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30 August 2023

Dear Sir or Madam

Land West of Forest Lane, Forest Lane, Chippenham SN15 3PX

Planning permission 17/05672/FUL dated 3 July 2018 for the erection of 6 no. residential units including landscaping, highways layout and related works

This letter accompanies an application for a Certificate of Lawfulness of Existing Use or Development relating to the above site (**Property**). Excavation and foundation works were undertaken on the Property on 30 June 2021. This letter explains why the undertaking of those works and obtaining of subsequent approvals has ensured that the permission referred to above (**Permission**) has been lawfully implemented.

1 LAWFUL IMPLEMENTATION

1.1 The position on whether works are adequate to lawfully implement a planning permission has been clarified through case law. There are two limbs to this: whether a material operation referable to the relevant permission was carried out before expiry of the permission and whether all necessary conditions were discharged.

1.2 In terms of the first limb, as a starting point, there must have been material operations (i.e. works that are more than *de minimis* – the threshold set by case law is low) undertaken on site which are clearly referable to the approved plans before expiry of the permission.

1.3 In terms of the second limb, development in breach of a pre-commencement condition can be subject to enforcement and there is a general principle that it may not be sufficient to lawfully implement a permission. This is known as the *Whitley* principle following the case of *Whitley & Sons v Secretary of State for Wales* (1992) 64 P&CR 2926.

1.4 There are two points to note in respect of the second limb however:

Whether a condition is a "true" pre-commencement condition

1.4.1 Case law has confirmed that the *Whitley* principle only applies to pre-commencement conditions which "go to the heart" of the permission (*R (Hart Aggregates Ltd) v Hartlepool Borough Council* [2005] EWHC 840 (Admin)). Whether a condition satisfies that test requires a "fact-sensitive inquiry into the terms of the condition in the context of the permission" (*Meisels v Secretary of State for Housing Community Local Government and London Borough of Hackney* [2019] EWHC 1987 (Admin)).

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Whether an exception to the *Whitley* principle applies

1.4.2 Case law has also confirmed that there are well-established exceptions to the *Whitley* principle. One of those is found in the *Whitley* case itself. In that case, mining operations commenced despite pre-commencement conditions not having been discharged.

1.4.3 The Court of Appeal held that the works done were lawful because it did not matter whether the condition approval was obtained *after* the expiry date of the permission, so long as the application had been made and material operations commenced prior to that date, with no enforcement action having been taken.

1.4.4 In essence, therefore, where any applications to discharge outstanding details were submitted before expiry of the permission (in respect of which a material operation was carried out in time in accordance with the plans and any relevant submitted details) and were approved afterwards, then the permission is deemed to have been lawfully implemented at that point.

2 APPLICATION OF THE LAW TO THE PERMISSION

2.1 We have been provided with photographic evidence confirming the works undertaken included the installation of a strip foundation with a length of 6m within a trench of no less than 1,450mm depth and 1,000mm width in the position of the rear wall footing of the dwellinghouse on “Plot 3”. These works are referable to the Permission in that they are shown on the approved plans P101 Revision H and P104 Revision B and were undertaken on 30 June 2021. This is established through the evidence set out in the attached statutory declaration. There can be no dispute that the works were sufficient to lawfully implement the Permission.

2.2 We have identified the following potential pre-commencement conditions of relevance to the Permission and set out the condition number, details, date of application and date / reference of approval below.

2.2.1 Condition 3 – No development of a building to take place until a sample materials panel of the external surfaces has been approved by the local planning authority (**LPA**).

Date of discharge application – 5 May 2021

Date of approval decision – 24 June 2022; PL/2021/04807

2.2.2 Condition 4 – No development to commence until a scheme of hard and soft landscaping has been submitted to and approved by the LPA. (Scheme to include indications of existing trees and hedgerows and to identify those to be retained as well as protection measures).

Date of discharge application – 7 May 2021

Date of approval decision – 12 July 2021; PL/2021/04853

2.2.3 Condition 11 – No development shall commence until a scheme of surface water discharge (including surface water from the access/driveway and incorporating sustainable drainage details) has been submitted to and approved by the LPA.

Date of discharge application – 5 May 2021

Date of approval decision – 24 June 2022; PL/2021/04807

2.2.4 Condition 12 – No development shall commence on site until details of the works for the disposal of sewage (including the point of connection to the existing public sewer) have been submitted to and approved by the LPA.

Date of discharge application – 5 May 2021

Date of approval decision – 24 June 2022; PL/2021/04807

2.2.5 Condition 15 – No development to commence until a Construction Method Statement (to include details of parking, loading and unloading, storage of plant and materials, security hoarding, wheel washing facilities, emission of dust, recycling scheme, natural environment protections, and hours of construction) has been submitted to and approved by the LPA.

Date of discharge application – 5 May 2021

Date of approval decision – 24 June 2022; PL/2021/048074

As can be seen from the above, all applications to discharge the conditions were submitted before the Permission expired on 3 July 2021. A material operation was undertaken on 30 June 2021. The conditions were finally discharged on 24 June 2022.

This set of circumstances sits squarely within the exception to the *Whitley* principle derived from the Court of Appeal *Whitley* case itself.

The works undertaken pursuant to the Permission became lawful and sufficient to have lawfully implemented the Permission on 24 June 2022.

Yours faithfully

Charles Russell Speechlys LLP

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