



Appeal Decision

Site visit made on 13 October 2021

by Gareth Symons BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 October 2021

Appeal Ref: APP/D0840/X/21/3277746

Land at Lestowder, Manaccan, Helston, Cornwall

- 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 Courtney Oates against the decision of Cornwall Council.
 - The application Ref: PA15/11455, dated 8 December 2015, was refused by notice dated 28 January 2016.
 - The application was made under section 191(1)(b) 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 erection of a bungalow.
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Decision

1. The appeal is dismissed.

Background and Main Issue

2. Planning permission was granted on 8 June 1959 (LPA Ref: 9689/W) for the 'Erection of a bungalow' on the appeal site under the provisions of the Town and Country Planning Act 1947. At that time, there was no requirement to begin a planning permission within any specified period. That did not come until the Town and Country Planning Act 1968. Under the subsequent Town and Country Planning Act 1971 and further provisions which remain in force, the appeal development needed to have been begun by 1 April 1974.
3. Under the 1971 Act, planning permission was taken to be begun on the earliest date on which any specified operation comprised in the development began to be carried out. The 'specified operations' under the 1971 Act are more or less mirrored in the Town and Country Planning Act 1990 (as amended) wherein they are referred to as 'material operations'. They include (a) any work of construction in the course of the erection of a building and (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building. The appellant relies on excavations and trenches for the foundations of the bungalow that it is claimed took place in the early 1960s. On this basis, the case is made that the 1959 planning permission remains extant and thus the bungalow can be lawfully completed.
4. Against this background, the main issue is whether the works relied upon were, as a matter of fact degree, material (or specified) and whether they were comprised in the development that was granted planning permission. The

burden of proof rests with the appellant and the test of the evidence is the balance of probability.

Reasons

5. The approved drawings for the bungalow show that in the North-east corner of the building, partly under the lounge, there would be garden store with a curved wall. Thus, at this end of the building, as shown on the East elevation plan, the bungalow would appear two-storey in part. In a statutory declaration by Mr Courtenay Oates, who had a family connection with the land, it is stated that *"I.....can remember an excavator coming to the farm to dig out the site of the bungalow where the basement area, which was to be the garden store, was to be situated...The ground area was previously sloping downwards from west to east but, when the machine had finished, a level platform had been created to accommodate the lower ground floor area. The earth which had been removed was placed alongside the Cornish hedge to the western side, thereby forming a step in the land to accommodate the two storey form of the bungalow at the northern corner. The excavated area, including the cut edge of the western bank, is still clearly visible today and recognisable as coinciding with the intended basement"*.
6. Evidence submitted to support the carrying out of these works is in the form of photographs of the site at paragraph 2.7 of the Explanatory Statement submitted with the application, where it is also stated that *"a site inspection will confirm that substantial evidence of the works undertaken to commence the development still remains, including as illustrated"* in the photographs. The first photograph is stated to show *"The area from which material was excavated in order to accommodate the basement of the building remains evident, coinciding with the location of the bungalow as shown by the approved plans"*. The photograph shows a gradual cut in the land running north-south that gets deeper at the northern end. There is a caravan in the picture to the right of this line.
7. The second photograph is stated to show *"The near vertical westerly face of the excavated area, confirming its formation by mechanical means"*. This photograph is taken looking back in the opposite direction from beyond the north end of the cut in the land with the caravan in the left of the picture. The third photograph is stated as showing *"Remaining marker stones to define the area to be excavated"*. The photograph shows a stone set in some low vegetation on top of the bank and to the left of that is a wooden post with the top of a red gas bottle visible, which are features that can also be seen in the second photograph.
8. At my site visit the land had been taped out indicating where the L-shape line of the bungalow would be. I accept, as the landowner did who was there, that the setting out may not have been entirely accurate, but it had clearly been done with some measurements having been taken. I was also able to visually check that the position was about right by reference to fixed datum points referred to by the appellant which are the water pipe in the western hedge (which I was shown) and the northernmost gatepost at the entrance to the site in the south-west corner. I also paced out 27 strides (each one being about 1m) from the gatepost into the site which took me to about where the northern-east corner of the taped area was, which according to the approved drawings, and what the appellant asserts in the Final Comments, is where the

corner of the building over the excavated area for the basement garden store would be. With these points in mind, the Council's representative also agreed that the marking out was about right. The setting out also accords thereabouts with the position of the bungalow shown by the overlay on the 2009 Google Earth image. All in all, it is clear enough for the purposes of this appeal, where the approved footprint of the bungalow should be.

9. However, this marking out clearly did not coincide with where the excavations referred to above took place. The set-out footprint was beyond (South) the caravan shown in the photographs referred to above. The caravan is about at the mid-point of the cut line into the land. Furthermore, the marker stone near to the post and the gas bottle, which is meant to define the area to be excavated, was well away from the position of the approved footprint. I do not know whether the excavations were undertaken in the wrong place, but it is very clear that the evidence being relied upon to show that the works done in the early 1960s to allegedly accommodate the two-storey northern end of the bungalow, are not where the building was approved to be sited.
10. In his statutory declaration Mr Oates goes on to further state "*I can also remember the trench being dug for the foundations of the basement area at the northern edge of the excavated area, but that trench was filled in long ago*". Given that the northern edge of the excavations does not match the approved site of the bungalow, this trench would also be out of position. I acknowledge that the work to construct the bungalow received Building Regulation consent in May 1959. It also appears that works of digging a trench to contain foundations ready for inspection prompted the submission to the Council of Inspection Notice no.1. I further note that the Council may have then enquired about why Inspection Notice no.2 had not been submitted. However, Inspection Notice no.1 is missing and there is nothing substantive showing, other than what Mr Oates says, where any such trench might have been. If it was the one now filled in at the northern end of the cut face, that would not relate to where the walls of the bungalow should be.
11. I accept there is other evidence such as another statutory declaration and a letter that refers to digging trenches/footings, preparatory works, and a level area. However, the other declaration refers to "*I can confirm that the levelled area and trenches were in place at that time*" in 1963. However, comments such as this do not show whether the works related to where the bungalow was approved to be constructed. The letter offers very little detail.
12. The Council has referred to another application for a lawful development certificate for the same development that is before me, that was refused on 15 July 2019 (LPA Ref: PA18/07593). I do not have any of the evidence submitted with that second application or any of the other letters or evidence received by the Council during its consideration of the proposal.
13. I do though have the officer report. In there, details are given about what various persons said about works on the site and many of those seek to cast doubt on the nature of the works, or even if trenches were dug at all. However, I do accept that some letters, as referred to in the appellant's final comments, substantiate that there were changes to the land, such as the creation of a lower flat section, a lower plateau and children sliding down into the excavation. Nevertheless, these comments do not demonstrate that any of the works were in accordance with the planning permission. Moreover, in the

absence of the appellant suggesting that the landform was changed elsewhere on the site, references to changes to land levels and a lower plateau probably relate to the vicinity of where the cut face is on the site. They would not correspond with the approved position of the bungalow for the reasons given. The land within the demarcated area is more or less flat. The only material level difference was in the North-east corner where the two-storey element might have gone. However, this was only a small slope which did not appear dug out or cut into in preparation for building the bungalow. In any event, it was not where I am being told that the excavations did take place.

14. I also saw at my site visit a rectangular trench within the taped area, but I have not got any of the details related to an inspection cross trench dug on the site as referred to in the officer report for the second application, or the structural report arising from an engineer's visit to the land in June 2018. I therefore cannot tell whether what I saw is the trench subject of the engineer's assessment. It is for the appellant to submit the evidence to be relied on in support of the appeal. In any event, if historically a trench was dug for foundations in this location, there is little to show that they might have been for the bungalow. I note that a detailed building works specification was drawn up for a contractor to follow. However, this does not show where or when any such works were carried out.
15. Taking an overall view, there seems little doubt that works, probably involving a digger, took place on the land probably in the early 1960s. It appears that the land was cut and levelled which, it is stated, was needed to accommodate the basement/garden store of the bungalow. Such works were probably also more than de minimis. However, the position of those works, as a matter of fact and degree, were not where the bungalow was approved to be sited. Furthermore, the evidence regarding a trench that was subsequently filled in is undermined as that too was not where the building was approved. More recent evidence about trenches/foundations has not been backed up substantively.
16. On the balance of probability, the evidence is not sufficiently precise and unambiguous to show that the works accorded with the planning permission granted for the erection of the bungalow. As such, they were not material/specified operations comprised in the development. The appellant has not discharged the burden on them to make out the case successfully.

Conclusion

17. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the erection of a bungalow was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Gareth Symons

INSPECTOR