



Appeal Decision

Site visit made on 27 September 2022

by **M Savage BSc (Hons) MCD MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 25 October 2022

Appeal Ref: APP/L3245/X/22/3297545

Land adjacent to The Old School, Cardeston, Wattlesborough, Shrewsbury SY5 9EA

- 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 & Mrs C Roberts against the decision of Shropshire Council.
 - The application ref 21/03516/CPE, dated 15 July 2021, was refused by notice dated 4 November 2021.
 - 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 commencement of works for the erection of a dwelling.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application form does not detail the building works which the appellants would like a lawful development certificate for, but instead refers to an attached statement. The grounds for the application refer to a use, operation or activity in breach of a condition or limitation, reference number 14/03486/OUT, condition 3. However, condition 3 states that 'The development hereby permitted shall begin before the expiration of two years from the date of approval of the last of the reserved matters to be approved'. The Council dealt with the application on the basis that it was 'commencement of works for the erection of a dwelling'. Having reviewed the evidence submitted, it is clear that the appellant is seeking to ascertain whether works for the erection of a dwelling have been lawfully begun. I have therefore used the Council's description in the banner heading above and considered the appeal on this basis.

Main Issue

3. The main issue is whether the Council's refusal to grant a LDC was well founded.

Reasons

4. An application under S191(1)(a) of the Act seeks to establish whether any existing use of buildings or other land was lawful at the time of the application. S191(2)(a) and (b) sets out that 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.
5. Planning merits form no part of the assessment of an application for a lawful development certificate (LDC) which must be considered in the light of the facts and the law. In an application for a LDC, the onus is firmly on the applicant to demonstrate on the balance of probabilities that the development is lawful. An appellant's evidence should not be rejected simply because it is not corroborated. If there is no evidence to contradict their version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted.
 6. Outline planning permission was granted on 15 May 2015 for the erection of a dwelling with all matters reserved, reference 14/03486/OUT. The Council granted reserved matters approval on 18 November 2016, reference 16/01009/REM. Condition 3 attached to 14/03486/OUT states 'The development hereby permitted shall begin before the expiration of two years from the date of approval of the last of the reserved matters to be approved. It is necessary, therefore, for the appellant to show, that the development lawfully commenced on or before 18 November 2018.
 7. The Council's Decision notice states the reason it considers the development is not lawful 'Condition 4 of 16/01009/REM would be classed as a condition precedent and goes to the heart of the permission. It is noted that the date by which works shall have commenced has lapsed and therefore the permission has expired.'

Whether development was begun

8. Section 56(2) of the Act states 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. It is necessary for the works carried out to be comprised in the planning permission and be more than *de minimis*. The appellant states that the work commenced when the following material operations took place prior to the 18 November 2018:
 1. Placing a caravan on site for health and safety measures so workers can have breaks under cover and shelter from severe elements of the weather.
 2. Scraping and levelling the site and carting material away followed by hardcore surfacing over the whole site.
 3. Providing water supply and stop tap to the site and caravan.
 4. Bringing foul drain onto the site toilet connection.
 5. Building brick electric canopy fixing supply and meter.
 6. Demolition of existing building (school bike shed) located on position of new dwelling which was taken down the day of purchase.
9. Section 56(4) of the Act defines 'material operation' as (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.
10. The siting of a caravan is generally held to constitute a use of the land and not operational development. Although it was not possible from my visit to ascertain how the caravan has been used since its placement within the site, the placing of a caravan for health and safety reasons does not fall within the definition of a material operation set out under section 56(4) and so is not a material operation for the purposes of section 56 of the Act.
 11. The appellant states that the site has been scraped and levelled, with material taken away and hardcore placed over the whole site and has provided a photograph dated 14 July 2018 which shows a digger within the site and exposed soil. I saw that hardcore has been placed near the entrance to the site. However, much of the area which has been laid with hardcore is shown as being laid with grass in the approved plans. It is therefore unlikely that the works were done for the purpose of carrying out the planning permission.
 12. I saw that a water supply and pipe is linked to the caravan. Although a water supply would be required for the proposed dwelling, the supply is connected via an overground pipe to the caravan. I saw that a foul drain has also been laid within the site. However, while its location is broadly in line with the foul drainage details shown on drawing WB-DL-600 Rev A, it is connected to the caravan. It has therefore not been shown that the works were done for the purpose of carrying out the planning permission. Furthermore, the appellant has not detailed when the water supply or foul drain were laid.
 13. The appellant has provided a photograph, dated 24 October 2018, of a brick canopy. I saw a brick electric canopy has been constructed which houses an electrical supply to the caravan. Although an electricity supply would be required for the dwelling, the approved plans do not show that a canopy would be provided. Such features are usually located on the dwellings, with free standing canopies, in my experience are more generally associated with caravans. It has therefore not been demonstrated that the works were carried out in accordance with the planning permission.
 14. The appellant states that the bike shed was 'demolished in July 2018 with a digger'. While a photograph showing the bike shed was included in the Design and Access Statement at the Outline planning application stage, the demolition of the building was not in the description of development. Due to its position in the site, I accept that the demolition of the building may have been necessary to facilitate the construction of the dwelling. However, no substantive details of the building, or its demolition have been provided. It has therefore not been demonstrated that the works to remove the building constituted a material operation for the purposes of section 56 of the Act.
 15. The appellant states that the majority of the above was carried out in July / November 2018 and suggests this is documented with correspondence between Mr and Mrs Roberts and Cathryn Robinson, Planning Officer at the time. However, the correspondence the appellant has provided is an email dated 6 December 2018 from the Council querying whether or not any works had commenced on site.
 16. The Council advise that a Building Control Initial Notice application was submitted on 1 September 2017 but that Approved Inspectors stated on 30

November 2020 that work has not commenced and three years have passed since we [sic] issued our Initial Notice. However, it is not a requirement of section 56 that a material operation must benefit from building control approval. Building control and planning permission are two separate processes.

17. Nevertheless, there is ambiguity as to when some of the above works were carried out and whether the works were carried out in accordance with the planning permission, or in association with the siting of the caravan.

Condition precedent

18. It was established in *F G Whitley & Sons v SSW & Clwyd CC* [1992] JPL 856 that if development was in contravention of a 'condition precedent', it cannot properly be described as commencing in accordance with the planning permission, the 'Whitley principle'.

Outline planning permission: Condition 4

19. Planning Permission 14/03486/OUT, Condition 4 states that '*No development shall take place until a scheme for the provision of surface water and foul drainage has been submitted to, and approved by the Local Planning Authority. The approved scheme shall be carried out in accordance with the approved details and completed before the development is occupied.*'
20. The condition is clearly worded so as to prevent development from occurring until a scheme of foul drainage and surface water has been submitted to, and approved by the Local Planning Authority. This clearly prohibits the commencement of development until the requirement has been met. The reason given for the condition is to ensure that the proposed drainage systems for the site are fully compliant with regulations and are of robust design.'
21. Given the site's rural location, there is no certainty that it would be possible to connect to the mains drainage system. The use of a building for residential purposes would generate foul discharge which has the potential to cause pollution if not adequately controlled. The additional built development is also likely to increase surface water run-off and therefore has the potential to increase risk of flooding.
22. It is therefore essential that the means of dealing with foul and surface water drainage are resolved before works can progress. Consequently, the commencement of development is conditional upon the submission of a scheme of foul drainage and surface water drainage. Such matters therefore, in my view, go to the heart of the permission.
23. Where planning permission has been granted at the outline stage, there is no scope to reconsider matters which were dealt with (or should have been dealt with) at the outline stage. The Planning Practice Guidance (PPG) advises the only conditions which can be imposed when the reserved matters are approved are conditions which directly relate to those reserved matters. Conditions relating to anything other than the matters to be reserved can only be imposed when outline planning permission is granted.

Reserved matters: Conditions 3, 4 and 5

24. There were three conditions attached to 16/01009 which are asserted by the Council to be pre-commencement conditions, conditions 3, 4 and 5.

25. Condition 3 of 16/01009/REM states *'No development shall take place until full details of splayed access drive way, in accordance with TD41/95 incorporating a dropped kerb crossing, as indicated on Drawing No.78-16-05 Rev.F, has been submitted to and approved in writing by the LPA, having consulted with Highways England. The access shall be installed in accordance with the approved details prior to the commencement of use of the development hereby permitted.'*
26. Condition 4 of 16/01009/REM states *'No development shall take place until full drainage details, as indicated on Drawing No. 78-16-05 Rev.F, showing how surface water run-off will be prevented from discharging from the development onto the A458. These details shall be submitted to and approved in writing by the LPA, having consulted with Highways England...'*
27. Conditions 3 and 4 of 16/01009/REM were specifically recommended by Highways England in order to ensure the safety of users on the A458 and enable it to continue to be an effective part of the Strategic Road Network in accordance with DfT Circular 02/2013: The Strategic Road Network and The Delivery of Sustainable Development. Highways England also pointed out that the works would require a Section 278 Agreement to be entered into and all costs relating thereto to be borne by the Applicant.
28. Condition 5 of 16/01009/REM states *'Full details, calculations, dimensions and location plan of the percolation tests and the proposed soakaways should be submitted to the Local Planning Authority for prior [sic] to the commencement of development. Percolation tests and soakaways should be designed in accordance with BRE Digest 365. The submission shall includes [sic] details of how surface water shall pass through a silt trap or catchpit prior to entering the soakaway to reduce sediment build up within the soakaway. The level of water table should be determined if the use of infiltration techniques are being proposed.'*
29. Section 278 of the Highways Act 1980 allows developers to enter into a legal agreement to make permanent alterations or improvements to a public highway, as part of a planning approval. Such agreements ensure that works to implement an access are carried out to the appropriate standards. However, they differ from planning decisions, which are only concerned with the form of an access, not the methods that will be used in its construction.
30. Condition 3 relates to the access and so it was reasonable for the Council to impose the condition on the reserved matters application. Given the need to ensure safe access onto the A458 can be achieved, it is essential that such matters are agreed before the works can progress. Consequently, the commencement of development is conditional upon the submission of details of splayed access driveway and dropped kerb crossing. Such matters, therefore, in my view, go to the heart of the permission.
31. Conditions 4 and 5 of 16/01009/REM, seek to control of surface water and, in my view, duplicate condition 4 of 14/03486/OUT. Since conditions 4 and 5 of 16/01009/REM are not necessary, it follows they do not go to the heart of the planning permission. Nevertheless condition 4 of 14/03486/OUT requires the submission of a scheme for the provision of surface water and foul drainage and so such matters would still need to have been addressed prior to the commencement of development.

32. Application 17/05208/DIS was submitted in order to discharge conditions 3, 4 and 5 of 16/01009/REM, however, the application was not proceeded with and the conditions have not been formally discharged.

Exceptions to Whitley

33. *Whitley* established the principle that development begun in contravention of a condition is development without planning permission, and it established an exception: if the condition requires that something is approved before a given date, and the developer applies for that approval before that date, and the approval is subsequently given so that no enforcement action could be taken, work that is carried out before the deadline and in accordance with the ultimately approved scheme can amount to a lawful start to development.
34. In October 2017, as part of the approval of conditions application, drainage details were submitted, Dwg No. WB-DL-600Rev A, together with Drawing No 211-17-35 C. Drawing No WB-DL-600 Rev A, 'Drainage Layout' dated October 2017 (Appendix 7 of the Appellant's SoC) provides details of surface water and foul water and shows an ACO Channel at the proposed access. Drawing Number 211-17-35 Revision C, 'Access apron construction', dated September 2017 (Appendix 8 of the Appellant's SoC) provides details of kerbing and the ACO Drain. Drainage calculations were also submitted (Appendix 9 of the appellant's SoC).
35. On 11 April 2018, a planning officer wrote to the appellant advising that consultees have made comment on the drainage based conditions, and are generally satisfied with the details. The officer raised issue with Condition 3 regarding the access arrangements and pointed out that the information submitted does not sufficiently provide the full details of a splayed access driveway, in accordance with TD41/95 incorporating a dropped kerb crossing required by Condition 3.
36. While an officer of the Council advised in an email dated 11 April 2018 that 'our consultees have made comment on the drainage based conditions, and are generally satisfied with the details', the condition was not discharged. Significantly, Highways England advised in a letter dated 13 December 2018, that *'the proposed ACO channel...situated across the top of the vehicular access apron as detailed on the Drainage Layout Plan, drawing no. WB/DL-600 Rev A, is not located to the rear of the Highway boundary resulting in surface water runoff from part of the development site discharging onto the A458 Trunk Road, which is not acceptable...'*.
37. The appellant suggests the issue with the ACO drain had been rectified in 2017 by obtaining land registry and topographical plans. The appellant has drawn my attention to correspondence with an employee of Kier who were acting as consultants for Highways England, dated 5 December 2017, who advised that information provided (a land registry plan and overlay) is helpful in defining the boundary. However, this email pre-dates Highways England's advice given on 13 December 2018 and so it seems unlikely that the information provided had been deemed sufficient at that time.
38. Furthermore, a '3rd Party Scheme Detailed Design Review' document, dated 18 July 2018, states 'Relocate private catch drain along the highway boundary to ensure all private surface water run off does not fall into the Highway Drainage System'. A further copy of the 3rd Party Scheme Detailed Design Review, which

appears to have been sent on 7 June 2019 and includes 'Designer Response 1 and Review Comment 2'. With respect to drawing number WB-DL-600 Rev A, dated October 2017, drawing revision 211-17-24a & 35b (211-17-35B, typo assumed) it is stated that Channel relocated to highway boundary due to updated outfall invert level. I note that the revision is identified as '20-06-18 Revisions/amendments following comments from Kier'.

39. However, it is not clear from the evidence provided whether this document was submitted to the Council on or before 18 November 2018 or whether it has since been modified. Consequently, I am not persuaded that an exception to Whitley applies in this case.
40. I note the appellant's concerns regarding the length of time the Council has taken to deal with application 17/05208/DIS. However, it would have been open to the appellant to submit an appeal against the Council's failure to issue a decision. While an officer of the Council may have suggested the appellant submit the application for an LDC, the Council cannot be bound by such a suggestion.
41. In my view, the appellant's evidence is not sufficiently precise and unambiguous and has therefore not demonstrated, on the balance of probabilities, that works that have been carried out constitute the commencement of development or that the development lawfully commenced on or before 18 November 2018.

Conclusion

42. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of commencement of works for the erection of a dwelling 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.

M Savage

INSPECTOR