
Appeal Decision

Site visit made on 8 December 2021

by B.S.Rogers BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 December 2021

Appeal Ref: APP/G2815/X/21/3279484

Land adjacent to 43 West Street, Kings Cliffe, Northamptonshire, PE8 6XB

- 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 Simon Brown against North Northamptonshire Council.
 - The application (Ref.NE/21/00848/LDE) is dated 20 May 2021.
 - 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 that operations associated with planning application 99/00672/FUL have commenced.
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Decision

1. The appeal is dismissed.

Reasons

2. Although the appeal was lodged against the Council's non-determination of the application, the Council has indicated that, had it made a decision, it would have refused the application.
3. In a case of this type, the onus is on the appellant to demonstrate his case on the balance of probability. The planning merits of the development are not matters which can be taken into account.
4. Planning permission was granted on 26 July 2000 by the then local planning authority, East Northamptonshire District Council, for a detached house (Plot 1) on the appeal site (Ref: EN/99/00672/FUL). The permission was subject to a number of conditions, including the requirement that development shall be begun before the expiration of 5 years from the date of decision. The appellant submits that all relevant conditions were discharged and that material operations in the commencement of development were carried out within the required period.
5. It appears to me that there are two main issues in this case:- i). whether material operations comprised in the development were carried out prior to 27 July 2005; and ii). if so, whether the operations were begun in breach of a condition precedent.
6. Section 56(2) of the Act states that 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. The Act goes on in Section 56(4) to

define 'material operation' as (a) any work of construction in the course of erection of a building; (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; (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building; (d) any operation in the course of laying out of constructing a road or part of a road; (e) any change in the use of any land which constitutes material development.

7. On the first main issue, the appellant has clearly demonstrated that the site contained buildings, including pigsties, at the time the relevant planning application was made. The site also included an unmade driveway. The appellant submits that the following operations were undertaken:- the demolition of pig sties, site clearance, the setting out and construction of a driveway and water main connection. Whilst site clearance is not one of the relevant operations listed above, the other operations could potentially fall within S.56(4) (aa), (c) or (d), as set out above.
8. A submitted photograph of rubble is said to indicate the demolished pigsties in 2000 and a further photograph is said to indicate the setting out of the drive in the same year. However, there is no indication of the actual date of the photographs and no persuasive corroboration of either the date of demolition or the setting out of the drive. If either action occurred prior to the grant of planning permission on 26 July 2000, it could not be regarded as the implementation of the permission.
9. Photographs of the site taken from Streetview are said to indicate a water connection and the old and new driveways. They also confirm the site had been cleared of former buildings. However, these are dated June 2009 and there is no evidence before me to indicate that the relevant works had begun before the expiration of the permission in July 2005. For the same reason, the submitted photographs from 2020 add nothing to the appellant's case.
10. On the first main issue, I find insufficient evidence to indicate on the balance of probability that the permitted development was begun before the expiry of the permission.
11. Turning to the second main issue, the Council submits that, even had material operations been carried out prior to the expiration date, they could not be considered to have begun in accordance with the planning permission. The permission contains four conditions precedent (nos. 2, 3, 4 & 5) which were not discharged.
12. In *Whitley*¹, the principles were established that a condition precedent must i. prohibit the commencement of development and ii. go to the heart of the planning permission.
13. In the present case, all four conditions begin "Before any work is commenced on the development ..." and therefore fulfil the first test of prohibiting the commencement of development.
14. The conditions required the prior submission of details of a sample wall panel (no.2), of roofing materials (no.3), of all windows and external doors (no.4) and of all walling and fencing within and on the boundaries of the site (no.5).

¹ F.G.Whitley & Sons v SSW & Clwyd CC [1982] JPL 856

As to whether such matters go to the heart of the permission is a matter of planning judgement.

15. In this case, the appeal site is within the Kings Cliffe Conservation Area, the adjacent building, no.43 West Street is Listed Grade II and there are other Listed Buildings nearby. Accordingly, this is a very sensitive location, with an impact on significant heritage assets, and it appears to me that the details of those matters set out in conditions 2-4 are fundamental to the acceptability of the development in question in that they affect the character and appearance of the Conservation Area and the setting of one or more Listed Buildings. In these particular circumstances, I regard these matters as going to the heart of the permission.
16. The appellant submits that the conditions in question were discharged. The evidence for this is an exchange of correspondence between the then LPA and the appellant regarding the then outstanding planning applications for the appeal proposal (referred to as Plot 1) and for the proposal on the adjoining site (Plot 2). However, whilst the letters in question did indeed refer to the subject matter covered by conditions 2-4, they are dated 20 and 27 September 1999. They therefore pre-date the grant of planning permission on 26 July 2000 and, as such, cannot be said to have discharged any conditions which did not even exist at the time.
17. Even if any similar planning conditions had been properly discharged in relation to the planning permission for Plot 2, (and I note that no such evidence has been put before me) this could not be inferred to apply to the entirely separate planning permission in respect of Plot 1, the appeal site. I am not aware of any procedure for the informal discharge of conditions.
18. The Council has no record of the discharge of the conditions and the appellant's evidence is insufficient to persuade me, on the balance of probability, that such discharge did take place. Any material operations would therefore not have been in compliance with the permission.
19. For the reasons given above I conclude that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

B.S. Rogers

Inspector