



Appeal Decision

by **P N Jarratt BA (Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 20 February 2023

Appeal Ref: APP/U5360/X/22/3290951

44 St Marks Rise, LONDON, E8 2NL

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended 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 Pearlman against the London Borough of Hackney.
 - The application ref 2021/1689 is dated 27 May 2021.
 - The application was made under section 192 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 lawfulness of proposed operations provided for in planning permission reference 2016/4311.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. A fuller description of the development is stated in the appellant's letter of 28 May 2021 accompanying the LDC application and the Community Infrastructure Levy Form 1, as: 'Certificate of Lawfulness to confirm that planning permission ref 2016/4311 for the erection of a single storey building to create one self-contained residential unit and one office unit (Use Class B1), erection of single storey extension to existing two storey building to provide additional self-contained residential unit; associated works to provide external lighting, boundary treatments, permeable hard surfaces and bicycle, refuse and recycling storage, including demolition of existing single storey building has been lawful (sic) implemented.'
3. The application and the submissions of the appellant appears to conflate the terms 'commencement' and 'implementation' (although there is no statutory definition of 'implementation'). However it is necessary to distinguish between the beginning of the development, the completion of the development and the implementation of the permission. It is not enough for development to be lawfully begun in order for a permission to be considered implemented in accordance with its terms and conditions. It is possible for a development to be lawfully begun on time but then for enforcement action in respect of some later deviation from the permission to be taken.
4. It is clear from the wording of the LDC application that an LDC in the terms requested would not be possible bearing in mind the stage that the development had reached at the time the application was made.
5. Section 191(4) provides a discretionary power to modify the description which I consider more appropriately relates to 'the lawfulness of proposed operations

provided for in planning permission reference 2016/4311'. This should be determined under s192(1)(b) and not under s191 as submitted by the appellant. As I do not consider the modification of the description to be substantive, I have therefore amended description in the banner headline above and determined the appeal on this basis.

6. In view of the particular circumstances of this appeal, a site inspection is unnecessary.
7. For the avoidance of doubt I should explain that the planning merits of any use or operations are not relevant and they are not therefore an issue for me to consider in the context of an appeal under section 195 at the Town and Country Planning Act 1990, as amended, which relates to an application for a lawful development certificate. My decision rests on the facts of the case and on relevant planning law and judicial authority.
8. The onus of proof rests with the appellant and the level of proof is on the balance of probabilities.
9. Although the application was not determined by the Council, they have indicated that it would have been refused on the grounds that the evidence submitted with the application is not sufficiently precise and unambiguous to demonstrate that, on the balance of probabilities, planning permission 2016/4311 granted on 9/11/17 will have commenced in accordance with the conditions of the decision notice and that the completion of the approved development remains lawful.
10. The main issues in this appeal are whether the Council's deemed refusal would have been well-founded, particularly in respect of whether demolition took place before 1 May 2020 and whether condition 17 is a true condition precedent.

The site and relevant planning history

11. The appeal site is a backland site surrounded by residential terraces and located in St Mark's Conservation Area.
12. Permission 2016/4311 was granted on 9 November 2017 for the erection of a single storey building to create one self-contained residential unit and one office unit (Use Class B1), erection of single storey extension to existing two storey building to provide additional self-contained residential unit; associated works to provide external lighting, boundary treatments, permeable hard surfaces and bicycle, refuse and recycling storage, including demolition of existing single storey building. It was subject to 17 conditions, the most relevant to this appeal being:
 - Condition 1 requires the development to be begun before 9 November 2020. (Later extended to 1 May 2021).
 - Condition 2 requires the development to be carried out in accordance with approved plans which include a plan showing the demolition of the garage.
 - Condition 17 states:

'Before commencement of the development a desk study, site reconnaissance researches and physical site investigation work shall be

undertaken and fully reported on, with a suitably detailed remedial action plan produced, and all documentation and information shall be submitted to, and be approved by, the local planning authority in writing.

Development shall not commence until all pre-development remedial actions, set out within the approved remedial action plan, are complete and a corresponding pre-development verification report has been submitted to, and approved by, the local planning authority in writing.

Work shall be completed and reporting produced by a competent person/ company in line with the current best practice guidance, including the local planning authority's contaminated land guidance. The developer shall provide the local planning authority with written notification of at least five days before investigation and remediation works commence. This condition may be varied or discharged in agreed phases.

Reason: in the interests of protecting the natural environment and human health from any harmful contamination related impacts.'

13. Approval of details (2021/0533) pursuant to the part discharge of condition 17 of permission 2016/4311 relating to a desk study and a physical site investigation was given on 16 April 2021.
14. On 14 May 2021 confirmation was refused on LDC application 2021/0584 that the proposed demolition in association with planning permission 2016/4311 constitutes commencement in accordance with condition 1 and that the completion of the approved development remains lawful. The reasons for refusal were that the demolition of the garage to slab level is de minimis and that condition 17 (site contamination) goes to the heart of the permission has not been fully discharged
15. On 15 June 2021 details pursuant to the discharge of condition 17 (remediation strategy and verification plan) attached to planning permission 2016/4311 were submitted but they have yet to be determined (Application ref 2021/0533).

Reasons

16. The appellant states that the permission was valid until 1 May 2021. All conditions requiring approval were discharged, except for small elements of condition 17. This condition is not considered by the appellant to be a true condition precedent and does not need to be approved before the permission can be implemented. Demolition is a material operation and is cited in the condition, so the demolition of the garages undertaken before 1 May 2021 served to implement the permission.

Demolition

17. The appellant's submitted Demolition Progress Statement indicates that demolition of the existing single storey buildings took place on dates between 27-29 April 2021 and includes photographs of the demolition. The Council concedes that demolition may have taken place on a scale in accordance with the development description of the permission (a volume of 292 cubic metres) but argue that there is insufficient evidence to corroborate the dates claimed

by the appellants. However, the Council has no evidence to contradict or otherwise make the appellant's version of events less than probable.

18. I have no reason to question the appellant's evidence, which is precise and unambiguous, and I am satisfied that demolition started prior to 1 May 2021. The courts have held that where the prior demolition of buildings was part of the total works necessary to undertake a development and carried out by a builder, and the permission was specifically authorised the demolition, those works of demolition should be taken as the start of the point at which development had begun¹. As such, it is a material operation for the purposes of s56(2) representing the time when the development was begun. However, it does not necessarily follow that the development would be lawful in all respects if aspects of the permission or conditions were not subsequently adhered to.

Condition 17

19. The Council considers condition 17 to be a condition precedent.
20. I note that the appellant has sought to discharge the condition. It was part discharged through application 2021/0533 relating to the desk study and physical site investigation under paragraph 1 of the condition.
21. An application has been submitted (2021/1895) in respect of a remediation strategy and verification plan which deals with the site in two parts – those parts that are accessible and those that are not. For the inaccessible parts, further investigations are required after removal of the concrete slab for which demolition is a necessary first step. Despite the Council's Pollution Control Officer being satisfied with the strategy as set out in his memo dated 2 August 2021 (appendix 5 of the Council's case), the Council has not determined the application, presumably on the basis that it was submitted on 15 June 2021, after the extended period of the original consent.
22. It is well established that to be a true condition precedent it must employ prohibitive language and, if it does not, it must 'go to the heart of the planning permission' meaning that it must go to the principle of the development as opposed to being confined to a particular part or aspect of the development.
23. Paragraph 1 requires site investigations to be carried out and reported prior to the commencement of development. The rest of the condition employs language that is more prohibitory as it clearly states that 'development shall not commence until.....etc'. Although it is contingent on remedial action being identified through site investigations, in the event that no remedial action is required, this does not undermine the importance and relevance of the condition. I do not share the appellant's view that this is subject only to a timing point as opposed to expressly preventing any development prior to the discharge of the condition.
24. The reason for the condition is 'in the interests of protecting the natural environment and human health from any harmful contamination-related impacts' and these protections are not limited solely to the construction process and would apply to the ongoing use of the development. It is a matter of judgement whether a condition goes to the heart of a planning permission, and in this case, it does not concern a matter of minor detail but one of

¹ Field v FSS and Crawley BC [2004] QBD.

substance relating to the interests of environmental and human health. I consider that the condition goes to the heart of the permission.

25. The appellant has not pursued his original argument that the Whitley exceptions apply in respect of whether enforcement action could be taken when submission and approval dates of details relevant to a condition are taken into account, presumably because the submission of the second application to discharge the condition was after the expiry of the planning permission. However it is now argued that it would be unlawful with public law principles for the Council to take enforcement action to prevent the development proceeding further on the basis of the Council's Pollution Control Officer comments on the development requiring works to begin in order for remedial steps to be taken. Little justification is submitted to justify this claim but the approach places undue weight on the Officer's response on documentation submitted by the appellant to satisfy the pre-development commencement part of the requirements of condition 17.
26. I acknowledge that there is a tension between demolition representing commencement of the development and the requirements of condition 17, but I consider that demolition forms part of site preparation which is a necessary precursor to essential investigative works prior to building works. The commencement of the development does not mean that other elements of the development would be immune from enforcement action should a breach a condition occur, or for that matter that that condition 17 is unreasonable or invalid. Additionally, the interpretation of a planning permission with its conditions should be approached on the basis of what a reasonable reader would understand the words to mean in the context of the overall purpose of the permission and with common sense. Similarly, conditions should be interpreted with a purposive and pragmatic approach.
27. I have had regard to the case law referred to by the appellant and I have reached my decision on this case having taken all relevant factors into account.
28. I conclude that although I have found that the demolition of the garage is a material operation indicating that the development has begun, it cannot be lawfully completed as the appellant has failed to demonstrate on the balance of probabilities that condition 17 does not come within the meaning of a condition precedent which needs to be discharged in full prior to the development.

Conclusion

29. For the reasons given above I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of the lawfulness of proposed operations provided for in planning permission reference 2016/4311 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.

P N Jarratt

INSPECTOR