

Appeal Decision

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Appeal Reference:	2022/L0004
Appeal by:	MJ McBride Developments
Appeal against:	The refusal to certify a Certificate of Lawfulness of Proposed Use or Development.
Proposal:	Residential Development of 16 No dwellings as approved under Z/2000/1483/F and Z/2005/1879/F (amended description)
Location:	112 Serpentine Road, Belfast
Planning Authority:	Belfast City Council
Application Reference:	LA04/2021/1435/LDP
Procedure:	Written representations with Commissioner's Site Visit on 11 April 2024
Decision by:	Commissioner Mandy Jones, dated 18 April 2024

Decision

1. The appeal is dismissed.

Reasons

2. The application for a Certificate of Lawfulness of Proposed Use or Development (CLOPUD) was received by the Council on 8 June 2021, in accordance with Section 170 of the Planning Act (Northern Ireland) 2011 (the Planning Act). The application was refused on 17 August 2022. This appeal was made under Section 173 of the Planning Act against the Council's refusal of the application.
3. Section 170 of the Act makes provision for the issue of a CLOPUD; Section 170 (1) states that ' if any person wishes to ascertain whether – (a) any proposed use of buildings or other land; or (b) any operations proposed to be carried out in, on, over or under land, would be lawful, that person may make an application for the purpose to the appropriate Council specifying the land and describing the use or operations in question. Section 170 (2) indicates that if, on an application under this section, the Council is provided with information satisfying it that the use or operations described in the application would be lawful if instituted or begun at the time of application, it must issue a certificate to that effect; and in any other case it shall refuse the application.
4. The main issue in this appeal is whether development has lawfully commenced to allow completion.
5. On 17 August 2022, the Council refused to certify citing the following reason:

'The Council, having considered the information provided, is not satisfied that sufficient evidence has been submitted to lawfully confirm that works in relation to planning permissions reference numbers Z/2000/1483/F and Z/2005/1879 had been carried out prior to the expiration date as per condition 1 of both planning permissions.'

6. Full planning permission was granted on 7 January 2003, for a 'Housing Development – 2 no. detached dwellings and 12 no semi-detached dwellings' (Z/2000/1483/F) and 6 conditions were attached to the approval. Condition no 1 stated:

'As required by Article 34 of the Planning (Northern Ireland) Order 1991, the development hereby permitted shall be begun before the expiration of 5 years from the date of this permission'.

7. Full planning permission was also granted on 2 February 2006, for 'Erection of 4 no semi-detached dwellings (amended scheme) (Z/2005/1879/F) and 2 conditions were attached to the approval. Condition no 1 stated:

'As required by Article 34 of the Planning (Northern Ireland) Order 1991, the development hereby permitted shall be begun before the expiration of 5 years from the date of this permission'

8. Approval Z/2005/1879/F, is for an amended house type to the previous approval Z/2000/1483/F, in that it replaced 2 no. detached dwellings with 4 no. semi-detached dwellings. The dwellings approved in both applications were accessed via the same internal roadway. The red line for approval Z/2005/1879/F, includes the internal roadway and 4 no. semi – detached dwellings addressing the Serpentine Road. For the planning permission to remain live development must have commenced on the site prior to 7 January 2008.
9. The relevant legislation at the time of the planning applications, approvals and for the duration of the permissions was the Planning (Northern Ireland) Order 1991 (the 1991 Order). Article 34 of the 1991 Order states that every permission granted is subject to the condition that the development to which it relates must be begun within; five years of the date on which the permission is granted; or other such period (whether longer or shorter) as the Department considers appropriate.
10. Article 36 of the 1991 Order sets out how Article 34 is to be interpreted. It states that development shall be taken to be begun on the earliest date on which any of the operations specified in subsections (a) to (d) comprised in the development begins to be carried out. The approved development includes the erection of dwellings. As such, Article 36 (1)(a) applies which states that development has begun where it consists of or includes the erection of a building, any work of construction in the course of the erection of the building.
11. The appellant provided the following evidence to demonstrate that the works undertaken on the appeal site constituted the lawful commencement of approval Z/2000/1483/F :

Invoices for Materials and Equipment including:

- MJ McBride – Daybooks Purchase Invoices dated 13.11.2000 for the period 1.12.2007 – 30.3.2008, regarding the general purchase of materials;
- James Boyd & Sons Ltd - invoice dated 31/12/07. At the bottom of this invoice 'Serpentine Road' is noted. This invoice was for crusher run and blinding;
- Patrick Megoran - invoice dated 31/12/2007. Top of invoice 'Serpentine Road' is noted;
- Island Forklifts Ltd – invoice dated 21/12/2007. Notes 'collect a large digger from Serpentine Road, Belfast and deliver to Tennant's Belfast Docks';
- MacBlair – invoice dated 12/12/2007. Job Reference: Serpentine Road. Lists fencing products for securing the site;
- Google Street View Image dated July 2008 showing the Glenhurst Drive site frontage with internal road formed in base course and dwelling foundations in place;
- Belfast City Council Building Control Notice of Approval for 'Housing Development comprising 8 three storey semi-detached (2 with attached garage) and associated site works for 112 Serpentine Road, Newtownabbey – date of approval 4/12/2006;
- Drawing no 2003-102, Site Plan indicating drainage layouts with Building Control Service date stamped received 27 & 28 February 2006;
- HSENI - Notification of construction project dated 3.12.2007 from the appellant. Lands between 11 -13 Glenhurst Drive – Construction of 16 no. dwellings and associated site works – states that the planned start date of construction was 10.12.2007;
- Letter from S Hawkins, Sales Manager, MacBlair, dated 27.10.2021. S Hawkins states that MacBlair provided materials on 12.12.2007 which was used to fence in the site to assist with the construction of housing at the MJ McBride Construction site located at 112 Serpentine Road. S Hawkins also states that the invoice is correct and authentic and relates directly to the construction of the housing development at 112 Serpentine Road that has begun and was on going at the time they provided their services and raised their invoice;
- Letter from D Donnelly, Accounts Administrator, James Boyd and Sons Ltd, dated 27.10.2021 to the Council. D Donnelly states that our company provided 14 loads of crusher run and blinding stone to assist with the construction of the housing development and that these loads were delivered to the site at 112 Serpentine Road on 20 & 21.12.2007. D Donnelly also confirms that the invoice is correct and authentic and relates directly to the construction of the housing development at 112 Serpentine Road that had begun and was on going at the time they provided their services and raised their invoice;

- Letter from M McCarroll, Accounts, Patrick Megoran, dated 27.10.2021 to the Council. M McCarroll states that their firm removed a number of loads of clay from the site during the excavations for the road and foundations to assist with the construction of the housing at 112 Serpentine Road on the 13 & 14.10.2007 as per invoices 7717 and 7848. Invoice 7848 does not appear to be provided and only invoice 7717 appears on MJ McBride Daybooks, purchase invoice records. It is unclear what invoice 7717 refers to.

Three signed affidavits were also submitted within the appellant's statement of case:

- Affidavit from Mr M McBride, Director of M J McBride Construction and owner of the appeal site. It states that M J McBride Construction Ltd, commenced the construction of the housing development on 10 December 2007. The Affidavit refers to confirmation provided to HSENI on 3.12.2007, of a commencement date of 10.12.2007 and also a number of actions which were carried out on the site particularly excavation and formation of the new road from the site entrance and foundations between 13/12/2007 – 19/12/2007. The Affidavit also confirms the invoices from P Megoran regarding the excavation of material from the site to landfill on 13 & 14 December 2007 and the invoice from James Boyd Ltd for the delivery of stone and blinding to the site on 20 & 21 December 2007 used to form the road, working platform and the first four foundations excavated on the site. The affidavit also confirms the transport of 13 tonnes excavated off the site on 21 December 2007 before the Christmas holidays and the return of continued construction of housing on the site on 7 January 2008;
 - Affidavit from D Donnelly, Accounts Administrator at James Boyd & Sons Ltd (Carnmoney) confirming transport and delivery of construction materials to the site on 20 & 21 December 2007 and related invoices, which was directly related to the construction of the housing development;
 - Affidavit from P Megoran confirming the recovery and transportation of multiple truckloads of clay from the site on 13 & 14 December 2007 and the associated invoice.
12. The appellant argues that the development is lawful as a result of development having commenced on site (construction of internal roadway and foundations) on the foot of the two extant planning permissions.
13. In terms of the internal roadway, the appellant argues firstly, that it involves operations on and over land and therefore falls within the meaning of development in the Planning (Northern Ireland) Order 1991, (Article 11(1)). Secondly, it was argued that the 1991 Order states that development shall be taken to be begun where the development consists of or includes the erection of a building, any work of construction in the course of the erection of the building (Article 36 (1) (a)). The provision of an internal road is an essential element in the course of the erection of a building, as it is required to provide access to that building. As such, according to the appellant it represents commencement of development.

14. The appellant stated that the approved dwellings as per approval Z/2005/1879/F, are accessed via the internal roadway which was approved by approval Z/2000/1485/F (ie included within the red line of the site location plan and shown on the stamped approved drawings) and therefore, the commencement of development to deliver the internal roadway effectively implements both permissions. The works already completed on site include the formation of the internal roadway and the placement of foundations for the dwellings fronting onto Glenhurst Drive. (approved under Z/2000/1483/F).
15. The formation of an access includes works which have been undertaken as site preparations and infrastructure and they are not works of construction in the course of the erection of the approved buildings. The meaning of development referred to by the appellant is a much broader scope than the application of Article 36 (1) (a) of the 1991 Order. The applicable requirement clearly stated in the 1991 Order is 'any work of construction in the course of the erection of the building.' The submitted evidence including invoices relating to the delivery of materials and equipment used for the internal roadway therefore is not evidence of any work of construction in the course of erection of buildings.
16. In terms of the foundations, the planning authority confirmed that consultations with Belfast City Council (BCC) Building Control stated that there are no records in respect of Notices of Commencement, which are required under Building Control Legislation. BCC Building Control confirmed that works were started on 23 January 2008 with the foundations excavated to a firm red clay. Building Control advised that it was likely that the concrete was poured the same day. A Building Control surveyor inspected the foundations on 25 January 2008 where the concrete was in place and was satisfactory for one unit. This evidence from BCC Building Control demonstrates that the works of construction in the course of erection of the buildings commenced after the 7 January 2008 expiry of planning approval Z/2000/1483/F.
17. In terms of the appellant's evidence, although some of the submitted invoices refer to Serpentine Road, none of them specifically relate to the appeal site address. The appellant has stated that they have no other planning applications or approvals on the Serpentine Road and therefore evidence submitted can only relate to the appeal site. Although there may be no other approvals on Serpentine Road, this would not preclude the appellant from carrying out construction works elsewhere on this road.
18. Notwithstanding, whilst invoices relate to the delivery of some materials (stone and blinding), removal of clay and collection of a digger in December 2007, none of the invoices submitted demonstrate that works of construction in the course of erection of the buildings was carried out prior to the 7 January 2008. I concur with the Council that stone and blinding materials and equipment could have been placed on the site for some time prior to the commencement of development. The delivery of materials and equipment is not evidence of any work of construction in the course of the erection of the dwellings.
19. Invoices in relation to securing the site, do not equate to the commencement of development. Regarding the security fencing, the appellant stated that as the Council did not take enforcement action they accepted that the fencing was permitted development and therefore the construction works were considered as

lawful development. No evidence has been submitted to demonstrate that the Council was aware of any fencing on the site or if any enforcement cases were open.

20. The appellant's HSENI form states that the planned start date of construction was 10.12.2007. I have no evidence from HSENI that this self-serving form was submitted or acted upon. The google street view image dated July 2008, does not demonstrate development prior to the critical date of 7 January 2008.
21. The appellant also submitted a number of statutory declarations to support their case. A statutory declaration dated, signed and witnessed by a Solicitor empowered to administer Oaths will always attract significant weight. The Commission has previously held that in the absence of persuasive corroborating evidence, affidavits in themselves do not demonstrate the veracity of an appellant's claims. I consider that the appellant's affidavits have not been corroborated with persuasive evidence and in addition I find the evidence from BCC Building Control to be conflicting.
22. In conclusion, I consider that on the balance of probability the totality of the evidence presented does not demonstrate that the works which were carried out prior to the 7 January 2008 constitute works of construction in the course of erection of buildings as required by Article 36 (1) (a) of the Planning (NI) Order. I am satisfied that the Council's refusal of this Lawful Development Certificate was well founded, and the appeal is dismissed.

This decision relates to the following : BCC ref: Drg. 01, Site Location Plan, Scale 1:2500. (received by BCC on 1 June 2021).

COMMISSIONER MANDY JONES

List of Documents

Planning Authority:
(Belfast City Council)

'A' Statement of Case

'B' Rebuttal

Appellant:
(Gravis Planning)

'A1' Statement of Case

