



Appeal Decision

by D Moore BSc (HONS), MCD, PGDip, MRTPI, IHBC

an Inspector appointed by the Secretary of State

Decision date: 30 August 2024

Appeal Ref: APP/F5540/X/24/3345413

Station Parade, Boston Manor Road, Hounslow, Brentford TW8 8DZ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (the 1990 Act) 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 Kieran Redmond of Station Parade House Ltd against the decision of the Council of the London Borough of Hounslow.
 - The application Ref 00133/AY/LAW1, dated 24 October 2023, was refused by notice dated 25 March 2024.
 - The application was made under section 191(1)(b) of the 1990 Act as amended.
 - The development for which a certificate of lawful use or development is sought is "commencement of works is in accordance with planning permission 00133/AY/P3 and its conditions".
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing operation which is found to be lawful.

Application for costs

2. An application for costs was made by Mr Kieran Redmond of Station Parade House Ltd against the Council of the London Borough of Hounslow. This application is the subject of a separate Decision.

Preliminary Matters

3. I consider that these appeals can be determined without the need for a site visit. This is because I have been able to reach a decision based on the information already available.
4. I have used the description of development provided on the application form as this clearly sets out what was sought by the appellant.
5. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.

6. For the avoidance of doubt, the planning merits of the development are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act.

Main Issue

7. I must decide whether, on the balance of probabilities, the appellant has shown that the development was begun in accordance with the planning permission and its conditions within the statutory time period, and that the planning permission is extant.
8. The main issue is whether the Council's decision to refuse to grant an LDC was well-founded.

Reasons

Background

9. Planning permission was granted on 2 October 2020 for the "construction of nine homes with associated cycle storage, bin storage and private amenity, and two shops with associated bin storage (Ref 00133/AY/P3)". The permission was subject to 22 conditions.
10. Condition 1 states that "the development hereby permitted shall be begun before the expiration of three years from the date of this permission". The Council is of the opinion that the development was begun on 2 October 2023.
11. The Officer's delegated report describes the following evidence - a Statutory Declaration¹ dated 23 October 2023, submitted by the appellant, which states that they witnessed construction work commence on 2 October 2023 to include setting out and digging foundations, loading soil from the excavations into a tipper lorry and its removal from the site; a further Statutory Declaration, made by John Leonard dated 10 January 2024, states that he attended the site on 2 October 2023 and used his vehicle to remove material; two further Statutory Declarations, dated 10 January 2024, from two construction workers stating they attended the site on 2 October 2023 and commenced construction works including setting out and digging foundations.
12. In addition to the sworn evidence, there are photographs showing an excavator and the digging of a trench between 16:11 and 16:15 on 2 October 2023. There is also an extract from the employee attendance book detailing the site owner and construction workers who made statements were present on 2 October 2023. There is a Duty of Care Transfer Notice concerning the removal of soil waste at 14.20 on 2 October 2023 and a related Waste Transfer Note, and a delivery note for haulage hire on 2 October 2023.
13. In terms of when the works on site were carried out, the Council says that it considers that the balance of the evidence supports the view that soil excavation works were undertaken within the development site prior to the end of 2 October 2024. It indicates that this would amount to a material operation as defined in Section 56(4) of the 1990 Act.
14. The main dispute between the parties is whether the planning permission had expired before the development was begun.

¹ Submitted in accordance with the Statutory Declarations Act 1835.

Analysis

15. Section 56(2) of the 1990 Act provides 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. 'Material operations' are defined in Section 56(4) as including the digging of a trench which is to contain the foundations, or part of the foundations, of a building. A material operation does not have to be completed. However, it is necessary for the works carried out to be comprised in the planning permission. Where there is a dispute, the question will be whether the works were done in accordance with the relevant planning permission and were material as a matter of fact and degree.
16. The evidence before me includes a Statutory Declaration by the appellant, dated 17 May 2024, which was duly signed and witnessed. This declares that the physical works to commence development started on site on 25 September 2023. It is stated that the appellant was present on site on 25 September and subsequent days to monitor the commencement of development. Corroborating information from the site attendance sheet is provided.
17. It is further stated that Donal O'Conchuir the site manager, Valdimir Tapu a supervisor and Sean Leonard a machine driver were also present on 25, 26 and 27 September 2023. It is explained that between Monday 25 September and Wednesday 27 September, the works included the digging basement foundations and other groundworks. Other corroborating evidence includes invoices and a delivery note.
18. Donal O'Conchuir has submitted a Statutory Declaration dated 13 May 2024. This sets out that physical works to commence development started on 25 September 2023. Mr O'Conchuir says he was on site each day between 25 and 27 September 2023 as shown in the attendance sheets. He managed site operations including the setting out works for digging the basement foundations.
19. Also submitted is a Statutory Declaration by Sean Leonard, dated 17 May 2024, which states that he attended the site on 25 September 2023 and was present on the following days until 27 September 2023, as shown on the attendance sheet. It is declared that Mr Leonard dug trenches and excavated soil for the foundations for the development.
20. There is a further Statutory Declaration dated 13 May 2024 by Valdimir Tapu. This says the development work commenced on 25 September 2023 and Mr Tapu was present on site each day until 27 September 2023, as shown on the attendance sheet. He supervised and coordinated the foundation dig and stockpiling of excavated material.
21. The Statutory Declarations were properly sworn and witnessed and carry significant weight. The sworn evidence, along with the corroboratory material, shows that works commenced on site on 25 September 2023. The works comprised the digging of a trench to contain the foundations, or part of the foundations of the approved building. This would amount to a material operation for the purposes of Section 56(2) of the 1990 Act, as a matter of fact and degree. Consequently, I find the development was begun on that date.
22. The additional Statutory Declarations, which were submitted at the request of the Council, show work continued on 2 October 2023. However, the Council

- accepted that works took place before then when it issued a Temporary Stop Notice on 27 September 2023. This was served after receiving an email on behalf of the appellant advising that construction works had commenced. I note that this was withdrawn on 2 October 2023 once the Council said it was satisfied that the pre-commencement conditions had been discharged².
23. As explained, I have found that development was begun on 25 September 2023. I must also consider whether the development was begun lawfully for the planning permission to be considered to have been implemented in accordance with its terms and conditions.
24. Of the 22 conditions, four of these required the approval of certain matters prior to the commencement of development. Details submitted pursuant to condition 6 (Contamination) Ref 00133/AY/P3(6) were discharged on 5 September 2023; condition 3 (Materials) Ref 00133/AY/P3(3) on 29 September 2023; and condition 7 (Construction Logistics Plan) Ref 00133/AY/P3(7,13) on 2 October 2023.
25. Condition 13 concerns the provision of a loading bay and states "The development shall not commence until agreement has been obtained from the local highway authority to provide a 'Goods Vehicle Loading Only' bay and a contract agreed for this to be fully installed to the southern side of the road and the cost of which shall be borne by the applicant". The layout details for the loading bay were approved by the Council on 2 October 2024, Ref 00133/AY/P3(7,13). However, the Council says there was no contract or agreement for the construction of the loading bay and there was no payment for the works. It indicates that condition 13 was not fully discharged despite having issued a decision to the contrary.
26. The Council has had regard to *Whitley*³ and whether condition 13 should be considered a true condition precedent. If it were a true condition precedent, then material operations which contravene pre-commencement conditions shall not be considered lawful. Such unlawful material operations (such as excavations) could not be considered commencement of development for the purpose of saving a planning permission and preventing it from lapsing.
27. With reference to the principles established in *Hart Aggregates Ltd*⁴, the Council's view is that the failure to agree a contract for the installation of the vehicle loading bay does not go to the heart of the planning permission. As such, this would not have been fatal to the LDC application. Furthermore, it is stated that it would be considered irrational for the Council to use the failure to discharge 'Part 2' of Condition 13 to determine that the planning permission had lapsed. This is because reasonable steps had been taken by the developer's agents before the close of 2 October 2023 to secure agreement with the local highway authority. There is no reason for me to disagree with the Council's position on this matter.
28. Conditions 3 and 7 were discharged after 25 September 2023, when I have found that the development was begun. In terms of condition 7, the construction logistics plan, I consider the same principle applies to this as the Council applied to condition 13. Although condition 7 prohibits the

² Email dated 2 October 2023 from the Council to the appellant.

³ *F G Whitley & Sons v SSW & Clwyd CC* [1992] JPL 856.

⁴ *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin).

commencement of development until a requirement has been met, it does not have such significance that it goes to the heart of the planning permission. As such, I do not consider it a true condition precedent.

29. Condition 3 requires details of materials to be submitted. This would affect the overall appearance of the development and would, in my judgement, go to the heart of the planning permission. It would be a true condition precedent and the *Whitley* principle applies.
30. However, the judgment in *Whitley* established an exception. If the condition requires something to be approved before a given date, and the developer applies for approval before that date, and the approval is subsequently given so that no enforcement action could be taken, then the work carried out before the deadline and in accordance with the ultimately approved scheme can amount to a lawful start to development. The exception applies in this case. The details required to discharge condition 3 were submitted on 19 June 2023 before the planning permission expired, and approval for those details was given.
31. Works to commence the development took place before conditions that were worded as pre-commencement conditions were discharged. However, I have concluded that these were either not true precedent conditions, or an established exception applies. Therefore, the works carried out before the permission expired, to dig a trench that would contain the foundations of the approved building, amount to a lawful start to development.
32. Overall, I find that the appellant has shown, on the balance of probabilities, that the development was begun in accordance with the planning permission and its conditions, within the statutory time period. Therefore, the planning permission is extant.

Conclusion

33. 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 "commencement of works is in accordance with planning permission 00133/AY/P3 and its conditions" 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.

D Moore

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 24 October 2023 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 appellant has shown, on the balance of probabilities, that the development was begun in accordance with the planning permission and its conditions, within the statutory time period. Therefore, the planning permission is extant.

Signed

D Moore
Inspector

Date

Reference: APP/F5540/X/24/3345413

First Schedule

Commencement of works is in accordance with planning permission
00133/AY/P3 and its conditions

Second Schedule

Land at Station Parade, Boston Manor Road, Hounslow, Brentford TW8 8DZ

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 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:

by D Moore BSc (HONS), MCD, PGDip, MRTPI, IHBC

Land at: Station Parade, Boston Manor Road, Hounslow, Brentford TW8 8DZ

Reference: APP/F5540/X/24/3345413

Scale: NTS

