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## Appeal Decisions

Inquiry opened on 23 October 2012

Site visit made on 22 October 2012 & 28 February 2013

**by Keith Turner LLB(Hons) DipArch(Dist) RIBA MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 12 April 2013**

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### **2 Appeals relating to land adjacent to Brewery Cottage, High Street, Coalport, Telford, Shropshire TF8 3JZ**

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
  - The appeals are against an enforcement notice issued by Telford and Wrekin Council.
  - The Council's reference is 0044/2009.
  - The notice was issued on 25 November 2011.
  - The breach of planning control as alleged in the notice is without planning permission, the partial erection of a dwelling on the Land.
  - The requirements of the notice are:
    - 1) Demolish the partially built dwelling.
    - 2) Remove from the land all resulting debris including the foundations of the building, all building materials and building equipment.
  - The period for compliance with the requirements is one month.
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#### **Appeal 1: APP/C3240/C/12/2168226**

- The appeal is made by Mr John David.
  - The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Town and Country Planning Act 1990 as amended.]
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#### **Appeal 2: APP/C3240/C/12/2168227**

- The appeal is made by Mrs Maureen David.
  - The appeal is proceeding on the grounds set out in section 174(2)(f) and (g) of the Town and Country Planning Act 1990 as amended. 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 as amended does not fall to be considered.
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### **Decisions**

#### **Appeal 1: APP/C3240/C/12/2168226**

1. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

#### **Appeal 2: APP/C3240/C/12/2168227**

2. The appeal is dismissed and the enforcement notice is upheld.

## **Application for Adjournment**

### **Case for the Appellants**

3. At the beginning of the inquiry the Appellants applied for an adjournment of the inquiry in order to negotiate further with the Council. The purpose was to seek a common basis upon which an application for planning permission could be made and approved thereby resolving the issues. The Appellants considered this the most expedient way forward in this instance because the matter has been fraught with inaccuracy, uncertainty and misfortune. Furthermore, the Appellants consider that the areas of difference between them and the Council are now relatively narrow and capable of resolution.
4. The Appellants have taken the decision on a previous planning appeal as their starting point in trying to achieve agreement with the Council. That identified matters which the previous Inspector considered to be not harmful and those which were regarded as unacceptable, thereby resolving a lot of the issues.
5. The Appellants also consider the enforcement notice to be defective, if not a nullity, because it is too vague to be able to grant a planning permission in the terms used in its allegation. Therefore, notwithstanding the limitations on what can now be done under S177(5) of the Act, the appeal under Ground (a) is not the most appropriate way forward. The fairest and simplest way to achieve justice in this case would be to allow a planning application to be made and determined.

### **Case for the Council**

6. The Council did not see what would be realistically achieved by an adjournment which would necessarily be prolonged. The matter was first set to be dealt with at a Hearing in May 2012, but was adjourned and the procedure changed by the Planning Inspectorate to an Inquiry. The Council were told that a planning application was imminent but nothing has been forthcoming. Drawings were presented to them one week before the Inquiry and they were very different from those produced several months earlier.
7. In the period during which this appeal has been live progress could have been made with monitoring of the ground conditions on the appeal site, but nothing has yet been done. The Appellants are now seeking an adjournment of some 12 to 18 months and possibly longer. The issues are not narrowed in the Council's view.
8. The Appellants have already had a lot of time in which to resolve this matter, but they have not presented anything which has demonstrated to the Council that they can finish the development in a manner which would be acceptable in terms of design and land stability concerns. The proposals in relation to design modifications do not overcome the Council's objections. The information provided about land stability does not relate sufficiently to the development as it currently exists and to how it would be completed. The modelling submitted relates to the earlier design and that has not been carried out. In addition, there have been material changes to ground levels on the site.
9. The Council therefore consider that the realistic way forward is for the Appellants to abandon this route of challenge and then to put in a planning application based upon what they wish to achieve.

### **My Ruling**

10. Given the complexity of this case, and the uncertainties relating to accuracy of drawings, the level of disagreement between the parties, and the issues of land stability, it is tempting to seek to resolve them in an alternative way to determining this appeal. However, for the following reasons I found that it was more appropriate to proceed with the Inquiry.
11. First, a protracted period of adjournment would be required. I estimate a period of 18 months to 2 years. That is based upon the need for stability modelling of the site, which could take up to 1 year. Then scheme design, stability works design, agreement with a third party whose land would be affected, and agreement to the design by the Highway Authority to retaining proposals affecting their land.
12. Second, there is a poor record of performance in relation to progress on this matter. This leads me to be sceptical that any agreed period would be adhered to. There would have to be considerable willingness on both sides, and there is nothing to support the suggestion that the future would be any more productive in this context than the past.
13. Third, there is no certainty that agreement would be reached on a final scheme. Substantial differences remain between the parties about the design, appearance and land stability issues. The issues have not been narrowed to a degree where there can be confidence about agreement. Consequently, there would be a real prospect of the matter being further protracted by another appeal.
14. Fourth, the scope for adaptation of what exists on site to a development acceptable to the Council seems, on the evidence before me so far, limited at best, and probably impossible having heard the comments made on this aspect of the case.
15. I accepted, at the beginning of the inquiry, that these conclusions may, to some extent, have pre-judged the evidence because it had not been subject to scrutiny through the inquiry process. This was a further reason for finding it reasonable and appropriate in the interests of natural justice, to continue with the inquiry and to determine the appeal. That will, if the weight attached to the previous appeal decision is an accurate guide, at least increase the degree of certainty in what I find to be a complex case.
16. For these reasons the application for an adjournment was refused.

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## **Nullity**

### **My Preliminary Ruling**

17. The Appellants raised the question of whether the enforcement notice which is the subject of the appeals is a nullity. Given the consequences which might flow if that assertion were correct, I heard submissions from both parties and made a ruling which is set out below.
  - (a) I have carefully considered the question of nullity. Whilst I understand Mr Horton's concerns about the distinction between carrying out development in the absence of planning permission compared with development not in

accordance with an extant planning permission, the fact remains that, as he concedes, the legal authorities indicate no distinction.

- (b) The notice before me does state the breach of planning control and what is required to remedy that breach. It accords with the Act. Whether or not the remedy is reasonable is a matter before me under Ground (f).
- (c) I accept that there are limitations to my powers under the deemed application in terms of what the Appellants seek, but they are no greater in this instance than usual, save for the fact that any permission, if granted, would be subject to the issues raised by inaccurate plans. That is not sufficient to render the notice a nullity on its face, though it may be difficult in practice to administer.
- (d) For these reasons I have reached the view that the case for nullity is not sufficiently compelling for me to make a definitive ruling at this point. That does not preclude such a course if, having heard all the evidence, I am so persuaded.

### **Background Facts**

- 18. The Appellants continue to maintain their stance that the enforcement notice is a nullity. Having now heard the evidence and considered the written submissions of both parties on the matter my final view is set out below.
- 19. There have been 2 enforcement notices issued in relation to the appeal development. Both sought to address the same issues, but they were couched in different terms. The first notice was issued on 1 May 2009 and the alleged breach of planning control was stated as "*without planning permission the partial erection of a dwelling which does not have the benefit of planning permission as it does not accord with the approved planning permission no W2007/1581....*". Reference was also made to minor revisions to the approved scheme and some 17 bullet points identified works considered to be at variance with the planning permission. The requirements were to cease all work on the site other than work that is authorised by the planning permission and its minor amendments and, to remove all work which is not in accordance with those permissions.
- 20. The Appellants consider that the alleged breach of planning control in this notice was fully expressed and purported to indentify the respects in which the dwelling, as built, did not accord with the planning permission. They also contend that the notice did not require demolition of the building, but only removal of the work not in accordance with the identified planning permissions. Notwithstanding this, the Appellants also contend that the first notice was a nullity, which the Council do not accept.
- 21. That notice was withdrawn by the Council in response to a threat by the Appellants to commence judicial review proceedings in relation to its validity. This approach was considered the most pragmatic by the Council and its legal advisor because such proceedings, whatever their outcome, would be costly and it was considered to be more expeditious to allow the Appellants to argue their case in the context of a planning appeal. The first enforcement notice had taken effect and so no planning appeal could be made unless it was withdrawn and a new notice issued.
- 22. A second enforcement notice, which is the subject of this appeal, was issued on 25 November 2011. This stated the breach of planning control as "*without planning permission, the partial erection of a dwelling on the Land*". The requirements were to demolish the partially built dwelling; and remove from

the land all resulting debris including the foundations of the building, all building materials and building equipment.

23. The Appellants contend that, since it does not acknowledge that planning permission has been granted, and it does not identify the particular respects in which the erection of the dwelling does not accord with that permission it is "*oppressive in the extreme*" and unclear in its terms.

#### **Reasons**

24. An enforcement notice is a nullity only if it is defective on its face, which means that it lacks some essential constituent or is incapable of being understood. S173(1) of the Act, as amended, requires an enforcement notice to state the matters which appear to the local planning authority to constitute the breach of planning control and the paragraph within S171A(1) within which in the opinion of the authority the breach falls. The former is stated in clear terms and the latter is identified in paragraph 1 of the notice. The issue between the parties is whether the breach is identified with sufficient precision.
25. What exists on the site is clearly a partially erected building and its overall appearance and general layout strongly indicate it to be a dwelling. Furthermore, those facts are not disputed. The alleged breach of planning control makes no mention that the building was purportedly being erected pursuant to a planning permission which had been granted. However, the evidence adduced as to the degree of deviation from the approved development leaves no doubt that the partially erected building on the site is sufficiently different from that approved to conclude that it is in breach of planning control. That view is reinforced by the fact that no appeal is pursued under Ground (c). Furthermore, case law<sup>1</sup> indicates that when a development is materially different in some respect from that permitted, then the whole development is unlawful, not merely those parts which are at variance.
26. The question raised by the Appellants is whether it is reasonable to not identify each and every particular which is at variance with the approved development because they contend that only by doing that can the average person know what he has done wrong. The word used in the statute in relation to identifying the breach of planning control is to "*state*" it, whereas the requirements must be "*specified*". I agree with the Council that the former implies a more general approach than the latter. Furthermore, case law<sup>2</sup> indicates that the breach is a matter which is capable of variation if the facts, as ascertained through the appeal process, indicate it to be necessary. That does not suggest to me that forensic or detailed precision in the description of the breach of planning control is fatal, though accuracy should always be sought.
27. In addition, if as they claim, the Appellants were erecting the dwelling pursuant to a planning permission, they were in a position to compare the building with the approved plans. In this case there were ambiguities in the plans. Some of these were resolved during the course of the Inquiry. However, a planning permission should be clear on its face and the drawings which accompanied it should be read within their four corners. This clearly gave rise to some problems.

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<sup>1</sup> Sage v SSETR and others [2003] UKHL 22

<sup>2</sup> Miller-Mead-Mead v Minister of Housing and Local Government [1963] 2 QB 196

28. Nevertheless, some variations in the building as erected are not, in my judgement, the result of misinterpretation. The building is longer and wider than shown on the plans. The basement is different and ground levels have been changed to accommodate an exposed basement on the south elevation where a concealed basement with a small light-well is shown on the plans. The full extent of the variations was also known to the Appellants because they had been identified in the previous enforcement notice. Consequently, I do not accept that the briefer terms of the notice before me were not capable of being understood by the Appellants or ascertained by others.
29. The Council contend that the approach adopted in either of the 2 notices would be acceptable. In the case of a partially erected development it may well be prudent to adopt the approach in the notice before me, because anything which is not identified in the alleged breach is not addressed, and failure to cover each and every item in the requirements could lead to unintended elements of under-enforcement.
30. The Council's case is that the development on the appeal site is not in accordance with the planning permission granted, and in their view it cannot be modified to comply with it. The Council do not accept the Appellants' assertion that they did not wish to compel demolition of the building because this was strenuously denied at the Inquiry. The Council regard demolition of the whole building as the only practicable means of remedying the breach of planning control because piecemeal alteration is not practicable due to the degree of variance from the approved scheme and other factors. There is evidence which supports that view and so it cannot be regarded as an unreasonable approach. Whether or not that view is correct, it is the basis upon which the notice was issued and, in that context, it is clear and unambiguous.
31. The partially built dwelling was the subject of a retrospective application for planning permission which was refused by the Council and dismissed on appeal on 22 April 2010. The Inspector on that occasion found some of the variations from the originally permitted development to be acceptable. However, two key issues were identified. First, the level of the entrance door in relation to the street. By extension it may be considered that this extends to the ground floor level as well. Second the introduction of a beam and block floor over voids between the walls of the building and parts of the site. Those matters led to the appeal being dismissed.
32. Some issues were not addressed by that Inspector, such as the discrepancies or anomalies between the various drawings, and altered site levels. Also, doubts have been raised about the accuracy of some of the drawings presented in support of the application before him, and those may not have been raised at that time. In addition, the implications of land instability were not considered in any particular detail. The Appellants no longer seek to install the beam and block floor and the Council subsequently conceded that the increased footprint of the building was acceptable in the light of the appeal decision. However, other matters remain contentious.
33. The Appellants also rely on estoppel arising from the Council's behaviour in relation to the first notice. The Council are correct, in my judgement, in saying that case law<sup>3</sup> indicates that estoppel specifically within the field of planning

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<sup>3</sup> R v East Sussex CC ex p Reprotech (Pebsham) Ltd [2002] UKHL

law is at an end. I also note that the case cited by the Appellants<sup>4</sup> in support of their contention was from a lower court and of an earlier date than that cited by the Council. The latter must therefore take precedence and is unequivocal in its terms.

34. The Appellants' case is not supported by legal authority<sup>5</sup>. It is based upon their assertion that there should be a legal doctrine that, where permission has been granted, but to some degree or other is alleged not to have been in accordance with it, the notice should acknowledge the existence of the permission and it should specify the lack of accordance with it. However, that would seem to go in the opposite direction to case law<sup>6</sup> and modifications to the statute<sup>7</sup> which have sought to remove excessive detail and complexity from the enforcement regime to avoid notices failing for purely technical reasons. Furthermore, if a building is erected in a manner which does not accord in some material respect with the planning permission authorising it, there exists no permission for it. If the variation from the permission is not material, then enforcement action would not be expedient. Consequently, I consider that the enforcement notice in this instance is appropriately drafted and I do not find the Appellants' argument persuasive in the light of clear jurisprudence which indicates otherwise. Indeed, that "*seems to invite a robust approach by the courts in future to dismissing technical challenges based on the wording of enforcement notice allegations*"<sup>8</sup>.

#### **Decision**

35. I find that the enforcement notice which is the subject of the appeals to be clear and unambiguous in stating the breach of planning control alleged, subject only to the facts supporting that, and in specifying the means of remedying that breach, subject to considerations which might arise under Ground (f). Therefore I find it to be a valid enforcement notice.

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## **Procedural Matters**

### **Background to the Decision**

36. The inquiry sat for 6 days on 23 October 2012; 16, 17 and 18 January 2013; 27 and 28 February 2013. On the last day there was a dispute about the admissibility of further evidence from the Appellants. That evidence related to the geotechnical issues of the appeal site. Having considered the matter I suggested that the most efficient solution would be for me to formulate my decision on the matters of nullity, the extent of my powers to deal with the deemed application and the appeal under Ground (a), and any other matters including determination of Grounds (f) and (g), if they did not require consideration of the geotechnical information from either side. Depending upon my decision on some or all of those matters, it might not be necessary to consider the geotechnical evidence. If it were necessary, then the inquiry could be resumed to complete that element of the case. This process might save abortive work for the parties and inquiry time for everyone. Both parties were in full agreement with this approach.

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<sup>4</sup> R (oao Niaza) v The Independent Assessor [2008] EWCA Civ 755 and R (oao Niaza) v The Secretary of State  
<sup>5</sup> Miller-Mead v Minister of Housing and Local Government [1963] 2 QB 196

<sup>6</sup> Ormston v Horsham RDC (1965) 63 LGR 452; and Eldon Garages Ltd v Kingston-upon-Hull BC [1974] 1 All ER 358

<sup>7</sup> Subsequent to the Carnwath Report – Enforcing Planning Control 1989

<sup>8</sup> Paragraph P173.12 at p2-3622 Encyclopaedia of Planning Law

### **The Inquiry**

37. At the end of the proceedings the inquiry was not closed. A resumption date and venue were arranged and agreed, together with a timetable for the preparation of closing submissions which were to be done in writing. Those submissions were received well within the agreed timetable and before I commenced my decision.

### **Costs Applications**

38. The Council have already indicated that they wish to make an application for an award of costs. The Appellants have reserved their position on this matter. It was agreed at the inquiry that such applications, if made, should be in writing. The timetable for this will be submission of any application by either side to the Planning Inspectorate by 24 April 2013. These will be copied to the other party and any responses should be submitted to the Planning Inspectorate by 1 May 2013. They will be copied to the other party and any final comments should be submitted by 8 May 2013. All of the documents will then be passed to me and I shall decide the applications. Following dispatch of any costs decisions the inquiry will be closed in writing.

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### **Appeal 1: Ground (a) and the Deemed Application**

39. The deemed planning application is for the operational development which has been carried out. That is defined by the alleged breach of planning control and, where that is modified in the light of the facts, the terms of the deemed application would be similarly modified. There are wide powers of correction<sup>9</sup>, but they are limited to the extent that planning permission cannot be granted for something materially different from that enforced against.
40. In this case the enforcement notice alleges "*the partial erection of a dwelling...*". The provisions of S177(5) of the Act suggest that in such circumstances planning permission could not be given for more than a partially completed dwelling. However, where planning permission is considered appropriate and the nature of the finished building is known, it may be pragmatic to treat the deemed application as being for the building as completed, requiring by conditions the submission and approval of any unknown details. Such an approach is entirely dependant upon the facts in any particular case.
41. The pertinent facts in this instance are that planning permission was granted in 2001<sup>10</sup> for a 2 storey 2 bedroom dwelling. Another planning permission was granted, subject to conditions, in 2002<sup>11</sup> for the "*erection of a detached dwelling with balcony, 0.9m high brick boundary wall and construction of a new vehicular access*" on the appeal site. That permission was renewed in 2008<sup>12</sup> and some changes to it subsequently agreed by a letter dated 22 August 2008. The principle of a dwelling being acceptable on the appeal site is, therefore, not in dispute and both parties have confirmed that to be correct. It is the 2008 planning permission, as amended, which the Appellants contend that they sought to implement, and the Council does not dispute that.

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<sup>9</sup> R v SSE Ex p F Ahern (London) Ltd (1990) 59 P&CR 133, [1989] 2 PLR 96, [1989] COD 564 QBD; Simms v SSE & Broxtowe BC [1998] PLCR 24

<sup>10</sup> Application references W2001.0471 and W2001/0472

<sup>11</sup> Application reference W2002/1090, dated 3 June 2002

<sup>12</sup> Application reference W2007/1581, dated 14 January 2008

42. The plans which formed part of the planning application were not numbered, but it was agreed to refer to them as Inquiry Plans 1, 2 and 3, and those which accompanied the proposed amendment are Inquiry Plans 4 and 5<sup>13</sup>. The planning permission refers to the plans accompanying it and Condition 2 requires that *"The development shall be carried out strictly in accordance with the deposited plans and drawings."*
43. Inquiry Plan 1 contains a site plan, 3 floor plans, 4 elevations and a sketch view of the proposal from the rear (south). It contains a number of anomalies:
- (a) The basement plan shows a light well with a spiral stair in the centre of the south face of the building. Each room has French doors opening into the light well. The flanks of the light well are enclosed by the outer bedrooms. The south elevation shows railings in the centre part of the ground floor reflecting the location of the light well.
  - (b) The ground floor plan indicates a "well" on either side of the south face of the building, but shows French doors in the centre opening over the void. That reflects the arrangement depicted in the sketch view which shows railings to either side of a central area at ground level. The railings appear to delineate light wells open to basement level on either side.
  - (c) The south elevation shows French doors on either side of a central window on the ground floor, but the sketch shows a central French door with windows to either side.
  - (d) The south elevation has windows and a central French door shown in broken lines beneath the Ground floor, but this does not reflect what is shown on the basement plan and does not therefore accord with the convention of broken lines indicating something actually concealed from the plane of the drawing.
  - (e) The east and west elevations are incorrectly labelled. That labelled east is actually west and that labelled west is actually east.
  - (f) Neither the east nor west elevation shows any indication of the presence of a basement, and the ground line is shown to be level from the front to the rear of the dwelling.
44. Inquiry Plan 2 contains three small detail sections and details for the entrance gate.
- (a) Section A-A is through the basement light-well and accords with the arrangement shown on the basement plan. It also notes a reinforced retaining wall on the south side of the well.
  - (b) Section B-B also shows the basement light-well looking towards the dwelling. It also accords with the arrangement on the basement plan.
  - (c) The third section shows a boundary wall along the north side of the site and indicates the road level to be above the paving level. No dimensions are given and a scale of 1:50 is stated. However, the size of the bricks shown suggests a scale of 1:20 and the measurement from the drawing at that scale indicates a difference in levels of some 370mm.
45. Inquiry Plan 3 appears to have had several incarnations. However the one which is relevant is stamped by the Council as an approved plan with the date 3 June 2003. It shows a number of levels across the appeal site from a datum comprising an inspection chamber cover in Coalport High Street. The levels indicate a fall across the site from the edge of the carriageway of 1m or less. That information is supported in the officer's delegated decision appraisal/report<sup>14</sup> which states *"The site is a flat former car parking area for*

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<sup>13</sup> These are contained in Appendix 3 to the Council's evidence

<sup>14</sup> Appendix 2 to the Council's Evidence

*the adjacent grade two listed building, Brewery Cottage*". The drawing is labelled, in manuscript, "As Existing Approval" and "Approved" Two Bedroom Cottage at Brewery Cottage, Coalport. This refers to a former scheme because the floor plans indicate the application dwelling would contain 3 bedrooms. However, there is nothing in the documents before me to suggest that the levels indicated were not relevant to the application before the Council and the other drawings do not state any levels.

46. Inquiry Plans 3 and 4 appear to be reproductions of the elevations contained in Inquiry Plan 1. However, the flank elevations are correctly labelled, but show the chimney on the west gable rather than the east as previously, and the west gable has a similar arrangement to that shown formerly on the east but with the addition of a window at first floor level.
47. Extrinsic evidence is not generally permissible when interpreting a planning permission<sup>15</sup>. However, the ambiguities which arise from the discrepancy between the various drawings may be considered to come within one of the three acknowledged exceptions to this rule<sup>16</sup>. An explanation of some of the discrepancies was given at the inquiry by the architect who drew the plans and was responsible for submission of the planning application. It seems that the then applicant sought changes to the proposal during the course of the application and the drawings were amended to reflect these, but only in part.
48. The original design comprised a basement which was fully underground but with a single light well located centrally along the south elevation as shown on the basement plan on Inquiry Drawing 1 and sections AA and BB of Inquiry Drawing 2. That was subsequently modified to a fully sub-surface basement but with two light-wells with a central entrance on the ground floor as portrayed in the sketch view on Inquiry Drawing 1. The inconsistencies arose because the drawings were not fully amended to reflect this change.
49. Notwithstanding this lack of clarity, the fact remains that neither variant of the proposal shown on the approved drawings is reflected in what exists on the appeal site. A substantial material difference is that the basement, as built, was not in accordance with the proposal for which planning permission was granted. The basement walls are constructed without damp-proofing and in a manner which would be inappropriate and inadequate to retain ground a full storey high behind them as the proposal, in either variant shown on the drawings, intended.
50. The footprint of the building, as erected, is larger than was permitted. The ground levels of the site appear to be materially different from those which can be taken to have existed when the application was made or those shown on the approved plans (Inquiry Plan 3 is stamped approved). Again, what was intended or approved remains unclear. The flank walls of the basement are currently exposed above ground level to varying degrees, and the level of the ground floor entrance, and upon my reading of the plans the entire ground floor, is higher in relation to the road level than was permitted.
51. Other inconsistencies with the approved plans were identified by the Council at the inquiry. Most are within modest limits of about 100mm to 200mm and, whilst regrettable, they are not material to the Council's reasons for taking

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<sup>15</sup> Miller-Mead v Minister of Housing and Local Government [1963] 2 QB 196; Slough BC v SSE [1995] JPL 1073

<sup>16</sup> Staffordshire Moorlands DC v Cartwright [1992] JPL 138 at 139

enforcement action, though they do add a further layer of uncertainty about how the building could be completed.

52. Notwithstanding all of the above discrepancies and variations, the planning permission could form the basis of the deemed application. However, I consider that it is not possible to return the building as erected to that form because the variations in size, arrangement, relationship with ground levels and the site generally, and construction adopted are too great to practicably reinstate. However, case law<sup>17</sup> indicates that an "*inspector has wide powers to decide whether there is any solution, short of complete remedy of the breach, which is acceptable in planning terms and amenity terms*". It is necessary, therefore, to consider whether the development as it exists could be completed in some other defined form which would be acceptable.
53. A further planning application was made to the Council in May 2009<sup>18</sup> in an attempt to regularise the development as built. That was refused by the Council, and dismissed on appeal<sup>19</sup>. The proposal was, therefore, the subject of required scrutiny and public consultation at that time and I consider that it is, therefore, appropriate to consider whether completion in accordance with that would be acceptable in planning and amenity terms, subject to any amendments which can be appropriately considered.
54. The plans which formed part of that application were again unnumbered but comprised:
- a) A drawing depicting the north and west elevations as proposed to be completed from the as built structure. This states the ground floor (entrance) level to be 0.5m above road level. It also states the height from ground floor level to roof ridge to be 8m. The basement is depicted by broken lines, but there is no ground line shown on the west elevation.
  - b) A drawing depicting the south and east elevations as proposed to be completed from the as built structure. It indicates the basement to be above ground level; an area adjacent to the west elevation covered by a beam and block floor with a void beneath it and a retaining wall along its western flank. The drive is shown to fall by about 1.5m from the entrance gate and a slope to the ground is shown on the eastern part of the south elevation suggesting that the ground may rise up in relation to the façade.
  - c) A site plan shows the area beneath the beam and block floor to be proposed for car parking. The levels given indicate it to be some 2m below the datum level which is the inspection chamber in Coalport High Street. The retaining wall beyond this extends around the north and east sides of the building 1m or so from it and with the ground at the same level as the parking area. The wall also returns along the south side of the building along about a third of the length of the south façade.
  - d) A section drawing shows the retaining wall along the north side of the building with the void between it and the north wall of the building closed off with a beam and block floor.
  - e) There are also three floor plans which indicate a different arrangement of the living accommodation, though it would still comprise 3 bedrooms.
55. It is readily apparent when these drawings are compared with those approved in 2008, that there are substantial differences in both the layout of the dwelling, but more importantly, the layout of the site and the building's

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<sup>17</sup> Tape Crown Ltd v FSS and another [2006] EWCA Civ 1744

<sup>18</sup> Application reference W2009/0671 dated 25 May 2009

<sup>19</sup> Appeal reference APP/C3240/A/09/2119098 issued 22 April 2010

- relationship with that. The development proposal permitted had a fully concealed basement and would, therefore, have appeared as a two storey building from the outside, save for the light well in whatever form. The 2009 scheme has the basement exposed, albeit concealed in part by the beam and block floor. Nevertheless, the building would be three storeys high on the south side and the relationship with the ground levels generally would be very different from that previously permitted.
56. The appeal decision is a material consideration of significant weight in terms of the acceptability of the proposal on grounds of planning and amenity. The Inspector on that occasion accepted that the variation in footprint from the previously approved proposal was acceptable. Given that it amounts only to about 1.75m increase in length and 0.2m in width I agree. He also found the height of the dwelling shown on the submitted plans to be broadly similar to what had been previously approved and acceptable. I agree with the previous Inspector's conclusion that the stated overall height remains within limits which would be acceptable. However, his conclusion was predicated on discounting whether it could be accommodated within the compass of what has been built. For clarity, my conclusion is based upon the height quoted being measured from the originally approved ground floor level which was 370mm below road (carriageway channel) level outside the entrance. Otherwise the Council's contention that the height would more than the 8m stated would be correct, and I agree that would represent an unacceptable increase in terms of the bulk and scale of the building having regard to the neighbouring listed buildings.
57. The architectural details of the proposal were somewhat lacking but the previous Inspector found that these could be adequately resolved and secured by the imposition of planning conditions on any permission granted. I agree.
58. There were, however, two points of concern for the previous Inspector which were sufficient to result in the appeal being dismissed. The first, with which he had "*significant difficulty*", was that the entrance door on the frontage was raised significantly above the level of the road and pavement. According to the drawings it was 0.5m above road level, whereas the formerly approved drawings showed it to be 0.37m below. By contrast the adjacent listed buildings along Coalport High Street all have entrances set well below road level. This development was found to not reflect a very important contextual detail, a judgement with which I concur.
59. The second concern related to the exposure of the basement on the frontage and the means of obscuring it by means of a beam and block floor. I read this concern to extend to the west flank of the building, as is shown on the rear elevation, because the Inspector referred to this level being taken around to the front. Again his concern related to the height of this surface above the road and its appearance, and the impact of these upon the context and setting of the listed buildings. I also agree with his conclusion on this matter for the reasons he gives.
60. Accordingly, I find that the proposal depicted in the 2009 planning application would not provide the basis for a completion of the building which would be acceptable in planning or amenity terms, even allowing for much of the detail to be provided by means of planning conditions. In reaching this conclusion I have considered whether the overriding objections to that scheme could be overcome.

61. Some solutions were proposed by the Appellant in drawings submitted in September 2012<sup>20</sup>, which sought to address these objections. They propose a retaining wall adjacent to the front boundary of the site with the ground between it and the front wall of the appeal building reinstated to form a lower house footpath between. The flank elevations show the ground level sloping down to the south across the site and splayed walls to the south elevation retaining the ground until it reaches basement level. The ground floor is partly lowered in the vicinity of the entrance to permit that to be 150mm below road level. The internal layout of the building is also different from that previously proposed.
62. These proposals were intended to comprise a planning application. The application was submitted, but has never been registered by the Council. It is not, therefore a matter which is formally before them for determination. Had it been so, I consider that I could not take it into account since that would have potentially fettered the Council's powers to determine the application.
63. Nevertheless, whatever the merits or otherwise of this proposal, there is a fundamental reason why it cannot form the basis for completion of the existing building under the deemed planning application or Ground (a) appeal. It is materially different from the planning permissions granted. It is also materially different from the 2009 planning application, which was found to be unacceptable in planning and amenity terms. Also, it has not been subject to the consultations and examination which they underwent and which are required by legislation. For these reasons I find that considering this proposal would extend beyond my powers under Ground (a) and the deemed application.
64. Even if that were not the case, there remains significant disagreement about many elements of the design which remain insufficiently detailed and clear to provide confidence that the building could be constructed as shown on the drawings. Furthermore, what the drawings do show is a very different relationship between the building and its site from previous proposals. Whilst discussion during the inquiry suggested that the structural issues of retaining the ground and providing adequate damp proofing might be resolved, the manner in which they would affect the appearance of the building and its setting remains imprecise. The issues are too complex, in my judgement, to confidently rely upon planning conditions to resolve them because material variations to the relationship of the building with the site may be required, and planning conditions cannot adequately cover such matters.
65. There is compelling evidence before me which demonstrates that the appeal building is not capable of practical adaptation or completion in a manner where the nature of the finished building is known and which would be acceptable in terms of planning or amenity. Accordingly, the appeal under Ground (a) fails and planning permission will not be granted for the deemed application.

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### **Appeals 1 & 2: Ground (f)**

66. It follows from my conclusions above that the measures suggested in the 2009 planning application would not adequately alleviate the effects of the development to succeed under Ground (f). Those suggested in the scheme

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<sup>20</sup> Inquiry Drawings 6 to 12

shown on Inquiry Plans 6 to 12 may go some way to alleviating the identified harm. However, the structural and design issues are by no means straightforward. I have concluded that, for this reason, the matter would be an inappropriate subject for planning conditions. For the same reason I find that it would be impracticable and imprudent to seek to control those matters through requirements in the Notice under the provisions of Ground (f). Accordingly, I find that, in the absence of firm and clear proposals as to how the building can be completed in a manner satisfactory in terms of planning and amenity, the requirements of the Notice are not excessive. Accordingly, the appeals under Ground (f) fail.

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### **Appeals 1 & 2: Ground (g)**

67. The appeals under Ground (g) were initially predicated upon the selective demolition of parts of the building to comply with any requirements arising from success under Ground (f). That circumstance does not arise and complete demolition of the building remains as a requirement of the Notice. It has not been suggested that this would need a longer period than the Notice provides. In any event, should that be genuinely the case, the Council have powers<sup>21</sup> to extend the period for compliance if due diligence has been demonstrated or other circumstances require it. For these reasons the appeals under Ground (g) fail.

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68. In the light of the above decisions, the evidence relating to the geotechnical conditions on the appeal site does not need to be considered.

**Keith Turner**

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<sup>21</sup> S174A(b) Town and Country Planning Act 1990, as amended

## Appearances

### FOR THE APPELLANT:

Matthew Horton QC	Instructed by Higgs and Sons Solicitors
He called	
Chris Bean BA(Hons)	Formerly of Bleazard & Galletta
Andrew Williams BA(Hons) Dip LA CMLI DipUD	Urban Designer with Define

### FOR THE LOCAL PLANNING AUTHORITY:

Sarah Clover of Counsel	Instructed by Head of Legal and Democratic Services T&W BC
She called	
David Jones BSc(Hons) MPlan	Planning Enforcement Officer T&W BC
Valerie Hulme BA(Hons) BTPI	Area Planning Officer-Team Leader T&W BC
Neal Rushton MRICS	Structures and Geotechnics Team Leader T&W BC

## Documents

- 1 Letter of notification of the inquiry and list of those notified
- 2 Letter, dated 25 October 2011, to the Council from Higgs and Sons
- 3 Copy of Environmental Engineering Response to planning consultation; 3 July 2001
- 4 Copy of letter, dated 8 August 2002, to the Council from Bleazard & Galletta
- 5 Copy of planning officer's appraisal of application W2002/1090
- 6 Bundle of Land Registry entries relating to the appeal site
- 7 Copy of Appendix 8 to Council's evidence for 2010 appeal hearing
- 8 Copy of planning officer's report on application W2001/0471
- 9 Copy of draft minute relating to application W2001/0471
- 10 Copy of consultations relating to application W2001/0471 & 2
- 11 Copy of response to consultation on application W2001/0471 by Environmental Engineering
- 12 Copy of agenda extract relating to application W2000/0733
- 13 Copy of response to consultation on application W2000/0733 by Environmental Engineering
- 14 Copies of 6 case law reports relied upon by the Council
- 15 Notes of meeting between Mr Rushton and Mr Hughes on 15 February 2013
- 16 Final submissions on behalf of the Appellants (on all matters other than land stability)
- 17 Final submissions on behalf of the Council (on all matters other than land stability)
- 18 Reply on behalf of the Appellants to Council's final submissions
- 19 Survey of appeal site dated 30 October 2012 submitted at Inspector's request

## Drawings

- 1 2002 PP drawing: elevations, plans, site plan and sketch view
- 2 2002 PP drawing: detail sections
- 3 2002 PP drawing: block plan
- 4 2008 PP drawing: east and west elevations: See Council's Appendix 3
- 5 2008 PP drawing: north and south elevations: See Council's Appendix 3
- 6 Sept 2012 drawing: south and east elevations
- 7 Sept 2012 drawing: basement plan
- 8 Sept 2012 drawing: north and west elevations
- 9 Sept 2012 drawing: ground floor plan
- 10 Sept 2012 drawing: section through building
- 11 Sept 2012 drawing: first floor plan
- 12 Sept 2012 drawing: site plan
- 13 Dec 2012 drawing: site location plan
- 14 Dec 2012 drawing: block plan
- 15 Dec 2012 drawing: proposed plans elevations and sections
- 16 Dec 2012 drawing: photographs with statement of case
- 17 Drawings a and b: Valerie Hulme's measurements of the existing building
- 18 Drawings attached to Mr Beans's proof: (a) - block plan original (re-stamped)
- 19 Drawings attached to Mr Beans's proof: (b) - original elevations drawing as approved
- 20 Drawings attached to Mr Beans's proof: (c) - Bleazard & Gallatta letter 8 August 2002
- 21 Survey plan stamped received 12 August 2002 + 9 Sept 2002 + 3 June 2003 approved
- 22 Topographical survey 2005