
Appeal Decision

Site visit made on 9 February 2021

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9th March 2021

Appeal Ref: APP/P2365/X/20/3253012

Land between 5 and 9 Mossy Lea Road, Wroughtington, Wigan WN6 9RB

- 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 failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr David Walsh against West Lancashire Borough Council.
 - The application (Ref. 2019/0949/LDC) is dated 16 September 2019.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended (the Act).
 - The development for which a certificate of lawful use or development is sought is a lawful commencement of approval A/15365/80 issued by Wigan MBC.
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Decision

1. The appeal is dismissed.

Procedural matter

2. The description given above is taken from the application form. However, it is clear from the evidence before me that the appellant is seeking to establish that the development approved on 28 July 1980 (the 1980 permission)¹ was lawfully begun and can lawfully be completed. I shall therefore consider the appeal on that basis.

Main Issue

3. Had the Council determined the application, it would have refused to issue an LDC and the main issue is whether that would have been a well-founded decision. This turns on whether the appellant can show, on the balance of probability, that no enforcement action could be taken in respect of the erection of a detached dwellinghouse and garage, pursuant to the 1980 permission, on the application date.

Reasons

4. No enforcement action can be taken in respect of operational development that has been lawfully begun and is carried out in accordance with the terms of an extant planning permission. Whether the development pursuant to the 1980 permission was lawfully begun will turn on 4 matters:
 - The nature of the 1980 permission.

¹ A/15365/80

- Whether the works undertaken had begun to be carried out before the expiration of any relevant period for the duration of the planning permission.
- Whether those works constitute a material operation, as defined in section 56(4) of the Act.
- Whether any works that constitute a material operation are comprised in the development permitted by the 1980 permission.

The nature of the 1980 permission

5. The application for this permission ambiguously sought approval of reserved matters and full planning permission for a house and garage. While the applicant did not identify an outline permission that this submission might have related to, he stated it had been granted approximately 8 years before. It therefore appears he meant 9/11/3353, granted on 14 October 1971 (the 1971 permission).
6. While the 1971 permission was for 2 detached bungalows, there is no reason why reserved matters approval could not have been sought in part, for only one of those bungalows. However, the submitted drawings confirm the 1980 permission was for a 2-storey house, consistent with the description of the development, something materially different in character. Furthermore, and crucially, the 1971 permission had included a standard condition required to be imposed by legislation then in effect². This condition required any application for approval of reserved matters to be made within a 3-year period that had expired long before 27 March 1980.
7. As summarised by the High Court³, a planning permission is to be construed within the four corners of the consent itself. When doing so, the question is not what the parties intended but what a reasonable reader would understand was permitted. While the 1980 permission was on a proforma decision notice intended for approval of reserved matters, it did not identify an earlier outline permission that had reserved any details for subsequent approval. On the other hand, it did not stipulate a date by which the development should be begun and there would have been no need for it to do so if that period had been set when an outline planning permission was granted. However, and despite these ambiguities, a reasonable understanding of the 1980 permission is that no further planning application was necessary before the house and garage could be lawfully constructed.
8. For these reasons, the 1980 permission could not have granted approval of matters reserved by the 1971 permission. Notwithstanding the administrative errors within it, the decision notice must reasonably be understood to have the effect of a grant of full planning permission.

Whether the works had begun to be carried out before the expiration of any relevant period for the duration of the planning permission

9. As the 1980 permission had the effect of granting full planning permission, it would have been subject to the provisions of section 41 of the Town and Country Planning Act 1971. This stated that every full planning permission

² Section 66 of the Town and Country Planning Act 1968

³ Telford and Wrekin Council v SSCLG & Growing Enterprises Ltd [2013] EWHC 79 (Admin); [2013] JPL 865

pursuant to that Act was to be granted subject to the condition that the development to which it relates must be begun not later than the expiration of:

(a) five years beginning with the date on which the permission is granted or, as the case may be, deemed to be granted; or

(b) such other period (whether longer or shorter) beginning with the said date as the authority concerned with the terms of the planning permission may direct, being a period which the authority considers appropriate having regard to the provisions of the development plan and to any other material considerations.

10. The decision notice did not direct an alternative period, as (b) had allowed, and there is no evidence of a further planning permission having been granted. In view of this, the development could only have been lawfully begun within 5 years of the 1980 permission being granted, that is on or before 28 July 1985.
11. The statement by Colin Walsh is not a statutory declaration but may be given significant weight because he lived adjacent to the site, at 5 Mossy Lea Road (No 5), and was the brother of the person who owned the site and obtained the 1980 permission. He was therefore well acquainted with the site and the people involved. Mr Walsh's statement indicates that he and his brother laid drains to an existing septic tank within the appeal site (the original tank) at some point between 1972 and 1974, when No 5 was being built. However, as those works pre-dated the 1980 permission, they could not form part of it.
12. Mr Walsh's statement also confirms that his brother carried out some works on the site following the grant of the 1980 permission and before he lost interest in the development in around 1984. These works were the construction of a chamber and pipes connecting to a new septic tank (the new tank) near the boundary with No 5, also intended to serve that property, and the clearance of the site so that building could start. In addition, a dropped kerb was installed, and a retaining wall was built on the boundary of the site and No 5, both in the same period.
13. A second statement by the appellant, the son of the person who owned the site and obtained the 1980 permission, states the same facts. While this statement is not a statutory declaration, it is made by a person with close knowledge of the people involved. However, it is not stated how old the appellant was at the time, so it is unclear how much he knew or understood of the work being carried out then. Nevertheless, taken together, the 2 statements are sufficient to demonstrate, on the balance of probability, that the works they describe were carried out on or before 28 July 1985.

Whether the works constitute a material operation

14. Section 56(4) of the Act defines a material operation in 6 paragraphs. No evidence has been presented in respect of 3 of these: (aa) any work of demolition of a building; (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building; and (e) any change in the use of any land which constitutes material development.
15. The remaining 3, to be considered in this appeal, are (a) any work of construction in the course of the erection of a building; (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); and (d) any

operation in the course of laying out or constructing a road or part of a road, in this case the driveway shown on the drawings approved in 1980.

16. While it is not claimed that any construction of the house began, a chamber was built in association with the new tank that was intended to serve it and No 5. I saw this brick structure on site and it appears, by reason of its permanence and physical attachment to the ground, to be a building, albeit a small one, consistent with the definition in section 336 of the Act, which includes "any structure or erection, and any part of a building, as so defined". Accordingly, the construction of the chamber was a material operation as defined by section 56(4)(a) of the Act.
17. In view of its size, permanence and physical attachment to the ground, the wall on the boundary of the site with No 5 is also a building and its construction was therefore also a material operation as defined by section 56(4)(a) of the Act.
18. Both statements confirm that pipes were laid to connect No 5 and the proposed dwelling to the new tank after the 1980 permission was granted. However, there is no evidence that any foundations were laid, or foundation trench dug, for the proposed house. Accordingly, any pipes that were intended to serve it were not laid to any part of its foundations or a foundation trench associated with it. Consequently, they did not constitute a material operation as defined by section 56(4)(c) of the Act.
19. The application for the 1980 permission stated that the development included the construction of a new vehicular access to a highway. Condition 4 of the permission required a turning facility to be created so that vehicles could enter and leave in forward gear. This, and condition 2, which prohibited any access to the M6, indicate that the local planning authority knowingly approved a vehicular access to Mossy Lea Road. The approved block plan shows a driveway leading toward where the dropped kerb is now.
20. However, the words 'in the course of' in paragraph (d) of section 56(4) of the Act are significant. They indicate that the dropped kerb would need to be installed as part of a wider scheme to lay out or construct the drive. There is no evidence of the driveway being laid out or constructed, even in part, so there was no such scheme for the dropped kerb to be installed in the course of. As such, and of itself, the dropped kerb is not within the definition of a material operation in section 56(4)(d) of the Act.
21. For these reasons, I find on the balance of probability that 2 material operations, namely the construction of the chamber and the construction of the retaining wall, were undertaken on or before 28 July 1985.

Whether the works constituting material operations are comprised in the development permitted by the 1980 permission

22. The chamber is not on the plans approved as part of the 1980 permission. The block plan includes a feature, "Ex. Septic Tank", in another part of the site, which tallies with the description of the existing tank in the statements. The application form stated that foul sewage would be disposed "to ex. septic tank". The chamber described in the statements, which I saw, is in a different part of the site. Evidence that this chamber and the new tank associated with it received planning or building regulations approval has not been produced.

23. There are no details of the original and new tanks, so they have not been shown to be similar. Critically, the capacity of the new tank is unstated, so it has not been demonstrated that it, and the chamber intrinsic to it, would have been substantially usable for both the proposed dwelling and No 5, as the original tank had been intended to be. Accordingly, even if the difference in the siting of the 2 tanks was not viewed as significant, it has not been demonstrated that the chamber is comprised in the development permitted by the 1980 permission.
24. There is no reference to the retaining wall in the application or the approved plans from the 1980 permission. The design and materials of the wall I saw on the boundary of the site and No 5 were consistent with the walls on other boundaries of No 5. No evidence that the wall formed part of the development permitted in 1980, or was necessary to implement it, has been produced.
25. Accordingly, and on the balance of probability, it has not been demonstrated that any of the works constituting material operations are comprised in the development permitted by the 1980 permission.

Conclusion

26. For these reasons I conclude, on the evidence now available, that the erection of a detached dwellinghouse and garage pursuant to the 1980 permission was not lawfully begun. A refusal to grant a certificate of lawful use or development in respect of that development would have been well-founded and the appeal should fail. I will exercise the powers transferred to me under section 195(3) of the Act.

Mark Harbottle

INSPECTOR