
Appeal Decision

Site visit made on 6 May 2025

by A Walker MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 2 June 2025

Appeal Ref: APP/W1850/X/24/3346543

Land to the rear of 73 Etnam Street, Dukes Walk, Leominster HR6 8AE

- 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 Martine Rohde against the decision of Herefordshire Council.
 - The application ref 240373, dated 21 December 2023, was refused by notice dated 25 March 2024.
 - 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 the development at Land at Dukes Walk Leominster Herefordshire HR6 8AW under planning permissions dated 25th November 2010 application number DMN/102446/O and 25th July 2011 application number DMN/111443/RM were implemented.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. Some of the evidence submitted by the parties conflicts with each other. To test the evidence further, it was suggested that the appeal procedure should be changed to an Inquiry. However, both parties confirmed the appeal could satisfactorily be determined under the written representations procedure. I am satisfied I can determine the appeal under the written representations procedure without causing injustice to any interested parties. Accordingly, I have determined the appeal on this basis.

Main Issue

3. The main issue is whether the Council's decision to refuse to grant an LDC is well-founded.

Reasons

4. The onus is on the appellant to demonstrate that, on the balance of probabilities, the development was lawful at the time of the LDC application. A development is lawful under the provisions of section 191(2)(a) and (b) of the Town and Country Planning Act 1990 (the Act) if no enforcement action may be taken because it did not involve development requiring planning permission, or because the time for enforcement action against the use has expired; and, providing it does not constitute contravention of any requirement of any enforcement notice then in force. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided his evidence alone is sufficiently precise and unambiguous.

5. Outline planning permission was granted on 25 November 2010 for a 3 bedroom property¹. Condition 1 attached to the permission states 'Application for the approval of reserved matters shall be made to the local planning authority before the expiration of nine months from the date of this permission.' Condition 2 states 'The development hereby permitted shall be begun before the expiration of one year of the date of this permission.' A subsequent application for the approval of reserved matters² relating to the outline planning permission was granted permission on 25 July 2011.
6. S191(1) of the Act, states 'If any person wishes to ascertain whether— (a) any existing use of buildings or other land is lawful; (b) any operations which have been carried out in, on, over or under land are lawful; or (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.
7. The LDC application was made in order to establish whether material operations were undertaken that amounted to the commencement of development the subject of planning permission DMN/102446/O, in accordance with condition 2 attached to that permission.
8. Section 56(2) and (3) of the Act provide that development shall be taken to be begun for the purposes of ss91 and 92 on the earliest date on which any material operation comprised in the development begins to be carried out. S56(4) states "material operation" means— (a) any work of construction in the course of the erection of a building; (aa) any work of demolition of a building; (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building; (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b); (d) any operation in the course of laying out or constructing a road or part of a road; (e) any change in the use of any land which constitutes material development.
9. The appellant contends the material operations comprised the undertaking of ground works in lowering the level of the site by approximately 800mm; the removal of soil and concrete foundations that remained on site; and setting out levels datums and excavation of trenches. There is no dispute that these material operations would amount to material operations that would be considered to have commenced the planning permission. The crux of the matter is whether these material operations took place prior to 25 November 2011, one year after the outline planning permission was granted.
10. In support of their case, the appellant has provided statutory declarations from several parties, including two from themselves. The appellant states the material operations took place in July/August 2011. Mayya Kostyuk, Ian Williams and Victor Smith also state these material operations took place in July/August 2011. However, none of these parties state how they can so specifically remember the material operations were carried out within a two-month timeframe some 12 years prior to making their statutory declarations.

¹ Council ref DMN/102446/O

² Council ref DMN/111443/RM

11. Mayya Kostyuk goes on to state they even remember the company name on the grab hire lorry on the site as being TW Jones Grabhire. I note the email sent to Mayya Kostyuk, dated 29 September 2021 from TW Jones stating they removed soil and hardcore from 'your' site in July 2011. It is not clear why in their declaration Mayya Kostyuk stated the material operations took place in July/August 2011 when they had already received an email from TW Jones confirming they had been on the site in July 2011. If Mayya Kostyuk knew the operations took place in July then it begs the question why they refer to them taking place in July/August 2011.
12. Ian Williams states they made a site visit 'out of interest'. However, there is no evidence to support how they can be so sure it was in July/August 2011, particularly as it was 12 years prior to the statutory declaration being made. Similarly, there is no documentary evidence to support Victor Smith and Ugis Kinkovskis's declarations that they were involved in carrying out the material operation works during July and August 2011.
13. Gintara Svipas states they were approached by the appellant in June 2011 to set out the datum levels. However, they provide no dates of when this work was carried out.
14. With regard to the declaration of Eng How Teoh, there is no evidence to support how they precisely remember the appellant asking them to move bins some 12 years prior nor why they specifically remembered noticing old foundations and large quantities of soil and hardcore having been removed whilst moving the bins.
15. I acknowledge the statutory declarations and the weight that should be afforded to them. Nevertheless, there is a surprising degree of consistency between them all in that they can all recall the material operations taking place within the relatively short timeframe of July/August 2011 without any documentary evidence explaining why they can or corroborating the declarations. It is unusual for 7, seemingly unrelated, people to be able to recall such events that took place over a maximum of a two-month period some 12 years prior.
16. Photographs have been provided including details of their metadata confirming when they were taken. The appellant argues that photographs can be manipulated. However, they have provided no evidence that the photographs before me have in anyway been manipulated. I also note the photographs are not accompanied by a statutory declaration, nevertheless they are a significant material consideration, particularly as they include their metadata.
17. The photographs dated 23 September 2011 show the site with Heras fencing surrounding it. The land appears to be stripped of vegetation with a pile of cuttings, soil and general waste piled in the south east corner of the site. There is no evidence in the photographs of any excavation works involving the old foundations or trenches for the approved dwelling.
18. In their statutory declaration dated 12 June 2024, the appellant addresses the 23 September 2011 photographs, stating 'the photograph quite clearly shows that all wooden fencing ...has been removed, kerbstones around the perimeter have been removed and the wooden enclosure to the bin store has been removed. Most of the vegetation has been removed...and the ground has been loosened, which was removed the following week in continuance of preparation works that were ongoing'. This statement clearly undermines and contradicts the statutory

declarations of the parties supporting the appellant who say that the material operations took place in July/August 2011. Most notably, the excavation and removal of existing foundations and the excavation of ground trenches for the approved dwelling, that Victor Smith and Ugis Kingovskis state took place in July/August 2011, did not occur.

19. The appellant also argues the 23 September 2011 photographs show the site levels having been set out. However, there is no evidence of what the site levels were prior to 23 September 2011. An undated photograph³, clearly taken prior to 23 September 2011 as it still shows the timber fence in place, shows the site as being extensively overgrown with vegetation. It is not clear from this photograph whether the vegetation is at different heights due to different ground levels or due to the extensive overgrown condition of the site, particularly as some plants are seen growing up the fence. Moreover, there is no evidence in the photographs of any demarcation of the site levels, for example datum level pegs.
20. The admission by the appellant of what the 23 September 2011 photograph depicts undermines and contradicts the appellant's own statutory declaration dated 1 November 2023, in which they state they excavated concrete foundations and the trenches for the approved dwelling in July/August 2011. As a result, this significantly brings into doubt the veracity of the evidence in the statutory declarations.
21. Based on the 23 September 2011 photographs, and taking the appellant's explanation of the works that had taken place in them, I do not consider the clearance of vegetation and piles of waste soil and rubble from the site to be material operations amounting to the commencement of the planning permission. In fact, it is reasonable to conclude that these works were actually in response to the s215 notice the Council issued on 10 August 2011, which required the cutting back of all vegetation and leaving the site in a tidy condition. Photographs attached to the 'Close Case Report', dated 11 October 2011, for the s215 notice appear to show the site in the same condition as those taken on 23 September 2011. I note the date on these photographs as being 9 January 2004; however, this is clearly erroneous.
22. Therefore, by 23 September 2011, it has not been sufficiently demonstrated that material operations had taken place amounting to the commencement of the planning permission. This leaves only a two-month window for the material operations to take place, by 25 November 2011. There is no documentary evidence to support the appellant's contention that the material operations took place during this time.
23. On the contrary, photographs dated 24 March 2012 show the site in a similar condition as on 23 September 2011, albeit with some vegetation having regrown. The pile of vegetation cuttings and waste remains in the south east corner, with additional items of waste being added to it, and the grey commercial wheely bin remain in the same position along the eastern boundary of the site. There is nothing to suggest that any further works had taken place on site since 23 September 2011. Consequently, based on the evidence before me, as material operations amounting to the commencement of the planning permission had not taken place by 25 November 2011, the planning permission was not commenced.

³ Page 1 of Appendix 5 to appellant's Appeal Statement

24. Although the photographs dated 20 and 23 June 2013 are far beyond the requisite date of 25 November 2011, they nevertheless further support my finding that the planning permission was not commenced. These photographs show trenches having been dug. This would appear to have been done recently as the soil looks to be freshly disturbed with no vegetation having regrown. The 23 June 2013 photograph shows a mini digger with its cabin door open, suggesting it was in use at the time.
25. The appellant states the trenches were being re-dug in June 2013 due to them collapsing, having been excavated before November 2011. However, if that were the case, then there is no explanation as to why the wheely bin and the pile of vegetation cuttings and waste in the south east corner of the site were removed to allow the excavation of the trenches and then by 24 March 2012, the wheely bin and a similar pile of vegetation cuttings were brought back onto the exact same positions on the site as they were on 23 September 2011 and the recently excavated trenches having seemingly been completely filled in.
26. Moreover, I note the Building Control Site Visit Records for 24 and 25 June 2013 and 2 July 2013 relating to the excavation of the footings and concreting of the foundations. There are no records before me relating to such works taking place before 25 November 2011.
27. I find therefore, the evidence before me fails to demonstrate that, on the balance of probabilities, material operations comprised in the development the subject of planning permission DMN/102446/O had not begun before 25 November 2011. Therefore, the planning permission was not commenced.

Conclusion

28. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful development 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.

A Walker

INSPECTOR