



Appeal Decision

Inquiry held on 15 March 2017

Site visit made on 16 March 2017

by Andrew R Hammond MSc MA CEng MIET MRTPI

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

Decision date: 19 April 2017

Appeal Ref: APP/U5360/X/16/315603
357-359 Kingsland Road, Dalston, London.

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Orland Limited and Blue Chip Trading Limited against the decision of the Council of the London Borough of Hackney.
 - The application Ref 2015/3810, dated 15 October 2015, was refused by notice dated 15 December 2015
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is proposed development of land in accordance with planning permissions 2008/0622 and/or 2011/2876.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed operation which is considered to be lawful.

Main Issues

2. The main issues in the determination of this appeal are:
 - Whether any of the conditions attached to planning permission 2008/0622 and/or planning permission 2011/2876 true conditions precedent;
 - Were the demolition works carried out in 2010 and/or the further works carried out in 2015 lawful or were they in breach of condition;
 - Were the demolition works carried out in 2010 and/or the further works carried out in 2015 material operations capable of commencing the development for which permission was granted; and, therefore
 - Did the works carried out constitute implementation of the planning permission(s).

Reasons

Chronology

3. On 14 March 2008 the appellants made a single joint application for planning Permission and Conservation Area Consent for "Comprehensive redevelopment of the site including demolition...."
4. On 31 March 2009 the Council granted planning permission Ref. 2008/0622 (the 2009 permission) for the 'Redevelopment of site to comprise the erection of a part six-, part seven-storey building containing a 290 room hotel (including restaurant, bar and conference space), with a car park for thirteen vehicles and theatre workshop space (Use Class D1) on the lower ground floor, subject to conditions, and Conservation Area Consent 2008/0740 for the demolition of existing buildings and structures on site to make way for a part six-, part seven-storey building containing a 290 room hotel and theatre workshop space, as per separate planning application ref. 2008/0622. The Conservation Area Consent was subject to two conditions,;
 - 1) The development hereby permitted must be begun not later than the expiration of three years beginning with the date of this consent.
 - 2) The demolition works hereby permitted shall not be carried out otherwise than as part of the completion of development for which planning permission reference 2008/0622 is granted and such demolition and development shall be carried out without interruption and in complete accordance with the plans referred to in this *[sic]* consent and any subsequent approval of details.
5. Starting on 18 March 2010 works were undertaken on the land involving the demolition of existing buildings and structures.
6. On 29 March 2012 the Council granted planning permission 2011/2876 (the 2012 permission) for 'Extension of time period for implementation of planning permission 2008/0622, dated 31/03/2009, for erection of a part six-, part seven-storey building containing a 290 room hotel (Use Class C1) including restaurant, bar and conference space, with car parking and theatre workshop space, (Use Class D1) on the lower ground floor. This permission was subject to a similar schedule of conditions to that imposed on the 2009 permission.
7. In March 2015 further works were carried out on the appeal site. The appellants contend that these works comprised the breaking of a concrete slab and the removal of underground works to facilitate piling of foundations. As such, the appellants maintain that these works constituted a start on site implementing the 2012 permission.
8. The Council maintain that a number of the conditions attached to both permissions were true conditions precedent and hence any works undertaken, including demolition or site preparation works, prior to their discharge cannot constitute implementation of the permission.
9. The appellants have argued that, even if the demolition works were in breach of condition they would have become lawful through the passage of time. There are two fundamental errors in this argument. Firstly, had the works not been lawful at the time they were carried out, they could not have comprised a lawful start of the development. Secondly, had the demolition works been

carried out in breach of condition, no enforcement action could be taken after the end of ten years, and not four, beginning with the date of the breach.

The 2009 Permission

2009 permission, condition 4

10. Condition 4 states

Detailed drawings/full particulars of the proposed development showing the matters set out below must be submitted to and approved by the local planning authority, in writing, before any work is commenced. The development shall not be carried out otherwise than in accordance with the details thus approved.

- windows, glazing bars and architraves
- doors, profiles and architraves
- all clear and obscure glazing
- design and appearance of railings and parapets
- details at a scale of 1:20 of all cladding elements and any structure beneath
- detailed section through first floor cantilever (structure, undercroft treatment and junction with brick
- ground floor elevations, external lighting and signage of the building
- ground floor entrances (porches, canopies etc.)

The reason given for the condition is to ensure that the external appearance of the building is satisfactory and does not detract from the character and visual amenity of the area.

2009 permission condition 15

11. Condition 15 states

no development shall commence until detailed plans and a specification of the appearance of the ventilation of and the equipment comprising a ventilation system which shall include measures to alleviate noise, vibration, fumes and odours (and incorporate active carbon filters, silencer(s) and anti-vibration mountings where necessary) have been submitted to the local planning authority. After the system has been approved in writing by the authority, it shall be installed in accordance with the approved plans and specification before the development hereby approved first commences and shall thereafter be permanently maintained in accordance with the approved specification.

2009 permission condition 14

12. The Council conceded at the inquiry that condition 14 was not a condition precedent, as previously held.

13. In *F G Whitley & Sons v SSW and Clwyd CC [1992] JPL 856177* the Court of Appeal said that the only question to be asked was whether the development was permitted by the planning permission read together with its conditions. If the development contravenes the conditions it cannot be properly described as

commencing the development authorised by the permission. (The Whitley Principle.)

14. However the Whitley Principle is subject to exceptions. Firstly it is necessary to determine whether any condition is genuinely a 'condition precedent'. To constitute a condition precedent it is necessary for the condition to be expressly prohibitive of commencement of development and to go to the heart of the planning permission. [*R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin)178]. Only if both tests are satisfied is it a condition precedent to which the Whitley principle applies and where the development would be development without planning permission. If that is not the case it would be a breach of the condition but the development would not be development without planning permission.
15. The matter was considered further in *Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908. There was no material difference between a condition which expressly prohibited development before a particular matter was approved, and one which required a particular matter to be approved before development commenced.
16. Condition 1 of the 2009 permission requires that *the development hereby permitted shall only be carried out and completed in accordance with the submitted plans hereby approved and any subsequent approval of details*.
17. Condition 4 requires approval of details of certain works before any work is commenced. All of the matters listed within the condition are matters relating to external appearance and capable of being approved after commencement of development but before work on that particular element commences. The overall design of the building is covered by the requirements of condition 1. As such it is not unreasonable to interpret the words 'before any work commenced' as referring to any work on the matters set out. Therefore the condition is not a condition precedent.
18. Condition 15 requires the details of the ventilation system to be approved in writing and to be installed "before the development hereby approved first commences". Quite clearly this is a condition that, as drafted, cannot be discharged or enforced against as it would be an impossibility to install the ventilation system before the development commences. The only reasonable interpretation is that the details must be approved before work involving the ventilation system commences.
19. Neither condition 4 nor condition 15 can be a condition prohibiting development before a matter was approved, nor is either a condition requiring a particular matter to be approved before any development commences.
20. Development on site could, therefore, commence before discharging conditions 4 and 15 without necessarily being a breach of those conditions. They were not true conditions precedent.

The 2010 Demolition Works

21. When the Conservation Area Consent for the demolition of buildings on the site was granted in 2009 a separate planning permission for the demolition was not deemed to be necessary.

22. The consent, ref. 2008/0740 was for the demolition of existing structures on site to make way for a part six-, part seven-storey building containing a 290 room hotel and theatre workshop space, as per separate planning application 2008/0622.
23. There were two conditions imposed on the consent
 - 1) The development hereby permitted must be begun not later than the expiration of three years beginning with the date of this consent.
 - 2) The demolition works hereby permitted shall not be carried out otherwise than as part of the completion of development for which planning permission 2008/0622 is granted and such demolition and development shall be carried out and without interruption and in complete accordance with the plans referred to in this [*sic*] consent and any subsequent approval of detail.
24. It may be that the 'plans referred to in this consent' in condition 2 was intended to read 'the plans referred to in that permission'. However it did not. Nevertheless the demolition works were carried out in compliance with condition 1 and, at the time, there was no indication that the demolition works were carried out for any other purpose than as part of the development for which planning permission had been granted.
25. Although not a matter before this Inquiry, it may be that the Council could have taken enforcement action against the appellants for breaching condition 2 in that the completion of the development did not proceed without interruption following the demolition works. The Council explained at the Inquiry that it was not considered expedient so to do.
26. Nevertheless, the demolition works themselves were carried out in full compliance with the conditions attached to consent 2008/0740 and, for the reasons given above, they could not be considered in breach of any condition attached to planning permission 2008/0622, as none of the conditions prohibited such works or required approval of details before demolition took place, the conditions 4 and 15 could only be construed as referring to the approval of details of construction. The consent and permission followed a single application for 'comprehensive redevelopment of the site including demolition of existing buildings and structures...'.
27. Where the prior demolition of buildings which was part of the total works necessary to complete the development, was carried out by a builder and was the type of operation normally carried out by a builder and the planning permission specifically granted permission for the demolition then those works of demolition marked the implementation of the permission (*Field v FSS and Crawley BC [2004] QBD*) and the beginning of a material operation (s56(2) and (4)) for the purposes of keeping a permission alive has to be more than *de minimis* (*Connaught Quarries Ltd v SSETR & East Hants DC [2001] JPL 1210*).
28. The demolition works, consisting of the removal of buildings and one industrial chimney, the extraction and the making good and preparation of the sub-surface for future works and were carried out by a general building contractor. (Witness Statement of Mr Fergal Morrison). The extent of the works is not contested by the Council and no other purpose of the works, other than preparatory works for the construction of the hotel, has been suggested by the Council or any other party.

29. Although the demolition is not specifically mentioned in the permission, since there was deemed to be no need for separate planning permission for demolition works at the time, the demolition works carried out in 2009, taking the application, consent 2008/0740 and permission 2008/0622 read as a whole, were clearly part of the total works necessary to complete the development permitted by permission 2008/0622, as substantial construction works could not begin until the existing buildings and structures had been cleared from the site.

Conclusions on the 2009 Permission

30. Section 56(2) of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 states that development of land shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. Subsection (4) (aa) defines "material operation" as including any work of demolition of a building.
31. For the reasons given above, the demolition works were a material operation comprised in the development and were not in breach of any condition attached to either permission 2008/0622 or consent 2008/0740.
32. The works carried out in 2010 to demolish buildings and an industrial chimney on the land, together with other works, were material operations sufficient to implement the 2009 permission. The Council's refusal to grant a certificate of lawful use or development was not well-founded.

The 2012 Permission

33. Although the Council contend that the submission of the 2011 application by the appellants indicates recognition that the permission had not been implemented. The appellants explained that the application was submitted following erroneous legal advice. In any event the reasoning above concludes that an application was not necessary.
34. Given that the conclusions above result in a Lawful Development Certificate being attached to this decision, it is not necessary to further consider whether the Council's decision to refuse a certificate of lawful use or development in respect of the 2012 permission was or was not well founded, the permission being described as 'extension of time period for implementation of planning permission 2008/0622 dated 31/03/2009, for erection of a part six-, part seven-storey building containing a 290 room hotel (Use Class C1) including restaurant, bar and conference space, with car parking and theatre workshop space, (Use Class D1) on the lower ground floor.

Overall Conclusion

35. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of proposed development of land in accordance with planning permissions 2008/0622 was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Andrew Hammond

Inspector

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 15 October 2015 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The works carried out in 2010 to demolish buildings and an industrial chimney on the land, together with other works, were material operations sufficient to implement the permission.

Signed

Andrew Hammond

Inspector

Date: 19 April 2017

Reference: APP/U5360/X/16/3153603

First Schedule

Redevelopment of site to comprise the erection of a part six-, part seven-storey building containing a 290 room hotel (including restaurant, bar and conference space), with a car park for thirteen vehicles and theatre workshop space (Use Class D1) on the lower ground floor, in accordance with planning permission 2008/0622.

Second Schedule

Land at 357-359 Kingsland Road, Dalston, London.

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that

described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority. The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.

Plan

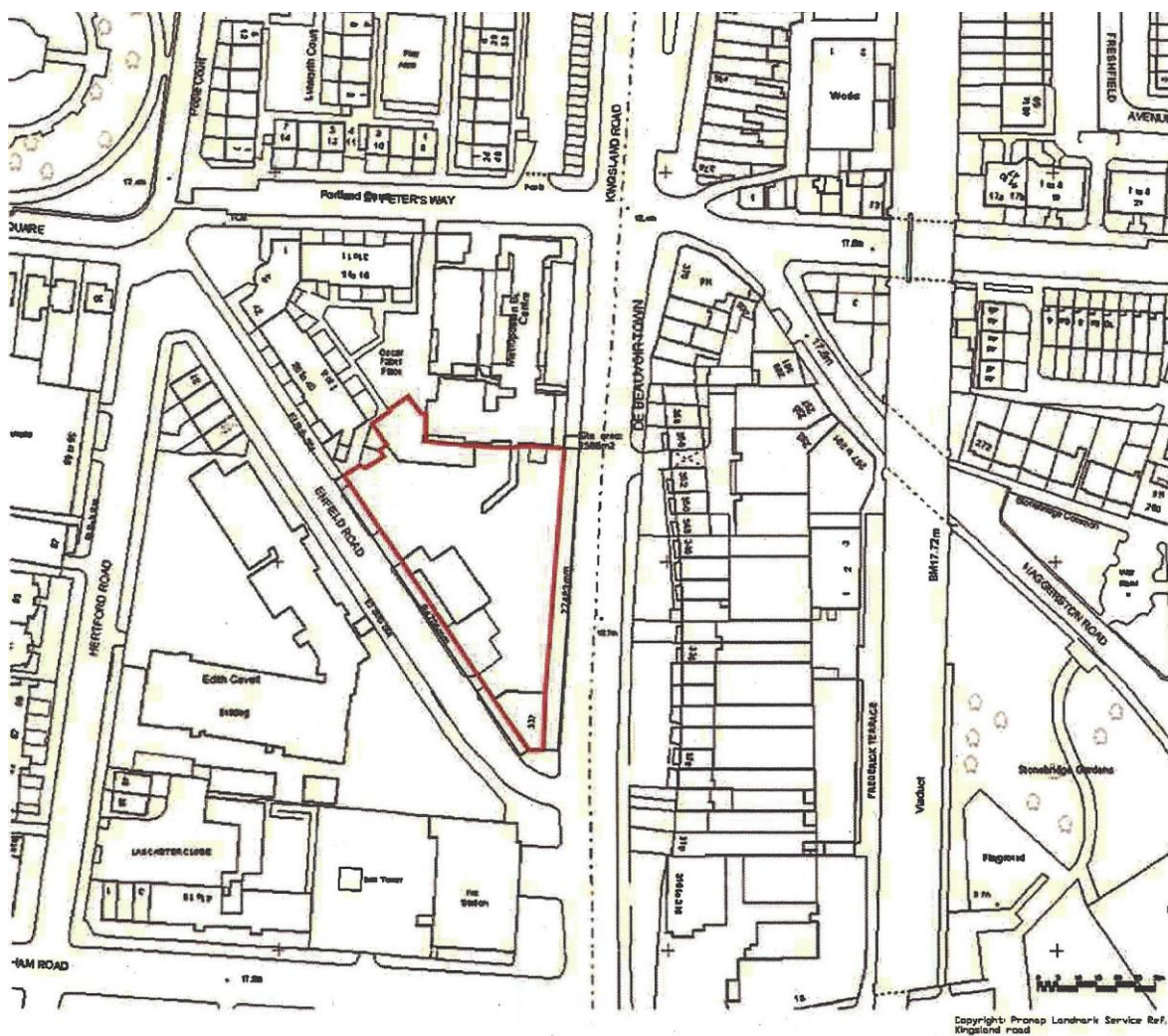
This is the plan referred to in the Lawful Development Certificate dated:19 April 2017

by **Andrew R Hammond MSc MA CEng MIET MRTPI**

Land at: 357-359 Kingsland Road, Dalston, London

Reference: APP/U5360/X/3153603

Scale:NTS



APPEARANCES

FOR THE APPELLANT:

Miss S Sheik QC of Counsel	Instructed by Seddons
She called	
Mr Mandip Sahota	Nicholas Taylor and Associates

FOR THE LOCAL PLANNING AUTHORITY:

Mr N Ostrowski of Counsel	Instructed by the London Borough of Hackney
He called	
Mr Robert Brew	London Borough of Hackney

DOCUMENTS

- 1 Bundle of Authorities, provided by the Appellant