



Appeal Decision

Hearing Held on 17 November 2020

Site visit made on 18 November 2020

by Stephen Brown MA(Cantab) DipArch RIBA

an Inspector appointed by the Secretary of State

Decision date: 26 January 2021

Appeal Ref: APP/V5570/X/19/3237171
392 Camden Road, London N7 0SJ

- 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 by Frixos Charalambous – Nexlynn Holdings Ltd - against the decision of the Council of the London Borough of Islington.
 - The application ref. P/2018/3827/COLP, dated 8 November 2018, was refused by notice dated 2 April 2019.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use and development for which a certificate of lawful use or development is sought is:
 - a) Continuation of the development authorised by planning permission ref. P121287 (as amended by P/2015/4073/s73) and Conservation Area Consent (CAC ref. P121288) after the expiry of the deadline for implementation in accordance with the approved plans.
 - b) The part demolition, refurbishment and redevelopment of the existing coachworks and the erection of a four-storey building to accommodate a new workshop space and ancillary office/administration facilities plus nine residential units.
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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.

Application for costs

2. At the Hearing an application for costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Preliminary matters

3. For the avoidance of doubt, I should explain that in the context of an appeal under section 195 of the Act, which relates to an application for a lawful development certificate, the planning merits of the proposed development are not relevant, and they are not therefore an issue for me to consider. My decision will rest on the facts of the case, and on relevant planning law and judicial authority.

4. In a s.195 appeal against the refusal to grant a LDC the burden of proof is on the appellant to show that on the balance of probabilities the proposed development would be lawful.

Background matters

5. The appeal site is a vehicle workshop with the main access and external parking area on the south-eastern side of Camden Road. The site is L-shaped and wraps around a public house on the corner of Camden Road and Hillmarton Road, where there is another vehicular access from the street.
6. On 9 January 2013 planning permission ref. P121287 was granted at appeal¹ on an application for:
'The part demolition, refurbishment and redevelopment of the existing coachworks and the erection of a four-storey building to accommodate a new workshop space and ancillary office/administration facilities plus nine residential units'.
This was subject to 15 conditions.
At the same appeal conservation consent was also granted for part demolition of the existing coachworks, subject to 2 conditions.
7. The requirement to obtain consent for demolition of a building in a conservation area was abolished by the Enterprise and Regulatory Reform Act 2013. At the same time this Act introduced s.196D of the Town and Country Planning Act 1990 as amended, which requires planning permission to be obtained for such demolition. In this case both the 2013 and 2015 planning permissions included part demolition of the building. I have taken these permissions to supersede the 2013 conservation area consent, although I note that the condition relating to submission of a valid construction contract for the complete development works has been discharged.
8. In 2015 the Council granted planning permission under s.73 of the Act for carrying out the development without compliance with Condition 13 of the 2013 permission² (referred to as 'the Minor Material Amendments'). That condition related to submission of details of controlling noise emanating from the appeal premises. A new condition relating to noise control was introduced, as one of 15 conditions otherwise very similar to those of the 2015 permission – including the requirement that the development should be begun no later than 3 years from 9 January 2013. Both the 2013 permission and the 2015 Minor Material amendment were subject to Condition 7, which concerned protection of a plane tree in the Hillmarton Road pavement directly outside the appeal property.
9. The appellant submits that a trench was excavated during the week commencing 30 November 2015, and that works of demolition were carried out during the week commencing 6 January 2016. It is argued that these works were sufficient to begin the approved development and part demolition within the 3-year period required.

Reasons

¹ Appeal refs. APP/V5570/A/12/2182172 & APP/V5570/E/12/218217, dated 9 January 2013.

² Decision notice ref. P2015/4073/s73, dated 26 November 2015.

10. The main issue in a s.195 LDC appeal is whether the Council's decision was well-founded. In that regard the principal questions in this case are:
 - Whether on the application date of 8 November 2018 the development was lawful as a result of material operations carried out sufficient to begin development within the time limit set on planning permission granted at appeal on 9 January 2013 and preserved in subsequently approved Minor Material Amendments.
 - Whether lawfulness may have been compromised by failure to discharge a pre-commencement condition on the Minor Material Amendment granted permission on 26 November 2015.
11. Regarding the time when development is taken to be begun s.56(2) and (3) of the Act include the provisions that for the purposes of s.91 – that is the duration of planning permissions - 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.
12. S.56(4)(aa) and s.56(4)(b) then set out that material operations mean amongst other things:
 - (aa) any work of demolition of a building; and,
 - (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building.
13. I note here that S.56(2) does not refer to the earliest date when any material operation comprised in the development is *completed*, but to when such operations are *begun* (my emphases).
14. The development proposed in the 2013 planning permission was to demolish the Hillmarton Road leg of the 'L' – a predominantly single storey industrial type flat-roofed shed. Within that space a four-storey block with basement would be built. This would house new workshop/B1 office space in the basement and on the ground floor, above which would be three floors of flats – nine in all. The remaining existing workshop would be to all intents and purposes unchanged.
15. I saw that a trench has been dug within the workshop area in the Hillmarton Road wing of the 'L', with its long axis parallel to the south-eastern wall of the building. The trench is about 4.4 metres long by about 1.2 metres wide and about 0.6 of a metre deep. The edge is about 0.35 of a metre from the adjacent wall. An area of concrete floor has been broken out to excavate the trench, and the hardcore base with soil below is exposed.
16. I also saw that part of the wall facing Hillmarton Road and close to the south-eastern site boundary has been removed. Prior to removal this section of wall comprised three roller shutters behind which were windows set below a steel beam spanning the entire opening. Below the windows was a block wall about 1.4 metres high. The shutters, windows and blockwork removed have been replaced with a timber hoarding in which there is a pair of padlocked gates.
17. The section of trench is on the line of the south-eastern wall of the proposed basement. The floor level of the basement would be about 2.7 metres below that

of the existing workshop floor. No information is provided about the likely type of foundations for the proposed building.

18. In assessing whether the excavation and demolition works should be considered as material operations I have to bear in mind that the subjective intentions of the developer are not relevant, but that an objective conclusion must be formed as to the function of the works – as was found in the High Court case of *Commercial Land Ltd*.³ This case further establishes that whether a material operation is comprised in the development the key questions are first, the degree of compliance with the approved plans, and second, the substantial usability of the works in the development.
19. It is clear that the development would include the excavation of a basement and formation of a foundation below to support the new basement wall, which will be a retaining structure. As it is, the trench is a very small quantum of work in relation to the overall building project, and I accept that it will not – and could not – contain the foundations or part of the basement foundations, which would probably be 3 metres or more below the present floor level. However, it is positioned directly above where part of the foundation would eventually be.
20. I appreciate that the foundation would be at a depth of 3 metres or more below the existing workshop slab level, and it is likely that shoring would be required during the excavation process before a permanent retaining wall and its foundation were in place. However, shoring could be – and would need to be – put in place as further excavation proceeded as an essential part of the construction process. While shoring is not necessary for the shallow trench that exists, this does not mean that the excavation undertaken so far is not the beginning of the operation of digging a trench that is to contain part of the foundations of the new building. Furthermore, it is an element that is comprised in the development and entirely usable in the overall process.
21. As a matter of fact and degree I consider excavation of this trench should be regarded as engineering works that have begun the material operation of digging the trench to contain part of the foundation of the approved scheme.
22. I turn now to the removal of part of the wall facing Hillmarton Road. There can be no question that this on its own would be a necessary part of carrying out the development. Again, it is a very small element of the works, but should be regarded as engineering works. However, on my visit I saw that the opening has not only been protected by construction of the timber hoarding with gates, but a full-height concrete block wall has been built behind the hoarding.
23. It appears to me that these works provide a higher degree of security than the previous windows with roller shutters, possibly carried out to protect the continued use of the building as a repair workshop. In order to proceed with the development the block wall and hoarding would have to be removed, and in my opinion these works would be significantly more extensive than the original demolition. As a matter of fact and degree I consider that as a whole – that is, demolition of the wall followed by reconstruction in another form – this should be regarded as an alteration resulting in betterment of the building, rather than works of demolition that are comprised in, and would be usable in the approved development.

³ *Commercial Land Ltd/Imperial Resources SA v SSTLGR & The Royal Borough of Kensington and Chelsea* [2003] JPL 358 (Admin).

24. Regarding the time when the works were done, the appellant puts forward photographs of the trench said to be taken by the appellant on 30 November and 1 December 2015, and further photographs taken by the Building Inspector on 15 December 2015 during a commencement inspection. The date of each photograph is supported by a computer screenshot showing the associated file properties including the date on which it was stored on the computer.
25. Similarly, photographs of the Hillmarton Road elevation show the roller shutters and most of the blockwork wall removed, and the hoarding erected by 8 January 2016. In his Statutory Declaration Mr Charalambous attests to the truthfulness of all these photographs. The Council do not dispute the dates on which the works were done, and I consider there is no good reason to question these.
26. The Council argue that Condition 7 of the 2013 planning permission – carried over to the 2015 permission – is a condition precedent and precludes beginning development before it is discharged. Condition 7 reads:
- 'No development shall take place until a scheme for the protection and retention of the tree in front of the development has been submitted and approved in writing by the local planning authority. Development shall thereafter be carried out in accordance with the approved scheme'.*
- The reason for imposition of the condition in the 2013 appeal decision is *'in the interests of proper planning'*.
- The reason for imposition of the condition in the 2015 planning permission is *'in order to protect the health and amenity value of the tree'*.
27. As found in the case of *Hart Aggregates*⁴ - extensively referenced in the more recent Court of Appeal case of *Greyfort*⁵ - a condition precedent must expressly prohibit any development taking place before a particular requirement has been met, and also go to the 'heart of the permission'. In the light of these cases non-compliance would mean that the entire development would be regarded as unlawful.
28. Apart from Condition 7, the appellant has successfully applied for discharge of all other conditions on both the 2013 and 2015 planning permissions prohibiting development before certain actions have occurred on, as well as a condition on the Conservation Area consent.
29. In the Council's delegated report on the application to discharge Condition 7, the trees' officer says that he did not consider the tree could be protected in any case. Furthermore, in the delegated report on the LDC application the Council make clear that if the tree cannot be protected then a financial contribution towards funding of a new street tree of equal value should be sought. These statements indicate that there are alternative ways of resolving the tree protection issue, with the financial option meaning there would be no physical effect at all on the realisation of the scheme.
30. Given that the Council could contemplate tree removal as an alternative to its protection, it appears to me that preservation of the plane tree is very much peripheral to the realisation of the approved development. As the Council suggest, if the condition were not complied with then enforcement action could be considered against a breach of condition. This comes very much within the class of case envisaged by the judge in *Hart*, where the failure would be limited

⁴ *R (on the application of Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin).

⁵ *Greyfort Properties v SSCLG and Torbay Council* [2011] EWCA Civ 908.

to a failure to obtain approval for one particular aspect of the development, and there has been a breach of condition. Overall, I consider that Condition 7 does not 'goes to the heart' of the planning permission or that non-compliance would reasonably vitiate the overall development.

31. Overall, I consider the commencement of the trench which would contain part of the foundations of the approved building was a material operation sufficient to begin development within the time limit set on the planning permission granted at appeal on 9 January 2013, and preserved in subsequently approved Minor Material Amendments. Although I have found that demolition of the wall did not constitute such a material operation, that does not override my finding about the trench.
32. Furthermore, I do not consider the lawfulness of the development commenced by that material operation was compromised by failure to discharge pre-commencement Condition 7 on the Minor Material Amendment granted permission on 26 November 2015.
33. I therefore find that on the balance of probabilities the Council decision to refuse the application for grant of a LDC was not well-founded.

Conclusions

34. 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 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.

Stephen Brown

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Frixos Charalambous	Appellant, Director of Nexlynn Holdings Limited.
Matthew Mainstone LLB	Solicitor with Wedlake Bell Solicitors.
Lorna Heslop	Lichfields Planning & Development Consultants.
Ben Kelway BSc MPhil MRTPI	Lichfields Planning & Development Consultants.

FOR THE LOCAL PLANNING AUTHORITY:

Ross Harvey BA(Urban Planning)	Planning Officer Islington Borough Council.
Charlotte Coyle LLB MB(Comm)	Planning Lawyer Islington Borough Council.
Penny Parkinson	Principal Planning & Development Lawyer Islington Borough Council.
Vaughan Melsom BA(Hons) MRICS	Principal Surveyor Islington Borough Council.
Jey Jeyakumar MICE	Structural Engineer Islington Borough Council.

DOCUMENTS

- 1 Attendance list.



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 8 November 2018 the operations described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto was lawful within the meaning of section 192 of the Town and Country Planning Act 1990 (as amended), for the following reason:

On the application date of 8 November 2018 the development was lawful as a result of material operations carried out sufficient to begin development within the time limit set on planning permission granted at appeal on 9 January 2013 and preserved in subsequently approved Minor Material Amendments.

Signed:

Stephen Brown

INSPECTOR

Date: 26 January 2021

Reference: APP/V5570/X/19/3237171

First Schedule

- a) *Continuation of the development authorised by planning permission ref. P121287 (as amended by P/2015/4073/s73) and Conservation Area Consent (CAC ref. P121288) after the expiry of the deadline for implementation in accordance with the approved plans.*
- b) *The part demolition, refurbishment and redevelopment of the existing coachworks and the erection of a four-storey building to accommodate a new workshop space and ancillary office/administration facilities plus nine residential units.*

Second Schedule

Land at no. 392 Camden Road, London N7 0SJ.

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.