

lawfulness of the planning permission.

3. Planning History

97/00883/FUL	Demolition of existing house and construction of new house	Refused	07.10.1997
97/01533/FUL	Demolition of existing house and construction of new house	Approved	22.01.1998
21/00740/LUEX	Lawful Development Certificate for the commencement of planning permission TEN/97/1533 for the Demolition of existing house and the construction of a new house	Current	

4. Relevant Legislation

The Town & Country Planning Act 1990; Section 56

5. Officer Appraisal

As this application is for a Lawful Development Certificate neither the National Planning Policy Framework (2019) nor the adopted Tendring District Local Plan 2007 or 2013-33 Emerging Local Plan are relevant to this case.

The statutory framework covering "lawfulness" for lawful development certificates is set out in section 191(2) of the Town and Country Planning Act 1990 (as amended) ('the Act'). In summary, uses or operations are lawful at any time if (a) no enforcement action may then 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 (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

Section 194 of the Act provides that if any person, for the purpose of procuring a particular decision on an application for a Lawful Development Certificate, knowingly or recklessly makes a statement that is false or misleading; or, with intent to deceive, uses any document which is false or misleading; or withholds any material evidence then that person is guilty of an offence.

Details of what must be included in each type of lawful development certificate can be found in section 191(5) or 192(3) of the Act. The Town and Country Planning (Development Management Procedure) (England) Order 2015 specifies the contents of an application and how it must be submitted.

Nationally the Planning Practice Guidance issues advice as to these Certificates. This guidance was issued on 6/3/2014. The relevant guidance is summarised below:

If the local planning authority is satisfied that the appropriate legal tests have been met, it will grant a lawful development certificate under section 191 of the Act. Where an application has been made under section 191, the statement in a lawful development certificate of what is lawful relates only to the state of affairs on the land at the date of the certificate application.

The grant of a certificate under section 191 applies only to the lawfulness of development in accordance with planning legislation. It does not remove the need to comply with any other legal requirements such as The Building Regulations 2010, or the Planning (Listed Buildings and Conservation Areas) Act 1990 (as amended) or other licensing or permitting schemes.

Article 39 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 specifies the contents of an application and how it must be submitted. It must be accompanied by sufficient factual information/evidence for a local planning authority to decide the application, along with the relevant application fee.

An application needs to describe precisely what is being applied for and the land to which the application relates. Without sufficient or precise information, a local planning authority may be justified in refusing a certificate.

The applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence.

In the case of applications for existing lawful development, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

There is no statutory requirement to consult third parties including parish councils or neighbours. It may, however, be reasonable for a local planning authority to seek evidence from these sources, if there is good reason to believe they may possess relevant information about the content of a specific application.

A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process. Likewise issues such as highway safety or drainage or sewerage matters are not relevant to the decision to be reached.

Case Circumstances

Statutory Declaration		14 th April 2021
Copy of Decision Notice; TEN/97/1533		12 th December 1997
Builder's Estimate	S. W. Byers	17 th March 1998
Builder's Estimate	Barnell Builders	17 th March 1998
Builder's Estimate	Phelan Construction	27 th May 1998
Notice of Intention to Demolish	Tendring District Council	8 th June 1998

The site is overgrown and unkempt; attempts have been made by the neighbour to provide a boundary treatment between the properties to control the flora.

There is a dilapidated structure on the site which appears to partially comprise asbestos cement sheets. The structure is almost entirely derelict and contains discarded items of furniture/building materials. This structure does not appear on any of the 1997 plans.

Through the submission of this Lawful Development Certificate the Applicant wishes to establish that application 97/01533/FUL has been commenced and therefore the permission lasts in perpetuity.

Condition 1 (Time Limit) of planning approval 97/01533/FUL required that the development shall be commenced before the expiration of 5 years from the date of this permission. The permission was dated 22nd January 1998 and would expire on 22nd January 2003 if commencement had not taken place.

The Town and Country Planning Act 1990, Section 56, sets out the legislative framework for ascertaining what amounts to commencement under the Section entitled 'Time When Development begun'.

Section 56, paragraph (1) states that:-

"for the purposes of this Act development of land shall be taken to be initiated -

- (a) if the development consists of the carrying out of operations, at the time when those operations are begun;
- (b) if the development consists of a change in use, at the time when the new use is instituted;
- (c) if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b)"

Section 56, paragraph (2) states that:-

For the purposes of the provisions of this Part mentioned in subsection (3) 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.

Section 56, paragraph (4) states that, in subsection (2) "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.

The courts have generally taken a lenient approach towards developers in deciding whether a permission has been implemented or not. In *Thayer v Secretary of State for the Environment*⁶ the Court of Appeal held that even the removal of 12 feet of hedge and some surface earth was sufficient to constitute 'specified operations' and so prevent the grant of planning permission lapsing after the expiry of the time limit. The sole principle was that the work carried out was referable to the permission; the extent of that work was irrelevant, provided it is more than de minimis⁶. In *Brent London Borough Council v. Secretary of State for Communities and Local Government*⁷ steps were taken towards construction of an access road which comprised the addition of a chemical to the soil intended to create a bonded layer capable of forming the basis for a road surface. The new surface overlapped with but was not wholly consistent with the permitted access road. After the planning permission would otherwise have expired the point arose as to whether the addition of the chemical to the soil was sufficient to amount to implementation of the planning permission.

Construction of the new dwelling could only begin once the original dwelling had been demolished and the description of development for the 1997 permission reflects this. As such, in accordance with Section 56 sub-paragraph (4) (aa) any work of demolition of a building would be the implementation of the planning permission, subject only to the consideration of the condition.

In regards to Condition 2 of planning approval – requiring that "Details or samples of all materials and finishes to be used in the construction of the external surfaces of the dwelling shall be submitted to and approved by the district planning authority before work commences."

So, where a condition requires that the development shall not be commenced until a scheme of working has been agreed (a condition precedent), the commencement of works before a scheme has been agreed will normally *not* save the permission.

The position regarding development which is begun in breach of a condition is confused. It had for some time appeared that development begun in breach of condition would be sufficient to constitute implementation except where the condition in question is construed as a condition

precedent to the commencement of development. In *Clywd County Council v Secretary of State for Wales and Welsh Aggregates Ltd* it was held that the words 'subject to the following conditions' were insufficient to create a condition precedent and that if the local authority sought to create a condition precedent, one would expect to find a condition containing words such as 'no development shall take place until ...'. The Court of Appeal held in *Oakimber Ltd v Elmbridge Borough Council* that where a permission was granted subject to a condition requiring details to be approved before any physical development or substantial change of use took place then no development capable of constituting a specified operation could take place until such approval was obtained. This point was also considered by the Court of Appeal in a case involving the Bishopsgate Goods Yard in East London.

The law concerning operations carried out in breach of condition was comprehensively reviewed in the case of *R. (on the application of Hart Aggregates Ltd) v Hartlepool BC*. The judge held that a distinction was to be made between a condition which required action to be taken prior to development beginning and a condition which prohibits any development taking place until it has been complied with. It was held that only in the latter case should the development in breach of the condition be deemed unlawful.

As the condition about materials relates to the construction phase ["to be used in the construction..."] and hence the demolition is not a breach of this condition. As such the condition has not been broken by the demolition.

Contributions

In the circumstances of a Lawful Development Certificate for an existing Use or Development a public consultation with neighbouring properties can sometimes provide evidence or recollection of events. In the circumstances of this case the following comments were submitted which typically relate to planning matters associated with a new dwelling. This Certificate is not a planning application for a new dwelling; it is a determination on whether the evidence submitted/available amounts to whether the development was commenced within the prerequisite five year period.

Number 1 North wall was burnt down around 25 years ago and has been let to go to ground since no attempt he's been made to clear the burnt remains since the day it was burnt down
my house has subsidence issues due to clay heavage building works could weaken my house even more
drainage issues
I have single drive coming in and a bridge over a Brook which again is week and would not take weight of materials coming in and out
there are also a lot of overhead cables over the property which I feel would be dangerous to build under
we were also under the impression once a property was demolished in point clear bay it could not be rebuilt
I just feel that current owners wish to sell land with planning permission to get as much money as they can for it with no intention of even living there
these roads are in terrible condition already
I'm also extremely concerned for the wildlife that is living around this plot, we have a family of foxes, birds and very rare insects along with snakes
This area was only ever meant to be for small holiday chalets it's now becoming a very greedy building area with current builders building enormous houses around the area
The proposed site contains remnants of the demolished property but there is no evidence that the building of a new property has ever taken place.
A Lawful Development Certificate cannot be sought on a piece of land that does not legally have planning permission to build a property on it.
The property on the corner on Colne way is literally 1m from the road, allowing this application to go ahead will not only increase vehicle traffic, it will pass my lounge window causing much noise, disturbance and vibrations.
The access to the North wall involves turning into it from Colne way, my driveway is often used for small vehicles that cannot make the corner, this has led to having my driveway broken up on the corners, a new water meter being installed due to the weight of vehicles that's crushed it, and the wear and tear to my driveway.

Having the amount of large vehicles that will need to come in will not only damage my property, but will cause me to repair it at my expense, and cause me so much stress. Already I am worrying over this and the permit has not even been granted yet.

This is totally unacceptable especially as the site is in Flood zone 3. Residents in Colne Way, Norman Way, Saxon Way and Cruce way are not allowed to live in the properties all year round to flood risk, so what makes this property any different?

It is neighbouring opposite our property to the right, and a house would overlook our property and garden.

The Parish Council objects to this application, as despite the approval of planning application 97/01533/FUL on 22nd January 1998, which resulted in the demolition of the existing property later that year, there is no evidence to suggest that the applicant has ever made any attempt to build on what is now a derelict site.

The original planning permission having expired in 2003, without any development as stipulated in Condition 1 of Schedule 2 of the approved application having taken place, the Parish Council would question how a Lawful Development Certificate could be issued, as there is no existing lawful use or development in place. Nor is there any evidence that planning permission is not required.

In response to the Parish Council comments; the Head of Legal are satisfied that the demolition of the original property (required to facilitate the replacement dwelling as they could not occupy the same space on the plot) is sufficient to amount to commencement of 97/01533/FUL.

6. Recommendation

Lawful Use Certificate Granted

7. Reason

- 1 The Town and Country Planning Act 1990, Section 56, sets out the legislative framework for ascertaining what amounts to commencement under the Section entitled 'Time When Development begun'. Section 56, paragraph (4) states that, in subsection (2) "material operation" means - (aa) any work of demolition of a building. Construction of the new dwelling could only begin once the original dwelling had been demolished and the description of development for the 1997 permission reflects this. As such, in accordance with Section 56 sub-paragraph (4) (aa) any work of demolition of a building would be the implementation of the planning permission, subject only to the consideration of the condition.

8. Informatives

Are there any letters to be sent to applicant / agent with the decision?		NO
Are there any third parties to be informed of the decision?		NO