



Appeal Decision

Site visit made on 10 June 2024

by M Bale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 June 2024

Appeal Ref: APP/Z1510/X/22/3299169

Builders Yard, Braintree Road, Shalford, Braintree, Essex CM7 5HB

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Alexander Tanner of George Tanner (Shalford) Ltd against the decision of Braintree District Council.
 - The application ref 21/03482/PLD, dated 4 November 2021, was refused by notice dated 20 January 2022.
 - The application was made under section 192(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 9 detached houses permitted by planning permission ref 09/01116/FUL dated 5 November 2009.
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Decision

1. The appeal is dismissed.

Reasons

2. Section 192(2) of the Town and Country Planning Act 1990 as amended indicates that if, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application. The onus of proof is on the appellant and the required standard is on the balance of probabilities.
3. Planning permission was granted for the erection of 9 dwellings in 2009 (the Planning Permission). There is no dispute that a commencement was made within the time limit by foundations being dug for plot 4. The main issue in this case is whether that commencement was lawful, given an accepted failure to comply with condition 8.
4. Condition 8 required the implementation of a programme of archaeological work in accordance with a written scheme of investigation (WSI) which had been submitted to and approved in writing by the local planning authority. An Archaeological Trial Trenching Brief (the Brief) was submitted and approved, but none of the archaeological fieldwork detailed therein was carried out. There is no dispute that the wording of the condition, that no development or preliminary groundwork of any kind shall take place until that had been done suggests that condition 8 is a condition precedent.
5. However, the appellant suggests that, following the principles established by *F G Whitley & Sons Co Ltd v SSW & Clwydd CC* [1992] 3 PLR 72, *R (oao Hart*

Aggregates Ltd) v Hartlepool Borough Council [2005] EWHC 840 (admin), and applied elsewhere, the requirements of condition 8 did not go to the heart of the planning permission and so a failure to comply should not render the commencement unlawful.

6. Amongst other cases, I have been directed to, *R (oao Howell) v Waveney District Council* [2018] EWHC 3388 (admin) that specifically found that a similarly constructed archaeology condition did not go to the heart of the planning permission in question. The reasons in that case included that neither the required WSI and an initial investigation, nor anything else, suggested any likelihood of finds on the wider site, and also because it was not a matter of particular significance to the Inspector who allowed the appeal permitting the development in the first place.
7. The development in the present case is not intrinsically linked to archaeology. However, comments from the Council's specialist advisor in respect of archaeology suggest that there is a likelihood of archaeological finds being present on the site because of the location close to the historic settlement of Shalford and where there are known to have been buildings in the past. The Brief also clarifies that potential, and the need for trial trenching to be carried out along the length of each proposed dwelling. That recommendation suggests that there could be archaeological remains across part or all of this site.
8. Despite previous uses, such as fuel tanks, that may have disturbed the ground around plot 4 and elsewhere, the Brief did not differentiate the required approach across different parts of the site. It may be that a further, more detailed, WSI may have identified the area around plot 4 as one that was an area of previous disturbance, where the discovery of archaeological remains was unlikely. However, there is no such further WSI, nor any other substantive evidence to confirm that as the case.
9. The appellant has confirmed, by statutory declaration, that the area covered by proposed plots 4, 7, 8 and 9 were stripped of soil to a depth of at least 30cm in or about 1970 and hardcore and concrete standings laid. They also describe the yard area as having a storm drainage run through it and a pit within the, now demolished, contractors shed having a depth of at least 1.8m. However the evidence is imprecise insofar as where these features were.
10. At my site visit, I observed that the foundations that have been laid appear to have required a deep excavation, well below the natural ground level. The evidence before me does not suggest that this was entirely in the location of the deep pit described above. The foundations are well below the 30cm that were said to have been stripped in the 1970s.
11. While it may be possible to comply with the condition in respect of the wider site, given my observations above, there appears to be no realistic prospect of satisfactorily complying with the condition in respect of the part of the development where work has been carried out. The condition is clearly designed to protect any archaeological interests that any development could have potential to disturb or damage.
12. Archaeology was not covered to any great extent in the Council's original officer report relating to the Planning Permission. However, unlike the situation described in *Howell*, the importance of archaeology at the site has been clearly demonstrated by both the Council and the information provided by the

appellant in respect of the condition. Moreover, in the situation described in *Howell*, initial investigations had been done, leading to a conclusion that further remains on the wider site were unlikely. That is not the case here, where the only substantive evidence before me recommends excavations across the whole site and there has been no on-site investigation or subsequent desk-based work to suggest otherwise. The cases are not, therefore, comparable.

13. At this site, then, archaeology is clearly a matter that should be properly investigated through site excavations. While condition 8 may be a standard form of words, the required work can only sensibly be done prior to other ground works. Not only may proper investigation be prevented by the presence of the development on the site, but the works themselves may destroy any archaeological evidence that exists.
14. The existence of archaeological remains at the site is uncertain. However, such is the nature of archaeology, and investigation of a site prior to any significant ground disturbance is, therefore, necessary to ensure that any remains are not destroyed. On this basis, it has not been shown that any potential enforcement of the condition would be manifestly unreasonable.
15. I, therefore, find that, on the balance of probabilities, condition 8 goes to the heart of the Planning Permission and so is a true condition precedent. Development has commenced in breach of that condition because the required on-site trial trenching, necessary to identify the absence or otherwise of any archaeology, did not take place.
16. Accordingly, there has been no lawful commencement of the development. The time limit for commencement has now passed and development cannot now be carried out pursuant to the Planning Permission.

Conclusion

17. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of the erection of 9 detached houses permitted by planning permission ref 09/01116/FUL dated 5 November 2009 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.

M Bale

INSPECTOR