



## Appeal Decision

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by **A L McCooey BA MSc MRTPI**

an Inspector appointed by the Welsh Ministers

Decision date: 22.08.2023

Appeal reference: CAS-02394-C3N8P2

Site address: Development site of former memorial hall, Trefeglwys, Caersws, Powys SY17 5PH

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- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 199) against a refusal to grant a certificate of lawfulness of a proposed use or development (LDC).
  - The appeal is made by Mr Peter Kremple against the decision of Powys County Council.
  - The application Ref 22/0654/CLP, dated 13 April 2022, was refused by notice dated 12 August 2022.
  - The application was made under section 192(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 erection of 30 no. dwellings, formation of vehicular access and estate road including the formation of a new access to cemetery.
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### Decision

1. The appeal is dismissed.

### Procedural Matter

2. I have taken the description of the use or operation for which the Lawful Development Certificate is sought from the Council's Notice of Decision as it represents a more accurate description than the application form. As this description is also used by the appellant on the appeal form, I am satisfied that there is no prejudice in this respect. I have corrected the description to remove phrases unrelated to the description of the development.

### Main Issue

3. The main issue is whether the Local Planning Authority's decision not to issue an LDC was well-founded.

### Reasons

4. Full planning permission M/2001/1041 for the development was granted on 24 September 2004 subject to 11 conditions. Condition 1 provides that the development must commence within 5 years i.e. by 24 September 2009.

5. The LDC seeks confirmation that the development approved under the above application has lawfully commenced. The appellant's justification for this is that material start to the approved development was undertaken prior to 24th September 2009, by the provision of foundations to Plot 30 on 22nd September 2009. A Building Notice reference BN/2009/1031 was submitted to the Local Authority. A letter from the owner of the site also confirms this to be the case. The Local Planning Authority accepts that the Building Control records confirm that excavations and foundations for Plot 30 were commenced on 22nd September 2009. These works constitute a material operation as specified in Section 56 of the Town and Country Planning Act 1990. The operation was undertaken within the 5 year period and so the development was begun within time.
6. However, that is not the end of the matter. Caselaw has established that if development is begun in contravention of pre-commencement conditions (or conditions precedent), it cannot be described as commencing in accordance with the planning permission. The relevant tests are that the conditions must prohibit development until a requirement has been met. And each must also have such significance to the planning permission that it goes to the heart of the permission. This is a matter of judgement on the facts of each case. The Local Planning Authority refers to conditions 2 and 6 of the permission M/2001/1041 that it claims were conditions precedent, in that they require the approval of the specified matters to be gained from the Local Planning Authority before development is begun. The Local Planning Authority acknowledged that whilst condition 4 was a condition precedent, it did not go to the heart of the planning permission.
7. Condition 2 related to the approval of details of external materials to be used on the dwellings. I do not consider that this goes to the heart of the planning permission as such details merely need to be approved prior to being used on the exterior of the dwellings.
8. Condition 6 stated that: Notwithstanding the submitted details the development hereby approved shall not commence until a scheme for the provision of surface and foul water drainage works have been submitted to and approved in writing by the Local Planning Authority. The drainage works shall be completed in accordance with the agreed details and timetable. Condition 6 clearly is a condition precedent; in that it requires the approval of the specified reserved matters to be gained from the Local Planning Authority before development is begun.
9. The condition as worded is prohibitive in substance and effect. Details of foul and surface water drainage can have fundamental implications for the development of the site in terms of the levels across the site and finished floor levels, for example. As a matter of fact and degree, I consider that condition 6 does go to the heart of the planning permission. In reaching this conclusion, I have been mindful of the legal authorities in respect of such matters referred to within the evidence, and I am satisfied that my findings are consistent with the principles established therein.
10. The next question to consider is whether the works were carried out in breach of that condition. No details were submitted for approval and so the requirement to obtain approval from the Local Planning Authority before development is begun was not met. As the material operation was undertaken in breach of the condition precedent, I conclude that the development did not lawfully commence within the timescales set out in condition 1.
11. The Local Planning Authority refers to a later planning permission M/2006/0583 which granted separate consent for 11 dwellings on part of the site, replacing 8 dwellings previously approved under the 2001 application. This was granted in 2014, requiring commencement by 2019. The Local Planning Authority argues that the 2006 planning permission has been considered to be implemented by virtue of the submission of a non-material amendment application in May 2020. The Council relies on the judgement in

Hillside Parks Ltd v Snowdonia National Park Authority (2022) to argue that the implementation of the 2006 planning permission means that compliance with the 2001 is not possible. I noted during my site visit that no substantive works had taken place on the site. I therefore conclude that it remains open to the appellant to choose which consent to implement. This distinguishes the facts of the case from those pertaining in the Hillside Parks case.

12. The appellant points out that the approval of a non-material amendment on planning permission M/2006/0583 varied a similar drainage condition to allow commencement on the site before drainage details were approved. I note that this approval related to surface water drainage only and not foul drainage, which distinguishes it from condition 6 of M/2001/1041. M/2006/0583 was granted on 11 December 2014 (following completion of a legal agreement). The revised condition required details to be submitted within 2 months following the first implementation of the planning consent. As minimal works had taken place on the site, I consider that this does not undermine my conclusions as to whether condition 6 on M/2001/1041 is a condition precedent, which is based on the facts of the case.
13. The site was an allocation in the previous Unitary Development Plan as a commitment. Contrary to the appellant's contention, this allocation is a separate matter. It does not of itself establish that development had lawfully commenced. This can only be established in accordance with relevant caselaw.

### **Conclusion**

14. I find that the development subject of planning permission Ref: M/2001/1041 did not lawfully commence within the prescribed timescales set out in condition 1 of that consent. The planning permission is not therefore extant, meaning that the site cannot be lawfully developed under the terms of that application. For this reason, and having considered all matters raised, I conclude that the Council's decision not to issue an LDC was well-founded. The appeal is therefore dismissed.

*A L McCooey*

**INSPECTOR**