

From:
To: [DCAdmin](#)
Cc:
Subject: Objection by Local Resident to Application 2022/70/92570/W by Penistone Homes Ltd for variation of condition 1(Plans) on previous permission 2019/90727 (reserved Matters) application for 8 dwellings at 106 Greenfield Road Upperthong Holmfirth HD9 2LP
Date: 13 September 2022 19:34:43
Attachments:

Dear Sirs,

8 Dwellings at 106, Greenfield Road, Upperthong Holmfirth, HD9 2LP

Objection by local resident to Application 2022/70/92570/W 8 dwellings at Variation of condition 1 (Plans) on previous permission 2019/90727 reserved Matters application pursuant to outline permission 2015/94106 for erection of 8 dwellings and demolition of existing dwelling

Objection and Request for Planning Intervention

I act on behalf of _____ He objects most strongly to the above application. He also requests the Council:

- takes immediate and effective enforcement action to reverse the obvious breaches of planning control which the application seeks to rectify; and
- to restrain the carrying out of further development without planning permission and/or in breach of planning condition

Background

For the last 22 years, _____ has lived immediately next door to and directly above application site.

His two storey property is _____ is situated in the upper part of the Village which directly overlooks the application site.

In common with the application site, _____s property forms an integral part of and shares expansive views over the unique, much treasured Holme Valley landscape. As confirmed in the Holme Valley Neighbourhood Plan and the associated Landscape Character Assessment, the sparsely-settled Holme Valley is rightly and justifiably and internationally acclaimed for its natural and man made beauty.

This treasured landscape is highly sensitive to change.

Even small changes can have significant effects. Building heights are a significant issue and the scale height, massing and materials of prominent new development in hillside development are a particular concern for the area's historic landscape legacy and the grain and character of the Holme Valley Villages, preserving the village vernacular and for residential amenity.

Fundamental Breaches of Planning Law and Practice Material Misrepresentations and Unauthorised Development.

The alleged date of commencement of development – a lapsed permission

The application form states that:

- the development has commenced and
- development began on 4th October 2019.

Neither statement is true.

Firstly, there is no evidence of commencement or service of notice of commencement under the Building Acts which leads us to doubt the statement that development began on 4th October.

Secondly, it is clear to us that development could not lawfully have begun by that date because of failure to discharge a fundamental pre-condition 17 of the original outline planning permission 15/60/94106.

17. **Prior to the development commencing**, a scheme detailing the proposed internal adoptable estate road layout as shown on the Howarth Consultants Ltd drawing no. 579/004A shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall include full sections, drainage works, street lighting, signing, lining, surface finishes, and the treatment of visibility splays, together with an independent safety audit covering all aspects of work. Before any building is brought into use the scheme shall be completed in accordance with the scheme shown on approved plans and retained thereafter

Reason: **This is pre-commencement condition** to ensure all works associated to provide the proposed internal road layout are carried out to appropriate and suitable standards and to ensure the safety of all users, in the interests of highway safety and to accord with Policies D2 and T10 of the Kirklees Unitary Development Plan and the National Planning Policy Framework.

This obvious default on the developer's part:

- renders all of the works carried out so far unlawful and
- means that as matter of law the planning permission 15/60/94106 cannot have been commenced; and
- means that planning permission 15/60/94106 has expired through the passage of time.

Thirdly, it is clear to us that development could not lawfully have begun by that date because of failure to discharge a fundamental pre-condition 4 of the planning permission 2019/70/91004/W REMOVAL OF CONDITION 6 (AFFORDABLE HOUSING) ON PREVIOUS PERMISSION 2015/94106 FOR OUTLINE APPLICATION FOR ERECTION OF 8 DWELLINGS AND DEMOLITION OF EXISTING DWELLING.

4. **No material operation as defined in section 56(4)(a)-(d) of the Town & Country Planning Act 1990 shall be carried out to commence the development** pursuant to this planning permission until arrangements for the provision of public open space to serve the development have been submitted to and approved in writing by the Local Planning Authority.
The arrangements shall cover the following matters:-
a) the layout and disposition of the public open space.
b) the timescale for the implementation and completion of the works to provide the public open space;
c) the mechanism for ensuring that the public open space will be available for public within perpetuity.
d) maintenance of the public open space in perpetuity.

Reason: To ensure the provision of open space to serve the development and in accordance with Policy LP63 of the Kirklees Local Plan.

We can find no evidence on the planning portal as to the discharge of this precondition.

Fourthly, permission 2020/70/93548/W VARIATION OF CONDITIONS 9, 10, 11, 12, 14 AND 15 ON PREVIOUS PERMISSION 2019/91004 FOR REMOVAL OF CONDITION 6 (AFFORDABLE HOUSING) ON PREVIOUS PERMISSION 2015/94106 FOR OUTLINE APPLICATION FOR ERECTION OF 8 DWELLINGS AND DEMOLITION OF EXISTING DWELLING contains the following condition:

1 The development hereby permitted shall be begun before the expiration of two years from the date of the approval of the reserved matters application reference no. 2019/90727 (**this being 10th September 2021**).

Reason: Pursuant to the requirements of Section 92 of the Town and Country Planning Act 1990.

This means that even if development did start on 4th October 2021 this post-dated the 10th September 2021 deadline for commencement imposed by condition 1 of this consent to variation.

It follows that these quadruple defaults on the developer's part:

- deal a fatal blow to the unlawful development on this part of the Holme Valley hillside
- mean that the eight unit residential development which was first granted in 2015 under reference 2015/60/94106 has now lapsed
- render all of the works carried on site out so far unlawful; and
- mean that as matter of law the planning permission cannot have been commenced; and
- mean that planning permission 15/60/94106 and 2019/70/91004/W and 2020/70/93548 and all other related consents have expired through the passage of time and are of no effect
- the Council has no power to determine application 2022/70/92570/W as the planning permission to which it relates is already "dead".
- the developer who has taken the law into his own hands must stop all further work and go back to square one
- the Council must pursue enforcement action against the developer's unauthorised development
- Any future application must have regard to the recently adopted Home Valley Neighbourhood Plan (adopted December 2021)
- in particular any new development must comply with its exacting requirements relating to design, scale height and massing and materials and urban grain and the need for new development of the Valley sides not to dominate but to remain subservient and respectful to the scale of its nearest neighbours.

Notwithstanding our submissions that the permission has lapsed and the development is unlawful we would make the following observations and comments in support of our objection:

The planning permission

Scale - the application seeks to amend "the scale of the development"

The scale of surrounding development is low-rise two-storey development. With the increases in ridge heights the proposed properties as built (plot 3) and under construction (plot 2) now approximate in height to that of a four-storey house. Buildings over two-storeys in this part of the Holme Valley are a rarity. Three and four storey Town Houses are seldom seen in Home Valley's rural villages.

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Holme Valley Neighbourhood Plan and adopted development plan policy

The Holme Valley now has a Neighbourhood Plan was adopted in December 2021 following a referendum and development must now accord with it. The inspector's findings were reported in June 2021 and could not have been clearer:

The following design principles were adopted following endorsement by local residents in the community referendum

Policy 2: Protecting and Enhancing the Built Character of the Holme Valley and Promoting High Quality Design
Policy 2 does not apply to that part of the neighbourhood area that is within the Peak District National Park.

1. ***Local Character*** *Building designs in proposals for new development and alterations to existing buildings*

should respect the key characteristics and character management principles relating to built character, of the Landscape Character Area in which they are located as set out in paragraph 4.1.17. They should protect and enhance local built character and distinctiveness and avoid any harm to heritage assets including conservation areas.

2. **Sense of Place** New developments should strengthen the local sense of place by designing the site layout to respect the existing grain of development in the surrounding area and through use of local materials and detailing. Where historic features such as mill chimneys function as key focal points, they should be retained and restored as an integral part of new development schemes.

- 8 **Built Form and Materials** **Designs should respect the scale, mass, height and form of existing buildings in the locality** and the site setting.

Development should fit in with and neither dominate nor have a detrimental impact on its surroundings and neighbouring properties.

Materials must be chosen to complement the design of the development and add to the quality or character of the surrounding environment. Local millstone grit and stone flags should be used where these are the prevailing material.

As for this wording the Inspector stated

viii. With these modifications **Policy 2 will meet the requirement for a policy to be clear, unambiguous, concise and precise** and therefore be in accordance with Basic Condition a). As modified the Policy will also be in general conformity with KLP Policies LP24, LP35, LP52 and LP63. **The Policy, in protecting and enhancing a sense of place and local distinctiveness,** is likely to make a strongly positive contribution to achieving sustainable development

Against this background there can be no planning case for increasing the height scale and massing of the approved dwellings.

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The policies of the Neighbourhood Plan which are designed to **RESTRICT** scale height and massing of new development and protect local character were adopted by common consent in a referendum of all local residents. This is now a recently adopted and important part of the adopted development plan for the area against which all applications (including section 73 applications) must now be measured and decided.

Character of the immediate Locality

Here are the site's nearest neighbours – which define the traditional historic low rise “grain” and character of the immediate locality:

The site is not an allocated housing site. Any new application or changes to the existing planning permission must be considered against the provisions of Policy 4.2 of the Neighbourhood Plan which post date the original outline planning permission.

If, as we submit, the existing development is wholly unlawful, then any fresh application or section 73A application must as a matter of both planning law and planning policy be considered afresh and determined in accordance with the newly-adopted up to date Holme Valley Neighbourhood Plan.

The position is further emphasised in the following Neighbourhood Plan policies

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**4.2 Protecting and Enhancing the Built Character of the Holme Valley and Promoting Quality Design
Introduction and Background**

4.2.1 The built character of the Holme Valley is described for each of the Landscape Character Areas (LCAs) in the Holme Valley Heritage and Character Assessment. The built character and form varies within and across each of the LCAs. The section on Character Management Principles sets out that 'In general, the design, form and pattern of new development should respond to the historic local vernacular within the parish, using local materials. **Development should also respond appropriately to the immediate context, taking into account layout, scale, density and appearance (including materials) of neighbouring buildings.**

- The immediate context neighbouring buildings in this case are traditionally built millstone cottages to the south and west as depicted above.

Scale height and massing – a constant and continuing concern

- Indeed, the Council Officers' own report on the reserved matters application as well the applicant's Design and Access Statement for the outline application both reflect significant concerns and sensitivities as to building heights on this particular site.

Extract from Officers report on reserved matters application 2019/61/90727/W

History of negotiations/amendments received

Although, the scale and layout have previously been approved and not necessary to be included within the scope of this reserved matters application, an extended sectional drawing has been included within the submission documents which shows the height and relationship of the dwellings in comparison to the properties on Broad Lane. This information was requested to address concerns of local residents.

Extracts from the Applicant's own Design and Access Statement

2015/60/94106

2. Scale

2.1 Careful consideration was given to the scale of the proposed 8 dwellings in order that the amenity of the adjoining residential dwellings will remain unaffected. In all of the previous planning application submissions planning officers have raised concerns about amenity issues.

2.2 It is submitted that the scale of the proposed dwellings have already been accepted as the dwellings are the same as proposed in the 2012 planning permission.

4. Appearance 4.1 The appearance of the proposed dwellings will be respective of the character of the surrounding residential dwellings in an attempt to provide a harmonious development.

Mr. _____ property is one of the five dwellings which are closest to and most directly and adversely impacted by the development in question.

Variations in the Scale of the approved development

The scale of development is fixed by the outline planning permission and Section 73 of the Application cannot be used to vary conditions attached to the reserved matters approvals which do not and cannot relate to or affect the scale of the development.

The latest Penistone Homes application 2022/70/92570/W seeks to adjustments to the scale of the development of plots 2 and 3... the remaining 6 dwellings have yet to be started.

These changes include adjustments to the the configuration, volume, shape, height, length, slope/pitch/rake and

fenestration of the roofs of plots 2 and 3 – all of which are matters of scale.

However, scale is a matter which was fixed and particularised as part of the original outline planning permission and was not a reserved matter and it is not possible to amend matters of scale in the manner proposed.

It is of course clear that reserved matters consents (such as 2019/61/90727) cannot vary matters which are already approved and fixed by an outline application (such as 2015/61/90727).

Planning application details | Kirklees.gov.uk

kirklees.gov.uk/beta/planning-applications/search-for-planning-applications/filedownload.aspx?application_number=2015/94106&file_referenc...

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Country: United Kingdom Email address: Postcode: Are you an agent acting on behalf of the applicant? ☒ Yes ☐ No

2. Agent Name, Address and Contact Details

Title: Mr First Name: Robert Surname: Halshead

Company name: Robert Halshead Chartered Surveyor

Street address: 57 Bowers Mill Branch Road Barksland Halifax

Town/City: West Yorkshire Country: United Kingdom Postcode: HX4 0AD

Telephone number: 01422 379841 Mobile number: 07930 603936 Fax number: 01422 379841 Email address: jim.westhead@btconnect.com

3. Description of the Proposal

Please indicate all those reserved matters for which approval is being sought:

☒ Access ☐ Appearance ☐ Landscaping ☒ Layout ☒ Scale

Please describe the proposal:

Outline Application for Erection of 8 Dwellings and Demolition of Existing Dwelling

Has the building or works already been carried out? ☐ Yes ☒ No

Extract from outline application form 2015/60/94016 noting Under description of the proposal that approval is being sought for 1) access 2) layout and 3) scale none of which are reserved matters

In this context we would refer you to the following decisions in the Courts both of which are legally binding on the Council as planning authority.

- *R v Coventry City Council Ex p. Arrowcroft Group Plc* [2000] 7 WLUK 647 (in which it was held that under Section 73 a different condition could be imposed, but only if it did not amount to a fundamental alteration of the original proposal); and
- the Court of Appeal decision in *Finney v Welsh Ministers* [2019] EWCA Civ 1868.

***R v Coventry City Council ex p Arrowcroft Group* [2001] PLCR 7**

- *Thus the council is able to impose different conditions upon a new planning permission, but only if they are conditions which the council could lawfully have imposed upon the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application.*
- *§35 Whatever the planning merits of this new proposal, which can, of course, be incorporated into a new "full" application, I am satisfied that the council had no power under section 73 to vary the conditions in the manner set out above. The variation has the effect that the "operative" part of the new planning permission gives permission for one variety superstore on the one hand, but the new planning permission by the revised conditions takes away that consent with the other.*

In the case of *Finney v Welsh Minister*

https://s3.amazonaws.com/windaction/attachments/3416/Finney_v_Welsh_Ministers_et_al_11-5-

[2019.pdf](#) the Court of Appeal held that:

“a condition altering the nature of what was permitted would have been unlawful”.

It follows that as scale of the development (which would include its height. Bulk, shape, floorspace, volume footprint and massing was fixed by the outline planning permission : any attempt to adjust raise the fixed and approved height volume and pitch/alignment/slope or “rake” of the roofs of the new buildings by means of a section 73 application would be unlawful. As such the law requires that the current section 73 application must be rejected by the Council as an inappropriate procedure.

Section 73 cannot be used to validate unauthorised development already complete

Likewise, section 73 cannot be used to retrospectively approve works which have already been completed. What is unlawful cannot be made lawful by the use of section 73 as a device to retrospectively validate unlawful development.

The resulting permission following a section 73 is a planning permission in its own right and its effect is and can only be prospective; not retrospective. As the roof and finished floor levels of plot 3 are now completed (and what we anticipate are physically different slab and finished floor eaves and wall levels of Plot 2) none of this can now be validated other than by an application under section 73A of the Town and Country Planning Act 1990 (TCPA).

We are told that the pitch of the roofs have been reduced and yet the ridge heights have increased. This being the case, we can only deduce that that the buildings must have “grown” in height beyond the approved finished floor levels. No other conclusion is mathematically and geometrically possible. If everything else remains unchanged then a reduction in the pitch or flattening of the roof must result in the ridge heights being lowered. If indeed the ridge heights have increased then the approved slab and/or finished floor levels are almost certain to have been overstepped.

Section 73 cannot be used to extend time

Finally, section 73 of the TCPA is inapplicable if it would have the effect of extending the period for commencing development or submitting reserved matters (see Section 73 (4)). The deadline for submission of reserved matters expired in April 2019 and no new reserved matters may now be submitted.

73 Determination of applications to develop land without compliance with conditions previously attached.

(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

(2A) See also section 100ZA, which makes provision about restrictions on the power to impose conditions under subsection (2) on a grant of planning permission in relation to land in England.

(3) Special provision may be made with respect to such applications—

(a) by regulations under section 62 as regards the form and content of the application, and

(b) by a development order as regards the procedure to be followed in connection with the application.

(4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.

(5) Planning permission must not be granted under this section for the development of land in England to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which—

(a) a development must be started;

(b) an application for approval of reserved matters (within the meaning of section 92) must be made.

It follows that even if “scale” were a reserved matter (and in this case it is not as it was fixed at the outline stage) section 73 of the TCPA could not in any event be used as a means of sidestepping the fundamental requirements of the reserved matters time condition.

As such, any attempt to validate the unlawful dwellings can only be achieved through submission of a retrospective planning applications under section 73A of the TCPA

“Planning permission for development already carried out”.

73A Planning permission for development already carried out.

(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.

(2) Subsection (1) applies to development carried out—

(a) without planning permission;

(b) in accordance with planning permission granted for a limited period; or

(c) without complying with some condition subject to which planning permission was granted.

(3) Planning permission for such development may be granted so as to have effect from—

(a) the date on which the development was carried out; or

(b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period.

The time for submission of reserved matters is now expired and it is no longer possible to grant permissions under section 73 of the Town and Country Planning Act 1990 as this would have the effect of extending the time period for submission of reserved matters.

It follows that the only way in which the current building works can be validated is through a retrospective application for development under section 73A of the TCPA. Any such application would need to be judged against the exacting requirements of the Holme Valley Neighbourhood Plan which mitigates against buildings which dominate or are out of scale and character with surrounding development.

In our submission the development as built is both dominant as well as being wholly out of scale and out of character with the low rise humble cottages which constitute its immediate neighbours and which define the prevailing soundly-built, flat-fronted, stone-built, humble hillside-cottaged character of this part of the Holme Valley landscape. The dominance of plot 3 over its simpler stone cottaged neighbours is well illustrated by the photograph below:

Matters of Scale

The height and pitch of the roofs in question are both matters of scale. As scale is a matter which Impac particularised for determination as part of the original it is not and cannot be now be treated as a matter reserved for subsequent approval. Once fixed by the original outline planning permission it is and must remain fixed by that consent. To be clear the conditions of the subsequent the reserved matters section approval 2019/61/90727 which the applicant now seeks to amend cannot as a matter of law be expanded to include matters which were fixed under the baseline planning permission 2015/60/94106.

Section 92 Town and Country Planning Act 1990

A permission granted under section 73 of the TCPA is of course a separate and distinct planning permission in its own right. It has its own separate existence and exists independently of the original consent but its content reverts back to the original outline application details and matters reserved for subsequent approval. Every outline planning permission must as a matter of law have a timescale for submission of reserved matters and a timescale for implementation (see section 92 of the Town and Country Planning Act). Those dates cannot predate the grant of the section 73 consent. Where no such conditions are imposed by the planning authority then the provisions of section 92 deem them to have been imposed by operation of law.

Impact of Development

It is into this largely blank pristine landscape canvas that 2 large detached dwellings are being constructed in breach of planning law. The Holme Valley is a sensitive and valued landscape where small changes can have significant effects and damaging consequences for both residential amenity and landscape character.

I would urge the Council to reject the current (minor material amendment) application under section 73 of the Town and Country Planning Act 1990 for both legal and planning grounds.

Commencement in breach of planning preconditions: condition 17 of outline PP 2015/60/94106

Whilst I appreciate that outline planning permission was granted in 2015 for eight dwellings this was not lawfully commenced. It follows, as a matter of law, that the planning permission has now lapsed given that the works (if indeed they were commenced in time) were commenced in breach of condition 17. This being the case such works do not and cannot amount to lawful implementation of the planning permission.

Condition 17 is an essential precondition which goes to the heart of the planning permission and, so far as we can ascertain from the Council's planning portal, has never been cleared or varied. Condition 17 reads as follows:

17. **Prior to the development commencing, a scheme detailing the proposed internal adoptable estate road layout as shown on the Howarth Consultants Ltd drawing no. 579/004A shall be submitted to and approved in writing by the Local Planning Authority.** The scheme shall include full sections, drainage works, street lighting, signing, lining, surface finishes, and the treatment of visibility splays, together with an independent safety audit covering all aspects of work. Before any building is brought into use the scheme shall be completed in accordance with the scheme shown on approved plans and retained thereafter

Reason: **This is pre-commencement condition** to ensure all works associated to provide the proposed internal road layout are carried out to appropriate and suitable standards and to ensure the safety of all users, in the interests of highway safety and to accord with Policies D2 and T10 of the Kirklees Unitary Development Plan and the National Planning Policy Framework.

Whilst application 2019/44/91279 sought clearance of a number of planning conditions including condition 17, condition 17 was NOT discharged by the Council. The Council's decision letter dated 6th February 2020 could not have been clearer and stated as follows:

Condition no. 17: Development Management Highway Officers, following consultation with the Council's Section 38 Road Adoption Team, advise that the Council is not in a position to adopt the proposed internal road layout. This is because the proposed road gradients are not shown to meet current day adoption standards. As such this condition cannot be discharged.

In light of the above, and in the event it is proposed to serve the development off a private road, the applicant may wish to formally apply for removal of this condition. However it is advised any such application should be accompanied with evidence of a maintenance and management scheme and servicing schedule which would need to be set up prior to the occupation of any dwelling

So far as we can ascertain no application for removal of condition 17 was ever submitted. If we are correct in this regard then none of the development is lawful and the outline permission has now lapsed.

Summary

There are therefore multiple reasons (both legal and planning reasons) for rejecting the proposals, not least because the development proposed is:

- inappropriate,
- unlawful,
- unbalanced,
- out of character with the scale and appearance of surrounding properties,
- at odds with the village vernacular, and the scale of all neighbouring properties
- objectionable in planning terms and contrary to the adopted policies of the Holme Valley Neighbourhood Plan and the Kirklees Local Plan; and
- cannot be lawfully dealt with as a section 73 application

Previous consideration of matters of Height

Great care was taken at the original application stage to ensure that the scale and character of the development was in keeping with that of its neighbours and the village vernacular.

Subsequently and recently adopted development plan policies (including a Neighbourhood Plan approved by referendum and made as recently as 8th December 2021 place greater emphasis on consistency with neighbouring development and the need for the height, character, materials and appearance of new development reflecting that of its near neighbours. There can be no planning justification for further increases in height scale and massing of these properties.

This time around the developer and his agents are seeking to “hoodwink” the Council into nodding through a material changes under cover of section 73 of the Town and Country Planning Act, the proposals are in reality fundamentally different scheme.

THE LAW

- In ***Commercial Land Limited v SSCLG [2002] EWHC 1264 (Admin)*** Ouseley J considered the position where the works undertaken were not functionally different from the planning permission but deviated from what was permitted and concluded that it was not permissible to ignore part of the works that had been done and focus only on those works which complied with the planning permission.
- The changes sought are unlawful and (as is admitted by the applicant by virtue of his latest application) outside the scope of the existing planning permission;
- As such, the developer can no longer rely on **PP/2015/60/94106** as a precedent or a fall back position.
- The development to date has been carried in breach of an essential preconditions (namely **condition 17 of PP/2015/60/94106**). As such, the development has not been lawfully commenced. Whilst the Council officers recommended an application be made to delete condition 17 be made no such application appears to have ever been made. In ***GREYFORT PROPERTIES LTD v SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (2010)*** the Court of appeal concluded that a planning inspector was entitled to conclude that a condition in a grant of planning permission which required that the ground floor levels of a block of flats be agreed in writing with a local planning authority before work on a site commenced was a condition precedent such that a failure to comply with it rendered any development on the site unlawful. See also ***F& G Whitley & Sons v Secretary of State for Wales and Clwyd County Council[1992] 3 PLR 72*** and ***Henry Boot Homes Ltd. v Bassetlaw District Council [2002] EWCA Civ 983*** cases – the proposals fall within none of the exceptions contained in the Whitley case.

The transcript of the Henry Boot case can be found in the link below.

<http://www.bailii.org/ew/cases/EWCA/Civ/2002/983.html>

It will be seen that Condition 17 (details of internal road layout finishes etc) of the existing outline Penistone planning permission of 2015 can be compared with conditions 2 and 3 of the Henry Boot case which it was found invalidated the development which was being carried out in ignorance of them.

Condition 17 of PP 2015/60/94106

"17. Prior to the development commencing, a scheme detailing the proposed internal adoptable estate road layout as shown on the Howarth Consultants Ltd drawing no. 579/004A shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall include full sections, drainage works, street lighting, signing, lining, surface finishes, and the treatment of visibility splays, together with an independent safety audit covering all aspects of work. Before any building is brought into use the scheme shall be completed in accordance with the scheme shown on approved plans and retained thereafter

Reason: *This is pre-commencement condition to ensure all works associated to provide the proposed internal road layout are carried out to appropriate and suitable standards and to ensure the safety of all users, in the interests of highway safety and to accord with Policies D2 and T10 of the Kirklees Unitary Development Plan and the National Planning Policy Framework."*

Comparable conditions in the Henry Boot Case

"2. The siting, design and external appearance of the building(s), the means of access thereto, and the landscaping of the site shall be only as may be approved in writing by the District Planning Authority before any development commences."

Condition 3 was as follows:

"The details required by condition No 2 above shall provide for an adoptable road layout which shall include an extension of Heathfield Gardens in a easterly direction, making provision for access to adjoining land to the south in the manner indicated in Drawing No BH6616/1F ..

5. Before development commences precise details of the finished floor level of each dwelling, road and footpaths, garden areas and open spaces shall be submitted to and agreed in writing with the District Planning Authority...

The Court of Appeal held that:

- 1) works carried out in breach of such a condition could not amount to implementation; and
- 2) as a result the planning permission had lapsed

It coming to its decision on these critical issues the Court of Appeal emphasised the public nature of the planning process. Officers (who at all times had acted in good faith had wrongly assumed that the conditions had been cleared). Regardless of the Officers' naivety in the matter the Court found against the developer and was highly critical of the relaxed approach of the responsible planning officers and the essential need for public involvement in the planning process.

"... It is important at all times to remember the public nature of Town and Country Planning. It is not a matter for private agreement between developers and Local Planning Authorities."

- As the developer appears to have been knowingly and deliberately proceeding with a wholly unlawful development the developer must be required to stop all work immediately and the Council together with its Members and responsible Officers must now seriously consider:

- enforcement action; coupled with
 - service of a stop notice; together with
 - breach of condition notices or an injunction
- The changes sought are by no means minor and section 73 of the Town and Country Planning Act 1990 is in any event inappropriate and inapplicable as a legal mechanism for validating unauthorised and unlawful development.
 - Section 73 cannot, in any event, be used to validate development which has already been unlawfully built without planning permission or in breach of planning conditions
 - A section 73 consent can only apply changes to prospective development and not retrospectively
 - A section 73 consent cannot have the effect of extending the period for submission of reserved matters or commencement of the development and as the time for submission and commencement is now passed the planning permission has in our submission lapsed.
 - A quite separate process is required should the developer wish to pursue retrospective application. This process can be found in section 73A of the Town and Country Planning Act in the meantime the Council should not hesitate to launch immediate enforcement action.

Conclusions

In light of the above I am writing to my client's strongest possible record my objection to the recent planning application reference 2022/70/92570/W which is a section 73 application which states as follows:

We wish to make minor modifications to plot numbers 2 and 3, as per the application drawings, to adjust the roof heights slightly and make minor modifications to the areas of render and stone. The roof pitches will be at 37.5 degrees as oppose to 40 degrees shown on the approved drawings, which will lower the pitch slightly, due to recommendations from the truss manufacturers. The proposed changes also allow the developers to maximise the volume of the houses to create better use of the space and make the properties more flexible and sustainable.

The changes are by no means minor and the recommendations of a truss manufacturer do not by any rational measure amount to a sound and clear cut planning reason for deviating from the approved plans which were firmly fixed by the original application and are not reserved for subsequent approval by the outline planning permission

The sad fact is that Penistone Homes appear to have taken the law into their own hands.

The developer has literally:

- raised the roof,
- Increased the height of the overall buildings
- changed and cheapened the materials;
- we suspect raised the slab and finished floor levels (thus increasing height of the buildings – a short cut no doubt to save money on the amount of cut and fill and to create a sizeable fourth floor attic or loft space and increase the saleable living accommodation .
- Moved and altered the eaves and the ridge lines of the buildings
- Increased the volume of the buildings
- Changed the finishes and external appearance of the buildings
- Altered the internal layouts of the buildings

These changes whether taken individually or in combination are significant and are not matters which can be set aside or regarded as de minimis.

The works to plot 3 now appear to have been completed (at least the roof is now complete). The works to plot 2 are well under way and at least partially complete. The works have been carried out without seeking planning permission, without consulting local residents and community groups and without even attempting to secure planning approval in advance.

It would appear that the developer has “taken a flyer” in the hope the no-one would notice.

The actions of the developer are pre-meditated, deliberate and reckless as to the consequences of undertaking unauthorised development in the absence of planning permission and/or in breach of condition.

The developer’s actions have been undertaken knowingly and cannot be explained away as an oversight or an honest mistake. The application documents perversely claim that the changes which the developer has unilaterally decided to implement are **“due to recommendations from the truss manufacturers”**. In other words the developer knew they were in the wrong and nonetheless chanced their arm. They must now face the consequences of their unlawful actions and in fairness to local residents we expect the Council to take the necessary enforcement action without delay.

If the Council and its responsible officers are to maintain its commitment to the proper planning of its area, the protection of the local environment, the sanctity of its treasured landscapes, the preservation of its character as well as the rights interests amenities of its existing residents and the integrity of the planning system it must now take enforcement action in relation to the existing works. That enforcement action must be immediate decisive and conclusive. It must ensure there is no repetition of such scurrilous and underhand and unlawful behaviour and that full public consultation is sought, obtained and accounted for in relation to further or future development on this sensitive Home Valley hillside.

We request that the developer must now immediately face the consequences of his unlawful and reprehensible acts, namely enforcement notice, stop notice and breach of condition. On our own analysis logic and law dictates that:

- the entirety of the development is unlawful; and
- permissions have lapsed in their entirety.

If we are right then the developer must now be required to remove the unauthorised development and “go back to square one”.

Were the Council to turn a “Nelsonian eye” to such blatant and deliberate breaches of planning law then the public confidence in the Council would quickly evaporate. Local residents including our client would rapidly lose confidence in the integrity of the planning system and the Kirklees Council as planning authority and a precedent would be set for developers to carry on regardless.

It is quite wrong for the developer to seek to present the Council and its constituents and community charge payers— namely the local residents - with a fait- accompli.

The Council and its responsible officers will no doubt find it both surprising and galling to note justification for the current application – it being supported by the most feeble of all excuses (the recommendations of its truss manufacturers).

This of course is no justification for the developer’s unlawful actions. Nor does their truss manufacturers’ recommendation excuse the developer and its consultants’ abject failure to comply with their own earlier carefully negotiated plans and drawings.

Those approved plans no longer reflect the development on the ground and make a mockery of time effort and energy and officer time considering the numerous planning applications on this site.

If one were to leave matters untended one wonders what might happen next? What if a developer’s brick or roofing manufacturers or window designers were to start recommending and dictating differing designs and

materials?)

These are not minor material changes by any stretch of the imagination. They are fundamental differences to a carefully conceived scheme set within as most sensitive of local landscapes. The previous scheme was perhaps pushing the boundaries but at least was designed to respect the height, scale materials and amenities of neighbouring properties. The current attempt to raise the bar is a step too far and needs to be reversed by the planning authority's immediate intervention and exercise of its planning enforcement powers. There is also an important point of principle to which should not be forgotten – the public involvement in the planning process.

To be clear, the developer is in the process of constructing a development which is fundamentally different to that approved in 2015 under application reference 2022/70/92570/W. The developer has taken the law into its own hands and the Council must now intervene.

The development neither reflects nor respects the approved plans.

The matter of fact way in which the developer's consultant has sought to introduce, justify and validate these deliberate breaches of planning law is remiss, remarkable and wholly regrettable.

Pennistone Homes simply ignored the planning law. They have done so knowingly, deliberately and wantonly. They have carried out unauthorised works. They have done so in the full knowledge that the works were not authorised. They made no attempt to seeking the necessary planning permissions **before** carrying out the works. Such conduct is reprehensible and the developer must now bear the consequences of their own unlawful acts.

We therefore request that the Council

- investigates how this was allowed to happen
- Issues stop notice and takes immediate enforcement action to secure the demolition of the unauthorised and unlawful buildings which ignore the approved plans finished floor levels and depths of excavation and building heights and internal arrangements.
- Seeks undertakings from the developer that they will ensure that all future development on this site will be constructed in strict accordance with the approved plans and drawings and that there will be no repetition of such behaviour.

We would be grateful then if you could kindly:

- acknowledge safe receipt of our objection and
- confirm that this matter will now be immediately taken up by the Council's Planning Lawyers, the Monitoring Officer and the planning team and let us know how you intend to proceed before taking any final decision on the application.

In the meantime please ensure that the public are not in future neglected forgotten or ignored in any future actions or applications or developments relating to this site.

Yours Faithfully

POST SCRIPT – HIGHWAY SAFETY AND CONSTRUCTION TRAFFIC

We note from the register that our client is not alone in his objections and concerns about this site and the "shoot first and ask questions later" attitude of the developer.

In particular the our client's near neighbours have highlighted a further serious breach of planning conditions which needs to be looked at by you and your planning colleagues.

Put simply, the planning conditions require that the access road should have been completed before **ANY** work on **ANY** of the houses was commenced. Condition 15 states as follows:

15. The construction of the hereby approved dwellings shall not be begun until the means of vehicular access to the site has been constructed in accordance with the details shown on the Howarth Consultants Ltd drawing 579/004A.

Reason: To ensure adequate visibility in the interests of highway safety and to accord with Policies T10 and D2 of the Kirklees Unitary Development Plan.

The **access** road is nowhere to be seen let alone completed whereas plot 3 appears complete from ground to finished roofing and plot 2 has reached roof level.

We echo these neighbours' concerns and sincerely hope that immediate enforcement action be taken to **secure compliance and** remedy this **serious breach**.

It is of course of vital importance to ensure that the access for heavy construction traffic is properly formed surfaced and that sight-lines are in place from the outset.

This will also ensure that there is no mud on the road particularly in close proximity to the village school. Laying out and surfacing the access road will prevent construction and delivery vehicles bring mud onto the A635.

The four historic terraced cottages next door currently obstruct visibility to the west (to the right as vehicles exit the site) and the old coal cellar/storage building obscures visibility to the left.

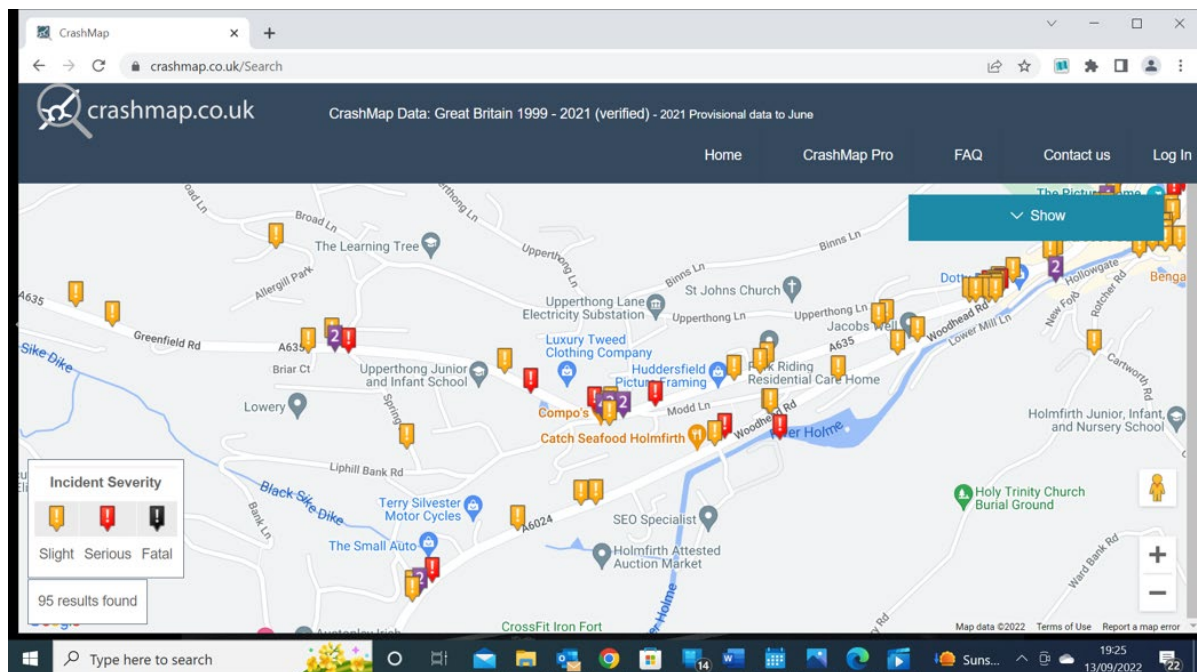
Three out of the four cottages appear to have no off-street parking.

Google earth imagery shows dangerous on-street parking in the vicinity of the junction where the accident record data shows there have been at least two personal injury accidents with a cluster of injury accidents a few yards to the east.

Highway safety must be paramount.

The risk of accidents with an inadequately formed construction access and slow moving HGV construction traffic entering and leaving a steeply-sloping site would in normal circumstances be high.

At a staggered junction on the outside of a blind-bend at a dangerous access point onto and off a fast moving section of the A 635 Greenfield Road with limited visibility to both the west and east means that construction activity (save for the construction of the access road itself) **MUST** be brought to an immediate halt and the Council's planning conditions must be enforced to the hilt. A plan identifying the clusters of personal injury accidents in the vicinity of the application site is set out below



We trust this is helpful and would again request the following by return of e mail:

- confirmation of safe receipt
- confirmation that the legal and procedural issues will be considered by the monitoring officer and the Council's planning lawyers
- confirmation that this objection and observations will be reported to Members
- confirmation that the application will be dealt with by committee
- confirmation that we will be afforded the opportunity to address committee members on these important matters and our client's legal procedural and planning issues

Thanking You in Anticipation