
Appeal Decision

Site visit made on 3 November 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 14 December 2020

Appeal Ref: APP/Z2830/X/20/3258861

Poplars Farm, Syresham Road, Wappenham NN12 8SU

- 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 A Jones against the decision of South Northants District Council.
 - The application Ref S/2020/0765/LDE, dated 4 May 2020, was refused by notice dated 1 July 2020.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
 - The development for which a certificate of lawful use or development is sought is in relation to the erection of a single wind turbine.
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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.

Procedural Matters and Background

2. The description of development for which an LDC is sought is given in section 5 of the application form and refers to the erection of a single wind turbine. Nevertheless, it is clear from the evidence before me that the appellant is seeking to establish that development granted planning permission on appeal¹ on 23 July 2014 (the 2014 permission) has begun and can lawfully be completed.
3. This is on the basis that the works conducted to the junction of the access road with the public highway form part of the development permitted by that planning permission and were carried out in June and July 2017. The 2014 permission granted permission for a single freestanding wind turbine, hard standing, access road, substation and trenching for cable at Land at Poplars Farm, Wappenham, Towcester in accordance with the terms of the application Ref S/2013/0010/FUL subject to conditions.
4. I will therefore consider the appeal on the basis that it seeks an LDC for commencement of the development, namely the erection of a single freestanding wind turbine, hard standing, access road, substation and trenching for cable, pursuant to the 2014 permission.

¹ Ref No: APP/Z2830/A/13/2202083

5. At my request the Council have provided copies of the 2014 permission, the documents and plans that formed part of the planning application² associated with that permission and the decision notice and approved plans associated with the application to discharge condition 10 of the 2014 permission.
6. A third party, in response to the LDC application, raised concerns in relation to the planning merits of the development. Nevertheless, the planning merits of the development are not relevant in this appeal which relates to an application for an LDC. My decision rests on the facts of the case, on relevant planning law and judicial authority. The burden of proof is with the appellant and the appropriate test of the evidence is the balance of probabilities. The appellant's evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided his evidence alone is sufficiently precise and unambiguous.

Main Issue

7. The main issue is whether the Council's decision to refuse to grant an LDC was well-founded.

Reasons

8. In this case whether the development, pursuant to the 2014 permission, was lawfully begun will turn on; whether the works undertaken comprise part of the development permitted by the 2014 permission; whether those works constitute a material operation, as defined in section 56(4) of the 1990 Act, and had begun to be carried out by 23 July 2017 and whether condition 10 of the 2014 permission is a condition precedent which precluded a law ful commencement being made.
9. In this case the red line around the application site did not include all of the land required for access to the site from a public highway as it did not include the access road/farmyard that extended/s from Syresham Road to the boundary with the application site. The works that have been carried out are to widen that access road close to its junction with Syresham Road by the formation of additional areas of hardstanding (the works). The works are not within the application site as indicated by the red line on the location plan.
10. The description of the development within the formal decision cites hardstanding and access road but it does not cite the widening of an existing access road or existing hardstanding. Condition 2 of the 2014 permission states that: -

'the development shall be carried out in accordance with approved plans being the 'Location and site plan' and 'Elevations: Proposed wind turbine' both stamped as received on 22 December 2012 and in accordance with the 'Design and Access Statement' stamped as received on 8 January 2013.'
11. The works are not shown on the approved plans and they are not specifically cited within the Design and Access Statement (DAS). Nevertheless, the DAS refers to the Transport & Access Statement (TAS), Sweep Analysis documents and that the farmyard's concrete road connects the proposed access road to

² Ref No: S/2013/0010/FUL

the highway. The 2014 permission related to a full planning application and its formal decision includes the wording *'in accordance with the terms of the application'*. Therefore, that wording is sufficient to inform a reasonable reader that the application is part of the planning permission.

12. As there is ambiguity as to whether the works undertaken comprise part of the development permitted by the 2014 permission it is reasonable to examine the application and the documents that formed that application to resolve that ambiguity. The application form for the application states at section 6 that a new or altered vehicle access is proposed to or from the public highway. At section 9 of that form a number of documents and plans are cited as providing additional information for the application these include the TAS and several swept path analysis plans. As stated above the DAS directly refers to the TAS and the Sweep Analysis documents. The swept path analysis plans are included as appendices to the TAS.
13. Within Section 3.0, Access Proposals, of the TAS the enabling works necessary to allow abnormal loads and Heavy Goods Vehicles (HGVs) to access the site are identified. These include 2 separate locations which it states require works to enable access by these vehicles with the farm access at its junction with Syresham Road being one of them. At paragraph 3.23 of the TAS it is stated that *'to gain access into the Farm it is proposed to widen the access to allow access for both the abnormal loads and also the HGVs'*. The extent of the works is shown on Plan 4 of the TAS which indicates where the overrun areas are to be provided.
14. I acknowledge that the materials for the construction of those overrun areas are not specified whereas the materials for the overrun areas for the High Street/Brookside enabling works are specified to be steel plates and timber. However, condition 10 of the 2014 permission states that: -

'No development shall take place until details of the proposed construction, materials and surfacing of the site access road and its junction with the public highway have been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out and maintained in accordance with the approved details.'
15. Therefore, it was considered that this condition in relation to the site access road **and its junction with the public highway** would meet the six tests set out at paragraph 55 of the National Planning Policy Framework (the Framework). Those tests are that conditions should only be imposed where they are necessary, **relevant to planning and to the development to be permitted**, enforceable, precise and reasonable in all other respects (my emphasis). Whether this condition is a condition precedent and has been fully discharged is dealt with below.
16. Even though, the access road/farmyard adjacent to the junction with Syresham Road was not included within the red line area works to widen them to enable access to the site for abnormal loads and HGVs were vital to the development permitted. Those works were clearly defined within the documents and plans that formed part of the application. Consequently, it is reasonable to consider that the enabling works to the farm access were part of the development permitted by the 2014 permission.

17. Whilst, the works that have been carried out may not exactly correlate with the overrun areas as shown on Plan 4 the works are to the same parts of the access road which has been widened in those areas. As such, it is reasonable to consider that the works that have been carried out are part of the enabling works to the farm access. They are related to the development permitted by the 2014 permission and substantially useable in that development.
18. There is no dispute that the works that have been carried out can be treated as '*any operation in the course of laying out or constructing a road or part of a road*' as defined at section 56(4)(d) of the 1990 Act. Therefore, the works to widen the access road is a material operation for the purposes of section 56(4) of the 1990 Act. A third party has stated that the works were not completed until after the deadline, but what matters is when those works were begun. The appellant has submitted photographs that indicate that the works were carried out between 13 June 2017 and 28 August 2017. Moreover, the Council has stated that the photos themselves are not date stamped, but that it has no reason to believe the dates are not accurate. I have no reason to disagree with this finding.
19. For all the reasons given, I conclude that, on the balance of probability, that the works carried out were sufficient to constitute a material operation, as defined in section 56(4) of the 1990 Act, comprised in the development granted by the 2014 permission which had begun to be carried out before 23 July 2017.
20. Nevertheless, the 2014 permission was subject to a number of conditions which required things to be done before commencement of development. There is no dispute between the main parties that those conditions were discharged. In *F G Whitley & Sons v SSW & Clwyd CC* [1990] JPL 678; [1992] JPL 856 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 operation contravenes the conditions, it cannot be properly described as commencing the development authorised by the permission. (The Whitley Principle)
21. 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 begun, 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.
22. The subsequent Court of Appeal decision in *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908 applied both the *Hart Aggregates* judgment and the Whitley Principle. It specifically endorsed the need for the condition to go to the "heart of the matter" to be a true condition precedent.
23. In this case, condition 10 is expressly prohibitive of development commencing prior to the details of the proposed construction, materials and surfacing of the site access road and its junction with the public highway being submitted to

and approved in writing by the Council. In May 2017 the Council approved³ the details of the site access road construction as shown on the submitted drawing⁴. The Council considers that all of the pre-commencement conditions including condition 10 were formally discharged.

24. Nevertheless, the details approved by the Council in respect of condition 10 only relate to the site access road and they do not relate to *'its junction with the public highway'*. As such, that condition has not been fully discharged even though the Council considers that it has been. Moreover, there is little evidence to indicate that the works carried out comply with the approved details through condition 10. The works at the junction with the public highway, which the appellant contends constitute a material operation are, therefore, in breach of condition 10.
25. As stated above, the widening of the farm access to allow abnormal loads and HGVs to access the site is vital to the development. However, the reason given in the appeal decision for the condition is *'in order to safeguard the visual amenities of the area'*. As such, it is reasonable to consider that the visual appearance of the materials to be used in the construction of the site access road and its junction with the public highway was the reason why the condition was necessary.
26. However, the approved details of condition 10 do not indicate what the visual appearance of the completed site access road and its junction with the public highway would be. In addition, whether the visual appearance of the widened farm access is acceptable cannot reasonably be considered to go to the heart of the 2014 permission. For these reasons, I do not find condition 10 to be a condition precedent that would have fettered the lawful commencement of the development.

Conclusion

27. For the reasons given above; having already concluded, on the evidence now available, that: the works undertaken at the junction with the highway were part of the development permitted; they constituted a material operation; and were begun to be carried out by 23 July 2017, I also find that they were not undertaken in breach of a genuine condition precedent. Accordingly, the Council's refusal to grant a certificate of lawful use or development in respect of the commencement of development, namely the erection of a single freestanding wind turbine, hard standing, access road, substation and trenching for cable, pursuant to the 2014 permission 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.

D. Boffin

INSPECTOR

³ Ref No: S/2017/0603/COND

⁴ Drawing No: CMS-131a

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 4 May 2020 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, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The development was lawfully begun in accordance with the planning permission dated 23 July 2014, granted on appeal Ref: APP/Z2830/A/13/2202083, because the works undertaken comprise part of the development permitted; a material operation, as defined in section 56(4) of the 1990 Act, had begun to be carried out before 23 July 2017 and condition 10 is not a condition precedent.

Signed

D. Boffin

INSPECTOR

Date: 14 December 2020

Reference: APP/Z2830/X/20/3258861

First Schedule

The commencement of development, namely the erection of a single freestanding wind turbine, hard standing, access road, substation and trenching for cable, pursuant to the planning permission dated 23 July 2014 granted on appeal Ref: APP/Z2830/A/13/2202083.

Second Schedule

Land at Poplars Farm, Syresham Road, Wappenham NN12 8SU

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: 14 December 2020

by **D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC**

Land at: Poplars Farm, Syresham Road, Wappenham NN12 8SU

Reference: APP/Z2830/X/20/3258861

Scale: Not to Scale

