LEGAL OPINION

Re: The implementation of the planning permission bearing Gravesham Borough Council's planning ref. 20220915, granted on 25 November 2022

Date: 18 March 2025

Introduction

1. This legal opinion has been prepared at the request of our client, Strawberry Star Real Estate Group, ("SSRE"), to address the question of whether the planning permission bearing Gravesham Borough Council's ("the LPA") planning ref. 20220915, granted on 25 November 2022, ("the Planning Permission"), was lawfully implemented on or before its expiry date, that is 17 February 2025 ("the End Date").

2. We understand that the intention is that this opinion will be used for three purposes: first, to demonstrate to the receivers acting for SSRE's lender, FRP Advisory, that the Planning Permission has been lawfully implemented; second, to support a Certificate of Lawfulness application seeking confirmation that the Planning Permission has been lawfully implemented; and third, to show to the LPA that as the Planning Permission has been lawfully implemented it can duly determine the planning application made to it under Section 73 Town and Country Planning Act 1990, bearing the ref. no. 20241124 ("the s.73 Application") which seeks to extend the trigger points for the submission of certain details of the development authorised by the Planning Permission.

3. While we are happy for this Legal Opinion to be used for these purposes, we should point out that only our client can rely on its content. Other parties may wish to obtain their own independent advice on the questions addressed here. We should also point out that while this opinion seeks to support our client's position, we should stress that it has been written in accordance with the Solicitors Regulation Authority's Code of Conduct for Solicitors which, among other matters, requires solicitors to only put forward statements, representations or submissions which are properly arguable.

Factual background

4. The background facts of this matter are set out in the statutory declaration ("the Declaration") given by Simon Taylor, Development Director at SSRE, and dated 14 March 2025.

5. We summarise the key points from the Declaration below:

    a. The Planning Permission was granted pursuant to Section 73 of the Town and Country Planning Act 1990 on 25 November 2022 and was required by way of Condition no. 1 to be commenced by 17 February 2025.

    b. The Planning Permission authorised the 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.

c. The Planning Permission was subject to 29 conditions and accompanied by 11 informatives. Condition nos. 1 to 12 are discussed below.

d. Condition no. 1 required the Planning Permission to be begun not later that the expiration of three years beginning with the date of the grant of the previous permission, bearing the LPA's ref. 20190504, that is, by the End Date.

e. Condition no. 2 requires the authorised development to be carried out in accordance with the listed plans.

f. Conditions nos. 3 to 12 are stated as being "pre-start conditions", that is to say, they required some further approval before works could start.

These conditions relate to the following matters:

3 - Code of construction practice;

4 – Details of construction compound;

5 – Contaminated land;

6 – Wheel washing;

7 & 8 - Surface Water Drainage Scheme;

9 – Contamination;

10 – Foul and surface water sewerage disposal;

11 – Heritage and archaeology; and

12 – Phasing.

g. Applications were submitted and duly discharged (approved) in respect of condition nos. 3, 4, 6 and 12 in a decision notice issued on 31 January 2025; see the LPA's ref. 20241118.

h. The s.73 Application, bearing the LPA's ref. no. 20241124, seeks to amend the "trigger point" for condition nos. 5, 7, 8, 9, 10 and 11, that is, the date by which those details should be submitted. If granted it would mean that the details to be secured under these conditions could be duly submitted after the implementation of the Planning Permission.

i. Unfortunately, although the s.73 Application was submitted on 10 December 2024, that is, well before the End Date, the application was not approved by that date.

j. It therefore became necessary to carry out works of implementation in apparent breach of these six conditions in order to ensure that the Planning Permission was commenced by the End Date in accordance with condition no. 1.

k. To that end, Mr Taylor instructed the demolition contractor, DDS Group Limited, to demolish a building described in the Planning Permission documents as either "the Engine Room" or "Building B2".

l. DDS Group Limited duly demolished this building on 15 February 2025, that is, prior to the End Date, and this demolition work is referred to as "the Works" below.

m. The Declaration makes clear by reference to the existing and approved plans that the Works were comprised within the development authorised by the Planning Permission.

5. The question therefore flows from this is whether the Works amount to the lawful implementation of the Planning Permission.

6. To address these questions, we first set out the legal framework and then apply that framework to the facts as set out in the Declaration.

Legal framework

7. Section 56 Town and Country Planning Act 1990 – titled "Time when development begun" - sets out the statutory framework for what needs to happen to begin a planning permission.

8. Subsection 56 (2) states:

> *For the purposes of the provisions of this Part mentioned in subsection (3) 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.*

9. Subsection 56(4) defines those "material operations" as follows:

> *In subsection (2) "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 any land which constitutes material development.*

10. In summary to begin – and therefore commence – a development authorised by a planning permission, a developer is required to carry out of a material operation comprised in the development. The earliest date on which those works are carried out is the date on which the development begins to be carried out according to the statutory scheme.

11. The Courts have developed case law which makes it clear that only works which amount to "lawful implementation" are capable of implementing a planning permission. Paragraphs 32 to 39 of the High Court judgment in *Howell v Stamford Renewable Power Limited* [2018] EWHC 3388 (Admin) provide a succinct explanation of how the Courts determine whether works of implementation are lawful:

> *32. If operations contravene the conditions to a planning permission, what has been termed the Whitley principle means that they cannot be properly described as commencing the development authorised by the permission. The operations constitute a breach of planning control if they do not comply with the permission and for planning purposes are unauthorised and unlawful: Whitley & Sons Co Ltd v Secretary of State for Wales (1992) 64 P & CR 296, 302 per Woolf LJ.*
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> *33. In Bedford BC v Secretary of State for Communities and Local Government [2008] EWHC 2304 (Admin); [2009] JPL 604, Waksman J (as he now is) described this as stage 1 in considering the application of the Whitley principle, whether there has been a breach of condition. Stage 2 of the inquiry he characterised as whether the Whitely principle has been engaged. In that regard he referred to Sullivan J's judgment in R (Hart Aggregates) v Hartlepool*

Borough Council [2005] EWHC 840 (Admin); [2005] JPL 1602 and the extensive discussion stemming from it.

34. In Hart Aggregates Sullivan J had held that development in contravention of a planning condition did not render the development as a whole unlawful. That was a case towards one end of the spectrum where, under condition 10, prior permission had not been obtained for a restoration scheme where the mining operations had been going on for many years. Sullivan J said that the condition was a "condition precedent" in the sense that it required something to be done before extraction was commenced, but it was not a "condition precedent" in the sense that it went to the heart of the planning permission: [61].

35. Later in Hart Aggregates judgment Sullivan J stated that the statutory purpose was better served by drawing a distinction between those cases where there is only a permission in principle because no details whatsoever have been submitted (where common sense suggested that the planning permission has not been implemented at all), and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development (where common sense suggested that the planning permission had been implemented but there has been a breach of condition which could be enforced against): [67].

36. Waksman J decided Bedford BC v Secretary of State for Communities and Local Government [2008] EWHC 2304 (Admin); [2009] JPL 604 at his stage 2: he upheld an Inspector's view that details of landscaping and boundary treatment did not go to the heart of the permission and so the failure to obtain those approvals did not prevent implementation. However, I accept Mr Harwood's analysis that it is unclear from Sullivan J's judgment whether he

was deciding the case on the basis of the irrationality exception to Whitley (what Waksman J characterised as stage 3, to which I turn shortly) or merely on the basis of a review as to whether the permission had been implemented.

37. Before the Court of Appeal in Greyfort Properties Ltd v Secretary of State for Communities and Local Government [2011] EWCA Civ 908; [2012] JPL 39 the parties proceeded on the basis that Hart Aggregates was correctly decided, and that the substance of Sullivan J's observations on the Whitley principle was correct. Consequently the Court of Appeal proceeded on that basis for the purposes of the appeal. It held that a condition requiring the prior approval of the ground floor levels of the building was sufficiently important that the permission was not implemented in its absence.

38. In commenting on Hart Aggregates, Richards LJ emphasised its unusual facts. He accepted the good sense of what Sullivan J had said about the need to avoid an unduly rigid application of the Whitley principle where it would produce absurd results and run contrary to the underlying purpose or policy of the legislation: [19]. Richards LJ added that condition 10 in Hart Aggregates was rejected as a condition precedent engaging the Whitley principle not because it used one form of words rather than another: [32].

39. There is solid authority for the exceptions to the Whitely principle in what Waksman J called the third stage. Operations which on their face are in breach of condition are not treated as unlawful, and a breach of condition is excused for the purpose of the principle, if they cannot lawfully be the subject of enforcement action. The most common example in the jurisprudence is where

enforcement would be irrational within the meaning of the Wednesbury principle or an abuse of power: see Ouseley J in R (Hammerton) v London Underground [2002] EWHC 2307 (Admin); [2003] J.P.L. 984, [125]-[129]; R (on the application of Prokopp) v London Underground Ltd [2003] EWCA Civ 961;[2004] Env. L.R. 8, [85].

12. It should be pointed out from the above that the question of whether works of implementation are lawful is considered through the lens of enforcement. In that respect, it is important to point out that Section 171 A Town and Country Planning Act – Expressions used in connection enforcement – distinguishes between the two types of breaches of planning control, namely: a) carrying out development without the required planning permission; and b) failing to comply with any condition or limitation subject to which planning permission has been granted. As we set out below, this is a case where the breach of planning control falls within category b, rather than category a, and this has important implications as to the action that the LPA could take against the breach.

13. We consider this legal framework against the facts as set out in the Declaration in the section below.

Analysis

14. In seeking to apply the law to the question of whether a planning permission has been lawfully implemented, the Encyclopedia of Planning Law & Practice (Sweet & Maxwell) at para P56.13.6 suggests the following approach:

In summary, the question whether development has lawfully been commenced is answered by a sequential test. First of all the condition must be construed; is it a pre-condition to lawful development? If so, has it been

complied with (a question of fact)? Secondly, if it has not been complied with, can the developer bring himself within one of the recognised exceptions? [This includes the exception set out in the *Hart Aggregates* case]. *Finally, even if he cannot bring himself within an exception, would a decision to initiate enforcement be judicially reviewable e.g. because it would be irrational or an abuse of power?*

15. We now apply this sequential test to the facts at hand as set out in the Declaration.

16. It is clear that the Works themselves are clearly referable to the Planning Permission. They therefore amount to "implementation" because they are a "*material operation*", being "*any work of demolition of a building*"; see s.56(4)(aa) Town and Country Planning Act 1990, and are also clearly "*comprised in the development*"; see the discussion at paragraph 12 of the Declaration. Simply put, it would not be possible to implement the development authorised by the Planning Permission without demolishing Building B2.

17. The next question is whether the Works amount to *lawful* implementation. This calls for a consideration of both the Works of implementation themselves and the conditions of the Planning Permission. As the Declaration makes clear the details in respect of condition nos. 5, 7, 8, 9, 10 and 11 have not been submitted or discharged. In our view all six of these conditions could be deemed to be "conditions precedent", and we accept therefore that they are in breach, notwithstanding the s.73 application which seeks to delay their trigger points.

18. This raises two questions: first, do the conditions go to "the heart of the permission"; and second, would it be legally reasonable in all circumstances to take enforcement action against the Works for the breach of these conditions. We consider these questions in turn below.

19. The question of whether a condition goes to the heart of the permission is one of the judicially recognised exceptions to the general position that works in breach of a pre-commencement condition are not capable of being deemed to be works of lawful implementation; see *Hart Aggregates.*

20. The assessment of whether these conditions go to the heart of the Planning Permission is a question of planning judgment. It is considered that none of these conditions goes to the heart of the Planning Permission. Each of them merely set out details of the procedures to be adopted in the construction of the development or relate to comparatively minor aspects of the final development, on a par with the landscaping and boundary details in the *Bedford* case, as opposed to significantly important matters, such as the levels which were held to be important in the *Greyfort* case. In sum, they only relate to relatively minor aspects of the development and not the development as a totality. They are not so significantly important to mean that their breach renders the Works wholly unlawful.

21. We consider these conditions in turn in outline below.

22. Condition no. 5 requires the submission of a contamination land assessment. This is a "process condition", relating to the procedures that should be adopted to ensure that the development can be carried out safely. It has no bearing on the final form of the development and therefore does not go the heart of the permission.

23. Condition nos. 7 and 8 requires a surface water drainage scheme to be approved and submitted and then carried out in accordance that that approval. While these conditions do admittedly have a bearing on the final form of the completed development, it is just one aspect as opposed to being a core part of the final development. It therefore does not go to the heart of the

permission and is therefore not a "true" condition precedent, the breach of which would render the Works (potentially) unlawful.

24. Condition no. 9 requires the submission of a strategy to deal with the potential risks of contamination. Again this is a process condition; it does not go to the heart of the permission.

25. Condition no. 10 requires the approval of details in respect of foul and surface water. Like condition nos. 7 and 8, dealing with surface water, it does have a bearing on the final form of the development, however it is a comparatively small detail which has little bearing on the overall impact of the development. So it too is not a true condition precedent because it does not go the heart of the Planning Permission.

26. Condition no. 11 requires the submission of an archaeological field evaluation. This is also a process condition which does not go to the heart of the Planning Permission.

27. In summary it is considered that none of these conditions go to the heart of the permission. Nonetheless, even if it is considered that the *Hart* exception does not apply to any or even all six of these conditions, the question needs to be asked, in light of the *Hammerton* and *Prokopp* cases, and the next stage of the sequential test as set out in the *Encyclopedia*, is whether a decision to initiate enforcement proceedings against the Works would be judicially reviewable, e.g., because it would be irrational or an abuse of power?

28. It is considered that that it would <u>not</u> be expedient for the LPA to take enforcement action against the developer for carrying out the Works in breach of these conditions. While it is accepted that a local planning authority has a broad discretion on whether such action is expedient it is not limitless. Section 172(1)(b) Town and Country Planning Act 1990 requires a planning authority to

have regard to the development plan and other material considerations when taking action against a breach of planning control. Section 173(4) Town and Country Planning Act 1990 requires such action to be routed in a specific purpose, either by remedying the breach by making the development comply with the terms of any planning permission, by discontinuing any use of land, restoring the land to its original condition before the breach took place or remedying any injury to amenity caused by the breach of planning control.

29. Overall, the Courts take the view that it must in all circumstances be reasonable for the LPA to take enforcement action. In this case, it is difficult to conceive that any enforcement action requiring the rebuilding of Building B2 would be reasonable. There has been no breach of the development plan and there are no material considerations that would justify issuing an enforcement notice requiring its rebuilding. There is no reason to restore the land to its original state and nor has there been any injury to amenity.

30. In particular, the nature of the Works themselves - that is demolition - taken together with the focus of the six conditions, which either addresses processes that need to be followed in constructing the development or comparatively small details of the development, together with the fact that there is a s.73 application in place to amend the trigger points, means that it would not be reasonable for the LPA to take enforcement action requiring the Works to be reversed. Such a view is in line with the Court judgments *Hammerton* and *Prokopp* which hold that works of implementation will be lawful where it would be irrational to take enforcement against them. It follows therefore that the Planning Permission has been lawfully implemented.

31. To put this another way, it would be legally unreasonable for the LPA to require the rebuilding of Building B2 when its demolition gave rise to no discernible

concerns. It is however accepted that in accordance with Section 171A(1)(b) Town and Country Planning Act 1990, the LPA could take action for breach of condition should it deem it expedient to do so.

32. In summary, applying the sequential test as recommended by the *Planning Encyclopedia,* we conclude that while the Works amount to implementation there has been an ostensible breach of conditions to the carrying out of lawful development. However, in this case, the Works are not unlawful because it is considered that, as a matter of planning judgment, the conditions themselves do not go the heart of the permission. Even if that view is rejected, then we submit that it would not be lawful – because it would not be rational - to take enforcement action against the Works themselves. It follows that the Works amount to the lawful implementation of the Planning Permission. It also follows that it is open to the LPA to positively determine the s.73 Application should it deem that this application acceptable in all other respects.

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