

## PLANNING APPLICATION REPORT

**Case Officer:** Steven Stroud

**Parish:** Kingsbridge **Ward:** Kingsbridge

**Application No:** 2727/22/CLE

**Agent/Applicant:**

Miss Jenna George - Roach Planning  
and Environment Limited  
12A The Triangle  
Teignmouth  
TQ14 8AT

**Applicant:**

Blakesley Estates (Kingsbridge) Ltd  
18 Pavilion Court  
Grand Parade  
Brighton  
BN2 9RU

**Site Address:** Garden Mill, Derby Road, Kingsbridge

**Development:** Certificate of lawfulness to establish whether there has been a lawful commencement of the development for 32 dwellings as approved by outline consent 28/1560/15/O (appeal ref APP/K1128/W/16/3156062 and reserved matters approval 0826/20/ARM)

**Recommendation:**

Cert of Lawfulness (Existing) Refusal

**Key issue for consideration:** Whether, on the balance of probabilities, the applicant's claim that the planning permission has been lawfully implemented is well founded.

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**The Proposal:**

The applicant seeks a Certificate of Lawfulness to establish that the planning permission has been lawfully implemented.

The application form states the following in relation to the grounds of the certificate:

*'The Certificate of lawfulness is sought to establish the lawful commencement of the development for 32 dwellings as approved by outline consent 28/1560/15/O (appeal ref APP/K1128/W/16/3156062 and reserved matters approval 0826/20/ARM. Please see supporting letter and legal opinion.'*

*'That all pre-commencement conditions have been adequately discharged and the development which has been carried out on the site to date is a material operation in accordance with Section 56 of the Town and Country Planning Act and represents a material start and a lawful commencement.'*

In essence the applicant claims three things to justify the grant of a certificate, being that:

- a. an application for reserved matters was made before the expiry of the 3-year deadline for its submission and that the application was duly approved.
- b. all pre-development conditions were satisfied on or by 6<sup>th</sup> May 2022.

- c. material operations to commence the development were carried out in respect of the permission before the expiry date of December 2022 and were implemented in accordance with the approved pre-development condition details.

In light of the above, the Applicant does not seek to rely upon any of the exceptions to the *Whitley* principle (that principle being explained within the assessment section of this report).

### **Consultations:**

- Kingsbridge Town Council – objects:

*‘Members noted that the final Condition from outline consent had been approved on 6 May 2022 and that the commencement of lawful development had been earmarked as 27 May 2022. However, the Section 106/Unilateral Undertaking reported that the applicant should have endeavoured to agree with the Council within 3 months prior to commencement the identity of the Registered Provider for the affordable housing. Moreover, if no such agreement had been reached the applicant was instructed to notify the Council within 28 days (deadline 24 June 2022) to enable the latter to nominate said Registered Provider. It was anticipated that the above important matter would have been highlighted within an application dated 3 August 2022 and in the absence of such information, within the public domain, it could only be concluded that the covenant had not been determined and therefore lawful commencement had not been met.*

*KTC: Recommend Refusal due to the apparent absence of information and lack of clarity regarding the social housing provider for the affordable housing’.*

- Local Highway Authority – no highway implications.

### **Representations:**

In excess of 25<sup>1</sup> separate representations objecting to the application have been received including associated material such as time-stamped photographs.

Those comments received are summarised below as follows:

- There is clear evidence that conditions were breached for many months. This must have a bearing on the legal commencement.
- It would be prudent for SHDC to defer granting legal commencement while the court case regarding breach of conditions is still ongoing. These aspects can't be separated.
- The S106 unilateral undertaking should be looked at to see if this impacts the legal commencement. This is because the s106 is, in this case, actually a condition of commencement because it is mentioned in the planning approval document.
- The developer has behaved badly.
- It should not be possible for the developer to go back and correct their mistakes.
- How can an unlawful act be deemed lawful.
- I overlook the site and confirm that works began in Spring 2021.
- The developer has already pleaded guilty to commencing before approvals given; the certificate cannot therefore be granted.

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<sup>1</sup> Some representations submitted by the same respondent; all representations received have been taken into account.

- If the Council approves this application then the law will have been undermined and a precedent set for future unlawful development.
- We have photos that show development began not later than July 2021; construction management was not approved until April 2022 thus the development cannot be lawful.
- It is impossible to suggest commencement began on 27th May 2022 when all parties now agree work commenced circa May 2021.
- It would be remiss of the LPA to lift a stop notice while an active court case seeks to determine what such informal behaviour was, and due to the seamless continuation of works on Locks Hill, potentially still is.
- The Council should take advice from relevant professional bodies.
- Time-stamped photographs of works being carried out in June 2021.
- Time-stamped photographs of works being carried out in July 2021.
- The developer accepts that works began in May 2021.
- There is clear evidence that work has continued despite enforcement/stop notices for the next 12 months.
- The legal opinion is factually incorrect and must be invalid.
- The application for legal approval must be rejected because the applicant has not shown, on the balance of probability, that work began after 6 May 2022.
- Developer has wilfully ignored planning law and the terms of the permission; no regard has been shown for wildlife or habitat.
- There would be injustice if the application is approved.
- Regardless of Stop and Enforcement notice being issued they continued to dig up, mark and layout the proposed road which is contrary to Condition 13 that no site clearance, preparatory work or development shall take place until a Construction Management Plan (CMP) had been submitted to and approved in writing by the LPA. This was not submitted until August 2021, some 4 months after starting work at the site.
- There has been no compliance with the Section 106 Agreement pre-commencement matters and all these remain to be agreed. (Schedule 2 part 1 clauses S1 .1 to S1.3 and schedule 3 Landscaping and Ecology clauses 1.1 and 1.2). This therefore still means that Blakesley Estates are continuing to develop the land unlawfully and should not be granted a Certificate of Lawfulness.
- We confirm that we witnessed work commence in April 2021; posted stop notices were taken down by the developers.
- The UU is noted in para 36 in the planning inspectors report and decision; the UU document is listed in the report and so compliance with the S106 UU is a condition of planning approval.
- If the UU has not been complied with then this application cannot be approved.
- Any claim that works began in July 2022 is entirely false.
- This is not commencement it is continuation of work that began in April 2021.
- Local media confirms that works began in April 2021.
- I have dated photos/video from July and August 2021 showing works being undertaken.
- Nothing the developer has done has been lawful.
- The developer is unfit to carry on working/should be blacklisted.
- The applicant had commenced full excavation works as far back as April 2021, they originally attempted to pass off this work as trial pits only which of course given the amount of excavation and removal of earth etc cannot be a true statement.
- The Council should show that it is acting in the public interest.
- The Group G1 had not been correctly coppiced on 21<sup>st</sup> October 2022 as stated.

- The applicant's own arboriculturist letter confirms that the tree protection barriers had been installed as required.
- The development has been carried out contrary to the arboricultural method statement.
- The tree protection barriers that have been installed are not as approved.
- No tree protection barriers have been installed that comply with BS 5837:2012.
- Construction Exclusion Zones have been breached.
- Trees identified for retention have been cut down.
- Scant regard for wildlife in nesting season.

A letter of objection from the South Hams Society has also been received, summarised as follows:

- The stated date of commencement is wrong.
- Equipment started to arrive on site on 10<sup>th</sup> May 2021.
- The Council issued a Stop Notice on 14<sup>th</sup> May 2021.
- An Enforcement Notice was posted on 14<sup>th</sup> June 2021 coming into force 4 days later.
- Works continued thereafter including vegetation removal absent any ecologist.
- Such works were clearly in breach of condition 6.
- Development should be considered to have commenced on 13<sup>th</sup> May 2021.
- The developer states development commenced May 2022 but that cannot be correct because this was not the earliest date on which a material operation was carried out.
- Extensive works had been carried out prior to leaving site in March 2022.
- Our compliance table highlights in red those pre-commencement planning conditions that did not have written approval from the LPA as required by the outline planning condition on the commencement of development date.
- Not one pre-commencement planning condition had been submitted or approved when the development was commenced.
- The starting point must be that the permission has not been lawfully implemented.
- It remains the case that condition 6 has not been satisfied because the applicant has failed to install the tree protection fencing, the first requirement before bringing any machinery onsite.
- Disagree with the legal opinion (para. 17) on the requirements for extant planning permissions/interpretation is incomplete.
- This is because, if a development relies on a planning permission, it is important to establish that the permission was extant at the time the development was carried out.
- The developer continues to act in breach of condition 6; no tree protection barriers have been installed/development is not being carried out in accordance with the approved plans.
- The Society currently believe that it would be wrong to remove an Enforcement Notice as requested, when the applicant is operating in breach of condition 6 and has done so since the 13<sup>th</sup> May 2021.
- Based on the considerable evidence available, it is still our opinion that this development has been unlawfully implemented because of the failure to submit the necessary documentation for the five pre-commencement planning conditions and obtain the required written approval to confirm that they have been satisfactorily discharged.
- And when the conditions were discharged by the LPA, Tree Protection fencing should have been installed prior to bringing machinery and equipment on site.
- The site owners have ignored the requirements of condition 6 from day one.

- When considering the construction exclusion zones of the Tree Protection Plan, the Society doubts that it is now possible to install the TP fences because some land within the exclusion zones appears to have been removed.
- The Society believes that the public would be angry if they witnessed the District Council issue a Certificate of Lawfulness for Lawful Commencement of Development when they have seen such contempt for their environment, the planning laws and the continual breach of a planning condition and enforcement notice.
- The Society respectfully requests the planning authority refuse this request and enforce the tree protection measures required by condition 6 of permission 28/1560/15/O satisfied by approval 3226/21/ARC.

### **Relevant Planning History:**

- 28/1560/15/O  
Outline application with some matters reserved for residential development scheme for 32no. dwelling at allocated site K4 – allowed on appeal 5<sup>th</sup> June 2017 (appeal ref. 3156062).
- 3377/20/NMM  
Non material minor amendment to planning consent 28/1560/15/O (Appeal ref: APP/K1128/W/16/3156062) to move 1 dwelling and increase path width to 2m – approved 9<sup>th</sup> November 2020.
- 0826/20/ARM  
Application for approval of reserved matters (landscaping) following outline approval 28/1560/15/O (Residential development of 32no. dwellings) – approved 21<sup>st</sup> December 2020.

Taken together those three decisions represent the “planning permission” relevant to this application.

Other requirements reserved by condition under that planning permission have been approved as follows:

#### Pre-commencement conditions

- Condition 6 (tree protection), discharged 22<sup>nd</sup> September 2021 (3226/21/ARC)
- Condition 9 (parking and turning), discharged 20<sup>th</sup> December 2021 (3181/21/ARC)
- Condition 10 (access junction), discharged 20<sup>th</sup> December 2021 (3181/21/ARC)
- Condition 11 (access road etc.) discharged 6<sup>th</sup> May 2022 (1276/22/ARC)
- Condition 13 (CMP), discharged 6<sup>th</sup> May 2022 (1413/22/ARC)

However, as noted in the legal opinion submitted with the application, the Council has taken enforcement action for breach of conditions 6, 9, 10, 11, and 13.

The following notices have been issued:

1. A Temporary Stop Notice relating to breaches of conditions 6 and 13 in the period between 14<sup>th</sup> May 2021 to 11<sup>th</sup> June 2021 (dated 14<sup>th</sup> May 2021). [“the TSN”]

2. An Enforcement Notice relating to breaches of conditions 6, 9, 10, 11, and 13 (dated 11<sup>th</sup> June 2021). [“the EN”]
3. A Stop Notice relating to breaches of conditions 6, 9, 10, 11, and 13 (dated 14<sup>th</sup> June 2021). [“the SN”]

The requirement of the EN is as follows:

*“The cessation of site clearance, preparatory work or development until the pre-commencement conditions 6, 9, 10, 11 and 13 have been approved in writing by the Council”*

## **ANALYSIS**

### **Preliminary Matters / Case Law:**

#### Nature of the application

The application is made pursuant to s191 of the *Town and Country Planning Act 1990* (“the Act”).

Section 191(1) states that a person may make an application to the local in planning authority in the prescribed terms if they wish to ascertain whether –

- a) *any existing use of buildings or other land is lawful;*
- b) *any operations which have been carried out in, on, over or under land are lawful; or*
- c) *any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful.*

Section 191(2) of the Act states that uses and operations are lawful at any time if:

- a) *no enforcement action may then be taken in respect of them; and*
- b) *they do not constitute a contravention of any of the requirements of any enforcement notice then in force.*

In this type of application, the onus of proof is upon an applicant. The relevant test of the evidence on such matters is the “balance of probabilities”. An applicant's own evidence does not need to be corroborated by independent evidence to be accepted: if a local planning authority has no evidence of its own, or 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 that balance<sup>2</sup>.

Neither the identity of an applicant, nor the planning merits of a given operation, use or activity, are relevant to the consideration of the purely legal issues which are involved in determining an application.

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<sup>2</sup> *Gabbittas v SSE and Newham LBC* [1985] JPL 630.

## Commencement of a permission

By virtue of S56(1) of the Act, development of land is taken to be initiated:

*'(a) if the development consists of the carrying out of operations, at the time when those operations are begun;...'*

S56(2) of the Act makes clear that:

*'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.'*

Those “material operations” are defined under s56(4) of the Act, as follows:

*'(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.'*

In practice, and as the applicant has pointed out as well as other third parties, what amounts to a “material operation” is broad, and the threshold is relatively low so long as the operations were genuinely intended to further the permission<sup>3</sup>.

The applicant identifies those works in this case as:

- Site set up and compound complete
- Setting out works for a large portion of the access road approximately 175m long
- Removal of surface, reduced level excavation, and clearance of spoil from the Site to form the access road for approximately 175m
- Reduced level excavation and grading of areas adjacent to the internal access road layout in readiness to form housing plot areas and preparation for underground infrastructure.
- Removal of tree T23 in accordance with the approved tree removal plan
- Removal of approximately 10,000m<sup>3</sup> of spoil from the Site.

Section 171A(1) of the Act defines a “breach of planning control” as the carrying out development without the required planning permission or failing to comply with any condition subject to which planning permission has been granted.

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<sup>3</sup> *Field v First Secretary of State* [2004] JPL 1286; *Malvern Hills District Council v Secretary of State for the Environment* [1983] 46 P & CR 58.

## Commencement in breach of condition

A number of court judgments have dealt with the issue of commencement in breach of a condition. Whilst each case is likely to be fact specific, a number of principles arise which are of relevance in the consideration of this application also bearing in mind the nature of comment received from third parties.

1. In *Whitley*<sup>4</sup>, the general principle was established that development which of itself constitutes a breach of planning control cannot satisfy the requirements of s56 of the Act i.e., that breach of pre-commencement conditions cannot normally begin a development and that the permission would then lapse in accordance with the time limiting condition in the normal course of events.
2. A number of exceptions to that general principle have subsequently been established, including in *Whitley* itself, where in that case the application to discharge pre-commencement conditions was made in time but approval was given after the period for commencement had expired.
3. *Hart Aggregates*<sup>5</sup> is a Court of Appeal judgment which established that in consideration of condition precedent matters (i.e., those details requiring approval before development may commence) it should be considered whether it is a true condition precedent in the sense that it “goes to the heart of the planning permission”, such that failure to comply with it will mean that the entire development, even if completed and in existence for many years, must be regarded as unlawful.
4. The law on commencing work in breach of conditions precedent was further reviewed by the Court of Appeal in *Greyfort Properties*<sup>6</sup>. That judgment applied both the Hart Aggregates approach and the principle/exceptions set out in *Whitley*, specifically endorsing the need for the condition to go to “the heart of the matter” to render a permission unlawful.
5. The question of whether a condition goes to the heart of the planning permission can be answered only by a fact-sensitive inquiry into the terms of the condition in the context of the permission and the permission in its planning context. That question is therefore a matter of planning judgement (*Meisels v SSHCLG* [2019] EWHC 1987 (Admin)).

Thus, in summary, commencement of development in breach of a true condition precedent (i.e., one that is fundamental to the permission) will render the entire development unlawful and not be considered effective to implement a permission and keep it alive unless one of the established exceptions apply. Planning judgement is needed in order to determine whether the breach has occurred in relation to a true condition precedent.

The applicant does not claim that any of the *Whitley* exceptions apply to this case.

Officers are inclined to agree with the applicant’s legal opinion insofar as it states, at paragraph 17 (appendix RP1 to the application), that a planning permission is extant if:

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<sup>4</sup> *F. G. Whitley & Sons v Secretary of State for Wales* [1992] 64 P. & C.R. 296.

<sup>5</sup> *Hart Aggregates Ltd v Hartlepool BC* [2005] EHC 840 (Admin).

<sup>6</sup> *Greyfort Properties Limited v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908.



- a. all pre-development conditions have been adequately satisfied;
- b. the time limit set by condition for starting the development (and in the case of an outline permission for submitting reserved matters) has not expired; and
- c. “material operations” comprising the development or a change of use authorised by the permission are begun before those deadlines expire.

However, it should be the case that those material operations are carried out in accordance with the approved details of the planning permission so as not to amount to a breach of planning control.

**Assessment:**

Considering the foregoing, the assessment of this application can be carried out succinctly.

- i. The relevant time limit for submission of the reserved matters was met and the period within which development was required to begin is yet to expire (December 2022).
- ii. The planning permission is subject to a number of condition precedent matters. They relate to condition nos. 6, 9, 10, 11, and 13.
- iii. All of those pre-commencement conditions are considered to be of a true condition precedent nature i.e., that they go to the heart of the permission. Officers reach that view bearing in mind the nature of the details required and how fundamental they are to the nature of the development bearing in mind the particularly sensitive site constraints and its relationship to the surrounding environs.
- iv. The applicant has shown that details necessary to satisfy those condition precedent matters were approved on or before 6<sup>th</sup> May 2022, subject to the development being carried out in accordance with those approved details.
- v. On the date that the Applicant claims that the material operations necessary to implement the planning permission were carried out, it is considered more likely than not that those operations were carried out in accordance with those details approved in relation to condition nos. 9, 10, 11, and 13 (the first three being relevant to matters later in the development, in any event).
- vi. However, this is not the same for condition no. 6. The approved details for condition no. 6 required further actions from the applicant developer prior to development commencing. Those actions included:
  - The installation of tree protection barriers as identified on the Tree Protection Plan (‘TPP’).
  - The TPP also required tree protection signs to be secured to the protection barriers, identified as braced Heras fencing, facing into the site every five metres.
  - Those barriers/fencing were required to be in place before any materials, plant, or other machinery were brought onto the site. This is also set out on the TPP.
  - The Arboricultural Method Statement (‘AMS’) which was expressly to be read alongside the TPP, also refers to the installation of such barriers as being “pre commencement”.

- Prior to the installation of those barriers, their positioning was to be confirmed by the arboriculturist and an email to the Council/local authority to follow.
- vii. No evidence has been adduced by the applicant to show that those actions were followed, and officers invited the applicant to provide further details especially in relation to condition 6 to show that the permission was implemented in accordance with the approved details.
- viii. Indeed, evidence of third parties would indicate a likelihood that no fencing was in place at the time that the applicant claims that the permission was implemented/material operations carried out (i.e., the “works” that they rely upon in their application to implement the permission).
- ix. Recent correspondence from the applicant includes an update from their arboriculturist. This states that on 25<sup>th</sup> October 2022 sections of fencing were missing and that it was essential that they be installed where works had already commenced in that area. Whilst a snapshot in time, post the alleged date of implementation, it is nevertheless difficult to understand why, if the barriers had been installed correctly and in accordance with the approved details prior to commencement of development, they would have subsequently been removed in contravention of the approved details. This supports a judgement that in all likelihood they were not installed prior to the commencement of development and therefore the works were carried out in breach of condition 6.
- x. A site visit undertaken by officers on 9<sup>th</sup> November 2022 also indicated various areas of fencing missing, contrary to the details approved under condition 6, and in the absence of the required protection signs at 5m intervals.
- xi. It is therefore adjudged that, on the balance of probabilities the claims of the applicant are not well founded, and planning permission was not lawfully implemented because the requirements of pre-commencement condition 6 were not followed as approved; that the permission was implemented in breach of planning control and therefore the works stated to have implemented the permission cannot be relied upon.

#### **Other Matters:**

##### **S106 Legal Agreement**

Interested parties have raised concern regarding the legal agreement (under s106 of the Act) which binds the land the land subject to the planning permission. It is correct that the Inspector in granting outline planning permission refers to that agreement, but it is not a condition of the planning permission itself; it is a separate mechanism to secure other planning obligations related to the development being permitted. The obligations under Section 106 are separate and distinct from planning conditions imposed by the Inspector.

As the applicant notes, the s106 has no bearing on the question of whether material operations have been carried out to begin development under s56 of the Act. A breach of a planning obligation is enforced by different means.

This is also the position of the Council, and this has no bearing on the determination of the current application for a Lawful Development Certificate.

**Conclusion:**

The application for a certificate of lawfulness should be refused because the works identified by the applicant as implementing the planning permission were carried out in breach of condition 6, which is a conditions precedent matter that goes to the heart of the permission.

**The above report has been checked and the plan numbers are correct in APP and the officers report. As Determining Officer I hereby clear this report and the decision can now be issued.**

**Name and signature: Steven Stroud**

**Date: 25<sup>th</sup> November 2022**