

**KIRKLEES METROPOLITAN COUNCIL  
INVESTMENT & REGENERATION SERVICE**

**DEVELOPMENT MANAGEMENT**

**Town and Country Planning Act 1990 (as amended) Section 191/192**

**DELEGATED DECISION FOR APPLICATION FOR CERTIFICATE OF  
LAWFUL DEVELOPMENT**

Reference no.: 2019/CL/90344/W

Site: Royd Edge Dyeworks, Holmfirth Road, Meltham,  
Holmfirth, HD9 4BY

Description: Certificate of lawfulness to confirm commencement of development approved under outline planning permission ref : 2007/92595 pursuant to reserved matters approval ref: 2009/92557 for the erection of 30no. dwellings within the 2 year time limit given in condition 4.

Case Officer: Kevin Walton

**Decision: Certificate of Lawful Development- Opps Granted**

**I hereby authorise the approval of this Lawful Development Certificate for the reasons set out in the officer's report and recommendation annexed below in respect of the above matter.**

David Wordsworth

**AUTHORISED OFFICER**

**Date 12-Nov-2019**

## APPLICATION FOR CERTIFICATE OF LAWFUL USE (LDC)

**APPLICANT: Brook Group Holdings Ltd**

**RE: Certificate of lawfulness to confirm commencement of development approved under 2007/92595 for the erection of 30no. dwellings.**

### Application

- 1.1 The application is submitted by the applicant for outline planning permission submitted on the 30 November 2007<sup>1</sup> for residential development of land at Royd Edge Dyeworks. The application was granted conditional outline planning permission on the 22 October 2008.
- 1.2 The applicant seeks a certificate of lawful development from the Local Planning Authority to confirm works previously carried out were undertaken pursuant to the outline planning permission and are as such lawful. The application wishes to establish the outline planning permission was implemented lawfully and development to erect 30 dwellinghouses can therefore continue.

### 2. Lawful Use Certificates

- 2.1 Section 191(1) (a) of the Town and Country Planning Act 1990 (“the Act”) permits any person who wishes to ascertain whether any operations or proposed use of buildings or other land would be lawful to make an application to the Local Planning Authority.
- 2.1 Section 191(2) of the Act provides that uses are lawful if at any time if no enforcement action may be taken in respect of them and they do not constitute a contravention of any the requirements of any enforcement notice then in force.

### 3. The Relevant Test

- 3.1 The burden of proof lies firmly with the Applicant and the relevant test for whether the use can be deemed lawful is the “balance of probability”.
- 3.1 The Applicant’s evidence does not need to be corroborated by “independent” evidence. If the Local Planning Authority have no evidence of their 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 the balance of probability.<sup>2</sup>

### 4. Limitations

---

<sup>1</sup> Planning reference ref: 2007/92595

<sup>2</sup> Para 06 <https://www.gov.uk/guidance/lawful-development-certificates>

- 4.1 A LDC must contain precise details of what use or operations are found to be lawful, why and when. These details will not be legally equivalent to a planning condition or limitation. They will be a point of reference specifying what was lawful at a particular date, against which any subsequent change may be assessed. If the use subsequently intensifies or changes in some way to the point where a “material” change of use takes place, a Local Planning Authority may then consider further development has taken place.<sup>3</sup>

## **5. Relevant Information**

### **5.1 Relevant Planning History**

2007/92595 – Outline Application for Residential Development – granted 24/10/2008

2009/92557 – Reserved Matters application for residential development for 30 dwellings with associated parking – granted 26/04/2010

2012/91063 – Discharge of condition 21 on previous permission 2007/92595 – granted 23/05/2012

### **5.2 Section 106**

Section 106 agreement dated 03/03/2016

## **6. Evidence submitted in support of the Application**

- Planning Statement – 01/02/2019
- Appendices 1-15 – 01/02/2019
- Photographs – received 21/05/2019
- Topographical Drw 5621/1 Sept 06 - received 21/05/2019
- Topographical Drw 6499/1 Sept 11 – received 21/05/2019
- Topographical Drw 7935/1 June 19 – received 21/05/2019
- Topographical Overlay 2011/2019 – received 21/05/2019
- Annotated Topo Overlay 2011/2019 – received 21/05/2019
- Annotated Res Matters layout – received 21/05/2019
- Proposed Drainage Plan 3597/110 – received 21/05/2019
- Proposed Layout Plan 3597/100 rec C – received 21/05/2019

## **7. Evidence submitted against the Application**

None

## **8. Site Visit**

<sup>3</sup> Para 010 <https://www.gov.uk/guidance/lawful-development-certificates>

Yes – noted previous mill buildings had been removed and ground works carried out to level areas of the site.

## **9. Assessment of the Evidence**

- 9.1 The applicant agent provides information within the Planning Statement setting out the chronological events of the development. It is claimed the outline planning permission (O/L) was granted **24 October 2008** with reserved matters (R/M) subsequently approved **26 April 2010**. The Local Planning Authority (LPA) do not dispute the granting of planning permission for the development.
- 9.2 The agent also refers the LPA to condition 4 of the O/L requiring the development to be begun either before the expiry of two years from the final approval of the R/M. The agent agrees the development should have commenced no later than the **25 April 2012** being two years following the final approval of the R/M application.
- 9.3 The agent provides evidence in the form of an invoice from a local demolition and earthmoving company dated 8 October 2011. The invoice stipulates a number of days where excavation works were charged between 28 September 2011 and 8 October 2011. The LPA holds aerial photograph of the site dated 2006 and 2012. It can be clearly seen the former mill buildings were present in 2006 whereas 2012 shows the buildings demolished with earthworks undertaken. The LPA has no evidence to demonstrate the applicants version of events in so far as the earliest date works were carried out is **28 September 2011**.
- 9.4 The agent has since submitted further evidence to demonstrate the groundworks were pursuant to the O/L and R/M permissions. The agent provides topographical surveys dated Sept 06, Sept 11 and June 2019. The agent overlays topographical surveys of 2011 and 2019 demonstrating a variation in levels at the time the works were carried out and a position in 2019. The 2006 topographical survey shows the position prior to works being carried out. It is accepted the works were intended to commence the outline planning permission providing the works are pursuant to the approved drawings
- 9.5 On visiting the site it can be seen the former buildings, as shown on the 2006 topographical survey, have been wholly demolished and the land subsequently levelled. Demolition of the existing buildings did not form part of the development description and cannot therefore be regarded to be pursuant to the O/L or R/M permissions. This in itself did not commence the development.
- 9.6 It is also evident from the site visit and comparison between topographical surveys dated 2006, 2011 & 2019 that the areas formally occupied by the buildings had been levelled particularly with a

reduction in ground levels between 2011 and 2019. The applicant refers the Local Planning Authority to an area in the north east corner of the former central building and points to an approximate 500mm reduction of levels since the buildings were demolished to the current position. The applicant argues this was carried out pursuant to the O/L planning permission by virtue of the reduction in levels post demolition and approved levels shown out site plans. It can be seen levels have changed post demolition towards the levels shown on the approved drawings, particularly in the car parking serving plots 1-5. The Council have no evidence to suggest these works were carried out for any other purpose other than to form the development plateau around the proposed dwellings.

- 9.7 The Courts have generally been satisfied that works are capable of commencing a development providing the works carried out comprise part of the development and are beyond de-minimis<sup>4</sup>. In this case it would be reasonable to conclude the levelling works would be necessary as part of the development works and as such would be integral to the development. The levelling would have also required the usage of heavy machinery and would have been carried out across the whole area formally occupied by the building. By virtue of the large area levelled the local planning authority is satisfied the works are more than inconsequential and as such were not de-minimis. The local planning authority are therefore satisfied the works carried out between 2011 and 2019 constitute works pursuant to the planning permission subject to conditions.
- 9.8 The agent acknowledges 10 conditions requiring further information to be agreed with the LPA were imposed on the O/L and 1 condition imposed on the R/M. The agent also accepts these conditions were required to be discharged prior to the commencement of development (Pre-conditions).
- 9.9 The agent provides information regarding the submission and discharge of planning conditions prior to works being carried as stipulated in conditions 5, 6, 11, 12, 15, 21, 22, 23, 24, 26, 27, 28, 29 & 31 of the O/L and condition 1 on the R/M. Information held by the LPA largely accords with this information and a detailed position is provided in Appendix A.
- 9.10 The position regarding the discharge of the planning conditions fall into five separate categories:-
- i. The LPA can accept conditions 5 & 6 on the O/L and condition 1 on the R/M were discharged prior to working being carried out.
  - ii. The LPA have no evidence to contradict the information provided by the agent where it is claimed information was submitted for conditions

---

<sup>4</sup> *R (Hart Aggregates Ltd) v Hartlepool BC [2005]*

11, 12, 21, 22, 23, 26, 27 & 31 prior to works being carried out. These were discharged after works commenced.

- iii. Conditions 15 & 29 required certain works to be carried out prior to commencement of works.
- iv. It is clear from discharge of condition application and S. 106 agreement dated 3 March 2016 the information required by conditions 26 & 28 were submitted 04/04/2012 & 17/12/2014 respectively after works commenced on site. These are discharged by virtue of the S. 106 agreement.
- v. The LPA has no record of any information submitted for condition 24.

9.11 There appears to be little doubt in this case that works physically commenced on site prior to Pre-conditions being discharged. The question is therefore simply, is whether those breaches of condition rendered the commencement of the development unlawful under the principles laid down in the Court of Appeal decision<sup>5</sup>. If so, no lawful development was commenced within the specified time limit and no certificate for lawful use can be granted in this case. If, however, the development was not to be regarded as unlawful, despite the breaches of condition, because it accords with the approved plans, the certificate can be granted. As the works are deemed to be in accordance with the plans, the matter turns on the breaches of conditions.

#### Category (i) Conditions

9.12 These conditions were discharged prior to works being carried out and therefore do not affect the lawfulness of those works.

#### Category (ii) Conditions

9.13 The agent contends that category (ii) conditions can be deemed to have been complied with in substance by virtue of the detail being submitted to the LPA prior to the works commencing and as such would simply have been a technical breach of condition which the LPA had in its power to rectify through the approval of those details submitted or that negotiations were underway with the LPA. The agent argues that if the LPA felt the conditions could not be discharged enforcement action could be taken and the fact it was not suggests there was no rationality to do so. The agent refers the LPA to several Court decisions to support this view<sup>6</sup>.

---

<sup>5</sup> *Whitely & Sons v Secretary of State for Wales* (1992)64 P &CR 185.

<sup>6</sup> *R v Flintshire CC Ex p. Somerfield Stores Ltd* (1998) PLCR 336 & *Hart Aggregates Ltd v Hartlepool BC* (2005) EWHC 840

- 9.14 J Waksman<sup>7</sup> summarised the Courts interpretation in such cases in paragraph 24 of his judgement. He stated three questions needed to be asked, “(1) has there been a breach of condition , (2) if so is the effect of that breach of condition such as to render the development as a whole unlawful (i.e. does it go to the heart of the permission) *sic* & (3), if so, do any of the exceptions to the Whitley principle apply, such as irrationality, abuse of power on the part of an LPA if it sought to enforce, or compliance in substance”. Essentially where the answer to questions 1 and 2 are yes and no exceptions apply in question 3 then the works carried out are unlawful and the permission was not lawfully implemented.
- 9.15 With respect to the conditions in category (ii), it is clear the works were carried out prior to conditions being discharged and the conditions were largely fundamental to the planning permission. As such Q1 & Q2 must be yes. However, the agents argument can be accepted in so far as the enforcement could have sought compliance through the discharge of the details submitted and subsequently did. It is therefore considered category (ii) conditions did not render the development unlawful.

#### Category (iii) Conditions

- 9.16 The agent claims both conditions were complied with at the time the works commence by virtue of an invoice for fencing and approval of a scheme for the junction onto Holmfirth Road. The LPA has no evidence to counter these claims and as such category (iii) conditions did not render the development unlawful.

#### Category (iv) Conditions

- 9.17 The agent provides evidence that the negotiations for public open space and bat mitigation strategy submitted pursuant to conditions were well advanced prior to works being carried out and technical legal matters delayed the signing of the s.106 agreement. The agent largely argues the same stance as category (ii) conditions in so far as the developers had done all they could to discharge the conditions prior to works being carried out.
- 9.18 The LPA has no evidence to demonstrate the applicant’s version of events is not accurate and by virtue of the same reasons set out above it is clear the conditions were breached as the works were carried out and Q1 must be yes, it is accepted that the provision of public open space and bat mitigation measures were not critical to the commencement of development in so far as those works would not necessarily be undone in the event an agreement could not be reached. As such Q2 would not render the conditions a true Pre-

---

<sup>7</sup> *Bedford Borough Council v Secretary of State for Communities and Local Government & Murzyn (2008) EWHC 2304*

conditions and the breach would not render the development works unlawful.

### Category (v) Conditions

- 9.19 The agent agrees that this condition was not discharged by the LPA and not expressly applied for discharge by the developer. The agent contends, however, that the details submitted for condition 6 included the details required for condition 24 and were subsequently discharged. By virtue of the reasons set out above the agent argues this condition was discharged in substance and therefore does not upset the lawful commencement of the works.
- 9.20 By virtue of the reasons stated for condition 24, it is accepted that the principle for the condition is the same reason for condition 6 and as such could have been dealt with under a single condition. The approved remediation strategy at point 12 of paragraph 8.5 does require the protection of Royd Clough from potential contamination by way of bunding. This is an approved document and essentially deals with the same matters as condition 24. Under such circumstances it appears details required by condition 24 largely duplicate the details required by condition 6 and therefore do not go to the heart of the overall planning permission (Q2). The condition still requires the discharge from the LPA although does not affect the lawfulness of the works carried out.

### 10. Other Matters

- 10.1 The agent submits a description stating **“Certificate of lawfulness to confirm commencement of development approved under 2009/92557 for the erection of 30no. dwellings within the 3 year time limit given in condition 1.”** As stated above, it is the LPA’s opinion planning permission was granted with the outline planning permission with matters reserved. Consequently the works carried out on the site implemented outline planning permission ref: 2007/92595 pursuant to reserved matters approval ref: 2009/92557. Moreover, condition 4 on the outline planning permission imposed the relevant 2 year time time limit before which the development should be begun rather than the 3 year period on condition 1 as specified by the agent.
- 10.2 The application was made under the provisions of section 191 of the Town and Country Planning Act 1990. Sub-paragraph (4) of section 191 provides for the LPA to modify the description of development and issue a certificate to that effect. It is considered the description of lawful development should therefore be **“Certificate of lawfulness to confirm commencement of development approved under outline planning permission ref: 2007/92595 pursuant to reserved matters approval ref: 2009/92557 for the erection of 30no. dwellings within the 2 year time limit given in condition 4.”**

## **11. Recommendation.**

- 11.1 By virtue of the above it is considered the conditions imposed on the planning permission have largely been discharged and do not therefore affect the lawfulness of the works carried out. It is therefore recommended to grant the certificate on the grounds set out in paragraph 9.8 above as modified by the substituted description stated in paragraph 10.2 above.

## **APPENDIX A**

2019/90344 - CLOPUD for erection of 30 dwellings

2007/92595 – outline granted

### **CONDITIONS:**

- 1- Res matters layout, scale, appearance and landscaping – res matters approved
- 2- Res matters shall be carried out in accordance –not pre con
- 3- Res matters within 3 years (22/10/2011) - –not pre con
- 4- Shall commence 2 years from approval of res mats – (25/04/2012) –not pre con
- 5- Phase II Report before commencement – discharged 23/06/11
- 6- Remediation Strat before commencement – discharged 12/08/11
- 7- Remediation Strat carried out –not pre con
- 8- Validation Strat before occupation –not pre con
- 9- 3m sewer stand off –not pre con
- 10-Separate drainage –not pre con
- 11-Discharge of surface water details before commencement – discharged 16/04/12
- 12-Foul water drainage details before commencement – discharged 16/04/12
- 13-Foul water drainage completed before occupation –not pre con
- 14-No residential buildings within Flood Zone 3 –not pre con
- 15-No development in sight lines –not pre con
- 16-Carried out in accordance with Flood risk assessment –not pre con
- 17-Floor levels no lower than 300mm above ground levels –not pre con
- 18-Egress route provided –not pre con
- 19-No buildings within 6m of watercourses –not pre con
- 20-A defined overland flood flow maintained –not pre con
- 21-Details of junction with Holmfirth Road before commencement – (details dis. 2012/91063)
- 22-Surface water details before commencement – discharged 16/04/12

- 23-Surface water runoff details before commencement – discharged  
16/04/12
- 24-Details of risks to Royd Edge Clough before development commences
- 25-No other access –not pre con
- 26-POS details before construction – S.106 3/3/16
- 27-Affordable housing details before construction – submitted 15/09/10
- 28-Mitigation strategy before commencement –S.106 3/3/16
- 29-Chestnut paling around trees –not pre con
- 30-Layout –not pre con
- 31-Scheme to open culvert before commencement – discharged 16/04/12

2009/92557 – Res Matters granted – 26/04/2010

CONDITIONS:

1. Materials before commencement – discharged 08/06/11
2. In accordance with Landscaping scheme –not pre con
3. Vehicle areas surfaced and drained before occupation –not pre con
4. Garage doors not to encroach over off street parking –not pre con
5. PD rights removed for garage conversion –not pre con
6. No windows/door or openings in north elevation of plot 10 –not pre con

## Decision Authorisation - Delegated Powers

**Application Number:** 2019/90344

**Officer Recommendation:** Grant Certificate

On the balance of probability it is considered the ground works carried out between 2011 and 2019 were lawfully carried out to implement outline planning permission ref: 2007/92595 pursuant to reserved matters approval ref: 2009/92557 for the erection of 30no. dwellings within the 2 year time limit given in condition 4.

Plans and specifications schedule:-

<b>Plan Type</b>	<b>Reference</b>	<b>Version</b>	<b>Date Received</b>
Planning Statement	n/a	n/a	01/02/2019
Appendices 1-15	n/a	n/a	01/02/2019
Photographs	n/a	n/a	21/05/2019
Topographical	Drw 5621/1 Sept 06	n/a	21/05/2019
Topographical	Drw 6499/1 Sept 11	n/a	21/05/2019
Topographical	Drw 7935/1 June 19	n/a	21/05/2019
Topographical Overlay 2011/2019	n/a	n/a	21/05/2019
Annotated Topo Overlay	n/a	n/a	21/05/2019
Annotated Res Matters layout	n/a	n/a	21/05/2019
Proposed Drainage	Plan Plan 3597/110	n/a	21/05/2019
Proposed Layout	Plan 3597/100 rec C	C	21/05/2019

- Planning Statement – 01/02/2019
- Appendices 1-15 – 01/02/2019
- Photographs – received 21/05/2019
- Topographical Drw 5621/1 Sept 06 - received 21/05/2019
- Topographical Drw 6499/1 Sept 11 – received 21/05/2019
- Topographical Drw 7935/1 June 19 – received 21/05/2019

- Topographical Overlay 2011/2019 – received 21/05/2019
- Annotated Topo Overlay 2011/2019 – received 21/05/2019
- Annotated Res Matters layout – received 21/05/2019
- Proposed Drainage Plan 3597/110 – received 21/05/2019
- Proposed Layout Plan 3597/100 rec C – received 21/05/2019

**NOTE:** It is brought to the developers attention that details reserved by condition 24 attached to the outline permission remain outstanding and the Local Planning Authority reserve the right to consider enforcement action in the event those details are not discharged.

Pursuant to article 35 (2) of the Town and Country Planning (Development Management Procedure) Order 2015 and guidance in the National Planning Policy Framework, the Local Authority have, where possible, made a pre-application advice service available, complied with the Kirklees Development Management Charter 2015 and otherwise actively engaged with the applicant in dealing with the application.

**Report Dated:**

06/11/2019
------------