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Application of Lawful Development Certificate of Existing Use or Development

Dear Officer

On behalf of the Applicants, Strawberry Star SL1 Limited, we submit an application for a lawful development certificate to Gravesham Borough Council as Local Planning Authority (LPA) for the redevelopment at the Former Gravesend and North Kent Hospital (M Block), Clifton Road, Gravesend, Kent.

The application is made under the provisions of Section 191c of the Town and Country Planning Act (TCPA) 1990, relating to certificates of lawfulness of existing use or development and failure to comply with any condition or limitation. The application serves to ascertain with the Local Planning Authority (LPA) whether operations carried out in, over or under the land are lawful within the specific scope of Permission 20220915.

The operations relate to progressing with the approved full planning permission, which includes the following description of development:

"Conversion of existing building with a side extension and a roof extension, the construction of a new residential building to provide residential units (class C3) consisting of one bed, two bed and three bed homes, together with associated car parking, motorcycle and cycles spaces alongside amenity space, private gymnasium and waste and space in Class E as flexi use space) to allow: amendments to Block M only (conversion building), including amendments to unit mix, internal layouts and parking, introduction of additional private and shared amenity space, elevational changes and amended material palette".

Condition 1 of the planning permission required development to commence by the 17th February 2025. The Applicant has started operations on site in accordance with the approved layout through the demolition of a detached building. This work was undertaken prior to the expiry date of the permission, although some pre-commencement conditions had not been formally discharged. These conditions were subject to a live application to vary the triggers but these applications were not determined prior to the expiry date and remain as pending determination.

This application presents evidence in support of the assertion that permission 20220915 has been lawfully implemented and, to this effect, the existing works are lawful and proposed works in accordance with the description of development as set out above can continue lawfully within the remit of this permission.



The Application

This letter should be read in conjunction with the following suite of submission documents:

- Site Location Plan.
- Legal Opinion prepared by Mirkwood Evans Vincent, dated 18th March 2025.
- Statutory Declaration provided by the Applicant (Simon Taylor, Development Director), dated 14th March 2025. The appendices include:
 - ST1 – Site Location Plan
 - ST2 – Copy of Planning Permission 20220915
 - ST3 – Copy of Conditions Approval 20241118
 - ST4 – Emails confirming arrangements for demolition of former Engine Room on 15th February 2025.
 - ST5 (a-e) – Photographs confirming demolition of former Engine Room on 15th February 2025.

Purpose of the Application

This application serves three key purposes:

- a) It presents evidence that material operations were undertaken on site prior to the expiry of permission 20220915 (before 17th February 2025).
- b) It seeks confirmation that, as identified in the submitted Legal Opinion, pre-commencement conditions 5, 7, 8, 9, 10 and 11 are process conditions and do not go to the heart of the permission. In addition, these conditions are proposed to be varied through minor amendments to the wording within two live applications – a S.73 application (20241124) and a non-material amendment application (20250112). Both applications were submitted prior to the expiry of Permission 20220915. Both applications remain pending determination.
- c) With the above points considered, it seeks confirmation that planning permission 20220915 has been lawfully implemented. This status will allow the conditions associated with the permission to be amended and a decision to be issued on both live applications (20241124 and 20250112).

Background

The application relates to land at the former Gravesend Community Hospital. This includes an existing building (known as M Block) and an area of vacant open land. The site is shown edged red on the Site Location Plan. Positioned on the corner of Clifton Road (to the north) Stuart Road (to the west), the site is within the town centre and close to local amenities and services.

We understand the site became surplus to requirements as a hospital and subsequent planning applications have proposed alternative uses. A schedule of the recent planning history (since the cessation of the hospital use) is at Appendix 1. Currently the site lies vacant and underutilised. It is within a very sustainable location. In order to make efficient use of the site to deliver the approved development, the Applicant sought to implement approved permission 20220915 by the demolition of the former 'Engine Room' building.



The operations for which this application seeks confirmation as lawful relates to further works to implement permission 20220915.

Planning History

The site received planning permission for the conversion of the existing building with extensions, a new residential building, flexible spaces, parking and open space on 17th February 2022 (20190504). Minor material amendments were submitted via a S.73 application (20220915) and approved 25th November 2022. As this was a S.73 permission it aligned with the expiry date of 17th February 2025 of the original permission.

Key conditions attached to this permission were successfully discharged via application 20241118 (validated on 9th December and approved on 31st January 2025).

An application to vary Conditions 5, 7, 8, 9, 10 and 11 was validated a day later on 10th December 2024. As a major application, the 13 week target determination date was stated as 11th March 2025, which falls beyond the expiry date of 17th February 2025. A subsequent application for a non-material amendment was lodged on 10th February 2025. Both of these applications sought the same very slight amendments to the wording of the conditions to delay the 'trigger points', allowing additional information to be provided 'prior to below ground works' rather than 'prior to commencement'. This would secure the purpose of each condition, but demolition and commencement of development would be permitted in lieu of this additional information. It is important to note that none of the conditions listed related to demolition. Both of these applications are, at the time of writing, still pending.

Within this time, and without formal approval of either of the above applications, the Applicant commenced planning permission 20220915 by demolishing the former 'Engine Room' building on site in line with the approved plans on 15th February 2025. No below ground works have been undertaken.

This was undertaken in breach of condition. However, as noted above, with two applications submitted prior to the expiry date of 17th February 2025, and noting that these conditions are referred to in the Legal Opinion as 'process conditions' i.e. they do not go to the heart of the permission. Key references are made to the Legal Opinion which sets out a case for the lawful implementation of Permission 20220915.

Lawful Development Certificate

As a result of the aforementioned series of events, this application seeks to clarify the lawful status of the approved development. Specifically, confirmation that the development has been lawfully implemented.

Relating back to the three key purposes of the application, the Legal Opinion, Statutory Declaration and appendices are all referenced as evidence below in relation to a) material operations and commencement of development, b) assessment of the pre-commencement conditions and c) lawful implementation to facilitate the issue of a positive certificate.



Material Operations and Commencement of Development

The TCPA (1990) provides criteria to ascertain the point at which a development has commenced at Section 56. This includes material operations and subsection (4aa) confirms that these include demolition where this is required to facilitate part of an approved scheme.

The submitted photographs, Statutory Declaration together with the email trail included within Exhibit ST4 of the declaration all evidence the demolition of the former 'Engine Room' building on 15th February 2025. This demolition is recognised within the Legal Opinion as a material operation to implement the permission prior to the expiry of Permission 20220915 (before 17th February 2025).

The Legal Opinion references relevant case law to support this application. This is not repeated in detail within this letter, so please refer directly to the Opinion.

In summary, it is established through the Whitley principle (Whitley & Sons v Secretary of State for Wales (1992) 64 P&CR 296) that to achieve the implementation of a planning permission, material operations must be lawful. This principle has been scrutinised through the courts and R (Hart Aggregates) v Hartlepool Borough Council [2005] EWHC 840 (Admin); [2005] JPL 1602 is of relevance. The Judgment concluded that works in breach of a planning condition did not always render the whole development 'unlawful'. This would rely on a case-by-case review focused on the wording of conditions - whether they go 'to the heart of the permission'. This is supported by Bedford BC v Secretary of State for Communities and Local Government [2008] EWHC 2304 (Admin); [2009] JPL 604 where the Judgment found that details of landscaping and boundary treatment 'did not go to the heart of the permission'. The development was 'lawfully implemented' despite being in breach of a pre-commencement condition.

The Applicant's case is that Permission 20220915 was implemented in accordance with Section 56 of the TCPA (1990) through the demolition works that took place on site prior to the expiry of the permission. This is supported by the Legal Opinion, which goes on to note that on the basis of the case law available, a sequential test should be undertaken to review the relevant conditions based on their wording, whether i) they go to the heart of a permission and ii) whether they could be enforced against. This test will enable a decision to be made as to whether the implementation of a permission is lawful. This is considered within the 'Analysis' of the Legal Opinion, and summarised below.

Review of Pre-commencement Conditions

Pre-commencement conditions should only be utilised where they are clearly justified. In reviewing the pre-commencement conditions attached to the Permission 20220915, the demolition of the Engine Room would not impact on any of the conditions listed within the two subsequent applications to amend their 'trigger points', namely:

- Condition 5 (Contaminated Land)
- Condition 7 (Surface Water Drainage Scheme)
- Condition 8 (Surface Water Verification Report)
- Condition 9 (Water Contamination)



- Condition 10 (Foul and Surface Water Sewerage Disposal)
- Condition 11 (Heritage and Archaeology)

The Planning Practice Guidance advises against the use of pre-commencement conditions unless there is a clear justification:

“Such pre-commencement conditions should only be used where there is a clear justification, which is likely to mean that the requirements of the condition (including the timing of compliance) are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission.”
Paragraph: 007 Reference ID: 21a-007-20180615 (emphasis added)

The proposed timing of the conditions as ‘prior to commencement’ was arguably not so fundamental to the development that it would otherwise be necessary to refuse the application. The Legal Opinion concludes that demolition works undertaken would not affect the requirements of these pre-commencement conditions as no below ground works were needed.

The Legal Opinion reviews each of the pre-commencement conditions in turn to establish if they go to the heart of the planning permission, or if they are ‘process conditions’ to be followed in constructing the development. Please refer directly to the submitted document for this detailed analysis. It concludes that each of the pre-commencement conditions relate to process, rather than going to the heart of the development.

If the LPA concurs with this, agreement on the lawful implementation of the development could be reached and a positive certificate issued. This would enable the operations to be completed and the approved development to be delivered.

Should the LPA disagree with this conclusion, the Legal Opinion goes on to explain with reference to the Encyclopedia of Planning Law and Practice and Court Judgements Hammerton and Prokopp that the next stage of the sequential test in assessing conditions relates to whether or not it would be ‘irrational or an abuse of power’ to enforce against the breach of condition, and could enforcement action be the subject of a Judicial Review.

The Legal Opinion states:

“To put this another way, it would be legally unreasonable for the LPA to require the rebuilding of the Engine Room when its demolition gave rise to no discernible concerns about the matters addressed in any of the six conditions at issue.

It follows that the Works themselves amount to the lawful implementation of the Planning Permission. It also follows that the LPA can positively determine the s.73 application should it deem the application acceptable in all other respects.”

With regards to enforcement, a proportionate approach is essential. Firstly, the pre-commencement conditions are the subject of two live applications – a S.73 application (20241124) and a non-material amendment application (20250112) which propose minor amendments to their wording to delay the ‘trigger points’ of each condition. Both applications were submitted prior to the expiry of Permission 20220915. Secondly, the Legal Opinion submitted concludes that it would be ‘legally unreasonable’ for the LPA to enforce against the demolition and request that the former Engine Room was rebuilt.



Both of these factors are relevant to the decision maker as part of the assessment of this application.

Confirmation of Lawful Development

The evidence submitted with this application supports the case set out within the Legal Opinion that;

1. Planning permission 202290915 was implemented with material operations listed within Section 56 (4aa) of the TCPA (1990) taking place prior to the expiry of the permission.
2. The Legal Opinion concludes that the pre-commencement conditions that were not discharged prior to the expiry of the planning permission did not go to the heart of the planning permission. The case law presented supports the conclusion that the development could be considered to be lawfully implemented even when in breach of these conditions.
3. Prior to the expiry of the planning permission date, two applications (S.73 and S.96A) were submitted to the LPA to vary the 'trigger points' associated with the conditions. Whilst formal decisions were not issued prior to the expiry of Permission 20220915, the Legal Opinion concludes that it would be unreasonable for the LPA to enforce against the development on site and require the Applicant to rebuild the former Engine Room. The demolition bore no impact on any of the conditions to which the variation of wording is proposed.

With the above points considered and supported by the Legal Opinion, Statutory Declaration and photographic evidence, confirmation of the lawful status of the site is sought in relation to the development approved by Permission 20220915.

Sufficient evidence has been provided to demonstrate that, on the balance of probabilities, material operations took place on site prior to the expiry of the key permission. Further, the Legal Opinion provides additional information and relevant case law supporting the case that the permission has been lawfully implemented.

We trust this submission includes the details required to inform the LPA's decision. Should any further information be needed, or should you have any questions, please contact Rebecca Hilton of this office.

Yours faithfully



Rebecca Hilton MRTPI
ASSOCIATE DIRECTOR

