



Appeal Decision

Site visit made on 25 June 2019

by Mrs H M Higenbottam BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 January 2020

Appeal Ref: APP/N0410/X/18/3208544

3 Lower Road, Gerrards Cross, SL9 0NL

- 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 Sean Reardon against the decision of South Bucks District Council.
 - The application Ref: 18/00820.CLUED, dated 2 May 2018, was refused by notice dated 28 June 2018.
 - The application was made under section 191b of the Town and Country Planning Act 1990 as amended (1990 Act).
 - The development for which a certificate of lawful use or development is sought is that development began on 27 March 2018 in compliance with conditions 1 and 10 of planning permission 14/02394/FUL.
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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 existing operation which is considered to be lawful.

Preliminary Matter

2. The description of development for which a certificate is sought is given in section 8 of the application form and refers to development began on 27 March 2018. However, in section 9 of the form it is stated that works conducted on 27 February 2018 were sufficient to satisfy the requirement of Condition 1 of the planning permission. Neither description relates to an act of development.
3. It is clear that the appellant is seeking to establish that the planning permission granted under reference 14/02394/FUL has been initiated and the relevant permission has commenced and can lawfully be completed on the basis that the works that have been undertaken to initiate the development are in accordance with Condition 1 and that Condition 10 has been satisfied.
4. I will therefore consider the appeal on the basis that it seeks a certificate of lawful use or development for the redevelopment of the site to provide a four-storey apartment block with basement car parking and associated landscaping, construction of vehicular access commenced in accordance with planning permission reference 14/02394/FUL on or before 27 March 2018.

Main Issues

5. The main issue in this appeal is whether the Council's refusal was well founded.

Reasons

6. Planning permission was granted (reference 14/02394/FUL) on 27 March 2015 (2015 permission) for redevelopment of the site to provide a four-storey apartment block containing seven two bedroom apartments with basement car parking and associated landscaping. Construction of vehicular access. (amendment to planning permission 14/00669/FUL). The two conditions of that permission referenced in the appeal are Conditions 1 and 10.
7. Condition 1 of the 2015 permission stated:
'The development to which this permission relates must be begun not later than the expiration of three years beginning from the date of this decision notice'.
8. Condition 10 of the 2015 permission stated:
'No work shall take place, including demolition, until a full survey of the site has been carried out by or on behalf of the applicant, and approved in writing by the District Planning Authority, to ascertain the presence of any contaminants on or under the surface of the site and to determine the potential for the pollution of the water environment. The details shall include appropriate measures to prevent pollution of ground water and surface water, including provisions for monitoring together with any necessary remedial works to render the site fit for use. Such agreed remedial works shall be fully implemented before the development commences and such measures shall thereafter be retained as required by the written approval.'

Were material operations undertaken within 3 years of the granting of the 2015 planning permission?

9. I shall first look at whether or not the works comprising the digging of a trench for the foundations of the bin store have amounted to initiation of the 2015 planning permission.
10. The Council consider that the trench that has been dug is relatively small scale such that it could easily be re-integrated into the unaltered ground and is not, in its view, sufficient to have commenced the development. Although I note that this is a point raised in the submissions on the appeal and not within the decision notice of the appeal application.
11. Where the works carried out are development and the development carried out is comprised in the permission there is little required to initiate or begin development under section 56(1) of the 1990 Act. Section 56(2) further clarifies that development shall be taken to be begun on the earliest date on which any material operation begins to be carried out. Even where works are undertaken solely with the objective of keeping a permission alive, when the developer had no intention at that time to proceed, can be enough to

initiate development comprised in the permission¹. The appropriate test under section 56 of the 1990 Act is objective; the intention of the person carrying out the development is not relevant. The question is, whether what was done had been done in accordance with the relevant permission and was material in the sense of not being *de minimis*.

12. The trench that I saw on site is stated to be a trench for the foundations to the bin store which is part of the development. The appellant states that work on digging the trench for the foundation of the bin store began on 27 February 2018. Photographic evidence was submitted at the time to the Council showing an engineered trench 2.1m long, 1m deep and 0.8m wide. The location and dimensions of this trench are consistent with the initial phase of digging the foundations required for the bin store as approved. The Council do not dispute these statements, albeit they do not consider that these works constituted a material operation.
13. Section 56(4) of the 1990 Act sets out what a 'material operation' under section 56(2) means and it includes '*the digging of a trench which is to contain the foundations or part of the foundations of a building*'. I therefore find that the digging of the trench for the foundations for the bin store building is a material operation under section 56(2) of the 1990 Act.
14. The works on the trench began within three years of the date of the planning permission 14/02394/FUL having been granted². The trench exists, is a trench for a foundation, and is of a large enough size to be a material operation. As such, I consider, on the evidence before me, that the works carried out were sufficient to constitute a material operation comprised in the development granted planning permission under reference 14/02394/FUL, subject to the discharge of any pre-commencement conditions.

Is Condition 10 a pre-commencement condition?

15. I will now consider whether or not Condition 10 of the 2015 permission was a pre-commencement condition i.e. condition precedent, and on the evidence available whether this condition has been complied with. Until any matters within any condition precedent has been complied with any works purporting to be commencement or initiation would be unlawful and in breach of planning control.
16. In *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin)¹⁷⁹ it was held that a distinction had to be drawn between a condition which required some action to be undertaken before development is commenced, and a condition which expressly prohibits any development taking place before a particular requirement has been met. It was held that it is necessary for the condition both to be expressly prohibitive of commencement of development and to go to the heart of the permission; only when both tests are satisfied is it a condition precedent to which the *Whitley* principle applies and there would be development without planning permission. If that is not the case, it would be a breach of the condition and there would not be development without planning permission.

¹ *East Dumbartonshire Council v SSS & Mactaggart Mickel Ltd* [1999] 1 PLR 53 which, whilst not binding on the English courts, was followed in *Riordan Communications Ltd v South Bucks DC* [2000].

² The planning permission is dated 27 March 2015 and the works began on 27 February 2018.

17. The subsequent Court of Appeal decision in *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908 applied both the *Hart Aggregates* judgment and the principles set out in *Whitley*. It specifically endorsed the need for the condition to go to the “heart of the matter” to be a true condition precedent.
18. In my view, contamination issues necessarily require assessment of whether there is contamination and what measures of mitigation may be required. As such, I consider Condition 10 goes to the heart of the planning permission as it is something that must be assessed and considered before works begin on site. I therefore find that Condition 10 is a pre-commencement condition.

Was Condition 10 discharged?

19. On 29 April 2016 an application was submitted (reference 16/00859/COND) to fully discharge conditions 3 (Materials); 4 (Hard surfacing); 5 Landscaping); 10 (Contaminated land); 11 (Levels); 16 (Mud on the highway); and 17 (Bin stores). The Council’s decision letter dated 10 October 2016 confirmed formal approval for the details submitted pursuant to Conditions 3, 4, 5, 16 and 17. In relation to the submission made to discharge Condition 10 the decision letter stated that:

The Environmental Health Officer has confirmed that the desk survey is satisfactory but that other phases cannot yet be approved as further testing needs to be done.

As such I can confirm that sufficient information has been received to satisfy part of the condition such that demolition of the existing building can now go ahead. After demolition you are advised to submit details relating to the later phases of the contamination investigation.’

20. The Council acknowledge in the appeal documentation that Condition 10 does not refer to phases of development. The comments on the decision letter dated 10 October 2016 are set out as advisories. However, it is clear that the Council accepted that works could begin on site, and they refer to the demolition of the existing building. While other works are not referred to in the decision letter neither is there a requirement they should not take place.
21. Condition 11 (Levels) details were found to be unacceptable and were not approved. However, a subsequent submission pursuant to Condition 11 (Levels) (reference 16/02124/COND) was approved by letter dated 3 January 2017.
22. The application reference 16/00859/COND was a submission for the full³ discharge of Condition 10 on 29 April 2016, along with other submissions for other conditions pursuant to the 2015 permission. The requirement of Condition 10 was that prior to any work to implement the 2015 planning permission a full survey of the site, to ascertain the presence of any contaminants on or under the surface of the site and to determine the potential for the pollution of the water environment was to be carried out and this had to be approved in writing by the District Planning Authority.

³ In question 5 of the application form it records that the development has not started and it is not completed, as well as confirming that the application is in relation to Conditions 3, 4, 5, 10, 11, 16 and 17. In question 6 it states a site investigation report is provided with respect to condition 10.

23. There has clearly been a submission in writing to the Council to clear the condition and this was approved in writing by the Council with some advisories but not requirements. In approving the details submitted pursuant to Condition 10 it is clear that the Council considered this was sufficient for works to start on site, because it is stated that the demolition of the building can go ahead. There was nothing to state that no other works could be carried out. The building to be demolished as part of the permission has not been demolished and thus the appellant has not acted contrary to the advisory comments the Council set out in approving application reference 16/00859/COND.
24. As such, I find that the Council has consented to works being carried out on the site and there is nothing to suggest that works other than demolition, such that have taken place, were not permitted. The details submitted pursuant to Condition 10 have been approved in writing by the Council and, in my view, Condition 10 has been accorded with, sufficient to begin works. As such, the 2015 planning permission has been initiated lawfully.

Conclusion

- 23 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 the redevelopment of the site to provide a four-storey apartment block with basement car parking and associated landscaping, construction of vehicular access commenced in accordance with planning permission reference 14/02394/FUL before 27 March 2018 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.

Hilda Higenbottam

Inspector

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(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 2 May 2018 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto shaded grey and edged in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

Condition 10 of planning permission reference 14/02394/FUL (the planning permission) was a pre-commencement condition and that the submission pursuant to condition 10 made on 29 April 2016 (reference 16/00859/COND) and approved was sufficient to allow works to begin on the development granted by the planning permission. The digging of the foundation trench for the bin store was sufficient to constitute a material operation comprised in the development granted by the planning permission, and the development was initiated on or before 27 March 2018 in compliance with Condition 1 of the planning permission.

As such, planning permission 14/02394/FUL has been lawfully initiated.

Signed

Hilda Higenbottam

Inspector

Date 20 January 2020

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First Schedule

The redevelopment of the site to provide a four-storey apartment block with basement car parking and associated landscaping, construction of vehicular access commenced in accordance with planning permission reference 14/02394/FUL before 27 March 2018.

Second Schedule

Land at 3 Lower Road, Gerrards Cross, SL9 0NL

NOTES

This certificate is issued solely for the purpose of Section 191 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 was /were 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.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 20 January 2020

by Mrs H M Higenbottam MRTPI

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Scale: nts

