

PLANNING APPLICATION REPORT

Case Officer: Steven Stroud

Parish: Kingsbridge **Ward:** Kingsbridge

Application No: 4471/22/CLE

Agent:

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

Applicant:

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

Site Address: Proposed Development Site At Sx 739 438, 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: Refuse Certificate

Key issue for consideration: Whether the applicant's claim that the planning permission has been lawfully implemented is well founded.

The Proposal:

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

The application follows a previously refused application seeking the same, application ref. 2727/22/CLE.

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, updated AMS and appendices 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 of development.'

That description is essentially the same as the previous but recognising that new evidence has been submitted to support the applicant's position.

As before, in broad terms 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 6th 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 – object:

‘A previous application 2727/22/CLE for a Certificate of Lawful Development was Refused by the Local Planning Authority on 28 November 2022 on the grounds that works had been carried out in breach of Condition 6 (Tree Protection). The Condition Discharge Compliance Table submitted with the above proposals is incomplete as it does not include planning application 3874/22/ARC to discharge said Condition 6 which was Refused by the LPA on 13 December 2022. The applicant now appears to revert to a previous incarnation and approval of Condition 6 by the LPA.

However, the crux of the recent Refusal of the revised Condition 6 was with regard to general tree protection measures and the retention of trees T5, T16, T17 and T18. The Arboricultural Method Statement now submitted at Appendix 2, paragraph 5.15, reports that “problems are foreseen” with trees T5, T16 and T18 notwithstanding that a previous application reported the trees as Health Class 1 and “the trees exhibit no significant structural risk features” and SHDC’s Tree Specialist (report dated 1 December 2022) identifies that said Ash trees should be retained.

Recommend Refusal on the grounds that it is abundantly clear that there remains unresolved issues relating to the protection of trees T5, T16 and T18 and the applicant perceives them as an inconvenience to the development.’

- Local Highway Authority – no highway implications.

Representations:

Those comments received are summarised as follows, noting that some respondents have asked that comments in relation to the previous certificate application be carried forward. This application is nevertheless considered afresh and in light of the new information submitted by the applicant:

- Metadata embedded within supplied photographs appear to show that dates have been edited.
- Retaining walls are not in compliance with condition 11.
- Arboricultural documents appear to have been edited.
- No site visit date records have been provided.
- All documents appear to have been compiled and edited by Roach Planning.
- The witness statement of Mel Wood appears to have been prepared by someone else.

- Evidence is not to an acceptable standard.
- The application is essentially the same as previous, but the evidence is largely the same.
- Object due to loss of wildlife habitat; loss of significant trees; flooding; loss of green field.
- More shale has been removed than permitted.
- Condition 6 has obviously not been complied with.
- Unacceptable TPO tree loss.
- Work was carried out illegally and is ongoing.
- The application is a duplicate of the previous.
- Why has the applicant been allowed to make a second application.
- Health and safety concerns; risk of landslide.
- Contrary to statement of Mel Wood, access to the southwest field was gained as early as June 2021. Photos show heavy plant vehicles driving over exposed lateral roots and in close proximity to TPO 1039 T4 and visible groundworks. [photos provided]
- If works commenced in May 2022 then what is the status of the works carried out in 2021?
- The site manager has accepted that root protection works have been ineffective.
- Concerns regarding precedent.
- The applicant's arboriculturist acknowledged that in October 2022 tree fencing was not in place.

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 5th 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 9th 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 21st 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 22nd September 2021 (3226/21/ARC)
- Condition 9 (parking and turning), discharged 20th December 2021 (3181/21/ARC)
- Condition 10 (access junction), discharged 20th December 2021 (3181/21/ARC)

- Condition 11 (access road etc.) discharged 6th May 2022 (1276/22/ARC)
- Condition 13 (CMP), discharged 6th 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 14th May 2021 to 11th June 2021 (dated 14th May 2021). [“the TSN”]
2. An Enforcement Notice relating to breaches of conditions 6, 9, 10, 11, and 13 (dated 11th June 2021). [“the EN”]
3. A Stop Notice relating to breaches of conditions 6, 9, 10, 11, and 13 (dated 14th 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”

As noted earlier in this report, the present application follows a previously refused application that also sought to establish that the planning permission has been lawfully implemented.

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 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 balance¹.

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.

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, what amounts to a “material operation” is broad, and the threshold is relatively low so long as the operations were genuinely intended to implement the permission².

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

¹ *Gabbittas v SSE and Newham LBC* [1985] JPL 630.

² *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.

- 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 10,000m³ of spoil from the Site.

[The above items were relied upon in the previous application]

- Removal of a section of bank to form the access into the second southern field in accordance with the approved layout plan (Completed 22nd – 23rd September 2022).
- Formation and setting out works for the access road in the upper southern part of the site.
- Removal of tree T30 in accordance with the approved tree removal plan; works notified to the LPA on 14th September 2022.
- Coppicing of hedgerow along the southern boundary of the lane carried out in accordance with the Tree Protection Plan (“TPP”) and Agricultural Method Statement (“AMS”).
- Digging of the foundation base areas on the southern side of the site entrance, and pouring of concrete for construction of block retaining wall adjacent to the Public Right of Way (“PRoW”) (9th -11th November 2022).
- Construction of retaining wall started at entrance to the site (13th November 2022), backfilling of areas adjacent to the PRoW with concrete and topped with soil.
- Construction of foundations for retaining wall on the northern side boundary of the site entrance (24th -25th November 2022).
- Construction of retaining block wall on northern side boundary of site entrance, placement of blocks and backfilling behind (27th – 30th November 2022).
- Foundation digging and base work, digging out area along the northern boundary of the second field and installation of steelwork.
- Concrete foundations poured along the northern boundary of the southern field (8th November - 1st December 2022).
- Reduce dig excavation to form first plot (commenced 4th December 2022).

It is notable that all the additional works now cited as being relied upon by the applicant as lawfully commencing the development occurred several months after the date by when the applicant claims that all pre-commencement conditions had been discharged.

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

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 are relevant in the present case:

1. In *Whitley*³, the general principle was established that development which of itself constitutes a breach of planning control cannot satisfy the requirements of s56 of the

³ *F. G. Whitley & Sons v Secretary of State for Wales* [1992] 64 P. & C.R. 296.

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*⁴ 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*⁵. 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 the purported implementation of a planning 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 19 (appendix RP1 to the application), that a planning permission is extant if:

- 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.

⁴ *Hart Aggregates Ltd v. Hartlepool BC* [2005] EHC 840 (Admin).

⁵ *Greyfort Properties Limited v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908.

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 application is assessed as follows:

- i. The relevant time limit for submission of the reserved matters application (i.e. before 5 June 2020) was met. As the reserved matters were approved on 21 December 2020, this meant that the development had to “take place” no later than 21 December 2022.
- ii. The planning permission is subject to a number of pre-commencement conditions. They are conditions 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 development bearing in mind the particularly sensitive constraints of the site and its relationship with the surrounding environs.
- iv. The applicant has shown that details necessary to satisfy those condition precedent matters were approved on or before 6th May 2022, subject to the development being carried out in accordance with those approved details.
- v. Document RP5 is a letter/notice of intended commencement of the development. It states that the commencement of development, and thus the implementation of the planning permission, was intended to occur on 27th May 2022.
- vi. It is considered more likely than not that a number of potentially qualifying works will have been carried out on or around that date. It is also considered more likely than not that those operations were not in conflict with the 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).
- vii. However, the position in relation to condition no. 6 is different. The approved details for condition no. 6 required further actions from the applicant developer prior to any development commencing. Those actions included:
 - The installation of tree protection barriers as identified on the 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.
- viii. If development was commenced on 27th May 2022, then the above matters needed to be complied with. The evidence adduced by the applicant does not demonstrate

compliance with these requirements before the first operations to commence development were undertaken.

ix. The new evidence submitted by the applicant does not further their position. In particular:

- RP1 is an updated legal opinion which, apart from setting out further works relied upon to show in the applicant's view that development was lawfully commenced, says nothing of the question of whether the key pre-development requirements of the details approved pursuant to condition 6 were adhered to.
- RP6 includes site photographs which the applicant claims shows the extent of works up to August 2022. None of the photographs are dated or include metadata to show when they were taken. Several appear relatively recent. Indeed, photographs O and P show an advanced installation of retaining walling at the site entrance, but officers know that such walling did not exist as of 9th November 2022. Regardless, in relation to condition 6 none of the photography positively indicates that the development commenced in accordance with the details approved pursuant to condition 6.
- RP7 is an updated AMS and is therefore not a reflection of the document approved when condition 6 was discharged in September 2021. It provides no positive evidence that the requirements of the details approved pursuant to condition 6 were adhered to when the first operations to commence development were undertaken. Appendix II to that document acknowledges that tree protection barriers were not in place in their entirety in post-October 2022 visits (as confirmed by planning officers on their own site visit in November 2022). Appendix II also states that fencing was erected around the site in July 2021 (although it is not expressly claimed to be tree protection fencing); however, photographs submitted by residents in relation to the last application show no fencing to be in place at key development areas (e.g., the northern boundary of the site, in March 2022). This was also the case in September 2022 after the time the applicant claims the development was first lawfully commenced.
- RP8 is a statement submitted by the site manager. Of note is the following paragraph:

'Access through to the Southwest field was gained on 23rd September in accordance with the approved layout plan and the AMS and TPP and Lee Marshall was notified of the works. Initially access to the field was prevented by security Heras fencing, and no vehicles were entering the field or works taking place, so additional Tree protection fencing was not required within the boundaries of the field. This was discussed with the project arboriculturist and was considered to be an acceptable approach.'

It is not clear whether the manager is referring to September 2021 or September 2022, but it is presumed to be 2022. If it were 2021 then this would predate the stated date of commencement and the dates when pre-commencement condition details had been approved. On that basis and presuming that the manager refers to access being gained on September 2022

this also undermines the application. This is because the statement appears to accept that works were being undertaken on the site without compliance with the approved AMS/details approved pursuant to condition 6, where no fencing had been erected in the southwest field.

- RP9 includes emails sent by the applicant to the Council's tree officer regarding tree works to be carried out in accordance with the approved details. All emails are from September 2022 onwards i.e., several months after development was said to have commenced.
- x. Evidence previously received from 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 first "works" that they rely upon in their application to implement the permission, on or around 27th May 2022).
- 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.
- xii. The implementation period for the permission has now expired.

Further evidence has been submitted by the applicant after the application was made, and this has been considered. That evidence purports to show more recent compliance with details approved pursuant to condition 6 but does not deal with or alter the judgement made regarding the key issue for this application: whether the applicant's claim that the planning permission has been lawfully implemented is well founded.

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 condition precedent 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: 8th March 2023