



Appeal Decision

Site visit made on 16 July 2024

by R Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 July 2024

Appeal Ref: APP/H4505/X/23/3330380

Former site of 21 Mill Road, Gateshead Quays, Gateshead NE8 3AD

- 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 Jonathan Riley, Valorem Investment Partners Limited, against the decision of Gateshead Council.
 - The application Ref DC/23/00132/CPE, dated 3 February 2023, was refused by notice dated 4 April 2023.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 as amended (the Act).
 - The development for which a certificate of lawful use or development is sought is lawful commencement of development pursuant to planning permission reference DC/19/00785/FUL.
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Formal Decision

1. The appeal is dismissed.

Preliminary Matters

2. For the avoidance of doubt, I have taken the date of the application, as set out above, from the appellant's relevant form.
3. An accompanied site visit was undertaken. At this time, it was not possible to physically go on to the subject land itself, which was secured by boundary hoardings and a locked entrance gate. However, I was able to view the interior of the site from a vantage point adjacent to the eastern boundary. The parties agreed that a trench, previously excavated to begin the development, and which is partly the subject of this appeal, had since been back filled. I was able to see the part of the site in question. The parties agreed that it would not have been necessary for me to enter the appeal site itself. I see no reason to disagree and this has not therefore hindered my decision.

Application for costs

4. An application for costs was made by Jonathan Riley, Valorem Investment Partners Limited, against Gateshead Council. This application is the subject of a separate Decision.

Main Issues

5. The main issues are whether planning permission DC/19/00785/FUL has been lawfully commenced, such that the permission has not now lapsed, because a) there has not been a failure to discharge 'conditions precedent' attached to that planning permission and b) if there was no such failure, the development has been begun pursuant to s56(2) of the Act by the carrying out of a material operation.

Reasons

Background

6. Planning permission DC/19/00785/FUL was granted in 2019¹ for a mixed use development which included a hotel, serviced apartments and commercial units. The development was subject to various planning conditions.
7. In accordance with Condition 2 of the aforementioned planning permission, commencement of the development was required within 3 years of the planning permission date, that is by 13 November 2022.

Conditions Precedent

8. It is settled case law² that it is necessary for a condition to be both expressly prohibitive of commencement of development before a particular matter is approved (or in requirement of a particular matter to be approved 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.
9. It is the Council's case that condition Nos 3 and 8 constitute conditions precedent that were not duly discharged before 13 November 2022. Accordingly, it says that the planning permission has lapsed.

Condition No 3

10. Condition No 3 is worded as follows:

"No development shall take place until a Construction Method Statement has been submitted to, and approved in writing by, the Local Planning Authority. The Statement shall provide for:

- i. the parking of vehicles of site operatives and visitors*
- ii. loading and unloading of plant and materials*
- iii. storage of plant and materials used in constructing the development*
- iv. the erection and maintenance of security hoarding*
- v. wheel washing facilities*
- vi. measures to control the emission of dust and dirt during construction*

¹ Dated 13 November 2019.

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

vii. a scheme for the recycling/disposing of waste arising from construction works.

In addition all works and ancillary operations in connection with the remediation of the site and the construction of the new development, including the use of any equipment or deliveries to the site (except for internal works, shall be carried out only between 0800 hours and 1800 hours on Mondays to Saturdays and at no time on Sundays, Bank Holidays or Public Holidays, unless otherwise approved in writing by the Local Planning Authority."

11. There can be no doubt the condition is expressly prohibitive of commencement of development prior to the details being agreed in writing. The question then is would the approved details be of such fundamental importance to the scheme, so as to constitute a matter which goes to the heart of the permission?
12. It seems to me that the absence of agreement would not bear on the final form and appearance of the development; neither would it potentially result in lasting off-site harmful impacts. Rather any impacts from the construction process would be temporary by nature. I acknowledge the Council has expressly stated the reason for the condition is to safeguard the amenity of nearby residents during construction, of fundamental importance in this case such that it would otherwise have been necessary to refuse the whole permission. Reference has also been made to the need for sensitive methods of working. During my visit I noted the proximity of a large development of residential apartments, known as Baltic Quay, to the immediate north of the development, also a hotel to the immediate east.
13. However, if brought to the attention of the Council during construction, I consider there would be alternative enforcement powers available to tackle such issues quickly and effectively.
14. I have had regard to the appeal decisions brought to my attention by the Council, which relate to different developments on sites elsewhere. However, the circumstances of those cases are different to those currently before me. There is no information presented which leads me to consider that failure to comply with Condition 3, before the commencement of development on site, would be so significant as to go to the heart of the permission. This condition is not therefore a true condition precedent.

Condition No 8

15. Condition No 8 is worded as follows:

Construction of the development hereby approved shall not commence until an intrusive land contamination assessment, to assess the nature and extent of any contamination on the site and whether or not it originates on the site has been submitted to and approved in writing of the Local Planning Authority. The report of the findings must include-

(i) a survey of the extent, scale and nature of contamination.

(ii) an assessment of the potential risks to,

- land stability

- human health,

- *property (existing or proposed) including buildings, service lines and pipes,*
- *adjoining land,*
- *groundwaters and surface waters,*
- *ecological systems,*
- *archaeological sites and ancient monuments,*

(iii) an appraisal of remedial options, and proposal of the preferred option(s) including a timeline and phasing for the implementation of the remediation scheme.

This must be conducted in accordance with DEFRA and the Environment Agency's Model Procedures for the Management of Land Contamination, CLR 11.

16. The appellant's position is that this condition is not prohibitive of the commencement of development, but rather it prohibits the commencement of construction of the approved development. They refer to the difference in wording between this condition and condition No 3, for example, which refers to 'no development'. In their view, if the commencement restriction of both conditions had been intended to have the same meaning, then the same words would have been used in both cases. The appellant refers to the dictionary definition of 'construction' in terms of the action of building something. They therefore say this would not include works such as the digging of a trench intended to accommodate a building foundation, as the trench would not be part of the building itself.
17. In any event the appellant says that this condition does not go to the heart of the permission; that investigations have now been completed and no formal gas protection measures have been found to be necessary such that any enforcement action would be irrational.
18. The beginning of condition 8 uses the words 'Construction of the development...'. The definition of 'construction' in the Oxford and Cambridge dictionaries includes reference to building, making or forming something. The meaning of development is set out in s55(1) of the Act and is defined as the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land.
19. To my mind, to the reasonable reader having regard to the natural and ordinary meaning of words, such development operations therefore go beyond the component parts of the building itself, and would include the types of material operation, such as the excavation of a foundation trench, that would be necessary to begin the development. I am not persuaded that the incorporation of the word 'the' prior to 'development' serves to materially alter what is meant by the condition.
20. I therefore concur with the Council that despite a slight variation in wording regarding the commencement restriction, Condition No 8, like No 3, is expressly prohibitive of commencement of development prior to the relevant details being agreed.

21. The Council found that contamination may be present on the site resulting from ground deposits, fill materials or the materials used in previous buildings on the site. Hence the condition was imposed with the reason recorded as seeking to minimise risk to users of the land and neighbouring land.
22. Indeed, it seems to me that once the ground becomes significantly disturbed, there would be the potential to open up pathways for any contaminants present to adversely affect the site and wider environment, such that opportunities to remediate the site effectively would be lost. I therefore conclude that Condition No 8 goes to the heart of the planning permission and is a true 'condition precedent'.
23. It is undisputed that this condition has not been discharged to date. The appellant has referred to investigations now having been completed, and concluding that no formal gas protection measures are necessary. Whilst this may be the case it does not deal with the requirements of Condition No 8 in its entirety. Reference is made to a ground investigation report having been produced, dated April 2022. However, it is not clear from the evidence before me that this was acceptable to the Council and that it had sufficient information prior to the expiration of the planning permission to ultimately discharge the condition.
24. I have had regard to the various case law brought to my attention by the appellant, where certain conditions were found not to be true conditions precedent. However, the circumstances in those cases are different to those currently before me.
25. I therefore conclude that the failure to discharge Condition No 8 by 13 November 2022 has meant that the planning permission DC/19/00785/FUL could not have been lawfully commenced and has lapsed.

Material Operation

26. Because I have found that the planning permission has lapsed due to the failure to discharge a condition precedent, as set out above, it is not essential for me to consider whether the development was formally begun by a material operation. However, I consider this matter briefly below in the interests of completeness.
27. The appellant has provided an affidavit from the architect associated with this project³. The author refers to supervising the formation of a trench. The trench was proposed to be a base for the crane, the principle pour for the foundation(s) and to be parallel with the incoming water main.
28. A second affidavit has been produced by a structural engineer who was involved with the project between 2016 and 2017 initially and latterly in 2023⁴. He states that the services entering the site are to be retained for future use and therefore require protection during the excavation, piling and formation of the ground works. Reference is made to the trench being required to form a raft foundation to contain and protect the services within.
29. Given that any person who lies about the information contained in a sworn statement could be prosecuted for the crime of perjury, and if convicted may

³ Mr G Williams – Audere BW Architects, dated 1 February 2023

⁴ Mr J Gendall – Clancy Consulting, dated 28 September 2023.

- have to pay significant fines or be sentenced to time in prison, I give the affidavits significant weight. I have not been provided with evidence from the Council which would serve to contradict the stated purpose of the trench.
30. In practice, little is needed for development to be begun under s56(2) of the Act. 'Material operations' are defined in s56(4) as including the digging of a trench which is to contain the foundations, or part of the foundations, of a building. It seems to me that utility services are a fundamental component of a building and that provision of a foundation to protect those services would be part and parcel of the building, as a matter of fact and degree.
31. In the alternative a material operation may also include any work of construction in the course of the erection of a building. It seems to me that the digging of a trench to provide a foundation to protect utility services would comprise such construction works.
32. I have had regard to the various case law brought to my attention by the Council. However, the circumstances of those cases are different to those currently before me.
33. It is undisputed that that the trench was dug on 9 November 2022, prior to the expiration of the planning permission. That the trench was dug by archaeological contractors, as alleged by the Council, makes no difference to the above assessment. I therefore find, on the balance of probability, that the subject trench would have been a material operation, that would have lawfully begun the development, but only in the event that all conditions precedent had been discharged.

Conclusion

34. I therefore conclude, on the evidence now available, 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 DC/19/00785/FUL" 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