deemed planning application had been before me. However, as I have previously indicated, I have not been able to take this evidence into account given the technical nature of the appeal before me.

Conclusion

22. After taking account of all relevant evidence before me, and whilst I am aware that my decision will be a disappointment to the appellant and her husband, I conclude that the building has been constructed without the benefit of planning permission and that the appeal on ground (c) should not succeed.

James Ellis

Inspector