



Appeal Decision

Site visit made on 15 July 2019

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 August 2019

Appeal Ref: APP/N5090/X/18/3217277

83 High Street and 2-8 Union Street, Barnet EN5 5UR

- 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 Mr James Freeman against the decision of the Council of the London Borough of Barnet.
 - The application Ref 18/0771/191, dated 31 January 2018, was refused by notice dated 6 September 2018.
 - The application was made under section 191(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 described as the continued implementation of planning permission N/05621E/07 dated 23 February 2009 granted on appeal following the discharge of all pre-commencement conditions and a lawful physical start on site.
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Summary Decision: the appeal is dismissed

Application for costs

1. An application for costs was made by Mr James Freeman against the Council of the London Borough of Barnet. This application is the subject of a separate Decision.

Procedural matters

2. The description of the development for which a certificate of lawful use or development is sought as set out on the application form is overly descriptive and somewhat cumbersome. For present purposes, I shall therefore abbreviate it to: the implementation of planning permission N/05621E/07 dated 23 February 2009.

Reasons

3. Section 191(4) of the Town and Country Planning Act 1990 (1990 Act) indicates that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operation or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to

grant a Certificate of Lawful Use or Development (LDC) was well founded. In this respect, the burden of proof is firmly on the appellant to show that, on the balance of probability, the development described would have been lawful on the date on which the application was made.

4. The principal question in this case is whether the digging of a trench on or around 13 February 2012 to provide foundations for a security gate was sufficient to initiate the development of land granted by planning permission N/05621E/07 dated 23 February 2009. There is no dispute that the trench was dug before that planning permission lapsed. Although subsequently backfilled, there was clear evidence of the position of the trench at the time of my site visit. By comparing the position of that trench with the extract of the approved plans with which I have been provided, I am satisfied that the trench was dug in the position of the rearmost set of security gates shown on the approved plans.
5. Section 56 (2) of the 1990 Act provides that a development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. Section 56 (4) of the 1990 Act states that 'material operations' includes the digging of a trench which is to contain the foundations, or part of the foundations, of a building. It follows that, if the digging of the trench in this case is to constitute a material operation for the purposes of Section 56 (2) the 1990 Act, the appellant must show on the balance of probability that (a) the trench which has been dug is to contain foundations of a building and (b) that building is comprised in the development granted by planning permission N/05621E/07. It is convenient to consider the former in the first instance.
6. A building is defined by section 336 of the 1990 Act as including any structure or erection and any part of a building. The security gates are clearly shown on the approved drawings as one of two sets of gates within the archway beneath that part of the proposed scheme that would front onto Union Street. I am satisfied that the security gates would be an integral part of a building that itself forms part of the development granted by planning permission N/05621E/07, and as such would in turn fall within the definition of 'any part of a building' for the purposes of section 336 of the 1990 Act.
7. The question remains, then, as to whether the trench was to contain the foundations, or part of the foundations, to support that building. In support of his position, the appellant has provided photographs of the trench at the time it was being dug and a supporting letter from an Architectural Consultant.
8. Turning first to the photographs that have been provided, I note firstly that the photographs do not provide comprehensive coverage of the trench. There are only two photographs showing the open trench, both taken from oblique angles and neither from directly above it. There is nothing in those photographs that to my mind shows actual foundations in place. There is an area of reddish-brown material visible on one side of the open trench that appears to provide some form of step or ledge, but it is not immediately apparent whether this is the foundations or part of the foundations for the security gates. Neither is there any commentary to those photographs in the appellant's written submissions to explain exactly what the photographs show.
9. Nevertheless, I am mindful that the provision in Section 56 (4) of the 1990 Act includes the digging of a trench which *is to* contain the foundations, or part of

the foundations, of a building (my emphasis). Given that the phrasing of this section is in the future tense, it is not determinative whether foundations for the security gates were actually put in place in when the trench was dug in February 2012. I therefore do not need to reach a conclusion on that point but it is then necessary to go on consider other evidence relating to the requirement for foundations to support the security gates.

10. In his supporting letter, the Architectural Consultant expresses the opinion that the width and depth of the trench was appropriate for the security/entry gates of the size approved under permission N/05621E/07. To my mind, a trench that spans the full width of the archway would appear somewhat excessive for security gates where the requirements for structural support is primarily at the sides where the gates pivot.
11. Moreover, beyond expressing the view that the trench was necessary to provide foundations for the security gates, the Architectural Consultant has provided no technical evidence to support that claim. For example, I have been provided with no technical drawings of the foundations, no specifications for the security gates, no information from the manufacturer of the gates stating that foundations are required and no structural calculations to demonstrate that foundations would be required for the security gates. I have no doubt that the Architectural Consultant appointed by the appellant is suitably qualified to express that professional opinion but, in the absence of that evidence, the views expressed remain just that: a professional but unsubstantiated opinion.
12. This is important because the Council challenges that view and queries whether the provision of the security gates required the creation of the trench, suggesting that the gates could be hung from fixings bolted to the wall. That is a valid point with which, in my view, the appellant has failed to properly engage with evidence. In that context, I am mindful that the Council has provided no technical evidence of its own to challenge the view of the Architectural Consultant instructed by the appellant but, in this type of case, the burden of proof is firmly on the appellant. In the event, by not providing detailed evidence of the need for foundations for the security gates, the appellant has failed to discharge that burden.
13. I am mindful throughout that the appeal site was a working bakery at the time the trench was dug and that it was physically not possible to go further in implementing the planning permission at that time. Nevertheless, that can have no bearing on my objective assessment as to whether the works that were actually undertaken, and upon which the appellant relied in his application, constitute a material operation sufficient to initiate the development granted by planning permission N/05621E/07.
14. In conclusion, I am satisfied that the security gates form part of the development of land granted by planning permission N/05621E/07 dated 23 February 2009 and constitute a building for the purposes of the 1990 Act. I am also satisfied that the trench ostensibly dug to contain the foundations for that building was in the correct place. However, on the evidence available to me, I am not persuaded that the building (i.e the security gates) genuinely requires foundations to be contained in that trench.

15. Consequently, I am not, on the balance of probability, satisfied that the digging of the trench constituted a material operation capable of initiating the development granted by planning permission N/05621E/07. In reaching that conclusion, I am mindful that the courts have held that a material operation for purposes of Section 56 (2) the 1990 Act does not have to be extensive¹. However, because my conclusion turns on the purpose of the operation rather than the extent of it, that principle is not a relevant consideration in this case.

Conclusion

16. For the reasons given above I conclude that the Council's refusal to a grant a certificate of lawful use or development in respect of the implementation of planning permission N/05621E/07 dated 23 February 2009 was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Formal Decision

17. The appeal is dismissed.

Paul Freer

INSPECTOR

¹ *Thayer v Secretary of State for the Environment* [1991] 3 PLR 104, subsequently referred to in *Connaught Quarries Ltd v SSETR* [2001] EWHC Admin 76