
Appeal Decision

Site visit made on 8 August 2024

by D A Hainsworth LL.B(Hons) FRSA Solicitor

an Inspector appointed by the Secretary of State

Decision date: 4th September 2024

Appeal Ref: APP/N4720/X/23/3330182

1 Lower Mickletown, Methley, Leeds, LS26 9JH

- The appeal is made by James Fender under section 195 of the Town and Country Planning Act 1990 against a refusal by Leeds City Council to grant a lawful development certificate.
 - The application Ref: 22/08405/CLP, dated 20 December 2022, was refused by notice dated 8 September 2023.
 - The application was made under section 192(1)(b).
 - The development for which the certificate is sought was described on the application form as “Construction of a dwellinghouse”. This description has been modified so that the certificate is now sought “to confirm future works relating to planning permission 10/00056/FU would be lawful development by virtue of operations carried out pursuant to that planning permission”.
 - The permission was granted on 3 December 2010. It authorises the construction of a five bedroom detached house and double garage on the appeal site, subject to nineteen conditions. Condition 1 is a standard condition requiring the development to be begun within three years. Condition 9 requires details of excavations to be approved before any works are commenced, to ensure the protection of retained trees.
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Decision

1. The appeal is allowed and attached to this decision is a lawful development certificate relating to the operations described in the application (as modified), which are considered to be lawful if begun at the time of the application.

Reasons for the decision

2. Section 195 requires an assessment to be made as to whether the Council’s refusal of the application is or is not well-founded. The assessment is based on the lawfulness of the proposed development at the time of the application. The planning merits of the development are not relevant to the appeal and there is no planning application before me.
 3. The Council refused the application for the following reason:

“The Local Planning Authority consider that the submitted application form, location plan, and statutory declarations (all submitted on the 13th of March 2023), the photographs submitted on the 10th of May 2023 and e-mail timeline submitted on the 25th of August 2023, taken together with previous submissions to the Local Planning Authority and available satellite data, suggest, on the balance of probabilities, that a material start to planning permission 10/00056/FU had not lawfully commenced in accordance with the approved plans and conditions.
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As such it is not possible to conclude that the remaining proposed development can be lawfully constructed, and thus a certificate cannot be granted.”

4. Section 56(2) of the 1990 Act states 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”. The definition of “material operation” in section 56(4) includes “the digging of a trench which is to contain the foundations, or part of the foundations, of a building”.
5. The appellant maintains that the development began when part of the foundations for the garage were dug out in July and August 2013. The supporting evidence consists of statutory declarations made by the appellant, the previous owner and a chartered surveyor.
6. The statutory declarations made by the appellant and the previous owner give details of the work they carried out together to dig the trench in July and August 2013. The work was done “in order to keep the planning permission alive”.
7. The appellant’s declaration is inaccurate when it states that the planning conditions were discharged in April to May 2013. It is correct that an application to discharge Condition 9 and other conditions was submitted to the Council by the appellant in April 2013, but it was not approved until June 2014 because of various delays not relevant to this appeal. The appellant stated on the application form that the development had not started.
8. The previous owner’s declaration indicates that in 2015 she sought advice from the planning department about the start of the development. In an exchange of emails with the department about various matters relating to the development she confirmed to the department that part of the foundations had been dug out in July 2013. She received written advice from a Senior Planning Officer that “that would constitute a start” for the purpose of Condition 1.
9. The chartered surveyor’s statutory declaration gives details of the measurements she carried out on site in 2022. She concluded that “the narrower excavated trench foundation trench (in yellow) [on her plan] for the garage approved by the planning permission is in the correct position”. When I inspected the site on 8 August 2024, a trench was still visible that follows a line where part of the garage walls would have been built.
10. In their appeal representations, the Council have accepted that the trench exists and that it would be a ‘start’ for the purposes of section 56, but they are not satisfied that it was dug within the three-year period allowed by Condition 1. They state that they cannot establish that the trench directly relates to the development, they query why Building Regulations approval was not obtained for the trench and they maintain that the evidence is not sufficiently precise or unambiguous, is inconsistent and is not supported by the available satellite data.
11. The Council’s consideration of the information provided appears to have become sidetracked by matters relating to the access and the provision of utilities, when it should have been focusing on the trench that is the basis of the application for the certificate. The appellant is not maintaining that the access work carried out in 2011 was a material operation for the purpose of section 56(4)(d) and it clearly was not

- sufficient to amount to such. The application form of April 2013 therefore correctly states that the development has not started and this is not inconsistent with any other evidence.
12. The Council's statement that they cannot establish that the trench directly relates to the development flies in the face of straightforward evidence to the contrary. The Council have acknowledged that the absence of Building Regulations approval for the trench is not a determining factor. The Council have also admitted that there is a gap in the satellite imagery for the critical period between 2009 and 2016. The satellite imagery produced for the period after 2016 shows that some work has been carried out at the site, but none of this work is in the area of the site containing the trench; that area appears to be overgrown, which is consistent with the trench having been dug much earlier. The Google Street View images do not assist since they only show the entrance to the site and the road frontage.
 13. I have concluded that the Council's representations are without sufficient substance and that the appellant's representations should be accepted on the balance of probabilities. That is not the end of the matter, however, because it is apparent from the information supplied to me that when the trench was dug in 2013 it had not been authorised pursuant to Condition 9, which calls into question the validity of the 'start' for the purposes of Condition 1.
 14. The case of *F G Whitley & Sons v SSW & Clwydd CC* [1992] JPL 856 established the general principle that if development is begun in contravention of a condition precedent it cannot properly be described as having commenced in accordance with the planning permission, but it also established an exception to that principle which applies in this appeal. The appellant applied in time for the approval of the details required by Condition 9, but the details were not approved until after the deadline in Condition 1. There has been no suggestion that development has not been carried out in accordance with the details subsequently approved. Applying the *Whitley* exception, the development could not thereafter be enforced against and had been validly commenced.
 15. For the reasons given above, I am satisfied that the Council's refusal of the application is not well-founded. The appeal has therefore been allowed and, as required by section 195(2), the appellant has been granted a lawful development certificate under section 192.

D.A.Hainsworth

INSPECTOR