Journal of Planning & Environment Law

1998

Case Comment

Construction of planning permission - accompanying drawings

Subject: Planning

Keywords: Conditions; Drawings; Interpretation; Planning permission

Case: Polhill Garden Centre Ltd v Secretary of State for the Environment, Transport and the Regions [1998] J.P.L. 1070 (QBD)

J.P.L. 1070 On September 19, 1989, the owners of Polhill Garden Centre made a planning application for new buildings and other development which was granted, subject to conditions on January 4, 1990.

Condition 2 stated that "full details of the colour and texture of the external finish of the buildings shall be submitted to, and approved in writing by, the District Planning Authority before development commences and the development shall be constructed in accordance with the approved finishes …". A series of drawings accompanying the application formed part of the permission. These showed plans and elevations in respect of the development subsequently carried out in 1991 for new sales areas comprising of buildings and an open plant area. On the plans was also shown a "store" but without any further drawings or elevations. In 1996, the owners wished to construct storage space and ancillary offices. On December 19, 1996 they made an application to discharge condition 2. Although the application did not purport to seek approval of design matters, an accompanying plan was submited, mirroring the original 1989 plan, depicting a building with elevations, etc., to be used as a warehouse/offices with a floor space of 704 square metres. The application was refused and the refusal was upheld on appeal. The issue rested squarely on what exactly was permitted by the 1990 permission. The owners contended that the 1990 permission was extant and covered their current scheme. It was counter-argued that the permission was ambiguous on its face as to the size of the "store". The Inspector concluded in para. 63 of his decision letter that, on the balance of probabilities, the proposed scheme did not form part of the 1990 permission.

The owners appealed.

Held, allowing the appeal:

1. The "balance of probabilities" was plainly not the right test to apply to a matter of construction. The proper construction of a planning permission was a matter of law for the court and not fact and degree for the Inspector.

2. There was no ambiguity upon the face of the planning permission and extrinsic aids to construction therefore were not needed. In the absence of a detailed reserved matters condition (save in this case for texture and materials) and also detailed drawings, a developer could construct the building in whatever dimensions and design he chose.

The following judgment was given:

J.P.L. 1071 **The Deputy Judge:** The Polhill Garden Centre is near Sevenoaks and has been in existence for a long time. The owners wanted further accommodation and on September 19, 1989 made a planning application for new buildings and other development to which I shall return. It was permitted on January 4, 1990. They carried out much of the development in about 1991.

By 1996 they wanted to construct storage space and ancillary office accommodation. On December 19, 1996 they made an application to discharge a condition upon the permission to enable them to construct it and to which I shall refer in a moment. That application was refused on March 3, 1997 for this reason:

"The District Planning Authority does not consider that the development sought as shown on the submitted drawings comes within the terms of the original planning permission SE/89/1874, by reason of the total floorspace, appearance and scale of the storage building."

That refusal raised neatly the question as to what was permitted by the 1990 permission, and in the way I approach this case that is the only question in the case.

The applicant appealed to the Secretary of State for the Environment and an inquiry was held. Incidentally they made a completely fresh planning application to the same effect as the 1996 application and appealed that as well, but that is irrelevant to this judgment.

Both appeals were dismissed by the Secretary of State's Inspector; so the applicants now apply to this court to quash the decision relating to the 1996 application. Thus raising the question to which I have already referred.

The permission granted on January 4, 1990 was as follows:

"PROPOSAL: Additions to provide much needed space for sales undercover plant displays and better customer control. To improve the external appearance and to retain landscaping and car parking facilities as they exist. A conservatory to improve existing …

The Sevenoaks District Council, as the district planning authority, HEREBY GRANTS PLANNING PERMISSION in respect of the proposal described above SUBJECT TO THE FOLLOWING CONDITIONS …

2. Full details of the colour and texture of the external finish of the buildings shall be submitted to, and approved in writing by, the District Planning Authority before development commences and the development shall be constructed in accordance with the approved finishes …

5. No part of the site shall be used for open storage without the prior written permission of the Local Planning Authority …

7. A no entry sign shall be erected as indicated on the site plan so as to prevent only vehicular access from Shacklands Road to the satisfaction of the District Planning Authority before the development commences …".

Although it is to be noted that the notice of permission did not make any reference to the relevant drawings, save in condition 7, I have no doubt, despite the somewhat hesitant submission of Mr Mould, who appears on behalf of the Secretary of State, as to

this that the two large sheets of paper, which actually form one series of drawings with one building straddling the two sheets, form part of the permission for the reason that one of them, drawing 02, is stamped "Permission Granted" as well as carrying the same reference number as the notice itself. So the permission comprised four sheets of paper in all.

J.P.L. 1072 These drawings show plans and elevations in respect of the development which was carried out in about 1991 being mainly proposed new sales areas comprising buildings and also an open plant area. But further, three times there is clearly shown a store. On the site plan on drawing 02 it is called "Store". It is shown again on the site plan on drawing 01 but not named. On the large plan, on drawing 01, it is shown disappearing off the top of the drawing; here it is marked "New Store". There are no elevations, nor any other drawing of this store. So the question arises as to how large the store may be and thus whether or not the development sought comes within the permission.

The December 1996 application was in these terms:

"Please therefore treat this letter as an application for discharging condition no. 2 of the permission in respect of colour and texture of the external finish of the buildings. I enclose our drawing number C9545/7A …".

This drawing showed, in the block plan, what was called a "warehouse extension" in the same position as in the drawings 01 and 02 and having the same or virtually the same footprint. As well as showing some of the existing buildings it showed plans and elevations on a fairly large-scale, of what was called on the ground floor, "warehouse" and on the first floor "ancillary office". On the elevations there were a series of notes specifying the colour and texture of the external finish of the building. The application did not purport to seek approval of the design but was confined strictly to dealing with condition 2 of the permission. By scaling of the areas shown on the plan one can calculate that the total is 704 square metres.

The planning authority say that that amount of floor space is too much and also that there should not be an ancillary office. It is now contended that the permission was ambiguous and accordingly one is entitled to look at the planning application to try to cure the ambiguity.

The description of the proposed development in the planning application is in the same terms as that in the permission which I have already read. However, on the third page there is a box headed "Floorspace" and under the heading "Proposed square metres" it reads as follows: "WAREHOUSE 320 square metres. RETAIL 1,922 square metres. TOTAL FLOORSPACE 2,242 square metres." It will be noted that there was no figure against the line labelled office. So the Planning Authority and Inspector say that that shows that the warehouse element is too large and that there should be no office.

I shall now read some of the paragraphs in the decision letter in which the Inspector dealt with this aspect:

"56. As I have indicated, this application is founded on the premise that a conditional planning permission has been granted for the appeal building and that the only matter at issue is the acceptability of the materials proposed. Whilst the Council has raised no

objections to these materials, its stance is that planning permission has not been granted for the erection of a two storey warehouse/store with ancillary office totalling 704 sq m of floorspace in this location.

57. The main issue to be decided in this appeal is whether there is an extant planning permission for the proposed development.

58. The application (No. SE/89/1874) was for full planning permission."

The Inspector then set out the description of the proposed development and concluded that paragraph by saying: "… it makes no reference to the proposed erection of a warehouse/store with ancillary office".

In paragraph 60 there is a sentence which reads as follows: "Although it lies to the rear of existing single ***J.P.L. 1073*** storey buildings, which are shown on the plans and elevations, it does not appear above those buildings."

That is a misconception, in my view, because the elevations have been drawn, not as perspective, but as a normal elevation along the line of the frontage with sections where the line cuts through adjoining buildings which project forwards.

In paragraph 61 the Inspector referred to the officer's report at committee as if that helped as a matter of construction in the permission. That of course is an impossibility and Mr Mould does not seek to argue otherwise. Also in paragraph 61 the Inspector canvasses the idea that the references to "Store" and "New Store" may refer to open storage. However that is an impossible notion not only because the word "Store" to my mind normally means a building and in the present case it is to be contrasted with the "open plant area" shown on the same drawing, but also because open storage was expressly forbidden by condition 5 without prior or written permission of the Planning Authority.

"62. Following the grant of planning permission, your clients wrote to the Council on 24th May 1990 confirming that the colour of roofing of the proposed buildings had been agreed by the Council's officers at a site meeting. The letter refers to the development being constructed in two phases, with the final phase (commencing in July 1991) to be completed by the end of that year. This indicates to me that the necessary approvals under condition 4 were obtained in 1990 and the condition had been complied with to the satisfaction of the Council."

[4 "must be a typographical mistake for 2".]

There is, in my judgment, nothing in this point either, partly because applications made after the permission cannot possibly assist with the construction of the permission and partly because it is in any event well established that one is entitled to make applications for approval in stages.

Finally, in paragraph 63, the Inspector says this:

"63. I have had regard to *Slough Borough Council v. SSE and Oury* [1995] J.P.L. 1128 to which you refer but I conclude, on the balance of probabilities, that the proposed erection of a two storey warehouse/store with ancillary office totalling 704 sq m of floorspace does not form part of the development approved on 4 January 1990 (No.

SE/89/1874). The appeal proposal is substantially different from not only the 'STORE' or 'NEW STORE' as annotated on the application plans but also the proposed warehouse floorspace referred to on the application form. It thus falls outside the terms of that planning permission. Accordingly, I dismiss this appeal."

The "balance of probabilities" is plainly not the right test to be applying to a matter of construction and the second sentence does not really make sense because, as I have already described, the warehouse and the store shown on the planning permissions and on the application for approval plan are virtually identical at the small scale. The only difference is that the latter, unlike the former, show elevations and floor plans for which, as I have said, the applicants were not seeking approval, save in respect of the colour and texture of the material. However, the fact that the reasoning is so poor is irrelevant. Mr Mould is fully entitled to make submissions as to what is the proper construction of the permission. It is a matter of law for the court, not fact and degree for the Inspector *per* Mr George Bartlett Q.C. sitting as a Deputy Judge of this Court in *Braintree District Council v. Secretary of State for the Environment* (1995) 71 P. & C.R. 323-331.

The law in this field has been most helpfully summarised in a recent, as yet unreported, judgment of Keene J. in the *R. v. Ashford Borough Council, ex parte Shepway District Council,* May 7, 1998. Lest it happens that the judgment is not reported I set out the relevant passages.

***J.P.L. 1074** "The legal principles applicable to the use of other documents to construe a planning permission are not really in dispute in these proceedings. It is nonetheless necessary to summarise them:

1. The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: See *Slough Borough Council v. Secretary of State for the Environment* [1995] J.P.L. 1128, and *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196.

2. This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: See *Slough Borough Council v. Secretary of State (ante); Wilson v. West Sussex County Council* [1963] 2 Q.B. 764; and *Slough Estates Limited v. Slough Borough Council* [1971] A.C. 958.

3. For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as '… in accordance with the plans and application …' or '… on the terms of the application …', and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: See *Wilson (ante); Slough Borough Council v. Secretary of*

State for the Environment (ante).

4. 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: see *Staffordshire Moorlands District Council v. Cartwright* [1992] J.P.L. 138 at 139; *Slough Estates Limited v. Slough Borough Council (ante); Creighton Estates Limited v. London County Council* (1958), *The Times,* 20th March 1958.

5. If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see *Slough Borough Council v. Secretary of State (ante); Co-operative Retail Services v. Taff-Ely Borough Council* (1979) 39 P. & C.R. 223 affirmed (1981) 42 P. & C.R. 1."

Later he said:

"The issue, however, is whether such recourse to resolve a particular ambiguity or inconsistency brings the application into play, so as to operate as a means of interpreting and, if appropriate, restricting the permission as a whole. There is no clear authority on this point, though such as there is suggests that that is not the consequence. In the *Staffordshire Moorlands District Council* case (*ante*), Purchas L.J. referred to the permission being construed 'where ambiguous' in the context of other material: see page 139. In *Creighton Estates (ante)* Danckwerts J. (as he then was) referred to extrinsic material in order to resolve a specific ambiguity and no more.

I propose to deal with this as a matter of principle. It is important to recognise that when an application is being used for such a purpose, it is not being incorporated into the permission. This is a wholly different exercise from that involved in incorporation. The justification for such resort to extraneous material is to resolve a particular inconsistency or ambiguity. That being so, ***J.P.L. 1075*** it would not be proper to regard other parts of the permission free from ambiguity as open to re-interpretation in the light of the application or, indeed, other extrinsic material. Such material is only being brought into play for a specific purpose. Such recourse does not make the application or other extrinsic material part of the permission generally. Otherwise the existence of an ambiguity on a single point or word in an otherwise complete and clear permission would mean that the extent of the development as a whole thereby permitted could be cut down by the application. That would be contrary to the general rule spelt out many years ago in *Miller-Mead* and endorsed by the Court of Appeal recently in *Slough Borough Council v. Secretary of State for the Environment.* Moreover, any such exception to a general rule ought to be narrowly construed."

Mr Mould does not contend that this is a case of incorporation of the planning application by the planning permission, but that the permission is ambiguous on its face as to the size of the store. So, looking at the language of Keene J. the only part of the application which Mr Mould wishes to pray in aid for the purpose of construction is the floorspace box in the application form, so as to show that 704 square metres is much more than 320 square metres.

Mr Mould emphasises that the notice of permission itself makes no reference to a storage building and that the drawings show no elevations of it. However, upon my holding that the drawings form part of the permission, he accepts that because of the appearance of "Store" and "New Store" on drawing 01, permission was given for it, but

then he submits that the ambiguity is that whereas the permission purports to be a full one (save for reservation of colour and texture of materials), there is doubt as to what has been approved as to the store. There is an absence of any three-dimensional drawings. Further he says that there is no warrant for the office space shown. However, I cannot accept these submissions and prefer those of Mr Dinkin, who appears on behalf of the applicant.

I agree with Mr Dinkin that there is no ambiguity. Mr Mould's real complaint is that there is no condition relating to reserved matters for the design of external appearance of the store (save for colour and texture of the materials), but in my judgment that is not an ambiguity. It has been trite law, specially in the early days following the inception of the modern planning legislation in 1948, when reserved matters conditions were not imposed upon permissions as commonly as nowadays, that if detailed drawings did not form part of the permission and the Planning Authority omitted to impose a reserved matters condition, the developer could construct the building in whatever dimensions and design he chose. Such a condition is normally imposed nowadays as a matter of form but that was not done here in the case of the store, despite the fact that full drawings had been produced and permitted in respect of the remaining part of the permitted development.

The cases upon ambiguity demonstrate proper ambiguities. Thus in *Slough Estates Ltd v. Slough Borough Council* [1971] A.C. 958. 964G: "Comparison of the planning permission with the plan reveals a remarkable discrepancy between them."

In the *Ashford* case above one could not tell whether "non-food store" embraced the plural as well as the singular. Whereas the presently alleged ambiguity is not a proper ambiguity at all.

Furthermore I should like to add what follows, even though I heard no argument about it, and there is no authority upon it. Even in a case where the permission does incorporate the application I have the gravest reservation as to whether the information, which is generally given on about page 3 of the application form, here called "Planning Application Form 2" can properly be treated as part of what is actually permitted or even used as an aid to construction save to resolve an ambiguity or mistake. It is usually, as here, merely supporting information giving such detail as not only the proposed floorspace areas but also the anticipated numbers of employees, hours of work and numbers of vehicles, usually as ***J.P.L. 1076*** here on the same page. The latter definitely do not form part of the permission unless appropriate conditions are imposed. Accordingly, I have the greatest difficulty in understanding how the former, the floorspace areas, can form part of the permission, that is unless an appropriate condition is imposed or the measurements are included in the description of the development which is permitted, or there are permitted drawings which show *inter alia* the floorspaces. All this information is, in my view, no more than an attempt to show what is in mind at the time the application is made. Unless it is made to form part of the permission in one of the ways I have described, the developer is not "stuck" with it when he or his successor comes to implement the permission or a later phase of it, maybe years later, and maybe after realisation that there can be an improved implementation of the same permission.

However, as I have already held, the floorspace box, is in any event not an aid to

construction in the present case because there is no ambiguity upon the face of the planning permission.

It is interesting to note that, as pointed out by Mr Dinkin, in *Slough Borough Council v. Secretary of State for the Environment* (1995) 70 P. & C.R. 56 there was a similar consequence resulting from an omission to limit the floor areas of new buildings. The Council sought permission for an additional 1,055 square metres of office floorspace, but their resolution to grant it, bearing in mind that that operated as a permission, omitted to include any limit. They sold the site and the developer proposed to erect a building with an additional floor area of 1,530 square metres, a 45 per cent increase. That was not an ambiguity case but the Court of Appeal held that the permission should be construed without reference to extrinsic evidence and so the result was a building which was much larger than was originally envisaged.

Finally, I have no difficulty with the ancillary office shown on the application drawing. It is ancillary, not primary office, and so it undoubtedly falls within the ambit of the permission.

The result is that the only basis upon which the application could have been refused related to the colour and texture of the materials, but as recorded by the Inspector, at paragraph 56, the Council expressly raised no objection to them.

For these reasons the application is allowed and the decision as to this appeal is quashed.

Comment. The jurisdiction of a local planning authority in granting a planning application must per force be fixed by the terms of the application. It is therefore a firm principle that in granting permission the authority cannot by fixing conditions grant something significantly different from the description of the proposed development in the application; see *Wheatcroft v. Secretary of State for the Environment* (1982) 43 P. & C.R. 223. Yet the Court has equally held that in interpreting a grant of permission, it is not possible to look at the details of the application unless those details are expressly incorporated or the grant itself is ambiguous.

In the way permissions are drafted it is often not difficult to point to some ambiguity. Keene J. in the recent decision of *Ashford* has however developed the sensible principle that ambiguity in one part of the condition is not a licence to refer to the application to construe other parts of the permission that are *not* ambiguous. This approach was accepted in the present case but it was argued that the part of the permission granting a store was ambiguous. The grant of permission clearly included a store as this was shown on the plans which were expressly incorporated into the grant. The argument was over the size of the store and as to whether can be used for ancillary office use. The description in the application appeared to exclude office use by exclusively referring to warehouse and retail floorspace and limiting the amount of floorspace for those uses. The Deputy Judge, who had to decide the meaning of the permission as a matter of law, concluded that there was no ambiguity in the simple granting of a store use without reserving matters of design. He found that the fact that full drawings had been produced for other parts of the permitted development did not in itself make the reference to the store ambiguous. This conclusion is probably technically correct but the bald grant of a store was nevertheless rather odd in the context of the rest of the permission.

Perhaps more importantly as a matter of principle, the Deputy Judge went on to hold that figures as to the amount of floorspace for specific areas set out in the application, should not generally be treated as part of the grant even ***J.P.L. 1077*** where the permission does incorporate the application, save to resolve an ambiguity or mistake. This proposition is more dubious and would seem to relegate such matters to the status of illustrative or supporting material. Unless it is clear that such details are merely illustrative, there would appear to be no sound reason for not referring to them to interpret the permission where the permission has clearly incorporated the application into the grant.

J.P.L. 1998, Nov, 1070-1077