

DELEGATED DECISION REPORT

HPK/2023/0455
Valid 24/10/2023

LAND AT DOLLYWOOD
CLOSE BRIERLEY PARK
BUXWORTH

APPLICATION FOR A LAWFUL
DEVELOPMENT CERTIFICATE
FOR -

THAT A LAWFUL, MATERIAL
START HAS BEEN MADE ON
THE SITE IN ACCORDANCE
WITH CONDITION 1 OF
HPK/2016/0108

(CERTIFICATE OF
LAWFULNESS - EXISTING)

MAIN ISSUES

- Do the works cited by the applicant amount to a “material” start having regard to Section 56(4)(b) of the Town and Country Planning Act 1990 and if it is judged that are works are ‘material’ has a lawful start been made having regard to Condition 1 attached to HPK/2016/0108

DESCRIPTION OF SITE

The application site relates to a parcel of land within the hamlet of Buxworth, approximately 2km west of Chinley, east of an existing cul-de-sac named Dollywood Close.

The site benefits from Outline and subsequent Reserved Matters permission for residential development comprising 5no. detached dwellings. The access to the site is directly from the turning head of the existing cul-de-sac, with dwellings laid out in a horse-shoe formation.

PROPOSAL

This application seeks a Certificate of Lawful Development to confirm that a lawful material start has been made on site thus protecting the permission, and providing confirmation that the development can be carried out in accordance with all approved plans and details, some of which have been secured by way of discharging pre-commencement conditions.

SITE HISTORY / RELEVANT PREVIOUS APPLICATIONS

HPK/2016/0108	Outline application with all matters reserved for residential development (Approved 24/11/2017)
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HPK/2021/0044	Approval of Reserved Matters following Outline application (Approved 30/07/2021)
NMA/2021/0028	Non material amendment to HPK/2021/0044 - Revision of house types and some alteration to landscaping and tree protection during the course of construction (Approved 26/04/2023)
DOC/2021/0008	Discharge of conditions 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, and 19 relating to HPK/2016/0108 (Split Decision 03/09/2021)
DOC/2021/0100	Discharge of Conditions 3 and 4 in relation to HPK/2021/0044 (Conditions Discharged 24/05/2023)
DOC/2022/0004	Discharge of Condition 19 relating to HPK/2016/0108 (Partially Discharged 14/11/2022)
DOC/2023/0047	Discharge of Condition 4 relating to HPK/2021/0044 (Condition Discharged 04/10/2023)

CONSULTATIONS

Site Notice: N/A
 Neighbour Consultation: N/A
 Press Advert: N/A

PUBLIC COMMENTS

4no. objections have been received in connection with this application.

Two of these objection refers to the planning merits of the scheme, which is immaterial to a legal judgement of whether a lawful material start to development has occurred.

The two objections that do raise material objections make the following submissions:

- No meaningful works undertaken to implement development
- Trenches may have been dug for one of the plots but no concrete or other materials were used to construct any footings and the land has been restored, meaning the same trenches would need to be dug again.
- Trenches are considered to be 'de minimis' and are not 'material'
- Condition 4 relating to Drainage under HPK/2021/0044 goes to the 'heart of the permission' and thus the fact that this has not been discharged before commencement means that no lawful start has been made

OFFICER COMMENTS

Do the works cited by the applicant amount to a "material" start having regard to Section 56(4)(b) of the Town and Country Planning Act 1990 and if it is

judged that the works are 'material' has a lawful start been made having regard to Condition 1 attached to HPK/2016/0108

The application is supported by a Cover Letter and accompanying appendices, which includes amongst other documents a 'Building Regulations Site Inspection Report' (Appendix 9).

The Covering Letter sets out and confirms the chronology of the planning history, supported by relevant appendices, in the form of Decision Notices, and written records of conditions being discharged.

The letter notes that due to a professional disagreement with regards to the level of information required to discharge Condition 4 under DOC/2021/0100 (Drainage details) further information was submitted under DOC/2023/0047.

This latest Discharge of Conditions application was submitted on 14th June 2023, some 6 weeks prior to the deadline for making a material start in line with Condition 1 attached to the Outline permission.

Due to significant delays which stemmed from the relevant consultee repeatedly requesting further information, this condition was not formally discharged until 4th October 2023. However, the Covering Letter claims that a 'material' start was made on site on 6th July 2023.

It is stated that the material start amounts to the digging of a trench that would contain the foundations of one of the dwellinghouses, and that these works were registered with Building Control.

In assessing whether a Certificate can be granted, there are two questions to consider, which are answered as follows:

Does the digging of a trench to facilitate the foundations of a proposed dwellinghouse amount to a "material" start having regard to Section 56 of the Town and Country Planning Act 1990?

This application as submitted was supported by a Location Plan, but no Site Plan detailing the specific location of the trench which is claimed to amount to a 'material' commencement of development.

The Building Control 'Site Inspection Report' dated 10th July 2023 contains the following notes:

"Foundation inspection for the erection of a detached dwelling... Foundation excavated to a depth of 2.3m to rear elevation where oak tree is present, 2.2m to front elevation where conifer tree is present and 900mm in other areas where no trees are within influencing vicinity. Foundation width measuring 800mm wide. No drains in the trenches or in nearby vicinity. Step foundations created correctly, not on corners. All depths achieved in accordance with NHBC tree calculator."

Observations within the report show photographs of the referenced trench but no photos or supporting plan showing the location and degree of the works within the context of the site as a whole are contained within the Report or indeed submitted with the application.

An initial site inspection carried out by Officers in December 2023, failed to identify evidence of the reference trench. The agent subsequently informed the LPA that the foundations had been covered, and that in order to inspect the works, they would need to be exposed.

A second site inspection was carried out on 17/01/2024, whereby two trenches dug at right angles was observed, as per the photographs below:



At the request of Officers, a Construction Layout Plan (Ref: 534-.21F) has been submitted which notes the details of the works commenced within the context of the wider development site.

The location of the works seen on site is consistent with those described in the Building Regulations Site Inspection Report and align with what would be expected to facilitate foundations for a dwellinghouse.

Officers have sought legal advice from the Council's Solicitor as to whether the digging of such a trench to support the foundations of a building (dwellinghouse) amounts to a "material" commencement of development having regard to Section 56(4) of the Act 1990. This advice supports Officers initial view that the works do indeed amount to a "material" start.

Therefore whilst the public comment that contends that a material start has not been made on site is noted, it is judged that in light of the evidence gathered on site, aligning with the Building Control Site Inspection Report and Site Plan showing that the location of the trenches is consistent with that witnessed on site, it is the view of Officers that the works carried out on site amount to a "material" start having regard to Section 56(4) of the Act 1990.

The question that remains is whether this material start is a lawful one.

Has a lawful start occurred on the basis that the works commenced before all pre-commencement conditions have been formally discharged?

Condition 1 attached to the Outline planning permission states the following:

1. *The development hereby permitted shall be begun either before the expiration of three years from the date of this permission or before the expiration of two years from the date of approval from the last of the reserved matters.*

Reason: To comply with Section 51 of the Planning and Compulsory Purchase Act 2004

The Outline and Reserved Matters permissions were granted subject to a number of pre-commencement conditions (i.e. a lawful material start to the development cannot be made until such details relating to each condition have been approved in writing and hence discharged).

The LPA acknowledges and accepts that all pre-commencement conditions with the exception of Condition 4 relating to the Reserved Matters consent have been formally discharged in the required timeframe.

It is a matter of fact that a material start (as confirmed above) was made on site prior to Condition 4 relating to HPK/2021/0044 being formally discharged. It is also a fact that the condition was formally discharged after the time limits specified under Condition 1 relating to HPK/2016/0108 has lapsed.

As such, one could arrive at the logical conclusion that the material start that has been made on site is unlawful, and that both permissions have now expired.

However, the applicant argues the following:

- Condition 4 was discharged four months after being validated
- Delays in discharging the condition was outside of the applicant's control
- The applicant made all reasonable efforts to ensure that pre-commencement conditions were discharged prior to 30th July 2023 (expiration date) and only took steps to trigger commencement when it became clear that the final condition would not be discharged before 30th July 2023.
- Council considered the permission live by virtue of discharging the condition after 30th July 2023
- Works commenced on 6th July and were in complete accordance with the permission and was not reliant on Condition 4 relating to HPK/2021/0044 being discharged
- It would be irrational for the LPA to undertake enforcement proceedings against the material start made on site and the start therefore must be considered lawful having regard to relevant case law (*Hammerton v London Underground Ltd* 2003 JPL 984 & *Prokopp v Londong Underground Ltd* 2004 Env LR)

Officers have sought advice from the Council's Solicitor as to whether a material start (which is accepted as being material) can commence lawfully when one condition that goes to the heart of the permission remains outstanding beyond the time limits of the permission.

The key paragraphs contained with the judgement passed down by Mr J Sullivan are as follows:

66. *Again, the Court of Appeal did not have to, and therefore did not, address the question: what happens if there is not an outline but a detailed planning permission and if all the conditions of that detailed planning permission are complied with, save for one, which requires approval of some particular aspect of the development before any development commences? Is the resulting unlawfulness confined to that particular aspect of the development, or does it render the entire development unlawful?*
67. *For the reasons set out above, I believe that the statutory purpose is better served by drawing 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. I appreciate that these are two opposite ends of a spectrum. Each case will have to be considered upon its own particular*

facts, and the outcome may well depend upon the number and the significance of the conditions that have not been complied with. Provided that the Court applies Wednesbury principles when considering these issues, there is no reason why it should usurp the responsibilities of the local planning authority.

This application falls into the exact scenario described above because every detail except the drainage condition (Condition 4) had been approved prior to material start taking place.

The 'late' discharge of Condition 4 relating to the Reserved Matters permission has not prevented the development from being commenced by way of an (accepted) material start (i.e. the digging of a foundation trench associated with Plot 1) in accordance with the approved details. Put another way, should the development have commenced in a manner that could not be rectified as a result of details being approved at a later date differing from that carried out, it may not be possible to conclude that a lawful commenced has occurred.

Mr J Sullivan also makes clear that he wants to ensure that "*a judge-made principle is not applied so inflexibly as to produce results which defy common sense and serve no useful planning purpose.*"

It is the case that should the LPA be minded to enforce against the breach of planning condition, it is not clear how this would be applied, given that the scheme was already satisfactory in all other aspects. If the condition had been refused (i.e. because of the details being unacceptable then the Council's Solicitor that this would be a different matter.

However, in light of the facts of the case and the legal advice sought from the Council's Solicitor, it is judged that the (accepted) material start on site, which amounts to the digging of two foundation trenches for the purposes of building the dwellinghouse on Plot 1, was, in light of legal advice, carried out in a lawful manner prior to the expiration of the time limit set out by Condition 1 relating to HPK/2016/0108.

As such, it is concluded that under Section 191 of the Act 1990, a positive Certificate can be granted which ratifies that a material lawful start has been made on site, thereby allowing the development to be built out.

OFFICER RECOMMENDATION : Grant Certificate

Case Officer: James Stannard

Recommendation Date: 25th January 2024

X *B.S. Haywood*

Signed by: Ben Haywood

On behalf of High Peak Borough Council