



Appeal Decision

Site visit made on 8 October 2024

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

an Inspector appointed by the Secretary of State

Decision date: 22 NOVEMBER 2024

Appeal Ref: APP/P5870/X/23/3331490

27 Burdon Lane and 1-6 Burdon Park, Cheam, Sutton SM2 7PP

- 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 R Greenaway (Clearview Residential Limited) against the decision of the Council of the London Borough of Sutton.
 - The application ref DM2022/02110, dated 24 November 2022, was refused by notice dated 10 February 2023.
 - 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 the erection of 6 dwellings.
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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 erection of 6 dwellings, which is found to be lawful.

Applications for costs

2. An application for costs was made by the Council of the London Borough of Sutton against Mr R Greenaway (Clearview Residential Limited). This application is the subject of a separate decision.

Preliminary Matters

3. I have taken the address from the Council's Decision Notice as it is more accurate than that outlined on the original planning Application Form. As the amended address is consistent with that outlined on the Appeal Form, I am satisfied that there would be no prejudice in this respect. The address is reflected in the banner heading above.
4. The description of development for which a certificate is sought is given in section 5 of the Application Form and states, '*Outline planning permission LB21/P3927/71/7213'O' was lawfully implemented by the erection of six dwellings and remains extant in perpetuity. It is therefore lawful to construct the remaining dwellings.*'
5. Based on the description, the appellant appears to be seeking confirmation that the historical permission, reference LB21/P3927/71/7213'O (hereafter referred to as the 1971 permission) was initiated and remains extant by the erection of 6 dwellings, and its lawful to construct the remaining 8 dwellings approved as part of the permission.
6. However, the application has been submitted under section 191 of the Town and Country Planning Act 1990 (1990 Act), which sets out provision for any person to

ascertain whether any existing operations (my emphasis) are lawful. The existing operations in this case would be the 6 dwellings already built, rather than the 8 dwellings not yet constructed.

7. In view of the above, the main parties' views were sought on a proposed change to the description of the existing operations to indicate '*the erection of 6 dwellings*.' Although there was correspondence on the extent of what could be considered as part of a section 191 application, ultimately the change of description was agreed, and has been reflected in the banner heading above. For clarity, the 6 dwellings that have been constructed on site have been edged in blue on the plan attached to this certificate.
8. If the appellant is seeking to confirm whether the remaining 8 dwellings could be built in accordance with the 1971 permission and its conditions, this could only be conclusively determined as part of a proposal under section 192 of the 1990 Act. I did have regard to whether the appeal could be amended to a section 192 application, to consider the remaining 8 dwellings and proceed on that basis. However, to amend the application in this way would require additional plans as well as a significant change to the description and the act of development being considered. As such, it was not possible to amend the appeal in this manner.
9. Notwithstanding the above, I am still able to consider the information submitted with the appeal to provide a view on whether the existing 6 dwellings lawfully initiated the 1971 permission, and it remains extant. In addition, as with all LDC appeals, I will also have regard to whether the existing operations are also lawful by complying with section 191(2)(a) and (b) of the 1990 Act.
10. For clarity, 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

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

Reasons

Evidence and Background

12. The LDC application and appeal included the plans and documents held by the Council in respect of the 1971 permission, together with a Cover Letter, dated 24 November 2022. A Site Location Plan and two legal opinions, one by Saira Kabir Sheikh KC dated 17 June 2017 and another by David Hardy dated 23 November 2022, were also included. It is indicated that the more recent legal opinion by David Hardy has been made with supplementary information that was not before Saira Kabir Sheikh KC at the time of her advice.
13. The 1971 permission is an outline planning permission granted on 11 March 1971 for 14 detached houses with garages and an access road at 27/29 Burdon Lane, Cheam, Sutton. As an outline planning permission, it included 12 conditions, but conditions 1, 2, 3, 8 and 9 are the most relevant and are referred to in the appeal submissions. For completeness, the most relevant conditions are outlined below:

- 1) *In the case of the matters hereby reserved application for approval must be made not later than the expiration of three years from the date hereof; and the development must be begun not later than whichever is the later of the following dates: -*
 - (i) *The expiration of five years from the date hereof; or*
 - (ii) *The expiration of two years from the final proof approval of the reserved matters or, in the case of approval of different dates, the final approval of the last such matter to be approved.*
- 2) *The development shall be carried out only in accordance with the detailed plans and drawings showing the siting, design, external appearance of the building/s to be erected on the land, and the means of access thereto.*
- 3) *The erection of the building/s shall not be commenced prior to the approval of such detailed plans and drawings by the Council.*
- 8) *The development hereby approved shall be carried out only in accordance with a detailed landscaping scheme to be submitted to, and approved in writing by, the local planning authority before the development is commenced. Such approved scheme shall be carried out to the satisfaction of the local planning authority within 12 months of the date of this planning permission, or such longer period as may be previously agreed in writing, but in any case shall be carried out prior to the buildings being occupied. Following the carrying out of the scheme, the landscaped area shall be kept and maintained to the satisfaction of the local planning authority.*
- 9) *The type and treatment of the materials to be used on the exterior of the building/s shall be approved in writing by the Local Planning Authority prior to the development being carried out.*

Did the material operations initiate the 1971 permission

14. Based on the evidence before me, the details required in respect of conditions 2 and 9 were submitted by 7 October 1971, within three years of the date of the permission. Correspondence on 25 October 1971 from the Council to the applicant indicated that the reserved matters details were approved on 20 October 1971. As such, based on the evidence before me, conditions 1, 2, 3 and 9 had been discharged and complied with by 25 October 1971.
15. Further to this, internal correspondence, dated 25 January 1972, between the Principal Chief Officer and Deputy Director of Planning, clearly indicates that work had commenced on site. As the works to erect the 6 dwellings had commenced by 25 January 1972, the existing operations would have initiated the development in compliance with condition 1 of the 1971 permission. Accordingly, the evidence is precise and demonstrates, on the balance of probability, that the development commenced in compliance with the agreed reserved matters details and within the expiration times set out in condition 1.
16. The two parties do not appear to dispute these matters, with the Council outlining in the Officer Delegated Report that *'there is sufficient evidence, on the balance of probability, that the development commenced according to the reserved matters that were approved within the prescribed period only in relation to the six houses that have been built at the site.* In coming to this conclusion, the Council also accepted that the 6 dwellings erected were carried out in compliance with

landscaping details submitted and agreed in respect of condition 8, but for the 6 dwellings only.

Is Condition 8 a pre commencement/ condition precedent and was it discharged?

17. The Council regards the landscaping condition as a condition precedent, and the failure to secure approval of landscaping for the whole of the site, or via an agreed phased approach within the prescribed times, means that the development was carried out in breach of the condition. Until matters associated with any condition precedent has been complied with, any works purporting to be the commencement or initiation would be regarded as unlawful and the operations as development without planning permission.
18. In view of the Council's position on condition 8, I have considered whether the landscaping condition was complied with at the time the development was initiated, and if it is a pre-commencement condition i.e. condition precedent.
19. Based on the evidence before me, the landscaping details were submitted for plots 1 to 6 on 1 February 1973. Landscaping details were not submitted for the whole of the site, and there is no correspondence that sets out a formal agreement between the parties for a two phased approach. Furthermore, although neither party has acknowledged it, the landscaping details were submitted in February 1973, almost a year after the evidence suggests the development commenced. As such, the development would have commenced in breach of the requirements of condition 8.
20. However, in *R (oao Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin)*¹⁷⁹ it was held that a distinction had to be drawn between a condition which required some action to be undertaken before development is commenced, and a condition which expressly prohibits any development taking place before a particular requirement has been met. It was held that it is necessary for the condition both to be expressly prohibitive of the commencement of development and to go to the heart of the permission to be a condition precedent. Only when both tests are satisfied is it a condition precedent where the *Whitley principle*¹ applies, and there would be development without planning permission.
21. The subsequent Court of Appeal decision in *Greyfort Properties Ltd v SSCLG [2011] EWCA Civ 908* applied both the *Hart Aggregates* judgment and the principles set out in *Whitley*. It specifically endorsed the need for the condition to go to the "heart of the matter" to be a true condition precedent. If that is not the case, it would be a breach of the condition rather than development without planning permission.
22. Having regard to the relevant tests set out above, the landscaping condition is not a true condition precedent. Although it does require details to be submitted before the development commenced, in my judgement, it does not go to the heart of the permission. This is because the agreement of the landscaping details as well as any phased approach could be achieved following the commencement of development without being unreasonable or impractical in principle. As such, although the landscaping condition was initially breached, it was not a condition precedent, and the operations would have initiated the 1971 permission and it remains extant.

¹ *F G Whitley & Sons v SSW & Clwyd CC [1992] JPL 856*

23. In many respects, the actions of the Council at that time supports this view, as they agreed the landscaping details for plots 1 to 6, even though the submissions did not cover the entirety of the site and were submitted after the development commenced. Furthermore, the later approval of the landscaping details by the Council for plots 1 to 6, would have resolved this breach in respect of the development already carried out.
24. Notwithstanding the above, what is indisputable in this instance is that the 6 dwellings subject of the appeal have been in situ in excess of 10 years. Consequently, the 6 dwellings constructed would be immune from any enforcement action against any outstanding breach of condition. Therefore, whether compliant with the 1971 permission and its conditions or not, the 6 dwellings as erected are lawful and comply with the provisions set out in section 191 (2) (a) and (b) of the 1990 Act.

Conclusion

25. Accordingly, on the balance of probabilities, and based on the evidence submitted with the appeal, there is sufficient evidence to demonstrate that the erection of the six dwellings was carried out within the prescribed time for implementation, and in accordance with the 1971 permission, which remains extant. Furthermore, whether carried out in breach of condition or not, the extended length of time the dwellings have been in situ means they are immune from enforcement action at this time.
26. For the reasons given above, I conclude, on the evidence available, that the Council's refusal to grant an LDC in respect of the erection of 6 dwellings 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).

M. P. Howell

INSPECTOR



The Planning Inspectorate

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 November 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 building operations consisting of the erection of 6 dwellings commenced more than ten years prior to the date of the application for the Lawful Development Certificate.

Signed

M. P. Howell

Inspector

Date: **22 NOVEMBER 2024**

Reference: APP/P5870/X/23/3331490

First Schedule

The erection of 6 dwellings.

Second Schedule

27 Burdon Lane and 1-6 Burdon Park, Cheam, SM2 7PP

IMPORTANT NOTES – SEE OVER

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 operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any 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: **22 NOVEMBER 2024**

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

Land at: 27 Burdon Lane and 1-6 Burdon Park, Cheam, SM2 7PP

Reference: APP/P5870/X/23/3331490

Scale: Not to Scale

