



Appeal Decision

Site visit made on 28 January 2025

by R Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 06 February 2025

Appeal Ref: APP/H2733/X/23/3330009

Land adjoining Friars Way, Scarborough, North Yorkshire YO11 1HN

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Sahed Ahmed against the decision of Scarborough Borough Council.
 - The application Ref ZF23/00672/CLE, dated 11 April 2023, was refused by notice dated 21 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 lawful commencement of development pursuant to planning permission reference 19/02420/FL.
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Formal Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Scarborough Borough Council against Mr Sahed Ahmed. This application is the subject of a separate Decision.

Preliminary Matter

3. The appellant failed to attend the scheduled accompanied site visit. However, I proceeded to make an unaccompanied visit, entering the site with the appellant's permission, and am satisfied that I was able to view the site sufficiently to enable the appeal to be determined on the basis of the information before me.

Main Issue

4. The main issue is whether planning permission 19/02420/FL has been lawfully commenced, such that the permission has not now lapsed, because the development has been begun pursuant to s56(2) of the 1990 Act, by the carrying out of a material operation.

Reasons

Background

5. Planning permission 19/02420/FL was granted in 2020¹ for a residential development of three flats and two town houses. The development was subject to

¹ Dated 20 January 2020.

various planning conditions. These included condition No 2, that a written scheme of investigation in relation to archaeology must be submitted to and approved in writing by the Council.

6. In accordance with the 1990 Act, it was required that the development permitted must be begun within three years of the date of the decision, that is by 20 January 2023.

The status of condition No 2.

7. It is settled case law² that it is necessary for a condition to be both expressly prohibitive of commencement of development until a particular requirement has been met (or in requirement of something to be done before commencement of development) and also to go to the heart of the permission in order for it to constitute a 'condition precedent'. A failure to discharge such conditions would result in development without planning permission.
8. Condition 2 is worded as follows:

No development shall take place until a Written Scheme of Investigation has been submitted to and approved in writing by the Local Planning Authority. The scheme shall include an assessment of significance and research questions:

- 1. The programme and methodology of site investigation and recording*
- 2. Community involvement and/or outreach proposals*
- 3. The programme for post investigation assessment*
- 4. Provision to be made for analysis of the site investigation and recording*
- 5. Provision to be made for publication and dissemination of the analysis and records of the site investigation*
- 6. Provision to be made for archive deposition of the analysis and records of the site investigation*
- 7. Nomination of a competent person or persons/organisation to undertake the works set out within the Written Scheme of Investigation.*

Following the approval of the Written Scheme of Investigation no demolition/development shall take place other than in accordance with the approved Written Scheme of Investigation.

9. There can be no doubt the condition is expressly prohibitive of commencement of development prior to details of the investigation being agreed in writing; with no development then allowed to take place other than in accordance with the approved scheme.
10. Indeed, it seems logical that such an approach recognises once the ground becomes disturbed by the development, there would be the potential for the search for archaeological features to become significantly compromised. Accordingly, I find that failure to comply with this condition before the commencement of

² *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin) and *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ 908.

development on site, would be of such significance as to go to the heart of the permission. It should therefore be regarded as a 'condition precedent'.

11. It is undisputed that the written scheme of investigation (WSI) was approved by the Council in July 2022³. The condition then allows for the development to take place providing it is in accordance with the WSI.
12. The WSI contemplates "Archaeological observation of all level reductions to formation levels for foundations and service trenches will be required."⁴ For the avoidance of doubt, I therefore consider it would have been possible, in principle, for the development to have been begun by a 'material operation' (or the beginning of a material operation), whilst the archaeological investigation was continuing, and to still have been in accordance with the WSI.

Material Operation

13. It is therefore necessary to consider whether the development was formally begun by a 'material operation', which is the essence of the dispute between the parties. In practice, little is needed for development to be begun under s56(2) of the 1990 Act. Indeed, it is only necessary for the material operation to be begun to be carried out, for the whole development to be taken to be begun under s56(2).
14. 'Material operations' are defined in s56(4) of the 1990 Act as including any work of construction in the course of the erection of a building; the digging of a trench which is to contain the foundations, or part of the foundations, of a building; the laying of any underground main or pipe to the foundations...; any operation in the course of laying out or constructing a road or part of a road; and any change in the use of any land which constitutes material development.
15. In support of their case the appellant has provided correspondence between the archaeological company, contracted to undertake the investigation, and his architect, dated 21 February 2023. The contractor refers to a site visit having been carried out on 29 November 2022; there the extent of the approved development being pegged out to aid an understanding of the logistics of the archaeological excavation; and to subsequent discussion about the appointment of a builder to enable agreement over the detail of foundations and health and safety issues. The contractor states they believe these preliminary steps to have been an integral part of carrying out the development, and constituted commencement of development.
16. However, as a matter of fact and degree, I am not persuaded that the aforementioned actions comprised works of construction in the course of erecting a building or any of the other potential operations described at s56(4) of the 1990 Act. Whilst the pegging out, would have involved a degree of physical intrusion on the land, if anything this comprised a step in the course of the archaeological excavation, rather than a work of construction in the course of the erection of a building. I conclude that a material operation, either in full or in part, sufficient to begin the development did not occur.
17. The misunderstandings that are apparent from the email dialogue which took place between the architect and Council, in February 2023, do not lead me to a different conclusion on this point.

³ Council letter dated 21 July 2022.

⁴ See paragraph 8.7.

18. The appellant's architect confirmed, the archaeological investigation was only about to begin in early February 2023⁵, with other correspondence explaining this had been due to a weather related delay. The delay to the archaeological investigation does not excuse the lack of a material operation, pursuant to the commencement of development, taking place within the requisite time period.

Conclusion

19. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of "lawful commencement of development pursuant to planning permission reference 19/02420/FL" 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.

R Merrett

INSPECTOR

⁵ See architect's email dated 9 February 2023.