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.: 2024/CL/92874/W

Site: Stead Commercial Estates (Albert Court) Ltd, 75, Bradford Road, Fartown, Huddersfield, HD1 6DZ

Description: Certificate of lawfulness to confirm valid commencement of operations under approved planning application 2012/92343 Erection of B1, B2 & B8 employment development

Case Officer**:** Kevin Walton

Decision Reference: Issue a certificate under section 191

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

Lee Stoney

AUTHORISED OFFICER

Date 03-Jul-2025

APPLICATION REFERENCE: 2024/92874
APPLICANT:: Stead Commcercial Estates (Albert Court) Limited

Certificate of lawfulness to confirm valid commencement of operations under approved planning application 2012/92343 Erection of B1, B2 & B8 employment development.

1. Application

1.1 The applicant seeks a certificate of lawful development from the local planning authority to confirm works previously carried out were undertaken pursuant to planning permission reference 2012/92343 ["the Planning Permission"] granted on the 26 March 2013 for the erection of B1, B2 & B8 employment development were lawfully carried out.

1.2 The application is submitted in accordance with Section 191 of the Town and Country Planning Act 1990 ["the Act"] and describes the existing development as "*the clearing and levelling of the site, excavation around the culvert to plot its exact location and the digging of the trench*."

1.3 If it is concluded that the operation ground works are undertaken lawfully and pursuant to the planning permission, it maybe concluded the planning permissions has been implemented and thus can be completed in accordance with the planning permission.

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.

2.2 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".

3.2 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[1].

4. Limitations

4.1 An 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[2].

5. Site Visit/Publicity

5.1 None undertaken

6. Relevant Information

6.1 Relevant Planning History

2012/92343 – Erection of B1, B2 & B8 employment development – Conditional permission – 26/03/2013

2015/93778 - Discharge conditions 3, 6, 9, 10, 11, 17 & 18 on previous planning application 2012/92343 for erection of B1, B2 & B8 employment development – Split decision – 22/01/2016

6.2 The site has not been subject to any previous enforcement investigation or action.

7. Evidence submitted in support of the Application

- Application Form
- Photograph of trench x 9
- Discharge of condition letter
- Approved plans
- Letter dated 2 February 2016 notification of commencement

8. Evidence submitted against the Application

8.1 None

9. Consultation

[1] Para 06 https://www.gov.uk/guidance/lawful-development-certificates
[2] Para 010 https://www.gov.uk/guidance/lawful-development-certificates

9.1 Highways Development Management – no objections to the detail submitted on the discharge of condition application.

10. Assessment of Evidence

10.1 The applicant within the application form states that a lawful start was made on the 21 March 2016 and that this was within the 3 year period stipulated within condition 1 of the Planning Permission. As the planning permission was granted on the 26 March 2013 the Planning Permission was due to lapse on the 26 March 2016 and thus the applicant the time pressed to make a start on site. However, it is acknowledged within the letter dated 2 February 2016 that the commencement was being undertake whilst planning conditions remained outstanding.

Commencement

10.2 The applicant provides a series of photographs indicating a substantial trench was being dug within the site. The photographs are undated although the applicant's letter of commencement indicates that the applicant was intent on undertaking work before the Planning Permission lapsed. The Council's aerial imagery dated 2018 and Google Earth images dated June 2016 indicate the trench was present roughly within the middle of the site running in a north-west to south-east direction towards Bradford Road. This is consistent with the photographs submitted. Moreover, the trench is substantial and beyond what may be considered de-minimis and thus capable of implementing a planning permission.

10.3 National Planning Policy Guidance[3] states that if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less probable, there is no good reason to refuse an application. In this instance, the photographic evidence suggests the trench was dug at the earliest June 2016 which is 3 month after the Planning Permission was due to lapse. However, it is clear from the letter of commencement dated 2 February the applicant was fully aware of the expiry dated and put the local planning authority on notice that the works were due to commence before the Planning Permission lapsed. As the local planning authority has no good evidence to the contrary and in light of short period of time between the letter of commencement and photographic evidence straddling the expiry date, it is considered, on the balance of probability that the works were undertaken before the 26 March 2016 and were carried out with the intention of commencing the development.

10.4 For the Planning Permission to be lawfully implemented it is crucial that the works undertaken are pursuant to the Planning Permission and are capable of being incorporated in the development in so far as they can be reasonable said to have been carried out to commence a planning

[3] Para 06 https://www.gov.uk/guidance/lawful-development-certificates

permission, notwithstanding any significant discrepancies[4]. In this case the approved plan reference 2012/001/02 indicates the proposed building is sited 42 metres to the rear of 83 Bradford Road running parallel to the south-west boundary. Comparing this with the Council's aerial imagery on 2018 and measuring from Council's mapping system, the trench dug along the line of the approved building and thus reasonably consistent with the Planning Permission.

10.5 The applicant has therefore demonstrated that the trench was dug within the expiry period and consistent with the Planning Permission and thus capable of implementation. However, it is noted that the letter of commencement confirms the applicants were undertaking the works in full knowledge planning conditions had not been satisfied.

Conditions

10.6 The Planning Permission was granted subject to a number of conditions that required further details to be agreed prior to development commencing ["Pre-Development Conditions"]. The Court[5] has held that Pre-Development Conditions must be discharged for a development to be lawfully implemented. This is referred to as the Whitely Principle. The Court has since held that a number of exemptions may be applicable to the Whitely Principle whereby a breach of condition need not be fatal to the implementation of a planning permission. J Waksman[6] succinctly summarised the Court interpretation of these exemptions in paragraph 24 of his judgment. He states 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.

10.7 In this case the Planning Permission was subject to 24 conditions:-

1 Commencement within three years
2 Approved plans
3 Materials to be agreed before development
4 Boundary treatment to be agree before first use
5 Surface water drainage
6 Landscaping to be agreed before development

[4] Commercial Land Ltd/Imperial Resources SA v Secretary of State for Transport, Local Government and the Regions [2003] J.P.L. 358 (Admin)
[5] Whitely & Sons v Secretary of State for Wales (1992)64 P &CR 185
[6] Bedford Borough Council v Secretary of State for Communities and Local Government & Murzyn (2008) EWHC 2304

7 Landscaping to be carried out after construction
8 Turning area to be completed before occupation
9 Access improvement to be agreed before development
10 Vehicular entrance details to be agreed before development
11 Bus shelter to be agreed before development
12 Cycle facilities to be agreed before occupation
13 Existing access to be closed off before occupation
14 Location of sewer
15 Location of watercourse
16 Flood risk measures before occupation
17 Flood route to be agree before development
18 Surface water to be agreed before development
19 Stray light mitigation to be agreed 3 months after commencement
20 Hours of operation
21 Delivery times
22 Roller shutters
23 Remediation to be carried out
24 Validation of remediation

10.8 In this case conditions 3, 6, 9, 10, 11, 17 and 18 required attention before development commenced. Discharge of condition application submitted on the 27 November 2015 sought to deal with all the pre-development conditions prior to the expiry of the Planning Permission on the 26 March 2016. Discharge of condition letter dated 22 January 2016 confirmed discharge of conditions 3, 6 with a tacit agreement of conditions 17 and 18 subject to Environmental Agency agreement which was forthcoming on the 14 March 2016. Therefore, conditions 3 and 6 have been expressly discharged. Conditions 17 and 18 have been discharged in so far as the Environment Agency raised no objections albeit without the local planning authority issuing a formal discharge letter. Therefore, and at the time of the development commencing the local planning authority were in no position to consider enforcement action on condition 17 and 18 and thus form an exemption to the Whitely Principle under category 3 of Waksman's judgment.

10.9 With regard to condition 9 and 10, these required details of highway work to the access before development commences. These details were submitted as part of the discharge of condition application and the letter of discharge dated 22 January 2016 clarified that comments from the Council's Highway officers were yet to be received by the local planning authority. Upon research into the discharge of condition file it appears no further comments were received from the Highway officer.

10.10 The Highway Development Management team were re-consulted during pre-application discussions and for the purposes of this application. Highway officer consultation response 29 August 2024 sets out that the original information provided with the discharge of condition application is considered to be acceptable and would have therefore been acceptable at the time of this application. As with conditions 17 and 18, conditions 9 and 10 have not been formally discharged although it is clear the information submitted was acceptable and thus the local planning authority could

have discharged prior to the works being carried out. It follows, therefore that any enforcement action would have been irrational at the time the development was commenced and as such conditions 9 and 10 also fall into category 3 of Waksman's judgment and therefore an exemption to the Whiteley principle.

10.11 Condition 11 required details of an upgraded bus shelter at stop number 17542 which is adjacent to the petrol station on Northgate opposite the development site. On the discharge of condition submission the applicant demonstrate the bus shelter had already been upgraded. Google Streetview imagery from 2009 and 2012 supports this view and it is unclear why the condition was imposed in light of the upgraded shelter. It is therefore considered the condition was superfluous and would therefore not be capable of rendering the whole development is being unlawful. Condition 11 therefore falls into category 2 of Waksman's judgment.

11. Conclusion

11.1 Overall, the Pre-Development Conditions attached to the Planning Permission were either discharged prior to the work being carried out or fall into valid exemptions to the Whitely Principle sufficient enough not to render the works carried out to be unlawful.

11.2 The works undertaken were carried out prior to the expiry of the development and consistent with the Planning Permission.

11.3 Therefore, the applicant has demonstrate that the works undertaken to dig a trench were undertaken lawfully and pursuant to planning permission reference 2012/92343. It is recommended a certificate be issued to confirm the lawfulness of the works carried out in 2013.

Recommendation : Issue a certificate under section 191.
Decision Notice

It has been demonstrated that on the balance of probability that the works to dig a trench was undertaken lawfully and pursuant to planning permission reference 2012/92343 for the erection of B1, B2 & B8 employment development granted on the 26 March 2013.

This decision is based on the following details(s):-

Plan Type	Reference	Version	Date Received
Application Form	-	-	09/10/2024
Photographs x 9	-	-	09/10/2024
Letter dated 2 February 2016 notification of commencement	-	-	09/10/2024
Discharge of condition letter dated 22 January 2016 – 2015/93778	-	-	09/10/2024

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 preapplication advice service available, complied with the Kirklees Development Management Charter 2015 and otherwise actively engaged with the applicant in dealing with the application. The application was determined on the submitted information.