

Officer Report

Application Number:	HGY/2023/1335
Application Type:	Lawful development: Existing use
Address:	Land off Brook Road and, Mayes Road, London, N22
Proposal:	Lawful Development Certificate to confirm compliance with Condition 1 (Commencement) of planning permission ref: HGY/2017/2886 (as amended by s.96A non-material amendment ref: HGY/2022/1076)
Case Officer:	Samuel Uff
Valid Date:	18/05/2023
Applicant:	Mr Yousuf Ayyub Bux
Agent:	Mr Nick Walker

RECOMMENDATION

Approve

REPORT FOR CONSIDERATION UNDER DELEGATED POWERS

1. RECOMMENDATION

GRANT Lawful Development Certificate

2. PROPOSED DEVELOPMENT AND LOCATION DETAILS

Lawful Development Certificate Details

The applicant has submitted a detailed submission to justify that the level of development undertaken prior to the expiration of the time limit set out in condition 1 of planning permission HGY/2017/2886 has occurred.

The submission includes details of a trench that was excavated in the car park of the existing Iceland supermarket car park, within the footprint of Phase 1 of the approved planning permission. The trench was for the expressed purpose of laying a pipe to be used for the drainage of the proposed building. The application seeks to establish that such works constitute development.

Site and surrounds

The site contains an Iceland supermarket and associated car park. Permission was granted for demolition of the existing supermarket and associated structures and construction of a residential led development, including commercial use and a medical centre. This was approved as a phased development, with Phase 1 developing the eastern end of the car park. The site is not located within a conservation area.

Site History

HGY/2017/2886 Demolition of existing building and erection of a 6-9 storey building providing 161 residential flats (Use Class C3), medical centre (Use Class D1), retail (Use Classes A1-A4) and a flexible retail / office unit (Use Classes A1-A4 and B1), plus associated infrastructure and landscaping works GTD 22/02/2021 (2 year permission)

HGY/2023/1076 Non-material amendment to planning permission HGY/2017/2886 for 161 residential flats (Use Class C3), and mixed use development to amend condition 2 (approved plans) and to amend triggers for conditions 3 (materials), 4 (cycle parking), 9 (design code public realm), 26 (overheating), 34 (sound insulation), 41 (parking layout), 49 (phasing strategy), 51 (CHP feasibility) GTD

HGY/2023/2611 Approval of details reserved by a condition 13 (Community liaison group) of planning permission HGY/2017/2886 for the demolition of existing building and erection of a 6-9 storey mixed use building PENDING

HGY/2022/2610 Partial approval of details (Phase 1 only) reserved by a condition 11 (Crossrail 2 Safeguarding) of planning permission HGY/2017/2886 for the demolition of existing building and erection of a 6-9 storey mixed use building GTD

HGY/2022/2612 Approval of details reserved by a condition 14 (Site Levels) of planning permission HGY/2017/2886 for the demolition of existing building and erection of a 6-9 storey mixed use building GTD

HGY/2022/2613 Approval of details reserved by a condition 17 (NRMM) of planning permission HGY/2017/2886 for the demolition of existing building and erection of a 6-9 storey mixed use building GTD

HGY/2022/2614 Approval of details reserved by a condition 20 (Air quality / dust) of planning permission HGY/2017/2886 for the demolition of existing building and erection of a 6-9 storey mixed use building GTD

HGY/2022/2615 Partial approval of details (Phase 1 only) reserved by a condition 15 (Contamination); 42(1)(2)(3) only (Additional Contamination) and 44 (monitoring and mediation) of planning permission HGY/2017/2886 for the demolition of existing building and erection of a 6-9 storey mixed use building GTD

HGY/2022/2616 Partial approval of details (Phase 1 only) for condition 47 (Boreholes) of planning permission HGY/2017/2886 for the demolition of existing building and erection of a 6-9 storey mixed use building GTD

LOCAL REPRESENTATIONS

No formal consultation was undertaken, but comments have been received from local group Parkside Malvern Residents Association (PMRA) and comments are summarised below.

The following issues were raised in representations that are material to the determination of the application and are addressed in the next section of this report:

- Digging trench and adding drainage are not demolition or works (Officer Comment: This is assessed in this report);

- The 'destruction' cannot be correct when the pavements are lying in a pile in their original and intact parts (Officer Comment: the laying of the pipe and drainage are considered to constitute development, as detailed within the assessment below);
- The single pipe is not connected to any other part of the development and should not be considered as "the laying of any underground main or pipe to the foundations, or part of the foundations, of a building" (Officer Comment: This is commencement only and will be expected to connect to wider drainage as the development progresses);
- The works are ephemeral and nothing to do with the 'development' in question, and will need to be removed before the new foundations can be constructed (Officer Comment: The applicant has shown that the pipe siting is accurate and the letter from PSA Design is considered to suffice as suitability, but this is a building regulations issue rather than Planning);
- Manhole used is cheap plastic variety not that shown on plan with pre-cast concrete rings with a concrete cap (Officer Comment: the letter from PSA Design states these are suitable. There is no requirement for the applicant to provide details of such drainage for Planning and this would be a Building Control issue);
- Site remains as a pay and display car park - HSE (F10) would have been served with notice and the site properly secured and managed if development had commenced (Officer Comment: There is no requirement in Planning for the closing off of the car park prior to commencement. Any health and safety concerns would be outside of Planning).
- No evidence of Building Regulations compliance has been provided (Officer Comment: there is no requirement for the applicant to provide this information to Planning);
- Condition 13 (community liaison group) and 15 (contamination) of the planning permission have not been demonstrated (Officer Comment: Condition 13 is with planning and being progressed. Condition 15 part (a) has been discharged).
- Consent of freeholder and leaseholder not been obtained / detailed in the application (Officer Comment: This is an ownership issue outside of Planning).
- Site wide masterplan approved in 2017 is now out of date (Officer Comment: this application seeks only to confirm commencement, not for the planning merits to be reconsidered).
- Further objection regarding the approved scheme and ways it could be improved (Officer Comment: This application does not seek to revisit the permission but only whether the development has commenced).
- The developer failed to secure the NHS facility (Officer Comment: This application does not seek to revisit the permission. There is a contingency that if this is not an NHS facility it may be operated as a private facility with NHS offer. Regardless, the suitability or delivery of the health centre is not assessed in this application.).

ANALYSIS/ASSESSMENT

Town and Country Planning Act 1990

The Town and Country Planning Act 1990 regulates the development of land. The Act sets out what constitutes development and commencement of development. Section 55(1), defines "development" as:

(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

1A) Section 55 of this Act defines "building operations" to include—

a) demolition of buildings;

b) rebuilding;

c) structural alterations of or additions to buildings; and

d) other operations normally undertaken by a person carrying on business as a builder.

Section 56 of the Act states:

1) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated –

a) if the development consists of the carrying out of operations, at the time when those operations are begun;

b) if the development consists of a change in use, at the time when the new use is instituted;

c) if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b).

2) For the purposes of the provisions of this Section mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.

3) The provisions referred to in subsection (2) are sections 61L(5) and (7), 85(2), 86(6), 87(4), 89, 91, 92, 94 and 108(3E)(c)(i).

4) In subsection (2) “material operation” means —

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 any such trench as is mentioned in paragraph (b);

d) any operation in the course of laying out or constructing a road or part of a road;

e) any change in the use of any land which constitutes material development...

5) By section 336:

1) In this Act, except in so far as the context otherwise requires and subject to the following provisions of this section and to any transitional provision made by the Planning (Consequential Provisions) Act 1990 — ...

“building” includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building; ...

“land” means any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land;

ASSESSMENT

The main points of contention are:

- i. Date of commencement
- ii. Development constituting commencement
- iii. Outstanding conditions / obligations

Date of commencement:

Planning permission was granted on 22/02/2021 for a set time limit for commencement of 2 years. As such the relevant date for commencement must be on or before 22/02/2023.

This Lawful Development Certificate was submitted on 18 May 2023 but provides evidence to show commencement prior to the relevant date of 22 February 2023. The evidence includes a letter from PSA Design dated 16 February 2023, provided as evidence of implementation on 11 February 2023. This letter references the photographic evidence of the trench and piping supervised on 11 February 2023. These photos have been submitted as part of this application.

There is no contradictory evidence to counter the claim that works were undertaken on 11 February 2023 and this date is accepted as the date of works. As such, this is considered to be acceptable evidence for the date claimed as works commencing. The following sections consider whether such works are considered to be relevant lawful development as required in Section 55 and 56 of The Act.

Development constituting commencement

The letter from PSA design highlights the extent of excavation and siting of those works and overlays this with the proposed footprint. The siting of the foul drainage aligns with what would be reasonably expected in the approved drawings as part of the medical centre footprint. The applicant's Counsel opinion letter has set out that these works required the demolition of part of the car park surface, with use of mechanical machinery to undertake the works. The letter from PSA Design confirms the drainage length appears to accurately reflect the materials, size and location of that set out on the design drawing.

The Counsel Opinion details what constitutes demolition and that this may involve demolition of part of a building or structure. This references Section 336, which details a definition of "building" to include associated structure. Such a rationale is cited with reference to the development required to demolish part of the car park to prepare the land for the laying of the associated pipework. However, the argument that parts of the car park constitute part of the building is questioned by officers.

This definition of demolition as a means of showing development is not necessarily accepted and this alone would be considered to be below the threshold of what could reasonably be considered demolition as a means of commencing development of the planning permission. Although officers disagree with this assertion that demolition has taken place, the works undertaken are considered to be structural alterations or other operations normally undertaken by a person carrying on business as a builder and therefore could be considered as parts "c" or "d" of Section 55. In this context it is considered that commencement is accepted under Section 55.

Section 56 of the Act goes on to clarify what constitutes "*material operations*" and gives the specific example in part c) of "*the laying of any underground main or pipe to the foundations, or part of the foundations*". The mechanical operations carried out by building specialists to create the trench and lay the pipe have been reasonably shown to be within the footprint of the proposed building and suitable for the proposed drainage purposes of Phase 1 of the approved development. As such, these are considered to be structural alterations and operations undertaken by a building professional and subsequently the associated works to dig the trench and lay drainage would constitute development of land as defined by Section 56.

The Park Malvern Residents Association (PMRA) objection letters reference that the level of 'destruction', 'demolition' and 'works' associated with the development are not significant and have not been reviewed in relation to building regulations. This has been put to the applicant, who have advised that they will not be responding further and that the case has been sufficiently made. LBH Building Control officers have advised that there is no obligation for the applicant to use the Council service and that they can use external inspectors. The applicant's submission is supported by the PSA Design letter, which states that the siting and materiality would be in accordance with the approved plans and this is considered to be reasonably acceptable.

The PMRA also reference that there is no connection of that pipe or trench to wider approved development. Connection of the trench / pipe work to wider parts of the approved development is not required in the Act. Commencement suggests initial works only, so it is reasonable that such further connections to the wider development would occur at this stage. The use of heavy

machinery to undertake the works and siting of the trench and associated structural alterations are considered to accord with definitions of development and are accepted.

The continued use of the Iceland store and car park is not unreasonable and was envisaged to continue as part of the approved phased development, which allowed both to be retained for continued use until such time that the store itself be demolished (in later phases of development). If there are any health and safety issues with the presence of the trench and continued use of the car park then such issues would be considered outside of planning and are not relevant to whether such works constitute development.

In terms of the specifics of such demolition / works, the applicant has outlined the modest level of development required to constitute commencement of development. This is highlighted in case law of *Malvern Hills DC v SSE & Barnes and Co* [1982] JPL 439 where the court established that the threshold for what is deemed to be material operations is low. In that instance the marking out of a line and the width of a road with pegs amounted to “material operations” within section 56(4)(d) of the TCPA 1990. The case of *R (Martin Grant Homes Ltd) v Basildon DC* [1987] 53 P&CR 397 also highlighted that drainage works were within the scope of what was allowed by that permission and were accepted as commencements.

As such, it is considered that although modest forms of development, the level of works undertaken do comply with the threshold for development required to constitute material operations and compliance with Condition 1 of the planning approval HGY/2017/2886. Whether or not such commencement was lawful, in terms of compliance with outstanding conditions and obligations are considered below.

Outstanding conditions / obligations

The following conditions required details to be submitted prior to commencement of that specific phase of development. These have all been submitted and approved other than conditions 9, 10 and 13.

9. *Design code for public realm*

10. *Piling Method Statement*

11. Crossrail 2 safeguarding

13. *Business and Community Liaison Construction Group*

14. Confirmation of site levels

15. Contamination (1)

17. Mobile machinery

20. Air Quality (Dust)

42. Contamination remediation

44. Contamination monitoring and mediation plan

47. No penetrative construction methods (boreholes, piling etc) unless permitted by LP

Condition 9 (design code for public realm) has not been submitted nor discussed with the applicant. This was a pre-commencement condition which is outstanding. However, this is not considered to be to the heart of the permission and the works carried out to date would not impact any of the public realm. This has been flagged to the applicant and will be expected prior to further works.

Condition 10 (Piling Method Statement) has not been submitted and this was questioned by Officers at the time. It was advised that no piling beyond the borehole excavations were intended and that as such this is reasonably covered by Condition 47. The applicant has been advised that if there is no need for this condition then an application for removal or variation should be submitted.

This is not considered to be at the heart of the permission and is accepted as not being required prior to commencement.

Condition 13 (Business and Community Liaison Construction Group) has been submitted but has been amended due to ongoing discussions about the specific constitution of who should be included in this group. It was agreed that there could be initial demolition / development without this being finalised, acknowledging that this had been submitted and in discussion.

The objection from PMRA has highlighted that condition 15 (contamination) should have been complied with in full, but it is reasonable that initial parts of development relevant to a specific phase and level of investigation only be submitted at this time. The applicant has provided suitable details for initial investigations and will require further details to be submitted prior to further works being undertaken.

As such, all relevant conditions prior to the commencement of the development have been approved and that no outstanding items would be contrary to the material consideration of the approval.

S106 Obligations

- Clause 4.2 states that on or prior to the Commencement Date to pay to the Council the Contributions. 'Commencement Date' is defined as per Section 56 of The Act and 'Contributions' refer to bus, carbon offset, construction monitoring, CPZ, transport Management Order and walking / cycling contribution.
 - No such payment has been made to date. Para 4.2.2 states that the signee of the S106 is not to "(i) Commence or cause or permit Commencement of the Development....until such time as he Council has received the Contributions in full by direct bank transfer to the Council's bank in accordance with clause 7.1.
 - These contributions remain outstanding and Clause 4.2.2 is explicit that the relevant trigger is that of commencement as defined in Section 56 of the Act.
- Clause 4.3 obliges the applicant to provide proof of registration with Considerate Contractors prior to implementation of development.
 - No such proof has been provided prior to implementation of the development.
 - The minimal level of works to date would not necessarily require this registration but the applicant has been advised that this obligation has been activated and is outstanding.
- Clause 4.9 obliges that an Employment and Skills Plan be entered into prior to implementation of development.
 - No proof of such measures required therein have been provided.
 - The level of development undertaken to date would not have necessitated such a plan but the applicant has been advised that this obligation has been activated and is outstanding.
- Clause 4.10 obliges the development not to commence or cause or permit Commencement until a Highways Agreement be executed and completed.
 - No agreement has been received and there have been no discussions toward this agreement to date.
 - It can be argued that the level of works undertaken to date would not be of a level to require such detail to be submitted but will be required prior to any further works.
- Clause 4.16 requires a Construction Plan be submitted prior to implementation.
 - No plan has been submitted. There have been initial discussions, but no submission has been received.

- It can be argued that the level of works undertaken to date would not be of a level to require such detail to be submitted but will be required prior to any further substantial works.

- Clause 4.17 relates to Third Party Implementation and does not allow for any Phase to be implemented until the relevant part has been vacated by the Second leaseholder. The Second leaseholder is defined as being the owner with leasehold title absolute of the Property registered at the Land Registry under numbers AGL151337 and AGL151338 not party to this agreement.

- As the store and car park are still in use, the relevant part of the site cannot be considered to have been vacated. However, the development has not been implemented by a third party and therefore this obligation is not relevant.

- This would be an ownership issue between the second leaseholder and the applicant.

- Clause 6.2 required written notice of commencement to or prior to commencement.

- A CIL form instructing commencement was received to the Council's Monitoring Officer. This obligation has been complied with.

The applicant's Counsel Opinion references where conditions prohibit commencement of development they must be explicit that such works are prohibited before a requirement has been complied with. The quote from the Counsel opinion states:

"In my judgment, the principle argued for by the defendant applies only where a condition expressly prohibits any development before a particular requirement, such as the approval of plans, has been met..."

The applicant has gone to some lengths to show that there are no outstanding conditions that would have prohibited the commencement of works. However, there is no reference to the S106 or obligations therein. These clearly require obligations to be paid, notices and agreements to be undertaken prior to commencement / implementation, thus do expressly prohibit development prior to the commencement of development. A number of these Clauses remain outstanding and in this regard the commencement was in breach of the legal requirements and therefore unlawful. However, the level of development would mean that the impact of this unlawful commencement is minimal, and these be more reasonably required as the development progresses.

These legal matters will be pursued separately to the consideration of this application, which focuses solely on whether commencement occurred and not whether all legal obligations were complied with. These legal requirements are linked to the development being undertaken in a safe and orderly manner and providing suitable socio-economic benefits, such as employment obligations, will be required prior to further development. Therefore, the nature of those outstanding obligations is not to the heart of the planning permission, but rather related to the construction process. There outstanding payments, notices and agreements will need to be addressed prior to any further development being undertaken.

The commencement and then subsequent stopping of any further works, thus stopping works, are not considered to be an abandonment of the site. There is a specific 'Development Break' reference in the S106, which is defined as no construction works taking place 24 months after commencement. Any further development will require all obligations to be progressed or an amendment to the S106 agreed.

The applicant submitted a CIL Exemption form and Notice of Commencement of Works form to the Council's Monitoring Officer. It has been agreed that future CIL payments will be linked to the agreed phasing of development, with CIL contributions paid for each phase individually. As such the CIL position is resolved for this phase of development.

Conclusion

The details provided are considered to satisfy that development has commenced before the relevant date of 22/02/2023 in accordance with Condition 1 of the planning permission. The evidence includes a letter from PSA Design dated 16 February 2023, provided as evidence of implementation on 11 February 2023. This letter references the photographic evidence of the trench and piping supervised on 11 February 2023. This is therefore considered to fall within the definitions of development as detailed in Sections 55 and 56 of the Town and Country Planning Act 1990.

All relevant conditional requirements have been complied with. The outstanding S106 contributions are being pursued separately on the basis that the development has commenced while these outstanding.

3. RECOMMENDATION

GRANT Lawful Development Certificate

Informatives:

The applicant is advised that there are a number of obligations that remain outstanding and should have been cleared prior to commencement.