The Planning Inspectorate

Appeal Decision

Site visit made on 24 January 2023

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 2 February 2023

Appeal Ref: APP/D1265/X/22/3301174
2-4 Stavordale Road, Weymouth DT4 0AB

- 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 Ben Andrews of St Jude's Care Limited against the decision of Dorset Council.
- The application Ref P/CLE/2021/02665, dated 16 July 2021, was refused by notice dated 9 February 2022.
- 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 described as: Certificate of lawfulness demonstrating that planning permission reference WP/15/00307/FUL was lawfully commenced.

Summary of Decision

1. The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision.

Preliminary Matter

2. The parties opted for the appeal to be determined by means of written representations and did not identify injustice that would otherwise arise. I am content to determine the appeal on the written evidence that is already before me, as well as my site visit, and do not consider that injustice would arise.

Main Issue

3. The main issue is whether the Council's refusal to grant a certificate of lawfulness is well founded.

Reasons

4. In matters such as this the onus is on the appellant to demonstrate his case on the balance of probabilities. For the purposes of certification, it will need to be demonstrated that a material operation comprised in the development was begun before the expiration of planning permission WP/15/00307/FUL, which would otherwise have been 6 August 2018 (the planning permission).

5. 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. Section 56(4) then states a material

operation means, amongst other things, the digging of a trench which is to contain the foundations, or part of the foundations, of a building.

6. The evidence of the appellant is that the setting-out of the southern end of the building approved by the planning permission was undertaken on 31 July 2018, with the ground broken for foundation trenches the same week. Photographs of works being undertaken on 2 August 2018 are then before me. Moreover, the Council's Building Control department has confirmed in writing that they visited the site on 6 August 2018 for a commencement of works visit and witnessed an excavated trench of approximately 3m in length at a depth of 1.25m. I could see during my site visit evidence of a sizable trench in the location of an external wall of the building approved by the planning permission, which has since been capped with concrete to surrounding ground level.

7. The Council is concerned that the trench was not wide or deep enough to form the foundations for the building approved by the planning permission and were not at the correct level. It is said to also contain a rainwater gully. However, s56(4) of the Act only requires part of the foundations to be dug to constitute a material operation, and I have found it to be sizable. It accordingly amounts to a material operation.

8. Whilst a commencement certificate was then not issued by the Building Control department, this does not undermine the evidence of a Council Officer stating in writing his observations from the commencement visit. The appellant is then criticised for infilling the trench, but I could see during my site visit that it forms part of an area which is used for parking and where people would otherwise be.

9. It is then suggested that the foundations would likely have to be removed to form the actual foundations in the future and are therefore sacrificial. This is however speculation, which I do not accept given the size and location of the trench. The works undertaken therefore have permanence and indicate the appellants intention to complete the development as a whole.

10. A submission was made with materials and landscaping details pursuant to conditions 5 and 6 of the planning permission, which was validated by the Council on 23 July 2018, albeit it did not approve these details until 13 September 2018. However, case law[1] has established an exception where circumstances such as this can still amount to a lawful start of commencement.

11. As a matter of fact and degree the appellant has therefore demonstrated on the balance of probabilities that a material operation was begun in accordance with the planning permission, and so a certificate of lawfulness should now be granted.

Conclusion

12. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful development 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.

[1] F G Whitley & Sons v SSW & Clwyd CC [1992] JPL 856

Formal Decision

13. The appeal is allowed and attached to this decision is a certificate of lawfulness describing what is lawful.

Paul T Hocking

INSPECTOR

The Planning Inspectorate

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 16 July 2021 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 appellant has demonstrated the lawful commencement of planning permission reference WP/15/00307/FUL on the balance of probabilities.

Signed

Paul T Hocking
Inspector

Date 2 February 2023
Reference: APP/D1265/X/22/3301174

First Schedule

The lawful commencement of planning permission reference WP/15/00307/FUL

Second Schedule

Land at 2-4 Stavordale Road, Weymouth DT4 0AB

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 operations described in the First Schedule taking place on the land specified in the Second Schedule were lawful, on the certified date and, thus, 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 operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any 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.

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Plan

This is the plan referred to in the Lawful Development Certificate dated: 2 February 2023

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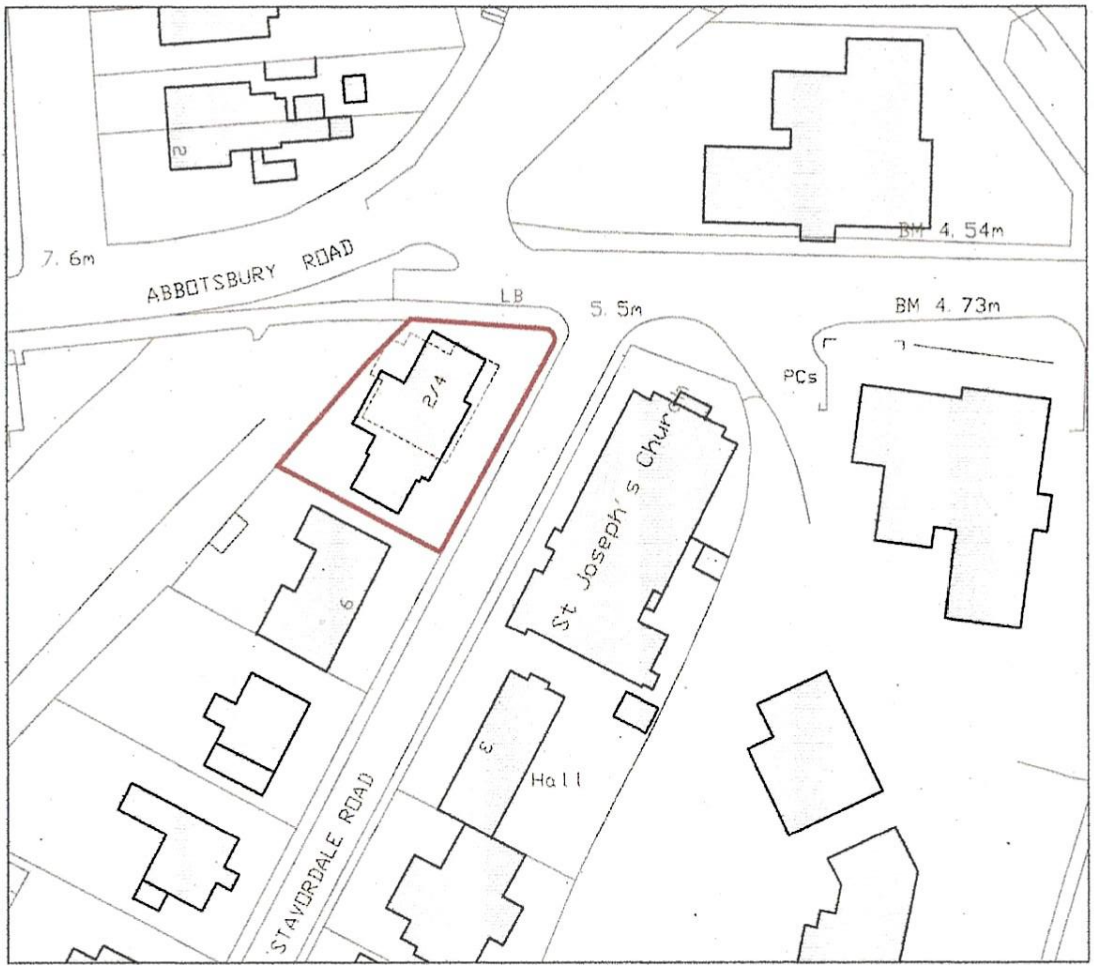
Reference: APP/D1265/X/22/3301174

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