



Appeal Decision

Site visit made on 11 December 2024

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 8 January 2025

Appeal Ref: APP/T5150/X/23/3315059

494-504 Neasden Lane North, LONDON, NW10 0EA

- 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 David Syroumper against the decision of the Council of the London Borough of Brent.
- The application ref 22/2691, dated 28 July 2022, was refused by notice dated 26 September 2022.
- The application was made under section 192(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 proposed completion of the development [for which permission was granted [on] 29 April 2019, under planning ref: 19/0335 comprising the erection of a second storey above current first floor above shopfront with converted roofspace to create two additional floors containing 5 new flats (1 x 3 bed, 1 x 2 bed, 1 x 2 bed and 2 x 1 bed), creation of internal staircase from existing first floor to second floor, erection of 2 x balcony at second floor level rear, associated external alterations and parking to the rear, incorporating the addition of 3 x double car stacking systems within the rear service yard.

Summary Decision: The appeal is dismissed.

Application for costs

1. An application for costs has been made by the appellant against the Council. This application is the subject of a separate decision.

Preliminary Matters

2. The Council's notice given in response to the present application purported to certify that the proposed development 'is not lawful'. The relevant sections of the 1990 Act do not permit of certificates to be issued describing what is not lawful; only what is. Nonetheless in substance I take the Council's notice to be one of refusal.

Main Issue

3. The issue in the appeal turns on whether or not the development for which permission was granted on 29 April 2019 has been started; and if it was started before that permission otherwise expired. If the development for which permission was granted was begun within the time limit allowed, then (in the absence of any expired completion or other notice, about which I am not informed) it follows that the appellant may proceed to complete the development.

Reasons

Background

4. Schedule B to the permission granted on 29 April 2019, for development of the description set out above and accompanied by plans and documents listed in the grant of permission, included a condition no. 2 providing that the development for which permission was granted must be begun not later than the expiration of three years from the date of the grant. It appears common ground between the parties that if the development was not lawfully begun by that date, then the permission has now expired and the development described therein could not now lawfully be carried out barring the grant of a further planning permission.
5. The permission was granted subject to a number of other conditions, including one requiring the submission of a Construction Method Statement for approval prior to the commencement of the development. This condition was discharged, insofar as a Construction Management Strategy was approved, on 7 October 2020.
6. The relevant planning condition required that the development shall be carried out in accordance with the approved details. The approved Construction Management Strategy does not expressly require any matters to be carried out in advance of any development taking place, although it does require a guardrail to be erected around the front, sides and rear of the properties for the removal of roof tiles and timber, and requires the rear yard area of the site to be boarded off with a gated entrance for vehicles and pedestrian access from Braemar Avenue. It is implicit that these matters are to be provided before the relevant works are undertaken. However I do not understand the Council to take any point that their lack of provision might mean that the development cannot lawfully have started. No arguments about whether the Construction Management condition amounts to a 'condition precedent', or whether it has been adhered to in any case, have been raised.
7. Rather, the Council's reason for refusing the application is principally that insufficient works have been carried out to justify a finding that the development has begun at all. An additional point is raised about the lack of a CIL payment but without further explanation that appears to me immaterial to the question whether the development has begun for present purposes.

The statutory framework and the burden of proof

8. I do not understand there to be any dispute between the parties about these matters. Section 55 of the 1990 Act describes what constitutes acts of development, and section 56 describes when development is begun. Section 56 provides that the digging of a foundation trench for a building amounts to a material operation. Very little needs to be done to satisfy this section. In turn a building is defined in section 336 as including any structure or erection.
9. When applying for a certificate of lawful use or development, the onus of proof lies upon the applicant to demonstrate that the use or works described are or would be lawful if carried out on the date of the application. The matters must be demonstrated on the balance of probabilities. The applicant's evidence does not need to be corroborated in order to be accepted, but it does need to be sufficiently precise and unambiguous to satisfy the burden of proof.

Reasons

10. The works relied upon here are the digging of a hole in the ground, said to measure 70cm by 90cm and being 1.1m deep, that is said to constitute a foundation trench for a cycle store that is depicted on plans accompanying the 2019 planning application. Condition 5 of the permission required that the cycle storage be provided before the development was occupied. The permission itself included 'associated external alterations and parking to the rear'.
11. Whilst the Council contend that the lightweight cycle shelter is not considered to form the foundations of the approved building, the building itself that is the main focus of the permission was to benefit from upwards extensions and presumably already benefits from foundations. I see no reason why the cycle shelter would not amount to a 'building' for the purposes of the 1990 Act. It was depicted on plans accompanying the planning application showing it to be a glass and steel three-sided structure with a roof, it appears intended to be fixed to the ground, to be of a permanent nature, and to measure some 14 square metres with headroom. It would appear to fall within the general scope of the operative grant of permission for 'external alterations and parking'.
12. The Council have not expressly found that the cycle shelter would not be a building itself, or that works to construct its foundations could not amount to a material operation beginning the development for which permission was granted.
13. The difficulty however lies in relating the works that have been undertaken to the permission itself. The appellant supplies some (undated) photographs of a hole in the ground. It is not said where this hole is. An annotated plan (the 'implementation site plan', drawing no. NL494-504.IP.00) dated 27 July 2022 appears to depict a rectangle measuring 700 by 980 at the point of the south-eastern 'leg' of the cycle shelter, but without explanation. A site inspection record carried out for the purpose of the 2010 Building Regulations on 9 March 2022 notes that 'Excavations has Commenced' but it is not said what these excavations consisted of or where they were on the site. It is also not explained why the commencement of excavations for the purposes of the Building Regulations would also suffice to begin a development for planning purposes.
14. Correspondence from the Council dated 14 March 2022 also referring to a big hole in the ground is supplied, together with some photographs. It is difficult to tell exactly what is being shown, but it seems that the 'hole in the ground' is covered up with a piece of board. The location of that hole and board appears slightly further south than is depicted on the implementation site plan. There is no acknowledgement by the Council that it relates to the planning permission. Their correspondence was concerned with safety and amenity matters arising from the condition of the site and the waste being stored upon it.
15. Nor is it explained to me why the cycle shelter would require foundations to a depth of 1.1 metres. It is said that this 'is adequate for the padstone required for [the] steel post of the approved cycle store'. It appears rather more than adequate: it appears excessive.

16. The cycle shelter depicted on plans shows it to have four legs each with a square base. It is not explained to me how it is proposed to affix it to the ground, and no foundations are depicted on the site section (or any other) drawings. In the absence of any such explanation I would expect it to be simply bolted on to paving slabs or other hardstanding material laid directly to the ground surface. There appears no reasonable requirement for a foundation hole more than a metre deep.
17. Without any explanation about this, I cannot be satisfied on the balance of probability that the digging of this hole is referable to the development for which permission was granted. Nor have I been supplied with any first-hand evidence about when the hole was dug, and for what purpose. The photographic evidence of the board laid across it suggests that it had been there for some time before the Council's photographs were taken. The photographs of the hole supplied by the appellant show it to have accumulated some debris. The absence of any evidence or explanation about these matters means that I cannot be satisfied that the appellant has discharged the burden of proof to demonstrate, on the balance of probabilities, that the development for which permission was granted was begun.

Other Matters

18. Notwithstanding the terms of the Council's decision notice, the parties will be aware that the refusal of an application for a certificate of lawfulness merely reflects the evidence supplied with, or resulting from, the application. It does not mean that the development described could not be lawful; only that insufficient information was provided to discharge the applicant's burden of proof to the standard of probability. The shortcomings in the evidence discussed above might (or might not) be surmountable on a different application.

Conclusion

19. For the reasons given above, and although departing from the Council's own reasoning in the case, I conclude that the Council's refusal to grant a certificate of lawful development 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.

Formal Decision

20. The appeal is dismissed.

Laura Renaudon

INSPECTOR