



Appeal Decision

by Gareth Symons BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date 27 November 2024

Appeal Ref: APP/P1805/X/23/3331238

416A Birmingham Road, Marlbrook, Bromsgrove B61 0HL

- 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 James Francis against the decision of Bromsgrove District Council.
 - The application ref 23/00528, dated 4 May 2023, was refused by notice dated 17 July 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: Domestic dwellinghouses.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. The circumstances of the appeal require considering evidence about site works that allegedly took place in the latter half of 2018. Seeing trenches and concrete poured for foundations now, 6 years later, would not have assisted my assessment of the written evidence. Furthermore, the appeal outcome does not depend on assessing any planning merits such as the effect of building two properties on the character and appearance of the area. The outcome is a legal determination. Against this background, there was no need to make a visual site inspection. Neither side has been prejudiced by me not visiting the site.

Background

3. On 15 October 2015, full planning permission (Ref: 15/0611) was granted for 'Proposed residential development of two dwellings: demolition of 416A Birmingham Road and replacement with a 2 storey dwelling and erection of an additional single storey dwelling'. The permission was subject to 8 planning conditions. Condition 1 was the standard time limit condition which stated, 'The development must be begun not later than the expiration of three years beginning with the date of this permission'. Therefore, the development needed to have begun by no later than 15 October 2018, hereinafter refer to as the 'material date'.
4. For the purposes of assessing the time when development was begun, s56(2) of the 1990 Act states "...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". S56(4) of the 1990 Act defines "material operation" as meaning (a) any work of construction in the course of the erection of a

building, and (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building. The appellant contends that prior to 15 October 2018, site works were undertaken including setting out, the clearance of topsoil and shrubs and the digging of the foundations and their concreting for a detached garage that was part of the planning permission. The focus of the case is the digging and concreting of the foundations. There is no dispute that these works did not comprise a material operation.

Main Issue

5. In view of the above, the main issue is whether, as a matter of fact and degree, the material operation of digging trenches and concreting them for the purpose of foundations were comprised in the development and whether that operation began to be carried out prior to 15 October 2018. The burden of proof rests firmly with the appellant. The test of the evidence is the balance of probability.

Reasons

6. There are photographs of trenches filled with concrete. However, the photographs are not dated and whilst the appellant confirms they were taken on 23 April 2023, this does not show that the works depicted were undertaken before the material date. Furthermore, a plan with a crudely drawn red line around the proposed garages on a 1:250 site plan, labelled 'Foundation Construc...' does not show that the trenches were dug to match where the walls of the garage were approved. I give the photographs and this plan very little weight.
7. A screenshot of a building regulation application related to the approved development shows that it was valid on Friday 14 September 2018. However, making a valid application does not show when any works related to beginning the development took place. A Building Control officer from the Council may have visited the site in the presence of others and seen the trenches being dug and approved their depth. However, the Council has no records to show any work had taken place on the site, such as details of inspections or emails describing any works or approvals.
8. There may be a reason for this, but there is no evidence of, for example, a computer failure that could have caused records being lost. In my experience records of formal site inspections by Council officers pertaining to a formal application for construction works to the local authority would be made and kept. Moreover, given that it is stated the works were specifically commissioned to preserve the planning permission, it is surprising that no details or records from that time were sought and kept by the persons involved at that time, such as the landowner/developer.
9. Although the Building Control officer concerned has now left the Council and has been tracked to their new place of employment, there is nothing further to show that such a site inspection took place, when it took place or that it was to see and approve works in accordance with the planning permission and undertaken before the material date. I give the alleged visit by a Building Control officer very limited weight.
10. There are several documents titled 'Affidavit of Planning Permission – 316A Birmingham Road, Marlbrook, Bromsgrove B61 0HL'. They all claim that

setting out, digging and concreting of the foundation trenches were completed by 12 October 2018. However, whilst they state that the works were connected with planning permission 15/0611, they only refer to “the foundation” trenches. They do not confirm that they are the ones shown on the photographs which are the basis of the appellant’s case. There is also no plan showing where those works were and if their positions corresponded with the approved garages. Also, there is no backup verifiable documentary evidence such as receipts or bank statements showing payments made to the supplier of the excavators used to dig the trenches or to the company which disposed of the soil from the site. The claims made in the affidavits are not sufficiently precise and unambiguous. Given these misgivings about the veracity of these statements, I give them very limited weight.

11. I note concerns about the Council deciding to refuse the application before further details to support the application were provided. However, that is a matter of process between the appellant and the Council not relevant to the legalities of this appeal. In any event, I have determined the appeal with those details before me. I note that a former house on the site was demolished. However, that appears to have occurred after the material date. There is no case made that the demolition occurred before then.
12. Taken in the overall round I find that, as a matter of fact and degree, the appellant has not discharged the burden on them to show, on the balance of probability, that digging trenches and concreting them for the purpose of foundations were comprised in the development and that the operation began to be carried out prior to 15 October 2018.

Conclusion

13. For the reasons given above I conclude that the Council’s refusal to grant a certificate of lawful use or development in respect of domestic dwellinghouses was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act (as amended).

Gareth Symons

INSPECTOR