
Appeal Decision

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 11 March 2025

Appeal Ref: APP/C3105/X/23/3321375
Unit 22, Beaumont Close, Banbury OX16 1SH

- 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 Arun Sahajpal of Corsair Engineering Ltd against the decision of Cherwell District Council.
 - The application Ref 23/00150/CLUE, dated 20 January 2023, was refused by notice dated 17 March 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 described as the implementation of planning permission 18/01366/F subsequent to 20/00046/DISC for the erection of 10 small commercial units (B2/B8) with associated car parking and landscaping.
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Decision: the appeal is dismissed

Procedural matters

1. I have taken the description of development for which the LDC is sought in the header above from the application form. In refusing to grant the LDC, the Council changed the description to: Commencement of development of the erection of 10 small commercial units (B2/B8) with associated car parking and landscaping (Implementation of planning permission 18/01366/F subsequent to 20/00046/DISC).
2. Section 56(2) of the Town and Country Act 1990 (the 1990 Act) provides that development shall be taken to *be begun* for the purposes of Sections 91 and 92 of the Act on the earliest date on which any material operation comprised in the development begins to be carried out (emphasis added). The description as changed by the Council includes the word 'commencement', which is closely related to 'begun'. I therefore consider that the Council's description is the more accurate. However, in practice both descriptions set out above amount to the same thing. Accordingly, I do not perceive there to be any merit in formally changing the description in this Decision.
3. I am satisfied that the appeal can be determined on the papers that are before me, without a site visit. The issue raised by this appeal relates solely to whether the works granted under planning permission 18/01366/F have begun in accordance with the discharge of conditions approved under permission 20/00046/DISC. The works involved constitute the digging of foundations and

the infilling of those foundations with concrete. I understand that the foundations have subsequently been covered with a layer of gravel and as such are no longer visible. The appellant has provided photographs of those foundations and I am therefore satisfied that, as a matter of fact, those foundations are in place. Accordingly, I consider that in this case there would be no benefit to be gained from undertaking a site visit.

Reasons

4. Section 191(4) of the 1990 Act indicates that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operation or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a LDC was well founded. In this respect, the burden of proof is on the appellant to show that, on the balance of probability, the development proposed would have been lawful on the date on which the application was made.
5. The foundations that have been dug on site are shown in photographs dated 21 October 2021. I understand that in a previous LDC for this same development the same photographs were not dated, and that the dates on the photographs now before me have been added subsequently using the metadata stored within the device on which they were taken. I have not been provided with the metadata itself.
6. Ordinarily, I would consider adding the dates retrospectively using the metadata (without that metadata itself being provided) not to be sufficient to show, on the balance of probability, that the photographs were taken on that date. However, on this occasion, there is other evidence before me that tends to support the date retrospectively added to the photographs as being accurate.
7. The first of these is an email exchange involving the appellant that took place around that time. In one of those emails, dated 21 October 2021 and timed at 17:24, photographs are attached showing the foundations in place and filled with concrete. This is strong evidence of the presence of the foundations at that time.
8. Secondly, there is an invoice from the company that carried out the works dated 22 October 2021. This states in terms that the work commenced on 19 October 2021 and was completed on 22 October 2021. I have some reservations about the reliability of this evidence. I acknowledge that parts of the invoice are redacted but nevertheless it does not contain all the information that I would normally expect to be present in an invoice: for example, a contract number or the date on which payment is due. I must therefore treat this evidence with an element of caution.
9. The third evidence is an email exchange between the appellant and the company that made the submission for these works under the Building Regulations on his behalf. This email correspondence is dated 13 October 2021

and refers to some technical details about the proposed works. The timing of this email exchange is entirely consistent with the foundations actually being dug between 19 October 2021 and 22 October 2021.

10. On the basis of this evidence, I am satisfied on the balance of probability that the initial foundations were completed on 22 October 2021, and therefore prior to 24 October 2021, that being the date set by Condition 1 of planning permission 18/01366/F. However, that in itself does not necessarily mean that a material start was lawfully made on the development. It is also necessary to consider whether those works were themselves sufficient to constitute a material start to planning permission 18/01366/F.
11. The application under the Building Regulations was a Building Notice submission (Council Reference:21/01260/BN). The application form clearly states that the application only relates to part of the initial foundation to secure the planning permission, and that a further application would be made when a full design was available. It is settled case law that works undertaken solely to keep a planning permission alive, even when the developer has no intention of proceeding further at that time, can suffice to initiate development.
12. The digging of a trench *which is to contain the foundations, or part of the foundations, of a building* is one of the material operations set out in section 56(4) of the 1990 Act, and relates back to the provision in section 56(2) of that Act (emphasis added). It follows that in principle the digging of such a trench could comprise a material start of the development. Section 56(2) of the 1990 Act sets an objective test and the intention of the person carrying out the development is not a relevant consideration in that respect.
13. The difficulty with the approach adopted by the appellant is that I have no way of understanding whether the foundations that have been dug are genuinely part of the development for which planning permission was granted. As the Council points out in its Officer Report, it is not clear whether the foundations are in the correct location on the site. The Officer Report goes on to make the point that there is also a question as to whether the foundations that have been dug would be necessary for the build out of the approved industrial unit. The appellant's case is inconsistent in this respect, with the digging of foundations being delayed pending clarification of technical details (the email dated 13 October 2021), suggesting that a detailed scheme was already in place, but the Building Control submission itself stating that a further application would be made when a full design was available.
14. The details submitted by the appellant include a drawing of the building for which planning permission was granted under reference 18/01366/F (Drawing No.116814-0FOUND, titled Location of Foundations). The location of the foundations that have been dug are depicted by broken red lines on that drawing. Careful examination of the broken red lines on that drawing reveals that they do not extend to the external walls of the building, but straddle a thin line that I take to indicate the internal subdivision between adjoining units.
15. In some instances, it is immediately apparent from a drawing that the walls are intended to be load bearing and for which foundations are required: for example, the external walls of a house. That is not the case in this instance. According to Drawing No. 116814-0FOUND, the foundations could only possibly support internal walls. The appellant has provided no explanation as to why foundations were not dug in a position that would clearly support a load

bearing wall: for example, the corner of Unit 10 (U10) as shown on that drawing.

16. The appellant does confirm that the foundations provided are to support two internal walls but it is not clear if these are load bearing walls or whether the strip foundations that have been dug on site are necessary in order to implement planning permission 18/01366/F. No evidence to support the appellant's contention that the walls would be load bearing has been provided: for example, from a report by a suitably qualified structural engineer. Neither has the appellant provided any explanation as to why strip foundations are required as opposed to, say, pad foundations.
17. The appellant responds in his Final Comments with the point that laying the foundations involved a financial cost and would not have been undertaken if not essential for the implementation of the scheme approved by planning permission 18/01366/F. There is some force in that argument and it may well be the case that with the submission of further evidence the appellant will be able to show that the foundations that have been dug are genuinely required in connection with the development approved by planning permission 18/01366/F. However, as indicated above section 56(2) of the 1990 Act sets an objective test and, on the balance of probability, the evidence submitted by the appellant in relation to this application has not met that test.
18. The provision within section 56(4) of the 1990 Act means that it is not a matter of simply comparing the scheme approved in planning permission 18/01366/F with some notional foundations that have been dug on site. That section of the 1990 Act specifically refers to the digging of a trench which is to contain the foundations, or part of the foundations, of a building. Where a 'building' is granted by a planning permission, the provisions set out in section 56(4) of the 1990 Act can only sensibly be read as relating to that particular building.
19. It is therefore necessary to link the foundations that have been dug with the technical specification for the development for which planning permission has been granted. Absent that level of detail, it is not possible for me to know whether the foundations that have been dug are in the right location and/or are of the correct type or depth. I am therefore not in a position to determine whether, on the balance of probability, any material operation comprised by the development granted by planning permission 18/01366/F has begun in the terms set by section 56(2) of the 1990 Act.

Conclusion

20. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the commencement of development of the erection of 10 small commercial units (B2/B8) with associated car parking and landscaping (Implementation of planning permission 18/01366/F subsequent to 20/00046/DISC is 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.

Paul Freer
INSPECTOR