

RE: CLEUD APPLICATION REFERENCE: 24/01183/COL IN
RELATION TO DEVELOPMENT AT LAND OS 5439 PART
TOWNSEND GREEN HENSTRIDGE TEMPLECOMBE
SOMERSET

OPINION

Introduction

1. I am instructed by Foot Anstey LLP ("**Instructing Solicitors**") on behalf of Henstridge Parish Council ("**HPC**") in respect of representations they intend to make against an application for a Certificate of Lawful Use and Development made by Barratt Wilson Homes (the "**Applicant**") to Somerset Council (the "**Council**") validated by the Council on 20 May 2024 and with application reference number 24/01183/COL for the following proposal:

Application for a lawful development certificate for an existing development relating to the commencement of works granted by planning permission ref. 17/03029/OUT and reserved matters approval ref. 21/03369/REM in breach of condition 10 of planning permission Ref. 17/03029/OUT as shown on drawing No 501-403-01 REV C (Planning Approval Commencement of works = Sheet 1) (the "**CLEUD Application**").

2. The Applicant has sought to rely upon a Joint Opinion dated 6 March 2024, by Mr Paul Tucker KC and Mr Martin Carter (“**Joint Opinion**”) to persuade the Council to issue a CLEUD.

Preliminary Observations

3. Those instructing me wrote by letters dated 28 June 2024 to both the Council and the Applicant making two observations which I endorse, namely:

First, no instructions seem to have been produced. We request that these are provided. If the local planning authority has not been provided with the instructions it should seek them. In order to assess the weight to be given to a legal opinion it is necessary to know the specific questions it is answering and the information that has been provided to counsel. If it has not done so already the local planning authority should ask for a copy of the instructions.

Second, the Joint Opinion contains redacted sections. There is no basis for these redactions. The document is presented as the opinion of counsel not as submissions. It seeks to gain weight by asserting that this is the view of leading and junior counsel. If that be the case, the whole view must be disclosed not just parts which suit their client’s interests. Again, if the Local Planning Authority is not in possession of an unredacted copy of the Joint Opinion it should request one.

4. The letter also sets out correctly in my view the position that there can be no basis of a claim of legal professional privilege in the part of the Joint Opinion. To date these matters have yet to be properly addressed. These matters plainly undermine any weight that may be attributed the Joint Opinion. However, ultimately, the key question is whether the Joint Opinion is correct on whether Condition 10 is a true condition precedent based upon the relevant facts a matter to which I now turn.

Enclosures

5. I have been provided with the documents as listed in the bundle index which accompanied my instructions.

Factual Background

The Planning Permission

6. The CLEUD Application relates to the outline planning permission with the reference number 17/03029/OUT (appeal reference number APP/R3325/W/18/3197690) in relation to the Land Os 5439 Part Townsend Green Henstridge Templecombe Somerset BA8 0RG (the "Site") which was granted by appeal on 20 November 2018 for the following development:

Outline planning application for up to 130 dwellings with public open space, landscaping, sustainable drainage system (SuDS) and vehicular access point from Woodhayes Way. (the "**Outline Permission**")

7. The reserved matters application with the reference number 21/03369/REM in relation to the Outline Permission was granted on 19 May 2022 for:

Reserved matters application for approval of appearance, landscaping, layout and scale, following outline approval 17/03029/OUT for construction of 130 homes, sustainable drainage infrastructure, open space and play areas, internal roads, paths and parking, landscaping and associated plant and infrastructure. (the "**Reserved Matters Approval**") (the Outline Permission and the Reserved Matters Approval together the "**Planning Permission**")

8. The CLEUD Application seeks to confirm that the works carried out by the Applicant lawfully implement the Planning Permission notwithstanding the

pre-commencement Condition 10 ("**Condition 10**") not having been discharged.

9. Moreover, Condition 3 of the Outline Permission specifies that the Outline Permission will remain in force until the expiry date "not later than 2 years from the date of approval of the last of the reserved matters to be approved". The Reserved Matters Approval was granted on 19 May 2022. I agree with those instructing me that it therefore follows that if the CLEUD is not granted in favour of the Applicant the Planning Permission would have expired without having been lawfully implemented.

Condition 10

10. Condition 10 of the Outline Permission reads as follows:

10) **No development shall take place** until a scheme for pedestrian improvements has been submitted to and approved in writing by the local planning authority. The approved works shall be implemented in accordance with the approved details before any dwelling hereby permitted is occupied and shall be retained thereafter. The submitted scheme shall have regard to the following:

i) dropped kerbs and tactile paving at the following junctions:

- Woodhayes Way/A357 Stalbridge Road
- Woodhayes/Townsend Green
- Woodhayes/Bugle Court
- Woodhayes (Marlstone Court)
- Woodhayes/Furge Lane
- Furge Lane opposite Furge Grove;

ii) installation of Traffic Signs Regulations and General Directions (TSRGD) Sign Dig. 544.1 Pedestrians in Road Ahead plus distance plate (380 yds) signs at the following locations:

- Junction Furge Lane/Furge Grove
- Junction Church Street/A357; and

iii) a signal-controlled priority arrangement along A357 High Street including footway provision, appropriate signage and tactile paving at Furge Lane/Marsh Lane generally in accordance with plan Ref. P17033-06-01E. [Underlining and embolden added]

11. HPC objected to proposals by the Applicant to discharge Condition 10. The Applicant has been unable to discharge Condition 10. Indeed, since the Planning Permission was granted, several applications have been made by the Applicant to discharge Condition 10 and vary Condition 10, all of which have been refused by the Council, as set out below:

Section 73 application with the reference number 22/02240/S73 refused by the Council on 27 October 2023 in relation to the following proposal:

S73 application to vary Condition 10 point iii (scheme for pedestrian improvements) of Condition 10 of Approval 17/03029/OUT (Inspectorate ref: APP/R3325/W/18/3197690) for the Outline planning application for up to 130 dwellings with public open space, landscaping, sustainable drainage system (SuDS) and vehicular access point from Woodhayes Way. (the "**First S.73 Application**")

Section 73 application with the reference number 23/03015/S73 refused by the Council on 29 April 2024 in relation to the following proposal:

S73 application to vary the requirements of Condition 10 of Approval 17/03029/OUT (Inspectorate ref: APP/R3325/W/18/3197690) for the Outline planning application for up to 130 dwellings with public open space, landscaping, sustainable drainage system (SuDS) and vehicular access point from Woodhayes Way, so that (save for works in respect of clearance, laying out and digging works as shown on plan ref 501-403-01-Planning Approval Commencement Works_Sheet 1-Rev C) no development should take place until a scheme for pedestrian improvements (in accordance with points i to iii) or an alternative scheme has been submitted to and approved in writing by the local planning authority. (The remainder of the condition will remain as previously worded and the section 73 will relate to the Outline application (17/03029/OUT Inspectorate ref: APP/R3325/W/18/3197690) and subsequently approved Reserved Matters Ref: 21/03369/REM in its entirety).(the **"Second S.73 Application"**)

Discharge of conditions application with reference number 24/00546/DOC1 was refused by the Council on 16 May 2024 in relation to the following proposal:

Discharge of Condition 10 (Part i - Dropped Kerbs and Tactile Paving and Part ii - Traffic Signs Regulations and General Directions, and having regard to Part iii)) of planning application 17/03029/OUT (the **"First Discharge of Conditions Refusal"**)

Discharge of conditions application with reference number 24/00547/DOC1 refused by the Council on 16 May 2024 in relation to the following proposal:

Discharge of Condition 10 (Part i - Dropped Kerbs and Tactile Paving and Part ii - Traffic Signs Regulations and General Directions, Vehicle Tracking and Part iii) Signal Controlled Priority Arrangement) of planning application 17/03029/OUT.(the **"Second Discharge of Conditions Refusal"**)

Discharge of conditions application with reference number 24/00548/DOC1 refused by the Council on 16 May 2024 in relation to the following proposal:

Discharge of Condition 10 (Part i - Dropped Kerbs and Tactile Paving, Part ii - Traffic Signs Regulations and General Directions, and Part iii High Street Calming scheme and additional pedestrian measures) of planning application 17/03029/OUT."(the **"Third Discharge of Conditions Refusal"**)

Discharge of conditions application with reference number 24/00650/DOC1 refused by the Council on 16 May 2024 in relation to the following proposal:

Discharge of Condition number 10 (Pedestrian Improvements Scheme Points i and ii) of planning application 17/03029/OUT (the **"Fourth Discharge of Conditions Refusal"**)

Discharge of conditions application with reference number 24/00651/DOC1 refused by the Council on 16 May 2024 in relation to the following proposal:

Discharge of Condition 10 (Part i - Dropped Kerbs and Tactile Paving, Part ii - Traffic Signs Regulations and General Directions, Vehicle Tracking and Part iii - additional pedestrian measures) of planning application 17/03029/OUT. (the **"Fifth Discharge of Conditions Refusal"**)

12. Notwithstanding the refusals as set out above in respect of the various applications to vary or discharge Condition 10, I am instructed that the Applicant commenced activity at the site on 23 April 2024. In the Chronology provided by HPC to me the operations are described as follows:

Developers start activity at the site, hardcore entrance, portacabin, security fencing and later digging on site and a bellmouth entrance created where the planned development entrance road is proposed. A sign erected “we are undertaking minor works at the entrance to the site to keep our current permission active”.

13. In my experience the erection of sign in such terms is highly unusual. I am reminded of a quotation of Tom Sawyer in *Huckleberry Finn*: “Your saying it so don’t make it so.”

The CLEUD Application

14. As stated above, in order to support the CLEUD Application the Applicant has produced the Joint Opinion. The Joint Opinion states that it is “arguable” the development authorised by the Planning Permission may be lawfully commenced without the discharge of Condition 10.
15. Extracts of the Joint Opinion are provided at pages 4 – 7 of the Applicant Covering Letter to the CLEUD Application dated 17 May 2024.

Analysis

16. Whilst I have the greatest respect for both Mr Tucker and Mr Martin I cannot agree with their Joint Opinion. I should say however that the height of the Joint Opinion is that it is “clearly arguable” that Condition 10 is not a condition precedent that goes to the heart of the permission (see paragraph 34 of the Joint Opinion). I do not agree that it is “clearly arguable,” but in a sense it does not matter – “arguability” is not the test for the grant of a

CLEUD -it is upon the balance of probabilities.¹ Based upon the Joint Opinion the Applicant's case does not meet this threshold.

17. The question is one of law applied to the particular facts. In short, for the reasons, I elaborate below Condition 10 is quite plainly a condition precedent. It cannot be said not to go to the "heart" of the planning permission. Works done in breach of that condition do not lawfully implement the planning permission.

18. I agree with the proposition in the Joint Opinion that *Whitley and Sons v. Secretary of State for Wales* (1992) 64 P.& C. R. 296 establishes the general rule that works carried out in breach of condition are unlawful and thus incapable of commencing a planning permission.

19. The *Whitley* principle was considered in *R (oao Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin) where it was held that a distinction must be drawn between a condition which required some action to be undertaken before development is commenced and a condition which expressly prohibits any development taking place before a particular requirement has been met. Sullivan J. (as he then was) took the view that even so it is necessary for the condition both to be expressly prohibitive of commencement of development and to go to the heart of the permission. Only when both tests are satisfied is it a condition precedent to which the *Whitley* principle applies and where the development would be development without planning permission. Sullivan J stated:

58. Going back to first principles, the starting point should be the proposition that there is no scope for implied conditions in a planning permission. If a local planning authority wishes to impose any obligation upon an applicant by way of a requirement or prohibition,

¹ *R. (Freedman) v Wiltshire Council* [2014] EWHC 211 Admin.

it should do so in express terms, because failure to comply with the condition may, ultimately, lead to prosecution for failure to comply with a breach of condition notice and/or an enforcement notice; see sections 179 and 187(A) of the 1990 Act. The need for a local planning authority to spell out any requirement or prohibition in clear terms applies with particular force where the condition is said to prevent not merely some detail of the development, but the commencement of any development pursuant to the planning permission. [Underling added]

20. The approach in *Hart Aggregates* was endorsed by the Court of Appeal *Greyfort Properties Ltd v SSCLG* [2011] EWCA Civ. 908. In that case, Richards LJ rejected an argument that the condition in question was not a condition precedent to the commencement of any development:

“27. In substance, therefore, the prohibition in condition 4 on the commencement of "any work ... on the site" was at the very least equivalent to a prohibition on the commencement of "development". The inspector commented (again at [93] of the decision letter) that "any work ... on the site" in condition 4 was arguably more extensive in its reach than the expression "any part of the development" in condition 2; but it is unnecessary to go that far.”[Underlining added]

21. In the present case Condition 10 is in very clear terms that “No Development...etc”. I consider the above passages from *Hart Aggregates* and *Greyfort Properties Ltd* to be highly relevant. *Greyfort Properties Ltd* is binding legal authority. The reasoning in these passages of the case law is simply not grappled with the Joint Opinion.

22. In my view it cannot be seriously suggested Condition 10 does not go to the heart of the permission. Paragraph 4 of the Appeal decision letter states in terms that that the condition requiring improvements to footway provision in the village is to be treated in as a "main issue.”

23. I also understand that the local planning authority's objection based on highway safety remained extant at the opening of the appeal inquiry and it was only withdrawn by virtue of agreement made with the Appellant for the provision of a highway improvement scheme which is the subject of Condition 10 (see paragraph 7 of the Joint Opinion). Given that the issue was a reason for refusal it is unlikely that it was not at the heart of the grant of planning permission. There is no suggestion in the Joint Opinion that the Appellant did not agree that the imposition of the condition was not necessary and reasonable. It is not open to the Appellant now to argue that the condition was never reasonable nor necessary, particularly since it is apparent that it arose out of an agreement with the local planning authority upon which the local planning authority relied when withdrawing its highways reason for refusal. Indeed, it was expressly considered both necessary and reasonable by the Inspector (and therefore complied with the legal and policy requirements of imposing a planning condition) (see paragraph 45) notwithstanding that the Inspector acknowledged that works in relation to another development might provide adequate on Furge Grove he found that he could not be certain. It is said that the works to the other development have now been carried out – whether they satisfy the requirements of Condition 10 is not clear from the Joint Opinion, but it is unlikely that they would have covered all the same ground, I note that the requirements of Condition 10 go some way beyond simply works to Furge Grove. In any event, there was no challenge to the legality of the Inspector's findings in the decision letter and in particular to the imposition of Condition 10 on this basis which did not provide for the obligation to fall away should works in connection with another development be carried out. Changes in circumstances post the grant of the planning permission cannot change the status of the negative precondition or make lawful works which were unlawful

when they were carried out and whether it went to the heart of the planning permission as granted.

24. Furthermore, the condition was imposed in part for reasons of highway safety. I pause to observe that in *Kane v New Forest District Council* [2002] 1WLR 312 the Court of Appeal accepted a claim in negligence against a local planning authority for its failure to exercise its statutory powers under planning legislation. In that case, the local planning authority had required a developer to build a footpath in connection with a residential development. The authority then allowed the footpath to open before important visibility improvement works had been carried out at the junction of the footpath with a road. The Claimant was in a serious road accident when he emerged from the footpath onto the road. The district judge has initially dismissed the case, holding that the Claimant had no realistic prospect of success. The Court of Appeal disagreed. It thought that the Claimant had a “positively powerful case.” The case no doubt then settled. In my judgement, where a negative condition relates to safety of people it is generally most unlikely that a negative pre-condition such as Condition 10 preventing the commencement of development for reasons of highways safety could ever be said to be peripheral or not at the “heart” of the planning permission.

25. I also have regard to the various attempts to discharge the conditions, this indicates that the Applicants knew full well the importance of securing its discharge prior to implementation. In my view, there is simply no basis for arguing that Condition 10 to be peripheral or not at the “heart” of the planning permission.

26. I should add that I see absolutely no basis for any suggestion that the present case might fall under another *Whitley* exception where it would be unconscionable for the local planning authority to enforce against the

Applicant. The situation is quite the reverse. The Applicant has successively failed in its attempts to satisfy the LPA that the proposed schemes to discharge Condition 10 are satisfactory.²

27. Finally, for the sake of completeness, I have looked at the recent judgment of the High Court in *R (oao Lisle-Mainwaring) v Royal Borough of Kensington and Chelsea* [2024] EWHC 440 (Admin). First, nothing said by the High Court judgment could overrule the binding authority of the decision in Court of Appeal in *Greyfort*. In *Lisle-Mainwaring* the High Court addressed an exception in *Whitley* to the general rule that where works are carried out in breach of a pre-commencement condition but before the statutory deadline for implementation, and the pre-commencement condition is subsequently discharged after the statutory deadline, those works will be effective to implement the planning permission.³

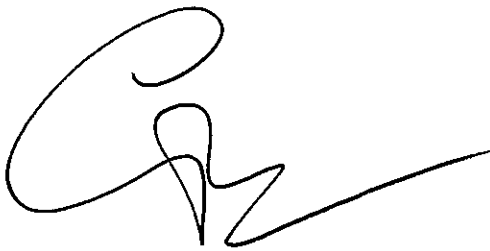
² The Applicant has since lodged appeal submissions with PINS dated 19 June 2024 (ref APP/E3335/W/24/3344570) against the decisions to refuse the various applications to discharge condition 10. The appeal decision is yet to be determined and outcome expected in November 2024.

³ In *Lisle-Mainwaring* the claimant challenged the discharge by the Defendant of a pre-commencement condition relating to a construction transport management plan. The application had been made the day before the expiry of the deadline for the implementation of the planning permission and on the same day as works were carried out which were said to be referable to the permission but in breach of the as-yet-undischarged condition. The import of the claim for the Claimant was therefore that if the decision to discharge the condition was quashed, the permission would not be lawfully implemented. The Claimant's single ground of challenge relied on a short passage of obiter dicta in *Whitley* to argue that a local planning authority had a discretion to refuse to even consider an application made in these circumstances, and that by failing to consider whether to exercise this discretion, the Defendant had erred. The Court rejected the claim. First, it found that *Whitley* is not authority for the existence of such a discretion, which would be contrary to the Defendant's continuing obligation to determine applications for the approval of details subject to condition. Secondly, if such a discretion existed, it was not a mandatory material consideration that the Defendant was obliged to take into account, not least because no one (including the Claimant) had asked the Defendant to consider or exercise it.

Conclusion

28. In conclusion for the reasons set out above in my Opinion Condition 10 is a condition precedent. It cannot be said it does not go to the “heart” of the planning permission. Accordingly, works done in breach of that condition do not lawfully implement the planning permission.

29. I have nothing further to add as presently instructed. I am happy to advise further on any aspect of this Opinion, in particular, should there be further disclosures resulting from the June letters sent by those instructing me to which I referred in the opening of my Opinion.

A handwritten signature in black ink, appearing to be 'GJ', with a long horizontal stroke extending to the right.

GREGORY JONES KC

Francis Taylor Building

Temple

29 July 2024