

5th May, 2021

Development Management
Ribble Valley Borough Council
Council Offices
Church Walk
Clitheroe
Lancashire
BB7 2RA

To whom it may concern,

Application for a Lawful Development Certificate of a Proposed Operation – seeking formal confirmation that Appeal Ref: APP/T2350/W/16/3164118 has been implemented and that the erection of the approved dwelling houses, in accordance with the permission, would be lawful in perpetuity.

- 1.1 Planning permission was granted on the 5th May 2017 by the Planning Inspectorate for the erection of two detached houses following demolition of existing house at 30 Barker Lane, Blackburn BB2 7ED in accordance with the terms of the application, Ref 3/2016/0346, dated 13 April 2016 (a copy of the Inspectors decision and approved site plan (in accordance with condition 2) has been submitted with this application).
- 1.2 The approval was subject to 15 conditions. Condition 1 required that - The development hereby permitted shall begin not later than three years from the date of this decision.
- 1.3 In relation to **condition 1**, Section 56 of the Town and Country Planning Act 1990 states that development of land shall be taken to be

initiated -

(1) (a) if the development consists of the carrying out of operations, at the time when those operations are begun;

(b) if the development consists of a change in use, at the time when the new use is instituted;

(c) if the development consists of the carrying out of operations and of a change of use, at the earlier of the times mentioned in paragraphs (a) and (b).

It continues by stating that development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.

1.4 It is considered that (1)(a) of Section 56 is relevant to the development approved under appeal reference APP/T2350/W/16/3164118.

1.5 Paragraph (4) of Section 56 states that "material operation" means-

(a) any work of construction in the course of the erection of a building;

(aa) any work of demolition of a building;

(b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;

(c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);

(d) any operation in the course of laying out or constructing a road or part of a road;

(e) any change in the use of land which constitutes material development.

1.6 Taking the above into account, the following evidence has been submitted with this application to demonstrate that 'material operations' were carried out prior to 5th May 2020 (i.e. the expiry of the three- year limit of condition no. 1 of appeal reference APP/T2350/W/16/3164118).

- 1) A written statement from Property Funding Limited detailing that during a site visit on 25th October 2018, the house at 30 Barker Lane was still in situ and the statements includes a dated photograph which demonstrates this.
 - 2) A Google Earth image dated 06/2018 highlighting that the house at 30 Barker Lane was still in situ along with a Right Move image of the house in situ in May 2018.
 - 3) A second Google Earth image dated 04/2020 clearly indicating that the house at 30 Barker Lane has been demolished and that foundations had been laid.
 - 4) The final image is an overlay of the approved site layout plans over the 04/2020 Google Earth image to highlight that the foundations had been laid in accordance with the approved site plan.
- 1.7 It is considered that the evidence summarised above firmly establishes that demolition of 30 Barker Lane and the laying of foundations in accordance with the approved site plan constitute 'material operations' for the purposes of Section 56(4) of the Act 1990 and that these material operations were carried out prior to 5th May 2020 (i.e. the expiry of the three- year limit via condition no. 1 of appeal reference APP/T2350/W/16/3164118).
- 1.8 In relation to the remaining conditions, it is accepted that conditions 2-15 have not been discharged such that, dependent on the wording of the conditions, they may have been breached.
- 1.9 There is much case law considering the effect of breaching a condition on the implementation of a permission which is summarised below.
- 1.10 *FG Whitley & Sons v Secretary of States for Wales* [1992] 3 WLUK 339 concluded that if the development was in contravention of a 'condition

precedent', it cannot properly be described as commencing in accordance with the planning permission. This has become known as the 'Whitley principle'.

- 1.11 The R (Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin) 179 case sets out, that in order to consider whether the Whitley principle applied (and whether the effect of the breach made the development unlawful) one had to consider:
- 1) how the condition was phrased (i.e. a distinction had to be drawn between a condition which expressly required some action to be undertaken before development is commenced, and a condition which expressly prohibits any development taking place before a particular requirement has been met;
 - 2) the effect of the condition in the context of the permission (i.e. does the condition go to the heart of the permission so that a failure to comply would make the development unlawful?)
- 1.12 It was held that only when both tests are satisfied is it a condition precedent to which the Whitley principle applies and there would be development without planning permission. If that is not the case, it would be a breach of the condition but there would **not** be development without planning permission.
- 1.13 Judge Waksman in Bedford Borough Council v SSCLC [2008] EWHC 2304 (Admin) states that a distinction must be drawn for 1) above between (a) a condition which in truth merely stipulates that something must be done before the time when the development commences, and (b) a condition which in truth goes further and stipulates that the development cannot commence unless the condition is fulfilled.
- 1.14 The Court of Appeal decision in Greyfort Properties Ltd v SSCLG [2011] EWCA Civ 908 applied both the Hart Aggregates judgement and the principles set out in Whitley. It specifically endorsed the need for

the conditions to go to the “heart of the matter” to be a true condition precedent.

1.15 Mr C M G Ockelton, in *Meisels v SSHCLG and LB Hackney* [2019] stated that ‘The question whether a condition “goes to the heart of the planning permission” is not merely a matter of construing the grant of permission. The grant may give reasons why the condition is imposed; but those reasons cannot resolve the question by themselves. Rather, the question can be answered only by a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context. In other words, this question is a matter of planning judgment’.

1.16 The only three conditions considered to be pre-commencement conditions in this case are conditions 8), 13) and 15) which state:

8) No development shall take place until details of the provisions to be made for building dependent species of conservation concern, artificial bird nesting boxes and artificial bat roosting sites have been submitted to, and approved in writing by the local planning authority. The details shall be submitted on a dwelling/building dependent bird/bat species development site plan and include details of the numbers of artificial bird nesting boxes and artificial bat roosting sites. The details shall also identify the actual wall and roof elevations into which the above provisions shall be incorporated. The approved artificial bird/bat boxes shall be incorporated into the dwellings during the actual construction phase before the dwelling is first brought into use and retained thereafter.

The Inspectors decision notes that the condition is necessary to ensure an acceptable form of development in respect of safeguarding protected species.

13) No development shall take place until all the existing trees within, or directly adjacent, to the site (except those shown to be removed on

the approved plans), have been enclosed with temporary protective fencing in accordance with BS 5837: 2012 Trees in relation to design, demolition and construction – Recommendations. The fencing shall be retained during the period of construction and no work, excavation, tipping, or stacking/storage of materials shall take place within such protective fencing during the construction period.

The Inspectors decision notes that the condition is necessary to ensure an acceptable form of development in respect of preserving the character and appearance of the area.

15) No development shall take place, including any works of demolition, until a Construction Method Statement has been submitted to, and approved in writing by the local planning authority. The Statement shall provide for:

- Timing of delivery of all off site highway works
- The parking of vehicles of site operatives and visitors
- The loading and unloading of plant and materials
- The storage of plant and materials used in constructing the development
- The erection and maintenance of security hoarding
- Wheel washing facilities and road sweeper
- Details of working hours
- Contact details for the site manager
- Periods when plant and materials trips should not be made to and from the site (mainly peak hours but the developer to identify times when trips of this nature should not be made)
- Routes to be used by vehicles carrying plant and materials to and from the site
- Measures to ensure that construction and delivery vehicles do not impede access to adjoining properties.

The approved Construction Method Statement shall be adhered to throughout the construction period for the development.

The Inspectors decision notes that the condition is necessary to ensure an acceptable form of development in respect of residential amenity.

- 1.17 Taking case law into account it is considered that condition 8 merely stipulates that details of the artificial bird nesting boxes and artificial bat roosting sites must be submitted before any development takes place whereas conditions 13 and 15 go further, and stipulate that the development cannot commence unless the condition is fulfilled. It is therefore considered that only conditions 13 and 15 are true pre-commencement conditions.
- 1.18 Furthermore, in relation to condition 8 the Daylight Scoping Survey prepared by EED dated 5th October 2015 and submitted with the planning application, found no evidence of roosting bats or nesting wild birds such that the condition was not required to safeguard a protected species. The inclusion of bird and bat boxes could therefore only be considered as a more peripheral matter.
- 1.19 With regards to conditions 13 and 15, for these conditions to be true conditions precedent, they must also go to the heart of the subject matter of the planning permission and in order for them to be considered as going to the heart of the matter, failure to comply with them would need to make the development unlawful.
- 1.20 It is considered that failure to comply with conditions 13 (tree fencing) and 15 (construction method statement) would not make the development unlawful as the two conditions do not go to the heart of the permission which was for the erection of two detached houses following demolition of the existing house such that the matters these two conditions are concerned with, are more peripheral.
- 1.21 When a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context is carried out in order to form a planning judgment, the following points are important.

- 1) The development which has taken place – demolition and foundations – has been done in accordance with the approved plans.
- 2) Furthermore, the main focus of both of these conditions is on construction, i.e. that the protective tree fencing should remain in place during construction and that the construction method statement should be adhered to during construction and construction of the houses has not yet commenced.
- 3) It is also considered that failure to comply with these conditions has not led to the reasons, why the conditions were imposed, being contravened, as even without the tree fencing and construction method statement there has been no impact on the character and appearance of the area or residential amenity.
- 4) With particular regard to condition 13, the trees are not protected so could be removed at any time without permission.

1.22 It is considered that the evidence submitted with this application clearly demonstrates that material operations' were carried out prior to 5th May 2020. Furthermore it is considered that as a matter of planning judgement, that whilst there has been a breach of conditions 8, 13 and 15 the wording of condition 8 is such that it is not a true pre-commencement condition and that condition 13 and 15 do not go to the heart of the permission due to the fact that failure to comply with them has not made the development unlawful.

1.23 As a result, it is considered that planning permission reference APP/T2350/W/16/3164118 has been lawfully implemented such that the erection of the approved dwelling houses would be lawful and that planning permission reference APP/T2350/W/16/3164118 will remain extant in perpetuity.

Yours sincerely,

Kate Grimshaw

