



Appeal Decision

Site visits made on 4 June and 11 July 2024

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 12 July 2024

Appeal Ref: APP/Z4718/X/23/3334101

Land off Hunsworth Lane, East Bierley, Bradford BD4 6RN

- 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 Carlton and Judith Ives against the decision of Kirklees Metropolitan Borough Council.
- The application Ref 2022/CL/91936/E, dated 31 May 2022, was refused by notice dated 31 May 2023.
- The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended ('the 1990 Act').
- The development for which a certificate of lawful use or development is sought is described as 'to confirm the lawful commencement of planning approval reference number 2912 granted in 1945 for the erection of a detached house'.

Summary Decision: the appeal is allowed and a certificate of lawful development is issued in the terms set out below in the Formal Decision.

Preliminary Matters

1. I wrote to the parties on 28 May 2024 noting, among other matters, that the application is made under section 191 of the 1990 Act. Any application under that section seeks confirmation that what presently exists is lawful. What presently exist, as I saw on site and on photographs, are some (recently uncovered) foundations to a dwellinghouse on the land identified in the application.
2. Thus the question before me here is whether those foundations are lawful, and to that extent the description of the proposal will be modified. This is consistent with the discretion afforded me by section 191(4) of the 1990 Act.
3. The appellants ask me to confirm the lawful commencement of a 1945 planning approval. That would not describe the existing development, but it might be a reason for issuing a certificate. Another reason might be that the existing development has been in situ for so long that it is now immune from enforcement action.
4. Nonetheless, despite my suggesting that the case might more appropriately fall for consideration under section 192 of the 1990 Act, because what the appellants in reality seek is confirmation that they may continue to build out the dwelling for which permission was granted in 1945, the appellants have expressed a preference for me to consider, as a preliminary question, the lawfulness of the existing development under section 191 of the 1990 Act. The Council have expressed no view.

5. Thus I consider whether or not the existing development was lawful at the time of the present application. Although whether the development permitted in 1945 was begun is considered in order to justify my conclusions on that question, I should stress that I have not given consideration to any later matters that might affect whether the 1945 permission now remains extant. In particular, I have not considered the transitional and saving provisions of the 1947 and later Planning Acts; how, if at all, the interim development order permission granted might have been affected by any Scheme under the 1932 Act; or whether any intervening incompatible development has taken place.

Site visits

6. I viewed the site from the adjoining highway on 6 June, unaccompanied by the parties. With the permission of the appellants I subsequently entered the site on 11 July in order to inspect the foundations more closely; again, this was unaccompanied by the parties.

Main Issues

7. The main issue is simply whether the existing foundations are lawful. However, as adverted to above, there could be more than one reason why they may or may not be so. Section 191(2) of the 1990 Act provides that operations are lawful at any time for the purposes of that Act if (a) no enforcement action may then be taken in respect of them; and (b) they do not constitute a contravention of the requirements of any enforcement notice then in force. Reasons why enforcement action may not be taken include because the operations did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason.
8. It appears common ground that the operations have constituted development requiring planning permission. In respect of section 191(2)(b) it is common ground that there is no enforcement notice presently in force (or that was in force at the time of the application). In respect of section 191(2)(a) I consider first whether the time for enforcement action has expired. I then consider whether there is 'any other reason' why enforcement action may not be taken; namely, whether the development benefits from a planning permission.
9. In all these matters the onus of proof lies upon the appellants to demonstrate lawfulness to the standard of probabilities. Planning matters, such as the desirability of the site's location in the Green Belt or any implications for highway safety, are not relevant to my considerations here.

Reasons

Whether the time for enforcement has expired

10. Section 171B(1) of the 1990 Act provides (or provided, at the time of the application) that where there has been a breach of planning control consisting of the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.
11. Thus the question whether the time for enforcement has expired rests on whether a breach of planning control can be identified. This in turn will be considered below, because if the foundations have been constructed pursuant

to a planning permission then no question of the time for taking enforcement action arises.

12. The foundations of the dwelling have by common consent been in situ since before 1947, much longer than four years before the present application was made. However the question whether the operations are 'substantially completed' again comes back to the question of what is being built. Insofar as the foundations constitute a holistic, and completed, operation of their own, they are immune from any enforcement action.
13. Thus if there is no planning permission that has authorised the foundations, I would find that they have constituted a breach of planning control comprising a building operation against which no enforcement action may now be taken due to the passage of time since their completion. Potentially, therefore, a lawful development certificate could be granted on this basis, but it will depend on the outcome of the next question.

Any other reason: whether carried out with the benefit of planning permission

14. A permission was granted on 18 September 1945 by the Urban District of Spenborough pursuant to the Town and Country Planning Act 1932 ('the 1932 Act'); the Town and Country Planning (General Interim Development) Order 1933 ('the 1933 Order'); and to the Batley and District Group Joint Town Planning Scheme ('the Scheme'). In pursuance of their powers under Article 4 of the 1933 Order, the Council permitted a "Detached House – Hunsworth Lane, Hunsworth for Mr. I. Crossland".
15. The house was permitted "in accordance with the plans submitted" and was "subject to compliance with" the requirements specified in the Schedule (but there were none); and "subject to due compliance with" the building byelaws (Local Acts, Regulations) and general statutory provisions in force in the area of the Council.
16. Thus the two principal questions arising are, first, whether the foundations were laid in accordance with the plans submitted and, secondly, whether due compliance was achieved with the building byelaws and general statutory provisions in force at the relevant time.
17. Construction of the house, by laying the foundations, was evidently begun by Mr Crossland, in whose favour the permission was granted. Notice was given to the Council stating that works were to be begun on 12 June 1946. An inspection evidently took place on 17 June 1946 and was 'approved'.
18. I am not informed by the parties what if any deemed time limit was imposed for the start of the development by the permission, but there is no suggestion that the development was begun too late. Although a building control rather than a planning provision, section 15 of the Public Health Acts Amendment Act 1907, not repealed until 1959, gave the local authority scope to declare a three year time limit where plans were deposited in pursuance of local byelaws. If any time limit applied to the permission, I would expect it to be broadly commensurate with that. However, there is no time limit expressed on the face of the permission itself. The Ministerial Memorandum accompanying the 1933 Order stated that it was open to the Authority, in granting permission to develop, to specify a time limit within which the development must be carried out if the permission was to be valid. In the absence of any such specified time

limit on the face of the permission, it appears that this permission was not the subject of one.

19. As the development was begun by Mr Crossland himself, I do not need to be concerned with the question whether the permission were to inure only for his benefit or for that of the land.
20. The foundations were inspected on the same day, 17 June 1946. No remarks were expressly made by the Inspector about those, although the inspection notice was signed in the same hand as the commencement notice referred to above, which was signed 'approved'. Taking these documents together I accept that the foundations were begun, and approved for building control purposes.
21. Whilst it was evidently a requirement of the byelaws that 24 hours' prior notice of the commencement of works should be given, it appears in this case that the foundations may have been laid by the time of the two notices given in June 1946. Nonetheless they were approved, and no issue appears to have been taken about any lack of a timely commencement notice.
22. A little over a year later, in July 1947, notice was given to the Council to say that the foundations and the damp proof course were ready for inspection. A different inspector visited. On 7 July 1947 Inspector Leech recorded that the damp proof course was not in the correct position, the partition walls were not tied in, the cavity was too wide, and the cavity was to be filled with concrete. The foundations themselves attracted no comment, adverse or otherwise.
23. Thereafter the trail goes cold, with no record of any further works having been carried out since. It appears possible that the works carried out between the 1946 and 1947 inspections have since been removed, with only the external foundations now visible.

Whether in accordance with the plans

24. The Council's sole reason for refusing to issue a certificate concerns the physical location of the foundations. They say that the foundations laid are not in accordance with the plans approved in 1945, and thus that a certificate cannot be issued. In so doing, the Council did not consider any modification to the description of the proposal, and so have considered solely whether the foundations laid were consistent with (and amounted to a start of) the 1945 permission, rather than whether they might be lawful for any other reason.
25. The appellants acknowledge that the building is slightly out of place. There appears no real dispute between the parties that the foundations accord with the dimensions of the permitted house: the issue is solely whether they are in the right location. The north-south alignment appears broadly correct, but the foundations are laid further east than the 1945 block plan depicted; possibly by as much as 5 metres. There is however some small overlap between the 'permitted' building and the foundations as laid.
26. In their officer report, the Council asked themselves the questions whether the foundations were 'as a matter of fact laid in full accordance with the 1945 approved block plan' and whether the works are, 'as a matter of fact and degree, in accordance with the planning permission'. These ask slightly the wrong question. I referred the parties to the case of *Handoll et al v Warner Goodman & Street* [1995] JPL 930 upon which the appellants but not the Council have commented. The relevant test there posited by the Court of

Appeal was whether the development does not comply “in a material respect, or to a material extent, with the planning permission which has been granted”.

27. This question of materiality must be addressed in context. The proposal in 1945 was for a small isolated dwelling lying within an open 24ha field. The foundations to the dwelling laid lie within the same application site and are partly on the same footprint. The north-south alignment does not differ. The technology available in the 1940s for the laying out of buildings was not as sophisticated or accurate as that available today, and there are some minor inconsistencies in the historic OS maps. Achieving an exact match would have been difficult.
28. The Inspector in the *Stroud* case (APP/C1625/X/16/3149289) that has been brought to my attention asked himself the question whether a reasonable person looking at the plans and at the building that was constructed would conclude that the building is the one approved. This is another way of posing the question of materiality raised by the Court in *Handoll*. Given the context here, where the building lies in a large field with few topographical features and a long way from other buildings, I do not consider that the building of the foundations some four or five metres further away from the road than envisaged by the plans constitutes a material difference. The foundations are materially consistent with the planning permission granted in 1945.
29. Relevant to, although by no means determinative of, my conclusion on this issue is the approach apparently taken contemporaneously by the Council. The ‘notice of building works’, which appears to have prompted consideration as an application for planning permission, was received by the Council on 30 August 1945. Article 8 of the 1933 Order provided that an application to the byelaw authority (for approving building plans) was also deemed to be an application for planning permission under the 1933 Order. It appears that the application was considered and approved for both planning and building control purposes at the same meeting on 10 September 1945. The plans are stamped for approval pursuant to both these purposes.
30. Whilst the subsequent inspections appear to have been carried out purely for building control purposes, some conflation in practice of the two functions by the local authority at the relevant time would not have been surprising, and hence the approval of the works by the building inspector is somewhat persuasive as to the overall position of the Council at the time. Nonetheless I acknowledge that the inspections were not expressly undertaken for the purpose of assessing compliance with the planning permission. The approval given certainly does not amount to anything akin to a lawful development certificate. In any event I should have reached the same conclusion without sight of the records of those inspections.

Whether due compliance with the building byelaws and statutory provisions

31. By the time the permission was granted, the Town and Country Planning (Interim Development) Act 1943 had been passed, thus subjecting most of the country to a system of interim development control. It appears that the appeal site lay in an area within which a planning scheme was nevertheless under preparation (the Scheme) to which the Council would have needed to have regard when deciding whether to grant the permission.

32. Evidently there were some building byelaws in force in the Spenborough area at the relevant time: the permission refers to them and so do the inspection notices. Unfortunately none of those documents identify exactly what they were, or what they said. The stamped plans refer to building byelaws of 1939. The permission pre-dated the general codification of building control via the Building Regulations 1965, made in the exercise of powers conferred by public health legislation.
33. No local byelaws have been supplied to me, but Model Byelaws were published by the Local Government Board in 1877 (and thereafter) pursuant to the Public Health Act 1875. Section 157 of that Act, again not repealed until 1959, enabled urban authorities to make byelaws with respect to matters including the structure of walls and foundations of new buildings for securing stability and the prevention of fires, and for purposes of health. The 1877 Model Byelaws included requirements that (14) every wall of a new building built at an angle with another wall was to be properly bonded therewith; and (17) that each wall of a new building shall have a proper damp course at a height of not less than six inches above the surface of the ground adjoining it. It appears from the July 1947 inspection report that Inspector Leech found the building under construction to contravene these, or similar, requirements.
34. Therefore, and notwithstanding that they have not been provided, it appears to me more likely than not that there was not, at the time of the July 1947 inspection, "due compliance" with the byelaws then in force. It follows that consideration needs to be given to the consequences for the 1945 permission.
35. At the relevant time, planning control fell under the general auspices of public health: under the 1932 Act, the Minister of Health was the relevant minister referred to in respect of approving planning schemes, and charged with making interim development orders such as the 1933 Order that applied here, and generally throughout the Act (section 2(3)). The Ministry of Health was also the successor to the functions of the Local Government Board, itself established in 1871 and having supervision over public health matters including what we would now recognise as local building control.
36. Nonetheless, although both falling under the Ministry of Health, there was not then (or now) a fusion of the two regimes, and the 1932 Act made provision for planning permissions to be granted subject to conditions. Section 10(3) of the 1932 Act provided that where an application for permission to develop land was made to the specified authority in a manner provided by the (1933) order, the authority may have granted the application unconditionally or subject to such conditions as they thought proper to impose, or they may have refused the application.
37. The requirement to 'duly comply' with byelaws and other statutory provisions was not expressly imposed as a condition of the permission but as a general requirement that appears to have lacked legal foundation. Even if it were considered to be a planning condition, I consider that it would have been a condition that unnecessarily duplicated other legislation. Planning conditions, it is now trite to say, must not be used to control matters that are the subject of other primary legislation; and this applies whether or not that other legislation is the province of the same government minister.
38. Section 158 of the Public Health Act 1875 provided that the relevant urban authority may have removed works constructed in contravention of the

relevant byelaws; and penalties for offences were also contemplated. Given these other means of enforcement, it does not appear to me a likely reading of the 1945 permission to say that a failure to comply with local building byelaws (or any other statutory provision) when constructing the dwelling would have amounted to a failure to comply with the permission itself. The 1932 Act was itself largely silent as to planning enforcement, but if development was carried out inconsistently with (i.e. not benefitting from) a planning permission then it would not have been aided by the compensation provisions of that Act if later removal were required.

39. There is in any event no evidence that the local authority required the removal of any works, nor that the errors made by Mr Crossland in 1947 were not rectifiable. Indeed, the development now existing on the site suggests that works carried out between the inspections of 1946 and 1947 have since been removed, with no evidence of internal walls now visible. Although there may be some elements of what was then built, or of what is there now, that were not duly compliant with building standards of the time, it is clear that the foundations were first inspected in 1946 and 'approved'. Those foundations have not been removed, and were sufficient in themselves to commence, for planning purposes, the authorised development notwithstanding any later deviation from plans approved for the purposes of building control or from the requirements of any local byelaws.

Conclusions

40. It follows that I consider the foundations were laid in accordance with the 1945 permission and that they are lawful for that reason. The question of immunity from enforcement action does not arise. Therefore a certificate will be granted. Although the description will be modified somewhat, my reasons for granting it will essentially reflect what is sought by the appellants.
41. Nonetheless I should stress again that in reaching this conclusion I have not had to consider whether any further works now carried out under the auspices of that 1945 permission would also be lawful.
42. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the foundations of a dwellinghouse on land off Hunsworth Lane 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.

Formal Decision

43. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing operations which are considered to be lawful.

Laura Renaudon

INSPECTOR

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 31 May 2022 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, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The foundations were constructed in accordance with planning permission reference plan no. 2912 granted by the Urban District of Spenborough on 18 September 1945 for the benefit of Mr Irvine Crossland. The foundations were constructed by Mr Crossland in or before July 1947 which on the balance of the evidence available is considered to have been within the time limit (if any) of the permission. Any difference from the approved location is not material.

Signed

Laura Renaudon

Inspector

Date 12 July 2024

Reference: APP/Z4718/X/23/3334101

First Schedule

Existing development comprising the foundations to a dwellinghouse.

Second Schedule

Land off Hunsworth Lane, East Bierley, Bradford BD4 6RN.

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



Plan

This is the plan referred to in the Lawful Development Certificate dated: 12 July 2024

by Laura Renaudon LLM LARTPI Solicitor

Land off Hunsworth Lane, East Bierley, Bradford BD4 6RN

Reference: APP/Z4718/X/23/3334101

Scale: DO NOT SCALE

