



Appeal Decision

Site visit made on 16 July 2024

by M. P. Howell BA (Hons) Dip TP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15th AUGUST 2024

Appeal Ref: APP/W0340/X/23/3325974

Hire Co Ltd, Colthrop Lane, Thatcham RG19 4NT

- 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 Paul White (Hire Co Ltd) against the decision of West Berkshire District Council.
 - The application ref 22/00180/CERTE, dated 24 January 2022, was refused by notice dated 8 June 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 confirmation that development has lawfully commenced under permission reference 16/02919/FUL.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of development for which a certificate is sought is given in section 5 of the Application Form and refers to 'confirmation that development has lawfully commenced under permission reference 16/02919/FUL.' However, this is not a description of any existing operations or a use of land.
3. Based on the submissions, the application is made under sections 191 (b) of the Town and Country Planning Act 1990 (1990 Act) and relates to existing operations on the land comprising a new front entrance way, works to make the front entrance wider by 3 metres, to dig a trench and bury cables alongside of the fence and make up levels on the right hand side of the new entrance with crushed concrete.
4. The accompanying cover letter makes it clear that the appellant is seeking to establish whether the works described above are lawful and can be regarded as being comprised in planning permission, reference 16/02919/FUL, and initiated the development in accordance with condition 1 on or before 7 April 2020. However, as with all LDC appeals, I will also have to have regard to whether the works are lawful by complying with section 191(2)(a) and (b) of the 1990 Act.
5. For clarity, section 191(2) sets out the circumstances in which 'uses and operations are lawful at any time' for the purposes of the 1990 Act. Section 191(2)(a) and (b) of the 1990 Act sets out that uses and operations are lawful at any time if: a) No enforcement action may be taken in respect of them (whether because they did not involve development or require planning

permission or because the time for enforcement action has expired or for any other reason); and b) They do not constitute a contravention of any enforcement notice then in force.

Main Issue

6. The main issue in this appeal is whether the Council's refusal was well founded.

Reasons

Background

7. Planning permission reference 16/02919/FUL (hereafter referred to as the 2016 permission) was granted on 7 April 2017 for the demolition of the existing portacabins, construction of a 3 bay workshop to include a vehicle testing lane and a body shop lane. It also proposed to construct a concrete vehicle check area adjacent to the proposed building.
8. There are no conditions attached to the permission requiring details of any additional matters to be submitted prior to the commencement of the development. Two conditions of the permission referenced in the appeal are conditions 1 and 2. For clarity conditions 1 and 2 state: -
- 1) The development to which this permission relates must be begun not later than the expiration of three years beginning from the date of this decision notice.*
 - 2) The development hereby permitted shall be carried out in accordance with the application form, the amended design, access statement, the cover letter received on 14 March 2017 and the approved drawings listed*
 - a. Amended proposed site block plan drawing No 01 REVISION E*
 - b. Amended proposed sketch layout plan drawing (showing existing cabins) No 07 REVISION A*
 - c. Amended proposed sketch layout plan drawing No 07 REVISION A*
 - d. Amended proposed layout plan drawing No 02 REVISION B*
 - e. Amended proposed elevations drawing No 03 REVISION C*
9. The two parties do not dispute that the material operations set out by the appellant are development in respect of section 55 of the 1990 Act. They also both accept that the material operations set out were carried out within three years of the date of the permission, and I have no reason to disagree with this. The dispute is whether the operations carried out were comprised in, and initiated, the 2016 permission in accordance with condition 1 of the permission.
10. The Council claim that the operations cannot constitute the lawful initiation of the permission as the works to form the 'in' access (hereafter referred to as the 'new access') do not accord with the approved plans set out in Condition 2, which would result in the permission lapsing.
11. The appellant claims that the works described on the PA Construction invoice as 'extra over works' are with respect to the 'out' access (hereafter referred to as the 'existing access') to the south, not the new access closer to Colthrop Lane. In terms of the 'new front entrance way' works or the new access, the appellant acknowledges that it has been constructed in a location that does not

match the approved plan, but claims the difference is only a minor deviation. As such, it is the appellant's position that the material operations to form the new access are still comprised in the 2016 permission and can be rectified through the provisions set out in Section 73A (2)(c) of the 1990 Act.¹

Did the material operations initiate the 2016 permission

12. The starting point in such cases is section 56(2) of the 1990 Act. This sets out that development shall be taken to be begun for the purposes of section 91 of the 1990 Act on the earliest date on which any material operation comprised in the development begins to be carried out. Section 56(4) of the 1990 Act sets out what 'material operations' means, and it includes, amongst other things (d) any operation in the course of laying out or constructing a road or part of a road. The appellant claims that the material operations carried out in August 2017 accord with section 56(4)(d) of the 1990 Act.
13. The evidence submitted with the LDC application and appeal in respect of works to the existing access is vague and ambiguous. For instance, based on the PA Construction invoice, the accompanying submissions and my site visit, it is not clear how the existing access has been widened; where the levels have been increased or where the trenches were dug and cables buried. More significantly, there is no indication from the evidence or submissions how the material operations to the existing access can be regarded as being comprised in the 2016 permission.
14. Notwithstanding the above, the PA Construction invoice evidently shows that the 'new front entrance way' was part of the material operations carried out at the same time to form the new access. The accompanying letter from PA Construction confirmed these works included adding new kerbs and a gateway. With the benefit of a site visit, I was able to see that a new access, comprising kerbs and a gateway, has been formed off the western boundary of the site. The 2016 permission proposed a new access, and it is shown on the approved plan referenced Amended Proposed Site Block Plan drawing No 01 REVISION E. The new access has been constructed a few metres closer to Colthorp Lane than shown on the approved site block plan, however, it is in a similar position on the western boundary of the site and is not a significant deviation from the approved location.
15. Accordingly, in my judgement, the 'new front entrance way' can be regarded as works to form the new access, which is a material operation comprised in the 2016 permission. As these works were carried out within 3 years, it would have initiated the development in compliance with condition 1 of the 2016 permission, even though its position deviates slightly from the approved location.
16. I have had regard to the Council's position on the breach of the plans condition (condition 2) and whether the permission would have lapsed. However, *F G Whitley & Sons v SSW & Clwyd CC [1992] JPL 856*, established that if the development was in contravention of 'conditions precedent', then it had not been commenced in accordance with the planning permission. *R (oao Hart Aggregates) v Hartlepool BC [2005] EWHC 840* established that for there to be a breach of a 'condition precedent' (and for a developer to have started

¹ Planning permission for development already carried out without complying with some condition subject to which planning permission was granted.

development without planning permission) the condition must both go to the heart of the planning permission and expressly prohibit any development taking place before a particular requirement has been met. Condition 2 cannot be regarded as a 'condition precedent' as it does not go to the heart of this permission, nor does it expressly prohibit the development before any requirement is met.

17. As such, based on the evidence before me, the works to form the new access is a material operation comprised in the development granted planning permission under reference 16/02919/FUL. The position of the new access would be a breach of the plans condition (condition 2) but would have still initiated the permission within 3 years of the date of the approval in accordance with condition 1.

Any other reason the material operations would not be lawful

18. For the reasons already outlined above, the works to form the new access was comprised in the development and initiated the 2016 permission. However, it is accepted by both parties that the new access deviates from the approved plans, and I do not disagree with this. Therefore, despite being considered a material operation comprised in the development, the new access is in breach of the plans condition (condition 2) which refers to the development being carried out in accordance with the Amended Site Block Plan drawing No 01 REVISION E.
19. Based on the evidence before me, the breach of condition has occurred within 10 years of the date of the application, and therefore, the time to take enforcement action has not yet expired. In view of this, enforcement action could be taken in respect of the material operations to form the new access. The development, therefore, contravenes the provisions set out in section 191 (2) (a) of the 1990 Act and cannot be lawful.

Other Matters

20. The appellant has referred to an appeal², which also considered whether material operations initiated an approved development. I have had regard to the appeal, but there are differences that mean it is not comparable to this case. Specifically, the material operations considered in the highlighted appeal were comprised in the approved development, but they did not deviate from the approved plans. Accordingly, this appeal is not directly comparable, and I have not given it significant weight when making my decision.
21. There is an indication in the submissions that portacabins were demolished and a perimeter fence erected as part of the material operations. However, there is no evidence detailing the date when these material operations were carried out. As such, I gave this element limited regard when determining the appeal.

Conclusion

22. While I agree with the Council's decision to refuse to issue an LDC, having regard to the available evidence, my decision is made on a different basis. As with all LDC applications, it is open for fresh applications to be made if, for example, greater detail or other evidence comes to light.

² Appeal Decision APP/N0410/X/18/3208544

23. For the reasons given above I conclude on the evidence available that the refusal to grant a certificate of lawful development in respect of the material operations carried out was well-founded and the appeal should fail. I will, therefore, exercise accordingly the powers transferred to me in section 195 (2) of the 1990 Act as amended.

M. P. Howell

INSPECTOR