

Appeal Decision

Site visit not required

by D Hartley BA (Hons), MTP, MBA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11TH SEPTEMBER 2024

Appeal Ref: APP/W4325/X/24/3337999

Callotts, 3 Mill Hey Road, Caldy, Wirral, CH48 1ND

- 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 Russ Canner against the decision of Wirral Metropolitan Borough Council.
 - The application ref LDC/23/01067, dated 12 July 2023, was refused by notice dated 7 September 2023.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended (the Act).
 - The development for which a certificate of lawful use or development is sought is confirmation of lawful commencement of development authorised by planning permission APP/00/5836.
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Decision

1. The appeal is dismissed.

Reasons

2. In order for an LDC to be granted under section 191 of the Act, the burden of proving relevant facts in this appeal rests on the appellant, and the test of the evidence is the balance of probability. The planning merits of the development being sought are not before me.
3. The LDC section of the National Planning Practice Guidance advises in the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.
4. The main issue is whether the Council's refusal to issue an LDC was well-founded. That turns on whether the appellant can demonstrate, on the balance of probability, that a material operation, as defined in section 56 of the Act, has been carried out, and, if a material operation began within the time limit imposed on planning permission APP/00/5836¹ (i.e., five year commencement of development condition stipulated in condition No. 01),

¹ Planning permission APP/00/5836 for the erection of a detached house and garage dated 16 June 2000

whether any such material operation began in breach of any condition precedent and, if so, whether or not planning permission APP/00/5836 was lawfully commenced.

5. The Council does not dispute the appellant's evidence, including Building Control records, that a foundation to the approved garage under planning permission APP/00/5836 was formed prior to the five-year planning permission expiring. I have no reason to disagree with this common ground position. Hence, I find that a material operation was carried out as defined in section 56 of the Act.
6. Notwithstanding the above, the Council claims that there was a failure to comply with the requirements of three pre-commencement conditions prior to the material operation being carried out. The conditions are No. 3 (boundary treatment), No. 5 (levels details) and No. 11 (drainage details). There are other pre-commencement conditions included as part of planning permission APP/00/5836, but it has only been necessary for me to focus on Nos. 3, 5 and 11, given my conclusion below, and as they are the ones that have been the focus of the Council's assessment. The appellant does not dispute the fact that details pursuant to condition Nos. 3, 5 and 11 were not submitted to the local planning authority for approval prior to the material operation being carried out.
7. The Courts have held that a condition will only be a condition precedent where it expressly prohibits the commencement of development and goes to the heart of the planning permission. I have reviewed the wording of the three conditions and find that condition Nos. 5 and 11 are conditions precedent in so far that they expressly prohibit the commencement of development.
8. The Council is of the view that the boundary treatment condition (No. 3) does not go to the heart of the planning permission and hence it is not a condition precedent. In this case, I agree with the Council that the provision of boundary treatment does not go to the heart of the planning permission. In this case, I do not find that it is an essential component of the approved development on the site which is the erection of a detached dwelling and garage.
9. Moreover, and, unlike the position of the Council, I do not find that condition No. 3 is a true condition precedent. This is owing to its wording which says, '*no development shall take place until details of any gates, walls and fences to be erected as part of the proposed development...*'. The condition would only bite if any gates, walls, and fences were to be erected as part of the proposed development. As per the evidence from the appellant, no such gates, walls or fences were intended or needed to be erected as part of the proposed development as '*all gates and fences were already in situ given the site is a back garden plot so no requirement to supply details*'. Put another way, the condition only prevents the commencement of development if any gates, walls, and fences were to be erected as part of the proposed development, and not if no gates, walls, and fences were to be erected as appears to be the case in respect of the approved development.
10. Condition No. 5 states '*before any development is commenced on site full details of the proposed finished floor levels and existing site levels shall be submitted to and approved in writing by the Local Planning Authority*'. This

condition requires both finished floor levels and existing site levels. The reason for imposing the condition was 'in the interests of amenity'. The appellant comments that the site is a 'level site', and, 'the original plans provided to scale provide floor heights and ridge height'. The evidence is unclear in terms of whether the appeal land has the same site level across its full extent. In any event, it cannot be assumed that the approved dwellinghouse and garage would be built on existing land levels. The condition goes to the heart of the planning permission in so far as ensuring precision and control from the point of view of approving finished floor levels relative to existing site levels. It was imposed in the interests of amenity.

11. The appellant claims that *'finished floor levels are only considered an issue if there is a risk of flooding and this has never been an issue'*. It is not the case that finished floor levels are only requested by condition in instances where there is a risk of flooding. In this case, the condition was imposed to ensure that there is *'adequate land drainage'* and not because the site was within a flood zone with a high risk of flooding. The appellant also states that the material operation (i.e., foundation) has not reached a point where there is a finished floor level and hence that this matter could still be discussed with the local planning authority. I do not find that this is a relevant consideration in terms of considering firstly whether the condition is a true condition precedent, and, secondly, whether such a condition was breached when the stated material operation took place.
12. Condition No. 11 states *'before any development is commenced full details including levels, gradients and outfalls for the land drainage of the site together with the method to be used for dealing with existing land drainage and in particular its connection to the proposed new system shall be submitted to and agreed in writing with the Local Planning Authority. The drainage works comprised in the agreed details shall be completed before any of the dwellings are occupied'*. The condition requires details of the land drainage of the site to be submitted for approval prior to commencement of development. Moreover, I find that it goes to the heart of the planning permission. It is part and parcel of ensuring that the approved dwelling and garage can be built in the approved positions while also ensuring that any associated drainage details can be satisfactorily provided.
13. Condition No. 11 is therefore a condition precedent, and the evidence is that when the stated material operation began the condition was breached. The appellant's comment that the agreed details are required to be completed before the dwelling is occupied does not obviate the fact that condition No. 11 is a pre-commencement condition and that it goes to the heart of planning permission APP/00/5836.

Conclusion

14. For the reasons outlined above, I find that the evidence demonstrates that when the stated material operation began, two conditions precedent were breached (i.e., condition Nos 5 and 11 of APP/005836). Consequently, I conclude that planning permission APP/00/5836 has not been lawfully commenced.

15. Therefore, the appeal is dismissed.

D Hartley

INSPECTOR