

**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.: 2025/CL/92619/E

Site: land off, Fieldhead Lane, Birstall, Batley

Description: Certificate of Lawfulness for engineering
operations to form a trench pursuant to outline planning permission
2017/93347

Case Officer: Laura Yeadon

Decision Reference: EXISTING OPERATIONS GRANTED

**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.**

Kevin Walton

AUTHORISED OFFICER

Date 10-Dec-2025

[Weblink](#)

Application Number: 2025/92619

Site: land off, Fieldhead Lane, Birstall, Batley

Proposal: Certificate of Lawfulness for the commencement of development of plot 12 approved pursuant to application 2022/92675 for variation of condition 2 (internal road specification) of permission 2020/93254 for variation of conditions 1 (Plans and Specification), 10 (Waste Collection), 11 (Electric Vehicle Charging Point) of previous reserved matters approval 2019/92710 pursuant to outline permission 2017/93347 for erection of 32 dwellings

1. Application

- 1.1 The applicant seeks a certificate of lawful development from the Local Planning Authority to confirm works carried out were undertaken pursuant to planning permission reference 2022/92675 granted on 1st February 2023 for the variation of condition 2 of permission 2020/93254 for variation of conditions 1 (Plans and Specification), 10 (Waste Collection), 11 (Electric Vehicle Charging Point) of previous reserved matters approval 2019/92710 pursuant to outline permission 2017/93347 for erection of 32 dwellings.
- 1.2 The application is submitted in accordance with Section 191 of the Town and Country Planning Act ["The Act"] and is stated within the application that a certificate is sought to establish that planning permission for the residential development of Plot 12 has been implemented though the layout of foundations for the retaining wall.
- 1.3 If it is concluded that the operation ground works are undertaken lawfully and pursuant to the planning permission, it may be concluded that the planning permissions have been implemented and can be completed in accordance with the approved plans.

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 of the requirements of any enforcement action 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 development 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.

4. Limitations

- 4.1 A Lawful Development Certificate 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.

5. Site visit

- 5.1 No site visit has taken place.

6. Site history

- 6.1 Relevant site history:

1990/00430 – Outline application for residential development – refused – 1st February 1991

1991/06620 – Landfill of former railway cutting – refused – 6th November 1992

2017/93347 – Outline application for erection of 32 dwellings – Conditional Outline Permission – 09/01/2018

2019/91089 – Discharge of condition 6 (Phase II) on previous permission 2017/93347 for outline application for erection of 32 dwellings – Approved – 17th May 2019

2019/91727 – Discharge of conditions 14 (drainage strategy) and 15 (drainage calculations) of previous permission 2017/93347 for outline application of 32 dwellings – split decision – 30th July 2020

2019/92710 – Reserved Matters application pursuant to outline permission 2017/93347 for erection of 32 dwellings – Section 106 approval – 11th September 2020

2020/93254 – Variation of conditions 1 (plans and specification) 10. (waste collection) and 11. (electric vehicle charging point) pursuant to reserved matters application 2019/92710 pursuant to outline permission no. 2017/93347 for erection of 32 dwellings – Section 106 approval – 20th March 2021

2020/93255 – Discharge of condition 7 (remediation) on previous permission 2017/93347 for outline application for erection of 32 dwellings – refused – 9th December 2020

2020/93570 – Discharge of conditions 14 and 15 (drainage) of previous permission 2017/93347 for outline application for erection of 32 dwellings – split decision – 19th January 2021

2021/91883 – Discharge of conditions 3 (tree protection). 11 (road traffic noise). 12 (electric vehicle charging), 14 (drainage), 16 (public open space), 17 (affordable housing) and 18 (pedestrian/cycleway) of previous outline permission 2017/93347 for erection of 32 dwellings – split decision – 29th June 2021

2021/92058 – Discharge of condition 5 (footway) of previous outline permission 2017/93347 for erection of 32 dwellings – refused – 30th June 2021

2021/92590 – Discharge of condition 2 (internal adoptable estate road), 3 (construction management plan). 4 (materials) and 6 (ventilation scheme) of previous reserved matters approval of 2019/92710 for erection of 32 dwellings – split decision – 29th July 2021

2021/93097 – Discharge of condition 13 (biodiversity enhancement) of previous permission – approved 8th November 2021

2021/93967 - Discharge of condition 7 (remediation strategy) of previous outline permission 2017/93347 for erection of 32 dwellings – approved 4th March 2021

2021/94042 – Discharge of condition 13 (biodiversity enhancement) of previous outline permission 2017/93347 for erection of 32 dwellings – withdrawn 20th December 2021

2022/90153 – Discharge of condition 5 (footway provision) of previous permission 2017/93347 for outline application or erection of 32 dwellings – withdrawn – 16th August 2022

2022/90154 – Discharge of condition 2 (internal roads) or previous permission 2020/93254 for variation of condition 1 (plans and specification), 10 (waste collection), 11 (electric vehicle charging point) pursuant to reserved matters application 2019/92710 pursuant to outline permission 2017/93347 for erection of 32 dwellings – withdrawn – 16th August 2022

2022/92583 – Variation of conditions 5 (footway) and 14 (drainage) on previous permission 2017/93347 for outline application for erection of 32 dwellings – approved 1st December 2023

2022/92675 – Variation of condition 2 (internal road specification) of permission 2020/93254 for variation of conditions 1 (plans and specification), 10 (waste collection), 11 (electric vehicle charging point) of previous reserved matters approval 2019/92710 pursuant to outline permission 2017/93347 for erection of 32 dwellings – approved 1st February 2023

2022/93025 – Discharge of condition 12 (electric charging point) on previous permission 2017/93347 for outline application for erection of 32 dwellings – approved – 7th November 2022

2023/91615 – Non material amendment to previous permission 2022/92675 for variation of condition 2 (internal road specification) of permission 2020/93254 for variation of conditions 1 (plans and specification), 10 (waste collection), 11 (electric vehicle charging point) of previous reserved matters approval 2019/92710 pursuant to outline permission 2017/93347 for erection of 32 dwellings – approved – 26th July 2023

2025/92959 – Non material amendment to previous permission 2022/92675 for variation of condition 2 (internal road specification) on permission 2020/93254 for variation of conditions 1 (Plans and Specification), 10 (Waste Collection), 11 (Electric Vehicle Charging Point) on previous reserved matters approval 2019/92710 pursuant to outline permission 2017/93347 for erection of 32 dwellings – approved – 5th November 2025

2025/93022 – Discharge of details reserved by condition 2 (estate roads) on previous permission 2022/92675 for variation of condition 2 (internal road specification) on permission 2020/93254 for variation of conditions 1 (Plans and Specification), 10 (Waste Collection), 11 (Electric Vehicle Charging Point) on previous reserved matters approval 2019/92710 pursuant to outline permission 2017/93347 for erection of 32 dwellings – *under consideration – not yet determined*

6.2 With regard to the above outline permission, reserved matters permission and variation of conditions permissions, the red line boundary appears to be consistent within the submissions and subsequent permissions.

6.3 An Enforcement Notice was issued on 7th February 1994 in relation to breaches of conditions on a 1982 permission. As this was in

relation to the tipping of general non-hazardous industrial waste including amounts of inert slurries on a 1982 permission, this enforcement notice does not impact on the determination of this application.

7. Evidence submitted in support of the application

- Application form
- Covering letter – ref: PP-14308631
- Decision notice – 2017/93347 – Outline Planning Permission
- Decision notice – 2019/92710 – Approval of Reserved Matters
- Decision notice – 2022/92675 – Variation of Condition on Reserved Matters
- Email – rewording of 2019/92710 highways condition to non-pre-commencement condition
- Covering letter to accompany application 2022/92583 to vary conditions 5 and 14 on 2017 outline permission
- Covering letter to accompany application 2022/92675 to vary condition 2 of 2020/93254 variation of condition application
- Email – dated 9th September 2022 confirming work executed on site
- 5 x photographs of works to carried out
- Location plan – drawing number 3001.09.600 – dated July 20
- Site layout plan – drawing number 3001.09.603S – dated Nov 20

8. Evidence submitted against the Application

8.1 None

9. Consultation

9.1 None required

10. Assessment of Evidence

10.1 The applicant within the application form states that a lawful start to the development was made on 9th September 2022 through the laying of foundations for a retaining wall adjacent to Plot 12. The covering letter submitted with the application states that... *‘The works undertaken are the laying of foundations for a retaining wall to Plot 12. Plot 12 was granted planning consent through Reserved Matters consent reference 2019/61/92710/E, approved on the 11th September 2020. The Reserved Matters were submitted pursuant to Outline consent 2017/93347 which was approved on the 9th January 2018. Whilst there are no timescale relating to the implementation of the planning consent on either the Outline or Reserved Matters application, Sections 91 and 92 of 1990 Act impose default time limits on the implementation of planning permission: on Outline permissions, three years to apply for reserved matters and two years*

to implement the permission from the final approval of reserved matters.'

- 10.2 The letter goes on to state that....'*Outline planning consent was granted on the 9th January 2018. The Reserved Matters submission was received by the Council on the 13th August 2019, within the three-year time limit. The Reserved Matters was granted on the 11th September 2020, to ensure an extant permission, the development therefore needed to be implemented by the 12th September 2022.*' Therefore'*This application seeks to obtain a certificate of lawful development to provide necessary confirmation that works which have been undertaken on site constitute a lawful start on site for plot 12.'*
- 10.3 The letter then details all pre-commencement conditions for both the Outline application and Reserved Matters application with the associated application numbers for each condition and the date these were received by the LPA and their approval dates. It concludes with an explanation of how the works have been undertaken and makes reference to the appendices as listed in section 7 above.

11. Commencement

- 11.1 National Planning Policy Guidance states that if a Local Planning Authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version less than probable there is no good reason to refuse the application. in this instance, within appendix 5 of the submission, an email with photographs has been submitted indicating that works on site commenced on 9th September 2022.
- 11.2 Section 91 provides a default time frame for which development must be begun.....' Development must be commenced no later than the expiration of two years from the final approval of reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved.' Reserved matters 2019/91710 decision notice is dated 11th September 2020.
- 11.3 The covering letter with the application states that the works to commence development needed to be implemented by 12th September 2022. This is disputed by the LPA as the decision notice states that works should be commenced no later than date of final approval which was 11th September 2020 and therefore, the LPA considered that for works to have commenced no later than the expiration date of 11th September 2022, the works should have commenced no later than 10th September 2022. Despite the discrepancy, the submitted information submitted indicates that works commenced on 9th September 2022 and therefore prior to the expiration date of the latest variation of condition application.

- 11.4 The email regarding commencement and the submitted photographs indicate that the works to dig the foundations for the retaining wall for Plot 12 were within the expiry date. As the Local Planning Authority has no good evidence to the contrary, it is considered that the works were undertaken prior to the expiration of the S73 application under reference 2022/92675. The photographs demonstrate that the works would be beyond what may be considered de-minimis and therefore considered capable of implementing a planning permission. The applicant refers to site layout plan 3001.09.603 D as the approved plan although this is not listed as an approved plan on the reserved matters approval for 2019/92710 but is listed on section 73 approval 2020/93254 dated 30 March 2021. It is therefore considered the operative planning permission was 2017/93347 with reserved matters 2020/93254 at the time the works were carried out. This plan indicates the position of plot 12 and by virtue of the difference in land levels, the indication of a retaining wall south west of the side elevation of plot 12. This plan is also annotated with "garage under construction" approximately 2 metres north west of the northern end of the retaining wall. The retaining wall measures approximately 2 metres directly east of the site boundary at the north end, has a "dog leg" running south leaving a distance of approximately 1.7 metres east of the site boundary on the south end. The photographs submitted show the garage under construction with concrete foundations reasonably consistent with the detail shown on the approved plan. Consequently, the applicant has satisfactorily shown the foundation to be reasonably within the approved location to the degree it can be said the foundations can be incorporated into the development.
- 11.5 It is also noted that Building Control records indicate that a site visit was completed on 12th September 2022 and this concluded that there was no sign of any works for PCC manholes commencing. However, this does not categorically mean that no works had been carried out.
- 11.6 It is therefore considered that the works were implemented prior to the expiration of the relevant reserved matters approval.

Conditions

- 11.7 Planning permission has been granted for the site via various applications and were subject to a number of conditions that required further details to be agreed prior to development commencing ["Pre-Development Conditions"]. The Court has held (*Whitley & Sons v Secretary of State for Wales* (1992)) that Pre-Development Conditions must be discharged for a development to be lawfully implemented. This is referred to as the Whitley Principle. The Court has since held that a number of exemptions may be applicable to the Whitley Principle whereby a breach of condition need not be fatal to the implementation of planning permission. *J Waksman (Bedford Borough Council v Secretary of State for Communities and Local*

Government & Murzyn (2008)) succinctly summarised the Court interpretation of these exceptions in paragraph 24 of his judgement. He states that there are three questions 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?)
- 3) If so, do any of the exceptions to the Whitley Principle apply, such as irrationally, abuse of power on the part of the 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 works carried out are unlawful and the permission was not lawfully implemented.

11.8 In this case, the approved applications in relation to pre-commencement conditions are as follows:

- 2017/92347 – Outline Planning Permission
- 2020/93254 – Approval of Reserved Matters

It is noted however that the Variation applications did not impose pre-commencement conditions.

11.9 Each of the above applications shall be assessed below:

11.10 Outline application – 2017/92347

- 1) Approval of details (Reserved Matters) before development commences
- 2) Works within Condition 1 (Reserved Matters) carried out in accordance with plans
- 3) Before development commences - Erection of protective fencing before development commences/materials brought on site
- 4) Prior to development commencing -Wall to site frontage set back, cleared of all obstructions to visibility and tarmac surfaced prior to development commencing
- 5) Development shall not commence - Scheme detailing provision of 2.0m wide footway, construction specification, surfacing, drainage, kerbing and relocation of street light columns to be submitted before development brought into use
- 6) Development shall not commence - Phase II Intrusive Site Investigation Report to be submitted before development begins
- 7) Development shall not commence - Remediation Strategy see condition 6
- 8) Works to be completed in accordance with Remediation Strategy see condition 7
- 9) Validation Report submitted following works identified in conditions 7 and 8
- 10) Identified unexpected contamination reporting

- 11) Before development commences - Road traffic noise to be submitted before development commences
- 12) No development shall take place - Scheme detailing electric charging points submitted before occupation
- 13) No development shall take place - Biodiversity enhancement scheme submitted before development commences
- 14) No development shall commence - Drainage details to be submitted before development commences
- 15) No development shall commence - Drainage calculations to be submitted before development commences
- 16) No material operation as defined.....- Public open space provision to be submitted before development commences
- 17) No material operation as defined.....- Affordable housing provision to be submitted before development commences
- 18) Any subsequent application to include details of pedestrian/cycleway route

11.11 The covering letter refers to conditions 3, 5, 6, 7, 11, 13, 14, 15, 16 and 17 being pre-commencement conditions. The Local Planning Authority agree with these findings. However, it is considered both conditions 4 and 12 also require details to be agreed prior to development commencing. Condition 5 and 14 relates to highways works and drainage works and the letter states that that these were varied from pre-development conditions to pre-occupation conditions under application 2022/92583. The Local Planning Authority agree these findings although this approval came after the works were carried out and as such the conditions that required attention at the time the works were carried out are those listed above.

11.12 Reserved Matters application – 2020/93254

- 1) Works to be carried out in accordance with the approved plans
- 2) Prior to development commencing - Highway details to be submitted before development commences
- 3) Prior to development commencing - Construction management plan to be submitted before development commences
- 4) External facing and roofing materials to be submitted prior to use
- 5) Landscape scheme implementation following commencement of development
- 6) Ventilation scheme to be submitted prior to installation of windows
- 7) Pedestrian and cycle routes prior to occupation
- 8) Travel Plan to be submitted prior to occupation
- 9) Parking areas to be laid out with hardened and drained surface prior to occupation
- 10) Bin presentation point to be provided and paved prior to occupation
- 11) Electric vehicle charging points to be installed prior to occupation
- 12) Boundary treatment erected prior to occupation
- 13) Sound attenuation measures to be installed prior to occupation

14) Works to be undertaken in accordance with Arboricultural Impact and Method Statement

- 11.13 The covering letter states that there is only one pre-commencement condition (condition 2) which related to highway works which was varied to be a pre-occupation condition as with condition 5 of the Outline permission under application 2022/92675. However, as above, the relevant conditions at the time the works were carried out are those listed above. The Local Planning Authority also consider condition 3 (construction management plan) to also be a pre-commencement condition. However, it is noted that condition 3 was formally discharged under application 2021/92590 provided that the ongoing requirement of the condition is fulfilled.
- 11.14 Taking each condition on the Outline Permission (2017/93347) in turn:
- 11.15 Condition 3 – tree protective fencing – application number 2021/91883 – discharged on 29th June 2021 – noted that this is an ongoing requirement to maintain the fencing until the development is completed.
- 11.16 Condition 6 – Phase II Intrusive Site Investigation Report – application number 2019/91089 – discharged on 17th May 2019
- 11.17 Condition 7 – Remediation Strategy – application number 2021/93967 - discharged on 4th March 2022
- 11.18 Condition 11 – road traffic noise – application number 2021/91883 – discharged on 29th June 2021
- 11.19 Condition 13 – biodiversity – application number 202193097 – discharged on 8th November 2021 – noted that there is an ongoing requirement to be retained thereafter
- 11.20 Condition 14 – drainage – application number 2021/91883 – discharged in principle on 29th June 2021 with variant condition on 2022/92583 for details to be provided prior to occupation
- 11.21 Condition 15 – drainage calculations – application number 2019/91727 - discharged 30th July 2020 and application number 2020/93570 on 19th January 2021 – noted that there is an ongoing requirement for the details to be retained thereafter
- 11.22 Condition 16 – public open space – application number 2021/91883 – discharged via S106 agreement on Reserved Matters
- 11.23 Condition 17 – affordable housing - application number 2021/91883 - discharged via S106 agreement on Reserved Matters
- 11.24 Taking each condition on the Reserved Matters Permission (2020/93254) in turn:

- 11.25 Condition 2 – highways details – not discharged.
- 11.26 Condition 3 – Construction Management Plan – discharged for previous reserved matters 2019/92710 but not 2020/93254.
- 11.27 At the time development works commenced on the 9 September 2022, pre-development conditions 4, 12 of the outline planning permission and condition 2 and 3 of the relevant reserved matters approval had not been discharged.
- 11.28 Regarding condition 4, this requires that prior to development, the existing boundary wall to be set back and cleared of all obstructions to visibility and then tarmac surface with details to be agreed with the Local Planning Authority. However, plan reference 17006/GA/010 rev D showing the approved visibility splay indicates that the wall would not need to be set back and the tarmac surface is existing as public footway. It is not considered this condition can be considered to render the whole development unlawful.
- 11.29 Condition 12 of the outline permission required details of electric charging points within the development before development commences. Approved reserved matters plan 3001/09.105 B indicated charging points for all plots and as such could be considered to be discharged in principle and therefore not a condition that could be said to render the whole development unlawful.
- 11.30 Condition 2 of the reserved matters approval 2019/92710 required internal road details to be agreed was applied to be discharged under application reference 2021/92590. The condition was not discharged by reason of the Council's section 38 team failing to pass comment on the suitability of the scheme and not because the details were unacceptable. The details required by the scheme were in fact amended on section 73 application 2022/92675 to only require the details to be agreed once works to the internal commenced. This application was submitted prior to the works on site taking place but not determined until 2 February 2023. Nonetheless, it is considered that officers would have been minded to vary the condition accordingly given this was the reason the application was submitted in August some 4 weeks prior to the works commencing. In light of the section 38 officers reluctance to consider the initial attempt to discharge the condition and officers variation of the condition to trigger details at a later stage in the development, it is considered that the Local Planning Authority had the information available to them at the time works were carried out but choose not to discharge the condition. Moreover, officers were willing to accept these details were not required prior to development commencing and thus would have been satisfied to accept the details after the works on site were carried out. Consequently, it is considered that it would have been irrational for the Local Planning Authority to take enforcement action at the time the works commenced and thus is considered to be an

exception to the Whitely principle. Therefore, a breach of condition 2 of the reserved matters approval would not render the foundation works unlawful.

11.31 Equally and with regard to condition 3 of reserved matters, details required by this condition were discharged for a previous reserved matters approval and despite the 2020/93254 having the same condition requiring details, there would be no rational in take action when the Local Planning Authority had acceptable details which it could have required the developer to implement if expedient to do so. Therefore, a breach of condition 3 of the reserved matters approval would not render the foundation works unlawful.

12. Conclusion

12.1 It is therefore considered that the pre-development conditions attached the Outline Permission and Reserved Matters Permission were either discharged prior to works being carried out, do not render the development as a whole unlawful or that there would be any rational in taking enforcement action. The works therefore were carried out prior to the expiry of the planning permission, are consistent with the planning permission and whilst undertaken in breach of condition the works are not considered to be unlawful in so far as the Whitely principle can take effect.

12.2 Therefore, the applicant has demonstrated that the works were undertaken to dig foundations for a retaining wall to plot 12 were undertaken lawfully and pursuant to outline planning permission 2017/93347 by virtue of details approved under reserved matters approval 2020/93254. It is recommended that a certificate be issued to confirm the lawfulness of the works carried out in September 2022.

12.3 Notwithstanding the description of development as provided by the applicant, it is considered necessary to modify the description to grant a lawful development certificate for the existing works only given these are the existing works undertaken.

Recommendation – issue a certificate under section 191

It has demonstrated that the works were undertaken to dig foundations for a retaining wall to plot 12 were undertaken pursuant to outline planning permission 2017/93347 for erection of 32 dwellings and by virtue of details approved under reserved matters approval 2020/93254.

Plans and specifications schedule:-

Plan Type	Reference	Version	Date Received
Application form			3 rd October 2025

Plan Type	Reference	Version	Date Received
Covering letter	Johnson Mowat		3 rd October 2025
Location plan	3001.09.600		18 th September 2025
Site layout plan	3001.09.603D		18 th September 2025
Photos x 5			18 th September 2025
Email regarding works commenced	Dated 9 th September 2022		18 th September 2025
Email from LPA regarding re-wording of conditions	Dated 25 th July 2022		18 th September 2025
Covering letter re variation of conditions 5 and 14 of 2017/93347	Johnson Mowat		18 th September 2025
Covering letter re variation of condition 2 of 2020/92354	Johnson Mowat		18 th September 2025

Dated: 12th November 2025