



Appeal Decision

by Thomas Shields DipURP MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 March 2025

Appeal Ref: APP/K5600/X/23/3322693

17 South End, London, W8 5BU

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) (“the Act”) against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
- The appeal is made by Mrs Zipporah Lisle-Mainwaring against Royal Borough of Kensington and Chelsea.
- The application ref CL/23/02057 is dated 27 March 2023.
- The application was made under section 192(1)(b) of the Act.
- The development for which a certificate of lawful use or development is sought is proposed demolition of existing building to be replaced with new residential dwelling including construction of basement pursuant to planning permission PP/19/01773.

Summary of Decision: The appeal is dismissed.

Applications for Costs

1. Applications for costs were made by the appellant and by the Council against each other. These applications are subject of separate Decisions.

Preliminary Matters

2. Along with the appellant's submitted statements and final comments a number of photographs, drawings, details and other documents, including earlier e-mail correspondence, all relating to the relevant planning permission, and to the discharge of its conditions, and also to an excavation that had been carried out on the appeal site, were submitted with the appeal. I have taken account of all the submitted information and documents in reaching my decision.
3. There is no dispute between the parties as to the dimensions or position of the excavation (described as a “hole” by the appellant) as shown in the photographs and drawings and hence it was unnecessary for me to view the site in person. Neither party disagreed with this course of action.
4. This case is very unusual. The applicant, now the appellant, has no interest in the appeal site itself. She is an occupier of nearby land. Rather than making a case as to why the development subject of the appeal would be lawful and that an LDC should be granted, she argues the proposed development if carried out would be unlawful, and all of her evidence and information has been submitted in support of that contention.

The Law

5. Section 191(2)(a) and (b) of the Act sets out that for the purposes of the Act uses and operations are lawful at any time if: (i) 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 (ii) they do not constitute a contravention of any enforcement notice then in force.
6. Section 192(1) provides that if any person wishes to ascertain whether any proposed use of buildings or other land, or any operations proposed to be carried out, would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use in question.
 7. Section 192(2) states that if the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
 8. Section 192(4) states that the lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness.
 9. At this point it is important to note that the granting of a LDC can only certify “lawfulness”. There are no provisions within the Act at s191, s192, or s195 (appeals) for an equivalent presumption of unlawfulness, or for certifying unlawfulness. This reflects the limitation on decision-making under s191(4) and s192(2); that where there is insufficient information to grant a LDC the application should be refused.
 10. The construction, operation and purpose of the Act’s provisions in only certifying lawfulness (and not unlawfulness) is demonstrated, for example, in circumstances where a LDC application is refused because of insufficient supporting evidence, but is then followed by a subsequent application(s) for the same proposal with different and/or additional supporting evidence, such that a LDC might then be granted. Hence it is clear the Act’s provisions purposely direct decision-making to a positive finding and certifying of lawfulness, or otherwise refusing the application.
 11. The PPG¹ also provides relevant guidance. Amongst other matters it states² that an application may be refused if there is insufficient or precise information; that for s192 applications the applicant needs to describe the proposal with sufficient clarity and precision; and that refusal is not necessarily conclusive that something is not lawful, it may mean that to date insufficient evidence has been presented.
 12. With all of the above in mind, and notwithstanding the appellant’s position that the proposed development would be unlawful, I must determine the appeal in accordance with the provisions of the Act. Importantly therefore, I take the approach to deciding the appeal on the basis that the burden of proof, exercised on the balance of probabilities, falls to the appellant to demonstrate that the proposed development **would be lawful**.
 13. The relevant date for ascertaining whether the proposed development would be lawful is the date of the LDC application (24 March 2023). Planning policies and the merits of the development are not relevant to my decision which is made solely based on matters of fact and law.

¹ Planning Practice Guidance

² Planning Practice Guidance Reference ID: 17c-005-20140306 – Paragraphs 005, 006, 009

Main Issue

14. The main issue in this appeal is whether the proposed demolition of the existing building and its replacement with a new residential dwelling including construction of basement, pursuant to planning permission PP/19/01773 granted by the Council on 10 May 2019, would be lawful. This turns on the appellant's single point of dispute - whether the excavation carried out on part of the appeal site land on 9 May 2022 (one day before the planning permission would have expired) began the development.

Analysis

15. Prior to the expiry of the planning permission an excavation of approximately 1m³ in size was dug in the rear garden area of the appeal site, in a location that aligned with the proposed line of the rear foundation and basement wall as shown in the approved plans attached to the planning permission.
16. Section 56(2) of the Act provides that:
- "..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."*
17. "Material operation" is defined to include at s56(4)(b):
- "the digging of a trench which is to contain the foundations, or part of the foundations, of a building;"*
18. With regard to the excavation itself, and as to what actually occurred on the ground, the appellant's evidence does not argue there is any distinction between "hole" and "trench". I also consider both terms reasonably describe the excavation that was carried out. Hence I accept it constitutes a trench for the purposes of s56(4)(b). Her evidence also sets out that the trench was a 'material operation' as defined. None of these factors are disputed by the Council and based on the evidence before me I have no reason to disagree.
19. However, the appellant states the trench is not "*comprised in the development*" as required by s56(2) and thus did not begin the development authorised by the planning permission, which she argues subsequently expired. Hence, rather than being evidence in support of obtaining a LDC it argues to the contrary.
20. In particular the appellant states the hole could never be comprised in the development because it would never contain the foundations, or part of the foundations, for the proposed building and would first need to be completely and permanently filled in to allow the permission to be built out. In support of that contention she points to a Construction Method Statement (CMS) previously submitted in relation to the planning application³. She states that the CMS sets out "the only way possible" to pile foundations for the basement, which would require a prior levelling of the ground and infilling of the trench. In support of that view the appellant refers to a engineering statement/report⁴ she commissioned.
21. Additionally, the appellant refers to the content of email correspondence by a Council Building Control officer. However, there is nothing in that which provides

³ Although the CMS is not an approved document tied to the planning permission.

⁴ Statement of James Chalmers, Civil Engineer, Knight Build Ltd.

any persuasive evidence, either way, of whether the digging of the trench was comprised in the development in fulfilment of the requirements of s56 of the Act.

22. The CMS is not an approved document tied into the planning permission, and there is no evidence submitted by the appellant of any alternative method of construction, or any alternative assessment of the approved plans to explain how there would be usability of the trench in the permitted development. As such, she has failed to show evidentially, on the balance of probabilities, how it would be a material operation “comprised in the development” pursuant to sections 56(2) and 56(4)(b) of the Act.
23. Mindful of the responsibility on the appellant to submit sufficiently precise and unambiguous evidence for the purpose of demonstrating that development **would be lawful** on the balance of probability, as I set out earlier, it should come as no surprise that I find the appellant’s evidence completely fails in that regard.
24. The Council in their appeal submissions state that they would have granted a LDC had they been able to determine the application. However, that conclusion appears to be a judgment made at officer level, it cannot be the formal determination by the Council (given the appeal against non-determination). In any event that opinion is significantly contradicted by the appellant’s own evidence upon whom the duty to provide clear and precise evidence falls.

Conclusion

25. Having regard to all of the information before me I find the evidence submitted by the appellant is not sufficiently precise and unambiguous. It fails to show, at the date of the LDC application, and on the balance of probability, that the development granted planning permission by planning application PP/19/01773 if it were carried out would be lawful. As such the appeal must fail and a LDC will not be granted.
26. However, as I previously explained, the parties should note this conclusion should not be interpreted as meaning that the development, if carried out, would be unlawful.

Decision

27. For the reasons given above I conclude that had the Council refused to grant a certificate of lawful use or development in respect of proposed demolition of existing building to be replaced with new residential dwelling including construction of basement pursuant to planning permission PP/19/01773, that refusal would have been 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).

Thomas Shields

INSPECTOR