



Appeal Decision

by Roy Curnow MA BSc(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 September 2020

Appeal Ref: APP/U1105/X/20/3244399

Site of Spillers Cottage, Road from Pear Tree Cottage to Deep Cut Farm, Shute, Devon EX13 7QG

- 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 Derek Branker against the decision of East Devon District Council.
 - The application Ref 19/1787/CPE, dated 31 July 2019, was refused by notice dated 14 October 2019.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is the excavation, laying out and back filling of an inspection chamber and associated pipework ready to connect to a new septic tank for the foul sewage system of the new house granted planning permission reference 7/87/91/P0654/00119 on 24 June 1991 and validly implementing that permission so that it remains extant.
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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 found to be lawful.

Procedural Matter

2. The parties were consulted on whether a site visit was required, given the nature of the case and that I was not considering any planning merits. Both agreed that this was not required and, as no party would be prejudiced, the appeal has been determined without a site visit.

Reasons

3. The documentation before me shows the appeal site is located in the open countryside. The red line on the plan that accompanied the application relating to this appeal encloses a small sloping field adjacent to a narrow lane. Towards its northwest corner there are the remains of a small cottage.
4. Amongst its terms, section 191 of the 1990 Act provides the statutory framework for a person wishing to ascertain whether any operations which have been carried out in, on or under the land are lawful. Section 191(2) states that such operations will be lawful if no enforcement action could be taken in respect of them and they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
5. In brief, the appellant seeks a certificate to show that operations undertaken on the site were sufficient to commence planning permission

7/87/91/P0654/00119 (which I shall shorten to 91/P0654 and refer to as 'the permission'). This permission allowed for the erection of a house. In applications for lawful development certificates (LDCs), it is for the appellant to make his case on the balance of probability.

6. I am not told that there was an enforcement notice relating to the site at the time that the application was made. Therefore, in this case the questions to be addressed are, on the balance of probability: whether the work reported to have been undertaken was done so in a timely manner; whether this work was sufficient to lawfully commence the development; and whether there was a breach of a condition on the permission that might have precluded a lawful commencement being made.
7. The permission was granted, subject to 8 conditions, on the 24 June 1991. Condition 1 attached to the permission required the development to be begun within 5 years from the date of the decision – that is to say by 24 June 1996 (the relevant date).
8. Section 56 of the 1990 Act relates to the time when development is begun. Section 56(1)(a) sets out that in cases of operational development a material start is made at the time when those operations are begun. Amongst the material operations that can commence operational development, identified in section 56(4), are (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building; and (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b).
9. A statutory declaration (the declaration) sworn by Mr Ross Dack was submitted with the application. Attached to this were pages from his work diary for the 14 and 19 June 1996. Mr Dack tells how he met a Building Control Officer (BCO) on the earlier date at the site to discuss 'the scope of work to be undertaken'. This was 'specifically excavation, laying and backfilling of an inspection chamber and associated pipework ready to connect to a new septic tank for the foul sewage system of the new house'.
10. The declaration goes on to state that the BCO agreed that the work would 'constitute a material operation sufficient to implement the planning permission'. Mr Dack states that he and his son undertook the work on the 19 June 1996 and that the BCO attended to sign off the works as 'having been satisfactorily completed'.
11. The photocopies of the pages from his work diaries appear to have had the '1' of the 14 June and the '9' of the 19 June handwritten in. It appears that this is due to the manner of the photocopying. Notwithstanding this, on the balance of probability I find the evidence of the declaration and the diaries to provide a reliable history of what was undertaken and when. However, I give little weight to the comments attributed to the BCO as he was not formally representing the Council's Planning Department in the matter of a commencement.
12. Although there is no evidence that the septic tank was installed or that it was connected to the pipe. However, given the requirements of section 56(4), this does not affect my findings in this regard.
13. Therefore, I find that on the balance of probability the appellant has proven that these operations were carried out prior to the relevant date.

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14. The Council's record of the planning application for 91/P0654 is incomplete. In addition to the application form and decision notice, I have been provided with a location plan and a drawing showing elevations and floor plans that were approved under the terms of the permission. The location plan shows the whole of the small field outlined in red, but does not show the precise siting of the approved house.
 15. In answer to question 6 on the application form for 91/P0654, which asked for 'Brief particulars of proposed development including the purpose(s) for which the land/and or buildings are to be used', the answer is "Demolition of derelict cottage and construction of new dwelling on same site". However, the description of development on the Council's decision notice was simply "House". Although the approved dwelling was to be of a linear form similar to the existing cottage, the evidence before me does not show conclusively that this would be sited precisely on the footprint of the building on the site. The application for a Building Notice, under the Building Regulations in force at the time that Messrs Dack's work was undertaken, described the proposed works as 'new house on site of existing cottage' is again inconclusive.
 16. As the Council states in its Delegated Report, "there is ambiguity in this regard".
 17. During the processing of the application that forms the subject of the appeal, the Council asked the applicant to supply a plan showing the location of the works that had been reportedly undertaken by Mr Dack. It shows a line running from a point near the southwestern boundary of the site north-eastwards to a small circle fairly close to, but not abutting, the outline of Spillers Cottage. Therefore, in the absence of a drawing showing its definitive siting, the house might well be positioned close to, or at, the point where the pipe that has been laid ends.
 18. Notwithstanding this, the judgement in *Spackman v Secretary of State and Thamesdown Borough Council* [1977], which addressed questions relating to the commencement of an approved development, is relevant. There it was held that the partial construction of a soakaway and the laying of drainage pipes was held to be 'specified operations' that began the development. This was the case even though the trenches for the foundations of the approved dwelling did not exist, a soakaway was constructed some distance from its approved position and the alignment of pipes that had been installed meant they would not have met the dwelling.
 19. The decision in *Spackman* was made under the terms of the Town and Country Planning Act, 1971. However, the relevant 'specified operations' required to begin a development, set out in its section 43(b) and (c), are the same as those in section 56(b) and (c) of the 1990 Act, which relates to the 'Time when development begun'.
 20. Taking the undefined location of the house approved by the permission, the nature of the operations undertaken, and *Spackman* into account, I find that the operations undertaken were sufficient to commence the permission.
 21. The appellant's case provides, as an alternative, that the breach of a materials condition attached to the permission would not preclude a lawful start being made. The condition was unnumbered and, for reasons that are unexplained, it is set out twice on the decision notice. It reads:

"No work shall commence until satisfactory details as to the colour and texture of the facing and roofing materials to be used in the construction of the proposed development have been submitted to and approved in writing by the Local Planning Authority".

22. The Council's Delegated Report states that it did not find it necessary to look at this matter in detail. However, given that the condition could have a bearing on whether the start that was made was lawful, it is a matter that this decision must address.
23. Amongst the cases that the appellant has drawn my attention to in respect of this matter is *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908. This decision applied both the *Hart Aggregates*¹ judgment and the principles set out in *Whitley*². The decision in *Greyfort* reinforced the position that a true condition precedent must both prohibit development without compliance with it and also go to the heart of the permission.
24. In this case, the condition fulfils the first requirement.
25. An Officer's report or Committee minute setting out the thinking behind the condition would no doubt assist in assessing whether it goes to the heart of the permission. In this case, I have not been provided with either, so I am reliant on the reason for the condition given on the decision notice. It reads:

"To enable the L.P.A. to consider the details of the materials to be used for the development".

26. This does not convey any underlying reasoning that the condition goes to the heart of the permission, in the manner set out in the judgements referred to, above. For this reason, I do not, therefore, find the two unnumbered conditions relating to materials to be conditions precedent that would have fettered the lawful commencement of the development. As such, non-compliance with them is not fatal to the case for a lawful start.

Conclusion

27. 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 excavation, laying out and back filling of an inspection chamber and associated pipework ready to connect to a new septic tank for the foul sewage system of the new house granted planning permission reference 7/87/91/P0654/00119 on 24 June 1991 and validly implementing that permission so that it remains extant 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.

Roy Curnow
INSPECTOR

¹ *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin)

² *F G Whitley & Sons v SSW and Clwyd CC* [1992] JPL 856