[redacted]

Sarah Pearce
Amber Valley Borough Council
Town Hall
Ripley
DE5 3BT

Our ref [redacted]

Your ref AVA-2020-0999

21 January 2021

Dear Sarah

Application for a certificate of Lawfulness, reference AVA-2020-0999 (the "Application")

Bushes Farm, Derby Road, Denby (the "Site")

[redacted]

1 Introduction

1.1 We write in relation to the Application.

1.2 Pegasus submitted the Application, [redacted] to certify that the demolition works, completed in January 2014, were carried out in accordance with planning permission reference AVA/2010/0718 granted on 17 January 2011 (the "2011 Permission").

1.3 We have reviewed the objection letter, dated 17 November 2020, submitted in relation to the Application. We are instructed by [redacted] to respond to this letter.

1.4 The objection letter raises two substantive arguments:

1.4.1 Insufficient evidence has been presented to demonstrate that the relevant conditions, specifically condition 13, to the 2011 Permission were discharged prior to the commencement of development; and

1.4.2 Insufficient evidence has been provided to demonstrate that development commenced following the discharge of relevant planning conditions.

2 Background

2.1 The Planning Statement, submitted with the Application, reviewed the 2011 Permission and the conditions attached to it.

[redacted]

2.2 The Planning Statement provides the factual background to this matter and explains why the certificate should be granted. We also submitted a Legal Opinion alongside the Application. The Legal Opinion set out the legal framework to the commencement of a development and also explained the application of the "Whitley Principle", together with the recognised exceptions to it.

2.3 We will not repeat the content of these documents here, but will refer to relevant sections in responding to the points raised by the objector.

3 Objection Letter

3.1 It is helpful to flag the following points from the objection:

3.1.1 Condition 13 is stated to be a "clear condition precedent".

3.1.2 The objector accepts "that the demolition of the building represented a material start to the development – although it is noted that the demolition of the original buildings is not directly referred to in the description of the development or any of the supporting material – by law, all of the details of Condition 13 must have been formally discharged in writing by the local planning authority, before commencement (or another time agreed in writing)".

3.1.3 "If there is any uncertainty, that all the requirements of Condition 13 had been formally and fully discharged in writing by 17 January 2014, or earlier, any commencement cannot be identified as lawful as a matter of fact".

3.1.4 It is asserted that "As a matter of fact therefore, lawful commencement of the development did not and could not have taken place by 17 January 2014".

3.1.5 The objector seeks to stress that condition 13 "lies at the heart of the permission" and reiterates that it is not satisfied that condition 13 has been fully discharged.

3.1.6 The objector goes on to argue that the evidence submitted with the Application does not demonstrate to their satisfaction that condition 13 has been discharged. The objector seeks to rely on the "Whitley Principle" to support their proposition that "…on the 17 January 2014 the permission would have expired". This will be explored in detail below.

3.1.7 The evidence supporting the works described in the Application is referred to as a "single anecdotal email from an unknown party" and that there is insufficient evidence to show that the demolition works took place.

4 Discharge of Conditions

4.1 The objector's main concern is that condition 13 was not discharged on or before 17 January 2014. The relevant context is as follows:

4.1.1 An application for approval of details reserved by conditions 2, 5, 7, 8, 9 and 13 of the 2011 Permission was submitted to the Council in December 2013 (reference COND/2013/0109).

4.1.2 An email dated 10 January 2014 from Darren Hurst (Scientific Officer, of the Council) confirmed that condition 13 could be part discharged to allow development works to commence prior to expiry of the 2011 Permission[1].

4.1.3 A discharge of condition notice was issued, dated 17 January 2014 (see Appendix 1 to this letter). This confirms the discharge of conditions 2, 5, 7 and 9. The discharge notice advises the applicant that a confirmation of the finished floor levels is required to enable condition 8 to be discharged. On the same day, the Applicant's agent directed the case officer to the finished floor levels on the submitted plans and re-submitted a plan indicating the finished floor levels. Condition 8 was subsequently formally discharge on 24 January 2014 (see Appendix 2). In respect of condition 13, the applicant is advised that a material start of the development should be made prior to the expiry of the 2011 Permission and that any such works should not conflict with condition 13.

4.1.4 An email dated 5 February 2014, from the Council, confirms that condition 13 is the only outstanding condition to be discharged[2].

4.1.5 A letter from the Environment Agency to the Council, dated 18 September 2014, records that the Environment Agency "*has no objection to the discharge of condition 13*". This is particularly pertinent as it was the Environment Agency who requested the imposition of condition 13 in the first place.

4.1.6 An email dated 17 October 2014, from the Council, stated that the Environment Agency have raised no objection to the discharge of condition 13 (see Appendix 3 to this letter). It is noted that the Environment Agency have reviewed the Reclamation Strategy prepared by WYG and are "*satisfied*" with it.

4.1.7 An email dated 20th November 2014 from Kate Smith (Council, planning officer) confirmed that condition 13 had been discharged[3]

4.2 The discharge of condition notice, dated 17 January 2014, indicates that condition 13 had not been fully discharged on 17 January 2014. However, it is clear that, on page 3, the Council supported works being carried out to implement the permission, provided those works only caused minimal ground disturbance. These very specific and unambiguous statements by the LPA give a clear instruction that development can commence on the Site.

4.3 This is because an exception to the Whitley Principle applies. The Whitley Principle is set out in paragraph 3.2 of the Legal Opinion, as follows: "*The starting point is that if operations contravene a true condition precedent then they cannot properly be described as commencing development*".

4.4 The case of *Leisure Great Britain plc*[4] provides an exception to the Whitley Principle. The Court found that "*work done before the deadline and in accordance with the scheme ultimately approved can amount to a start to development*"[5].

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[1] See Appendix 4 to the Planning Statement
[2] See Appendix 2 to the Planning Statement
[3] See Appendix 6 to the Panning Statement
[4] *Leisure Great Britain plc v Isle of Wight Council* 1999 WL 250024
[5] See also paragraphs 4.15-4.16 of the Legal Opinion

4.5 This exception to the Whitley Principle applies where (i) the details for a condition were submitted prior to the 2011 Permission expiry date; (ii) approval is obtained after the expiry of that time limit and before any enforcement action is taken; (iii) any works are carried out in accordance with the details ultimately approved.

4.6 This exception applies in totality to the present scheme. The details for Condition 13 were submitted in December 2013, prior to the expiry of the permission on 17 January 2014. Approval for the entirety of Condition 13 was subsequently given and no enforcement action was taken. The demolition works carried out were undertaken in accordance with the approved WYG Ground Investigation Report and Reclamation Strategy.

4.7 The Courts have also considered cases where a condition had in substance been complied with but the formalities, including the written notice of approval, had not been completed before work started on site[6]. In *Flintshire County Council,* Carnwath J found that a lack of formality in that case should not prevent the implementation of a permission. Indeed, he found that "*it would have been wholly unreasonable for [the Council] to have decided otherwise*".

4.8 This fully addresses the objector's criticisms of the commencement of development. As set out above, there are cases where works can take place prior to the discharge of pre-commencement conditions which still implement the relevant planning permission. In this case, two of the exceptions to the Whitley Principle apply:

4.8.1 It is a case where details in respect of a condition were submitted prior to the expiry of the 2011 Permission, approval was subsequently obtained and the works were undertaken prior to the 17 January 2014 and in accordance with details submitted to the Council in December 2013 as part of application COND/2013/0109, all of which were ultimately approved by the Council.

4.8.2 It would be quite unreasonable for it to be alleged that the 2011 Permission has lapsed. The applicant was told on a number of occasions by the Council that the relevant conditions had been discharged. The applicant has relied on these assurances.

4.9 The objector also states that demolition works are not referred to in the description of development for the 2011 Permission. The 2011 Permission granted planning permission for the "erection of replacement industrial (use class B2) building". Evidently, to construct a replacement building the existing building must be removed. It seems clear that the 2011 Permission, which authorises the replacement of an existing building, therefore also authorises the demolition of the same building.

4.10 However, for the avoidance of any doubt, the case of ***R v Basildon District Council*** (1987) 53 P. & C.R. 397 provides a further answer to this query. The Court found that:

"It also seems to me to make good sense to say that ***the planning authority must have intended that all necessary and reasonable works for the implementation of the permission were being incorporated within the general grant of consent***[7].

4.11 The case of ***R v Basildon District Council*** confirms that the 2011 Permission encompasses the demolition works.

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[6] See *R. v Flintshire County Council Ex p. Somerfield Stores Ltd [1998] P. & C.R 336.*
[7] Our emphasis

5 Works to commence development

5.1 As noted above, the objector seeks to argue that insufficient evidence has been produced to demonstrate that the demolition works took place.

5.2 The Planning Statement refers to the following paragraph of the Planning Practice Guidance which is relevant:

"In the case of applications for existing use, 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."[8]

5.3 In this case, no competing evidence has been produced by the Council or the objector.

5.4 Pegasus have submitted photographs, which were appended to an email dated 5 February 2014[9]. These show that, as a matter of fact, the demolition works had taken place at this date.

5.5 A sworn affidavit [redacted] who carried out the demolition works. [redacted] confirms that the demolition works were completed by 17 January 2014[10]. This corroborates the email [redacted] dated 5 February 2014. [redacted] clearly stated that he visited the Site on 17 January 2014 and the demolition works had been completed at this time[11].

5.6 The standard of proof is the balance of probabilities. It is considered that this standard is comfortably discharged by the evidence produced. It clearly shows that the demolition works commenced prior to the expiry of the permission on 17 January 2014.

6 Conclusion

6.1 The Council will already be aware that Condition 13 was formally discharged and have internal emails and records to rely on. Nevertheless, the submission of Appendix 3 to this letter further demonstrates that the Council and EA were satisfied with the evidence presented in the [redacted] reports, submitted in December 2013, to discharge Condition 13. The commencement of demolition works prior to the formal discharge of Condition 13 is a recognised and lawful exception to the Whitley Principle and is applicable in this situation.

6.2 The demolition works were carried out by the Applicant in accordance with the 2011 Permission and within the three year timescales set out in condition 1 of that permission. The evidence presented in the Pegasus Planning Statement has not been disputed and no competing evidence could be presented by any objectors. The demolition of the existing building was therefore more than sufficient to commence works and implement the 2011 Permission.

6.3 The evidence presented in the Pegasus Planning Statement and in this letter demonstrates that the 2011 Permission remains extant. The current application for a Certificate of Lawfulness of Existing Development should be approved without delay.

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[8] Paragraph: 006 Reference ID: 17c-006-20140306
[9] See Appendix 7 and Appendix 8
[10] See Appendix 11
[11] See Appendix 3

Yours sincerely

[redacted]