LEGAL OPINION IN SUPPORT OF AN APPLICATION FOR A LAWFUL DEVELOPMENT CERTIFICATE

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1 INTRODUCTION

1.1 This legal opinion is prepared in support of an application for a Certificate of Lawfulness of Proposed Use or Development (**"CLEUD"**) pursuant to Section 191 of the Town and Country Planning Act 1990 (as amended) (**"Act"**). It relates to Land at Former Gas Works Site, Park Road, Worthing, West Sussex (**"the Property"**).

1.2 The application seeks a CLEUD to establish the lawful implementation of planning permission AWDM/0083/24 granted on 11 June 2024 (the **"s.73 Permission"**). The s.73 Permission varies conditions relating to planning permission AWDM/1459/21 granted on 4 October 2022 ("the **Original Permission**") which granted approval for the demolition of existing structures, partial removal of boundary walls and the construction of 209 residential apartments spread across 5 blocks ranging in height from 3-7 storeys, associated access, parking, open space and landscaping.

1.3 Condition 2 of the s.73 Permission requires the approved development to be begun before the expiration of 3 years from the date of the Original Permission i.e. before 4 October 2025.

1.4 The s.73 Permission did not contain any pre-commencement conditions. Instead:

1.4.1 Condition 3 needs to be complied with "Prior to commencement of any works above slab level"

1.4.2 Condition 13 needs to be complied with prior to piling or deep foundation works

1.4.3 Condition 17 expressly permits "demolition and clearance works and remediation" works to be carried out before the condition must be complied with

1.4.4 Condition 20 expressly permits "site clearance works" to be carried out before the condition must be complied with

1.4.5 Condition 21 expressly permits "demolition and clearance works and remediation" works to be carried out before the condition must be complied with

1.4.6 Condition 22 expressly permits "demolition works or works up to slab level" to be carried out before the condition must be complied with

1.4.7 Condition 29 expressly permits "demolition works, site excavations and remediation" works to be carried out before the condition must be complied with

1.4.8 Condition 31 expressly permits works below slab level to be carried out before the condition must be complied with

1.5 Notice was given to Worthing Borough Council (the **"Council**") on 12 June 2024, confirming that the developer intended to commence works at the Property on 17 June 2024 in order to implement the s.73 Permission. This was acknowledged by the Council on 12 June 2024.

1.6 On 24 April 2025, the Council formally discharged conditions 13, 17, 20, 29 and 36 of the s.73 Permission and partially discharged condition 34.

1.7 For the reasons set out below, in our view, it is beyond doubt that the works undertaken at the Property constitute development, and as a result the evidence supplied in support of this application in the Statutory Declaration of Mark Hobden demonstrates, on the balance of probabilities, that the s.73 Permission has been lawfully implemented.

2 LEGISLATIVE CONTEXT

2.1 Section 192(1) of the Act states:

> "*If any person wishes to ascertain whether-*
>
> *…any proposed use of buildings or other land; or*
>
> *any operations proposed to be carried out in, on, over or under land,*
>
> *would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question*."

2.2 The National Planning Practice Guidance (**"NPPG"**) states:

> "…*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 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*" (Paragraph 006 Reference ID: 17c-006-20140306).

2.3 Development is commenced when a 'material operation', as defined in the Act has been carried out. Section 56(4) of the Act gives the following (non-exhaustive) examples of material operations:

> *"(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 a trench;*
>
> *(d) any operation in the course of laying out or constructing a road or part of a road; or*
>
> *(e) any change in the use of any land which constitutes material development*."

2.4 Any works capable of constituting a material operation implement a planning permission, provided that they:

2.4.1 relate to the planning permission i.e. they are 'comprised in the development' within the meaning of s56(2) of the Act;

2.4.2 are authorised by the planning permission; and

2.4.3 involve building operations which are more than de minimis.

2.5 The threshold (in terms of the nature and scale of works required) for lawfully implementing a planning permission is relatively low; the works do not have to be particularly costly nor extensive. Courts have generally taken a lenient approach towards what operations suffice in order to treat a planning permission as having been implemented. For example, case law has held the following types of works to constitute lawful implementation of a planning permission:

2.5.1 digging of a trench, even where the trench was subsequently backfilled (*High Peak Borough Council v Secretary of State for the Environment and Courtdale Developments [1981] JPL 366*);

2.5.2 pegging out of the centre line of a road on a site with permission for residential development *(Malvern Hills District Council v Secretary of State for the Environment [1982] 1 EGLR 175).*

3 LAWFUL IMPLEMENTATION

3.1 As a general rule, in order to lawfully implement a planning permission, the material operation needs to be carried out both in accordance with the planning permission in question and the conditions placed on it – meaning that a material operation carried out in breach of a pre-commencement condition will not save the life of a permission (see *F. G. Whitley & Sons v Secretary of State for Wales (1992) 64 P. & C.R. 296; [1992] 3 P.L.R. 72*). However, there are a number of limitations and exceptions to this general rule.

3.2 Firstly, not all pre-commencement conditions require discharge before a permission can be lawfully implemented. In Hart Aggregates Ltd v Hartlepool Borough Council [2005] EWHC 840 (Admin), the court held that in order for a failure to discharge a pre-commencement condition to render a development unlawful, the condition had to go "*to the heart of the planning permission, so that failure to comply with it will mean that the entire development, even if completed and in existence for many years….. must be regarded as unlawful*[1]" .

3.3 As such pre-commencement conditions need to be viewed as a spectrum. We need to draw *"a distinction between those cases where there is only a permission in principle because no details whatsoever have been submitted, and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development. In the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against"*[2] .

3.4 Further, there are numerous long-established exceptions to the requirement that true pre-commencement conditions are discharged prior to commencement in order to lawfully implement a planning permission.

3.5 In FG Whitely & Sons Co. Limited v The Secretary of State for Wales [1992] 3 PLR 72, the Court of Appeal held that where an application to discharge a pre-commencement condition was submitted, and works on site began, prior to the date on which a planning permission was due to lapse, but the relevant conditions were approved after that date, then this would be sufficient to constitute a lawful commencement. This decision was made on the basis that once the condition had been approved, it was no longer possible for the Council to enforce against the breach – and as such, no longer open to them to argue that the implementation was not lawful.

3.6 In R v Flintshire County Council ex p Somerfield 1998 PLCR 336, the Court held that where a condition had been complied with in substance, but formally approval had not been obtained, then the failure to discharge the condition would not prevent lawful implementation.

3.7 In Hammerton v London Underground Ltd. [2002] EWHC 2307 (Admin), the Court held that "*where it would be unlawful, in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development"* [3].

3.8 The s.73 Permission did not contain any pre-commencement conditions. The only condition that could potentially be argued to restrict some of the works that have been carried out to date

[1] Paragraph 61
[2] Paragraph 67
[3] Paragraph 127

(condition 20 – which only expressly permitted site clearance works) was discharged on 24 April 2025, and therefore falls within the *Whiteley* exception, discussed above.

3.9 As a result, the s.73 Permission was implemented at the Property at some point between 17 June 2024, when demolition works commenced and 16 May 2025, when the enabling works at the Property were completed.

3.10 The material operations carried out to implement the s.73 Permission comprised:

3.10.1 site clearance works including lifting and crushing existing concrete slabs for use as granular fill material;

3.10.2 general site clearance;

3.10.3 demolition of all existing structures;

3.10.4 installation of cellular drainage crates and drainage infrastructure;

3.10.5 installation of services;

3.10.6 demolition and construction of boundary walls;

3.10.7 construction of an electricity substation building;

3.10.8 construction of a haul road;

3.10.9 construction of vehicular accesses and footpaths on Park Road and Lyndhurst Road; and

3.10.10 associated enabling works

3.11 Included with this application is a statutory declaration sworn by Mark Hobden which includes evidence of the works described above at paragraph 3.1 sworn on oath. The works can also be viewed by the case officer on a site visit.

3.12 It is our view that above works comprise lawful implementation as they:

3.12.1 relate to the s.73 Permission i.e. they are 'comprised in the development' within the meaning of s56(2) of the Act;

3.12.2 fall within a category specifically described as a material operation within section 56(4) of the Act;

3.12.3 involve building operations which are more than de minimis; and

3.12.4 have not been carried out in breach of any true pre-commencement conditions that would prevent the lawful implementation of the s.73 Permission.

3.13 The works are therefore sufficient to implement the s.73 Permission within the meaning of section 56 of the Act.

4 CONCLUSION

4.1 The evidence submitted in support of this application demonstrates beyond any reasonable doubt (less still on the balance of probabilities) that the s.73 Permission was lawfully implemented prior to the deadline set out in condition 2.

4.2 The s.73 Permission are therefore extant such that the development authorised may lawfully be carried on and completed at any time in the future. We therefore invite the Council to grant an LDC pursuant to this application.

Irwin Mitchell LLP

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