OFFICER'S REPORT

Case Officer:	Lucy Hall		
Parish:	Kingsbridge	**Ward:**	Kingsbridge
Application No:	2187/24/CLE		
Applicant:	Mr Martin Wills Wills Marine Ltd The Promenade Kingsbridge Devon TQ7 1JF	**Agent:**	Mr Mike Derry D20 Architects Northside Wakeham New Barn Aveton Gifford Kingsbridge TQ7 4NE
Site Address:	Wills Marine Ltd, The Promenade, Kingsbridge, TQ7 1JF		
Development:	Certificate for lawfulness for existing use is to establish that permission 28/1382/00/F, as amended by applications 28/1315/01/F, 28/1990/02/F, and 28/0797/04/F, has been lawfully commenced [and] remains extant.		

Recommendation: Refuse Certificate

Insufficient information has been provided to demonstrate on the balance of probabilities that planning permission 28/1382/00/F ('2000 permission') was lawfully commenced. Furthermore, even if and contrary to the Council's primary position, development under the 2000 permission was lawfully commenced it can no longer be relied upon because it is now irreconcilable with the later planning permission 28/0797/04/F ('2004 permission') which has since been carried out.

The 2000 permission was therefore not lawfully commenced and, in any event, can no longer be lawfully carried out due to the implementation of the 2004 permission and the physical incompatibility between the two permissions.

Key issues for consideration:
Whether, on the balance of probabilities, the Applicant's claim that planning consent 28/1382/00/F has been lawfully commenced and remains extant is well founded.

The Proposal:
The Applicant seeks a Certificate to confirm that planning permission 28/1382/00/F, as amended by applications 28/1315/01/F, 28/1990/02/F, and 28/0797/04/F, has been lawfully commenced remains extant.

Consultations:

- Highway Authority – No highway implications

- Kingsbridge Town Council – Recommend refusal:

"It is contested that the remaining development (retail showroom to be built in the current yard) can be lawfully implemented because a 450mm wide boundary wall (north west boundary) has been built where the external wall of the retail unit permitted by 28/1382/00/F (and subsequent amendments) would be positioned as reported in the withdrawn planning application 1355/24/NMM."

Representations:
The Council has received 13 letters of representation, all raising objections. The comments received can be summarised as follows.

- 2004 permission shows the removal of the retail units and the change of the retail units at ground floor level of The Malt to 2 residential units with a garden and boundary wall. These two units were constructed. As a result, the original works on planning permission 28/1382/00/F could no longer be carried out.
- Former owner of Pindar Lodge confirms no work happened in the yard, understood the plan to build a retail unit was superseded by 28/0797/04/F.
- No works have been undertaken in the boatyard area since 1997.
- Understand that there is a covenant, drawn up in 2004 and signed by all interested parties including Wills Bros Ltd, which prevents building works taking place in the site. This would be an irrational thing for the developer to agree to if he believed he still had permission.
- Supporting information states that building works did not commence until 01.01.05, which would suggest this was based on the 2004 approvals, and the 2000 permission would have lapsed.
- Sites often have planning chapters where one permission supersedes the others. In this case the 2004 permission superseded the earlier consents. The 2004 permissions does not include retail units.
- 28/1381/00/CA was for demolition and is not referenced within the submission. This permission authorised consent for the demolition of the buildings. Demolition was not part of planning approval 28/1382/00/F, or any of the subsequent amendments and therefore the 2000 permission was not implemented.
- Condition 13 which required an archaeology report is listed in the 2000 and 2001 permission.
- Each of the permissions included the standard condition requiring development to be implemented in 5 years (condition 1).
- Sales details of the flats on 'Rightmove' list 11 apartments; two apartments more than the 28/1382/00/F planning permission allowed (9 apartments); 4 apartments more than the 28/1315/01/F planning permission allowed (7 apartments) and 1 more apartment than the 28/1990/02/F planning permission allowed (9 + 1 additional apartment). 11 apartments accord with the 28/0797/04/F planning permission that provided for 9 apartments plus 2 apartments in lieu of a retail unit – on this evidence alone the 2004 permission was implemented.
- Site boundary shown on the 2004 permission excluded the area for the retail unit, and there is no reference to it on the plans.
- Application 28/1382/00/F was for the 'Redevelopment to provide 9 apartments and replacement retail units. The ground floor retail unit was replaced by 2 apartments in 28/0797/04/F permission.
- It would not be possibly to build the southern retail unit as drawn in planning permission 28/1382/00/F Drawing ACL / 101/10 Rev 4 because the windows would overlook the outside amenity spaces of the two ground floor flats.

- Extensive case law regarding drop in applications and the general doctrine established by Pilkington v Secretary of State for the Environment and Others [1973] 1 WLR 1527 CA state that while a landowner can make multiple applications for the same piece of land which maybe inconsistent with each other once one of those permissions has been implemented, and development has been carried out which makes it impossible to achieve development under another permission over the same piece of land, that other permission is no longer valid. On this permission the 2000 permission is inconsistent with the 2004 permission, which has clearly been implemented, and therefore the 2000 consent has lapsed.

Relevant Planning History:

- 28/1699/94/7, Listed Building Consent for conversion, extension and partial demolition of old malthouse and associated buildings to form 20 flats and provision of parking facilities,
- Conditional Approval

- 28/1700/94/3, Conversion, extension and partial demolition of old malthouse and associated buildings to form 20 flats and provision of parking facilities, Conditional Approval

- 28/1140/99/LB, Listed Building Consent for amendment to approved plans 9/28/1699/94/7 for redevelopment (re-design of units 10-14), Conditional Approval

- 28/1141/99/F, Amendment to approved plans 9/28/1700/94/3 for redevelopment (redesign of units 10-14), Conditional Approval

- 28/1381/00/CA, Conservation Area Consent for demolition of existing buildings, Conditional Approval

- 28/1382/00/F, Redevelopment to provide 9 apartments and replacement of retail units, Conditional Approval

- 28/1315/01/F, Amendment to planning permission 28/1382/00/F for redevelopment to provide 9 apartments and replacement of retail units (reduction of apartments from 9 to 7)
- Conditional Approval

- 28/1990/02/F, Provision of additional apartment in lieu of ground floor retail area, Conditional Approval

- 28/0797/04/F, Amendment to approved plans 28/1382/00/F for redevelopment to provide 9 apartments and replacement of retail unit (provision of 2 no. 1 bed apartments in lieu retail unit and internal amendments, Conditional Approval

- 28/0701/04/F, Amendment to planning permission 28/1990/02/F to provide 2 no. flats in lieu of 1 no. approved, Withdrawn

- 28/1517/05/F, Substitution of window for Velux rooflight and additional openings to the north west elevation, Conditional Approval

- 1355/24/NMM, Non-material minor amendment to planning consent 28/1382/00/F to move the retail unit slightly away from the side (North West) boundary wall and omit the windows on this elevation, Withdrawn

- 3921/23/FUL, Extension to existing marine retail unit to provide a new showroom and cafe on existing boat storage yard, Withdrawn

ANALYSIS

Preliminary Matters / Case Law:
In this type of application, the onus of proof is firmly upon an applicant. The relevant test of the evidence on such matters is the "balance of probabilities" (whether it is more likely than not) and it is also clear that an applicant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the decision taker has no evidence of their own, or 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 that balance.[1]

Neither the identity of an applicant, nor the planning merits of the operation, use or activity, are relevant to the consideration of the purely legal issues which are involved in determining an application.

The application is made pursuant to Section 191 of the Town and Country Planning Act 1990 ('1990 Act'). The effect of a s.191 certificate in this case would be to evidence the lawful implementation of the permission and its ability to be relied upon i.e. that, in the words of the Applicant, it remains "extant".

Under s.191(1) of the 1990 Act, if any person wishes to ascertain whether— (a) any existing use of buildings or other land is lawful; (b) any operations which have been carried out in, on, over or under land are lawful; or (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, they may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

S.191(2) of the Act states that uses and operations are lawful at any time if:

a) no enforcement action may then be taken in respect of them; and

b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

There is no enforcement notice is in force and so b) is satisfied.

In this case there are two issues to consider. The first relates to the implementation or commencement of the permitted development. The second is whether notwithstanding any lawful commencement the permission remains extant and capable of being relied upon.

[1] *Gabbitas v SSE and Newham LBC* [1985] JPL 630.

Implementation / Commencement

Planning permissions are subject to a three-year time limit of implementation/commencement, *or* such other period as may be specified by the local authority (as s.91 of the 1990 Act). A planning permission has to be begun or implemented within the prescribed period, but not necessarily completed. Thus, in respect of a) there must have been a lawful commencement within the prescribed period in order to secure the permission.

Section 56 of the 1990 Act deals with the commencement of development. S.56(1)(a) states that development of land consisting of the carrying out of operations shall be taken to be initiated 'at the time when those operations are begun'. S.56(2) explains that '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.'

The meaning of "material operation" is set in s.56(4) and includes: '(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.'

Whether the development or the operation has or has not begun is a question of fact and degree on the evidence. The intention of the developer is irrelevant, the test to be applied is objective.[2] Something more than a token gesture will be required.[3]

S.56(4) is not exhaustive: development may be begun by material operations not included in that list.[4]

By way of examples, clearing a site, demolishing a structure and digging a foundation trench for a new garage certainly represents material development in the sense of not being *de minimis*.[5] Similarly laying out the drainage by digging trenches for pipes, and pegging out the further works, represents an operation.[6] Digging a trench, and then back-filling that trench in order to prevent children and animals falling into it, whilst the development is put on hold, is sufficient as a matter of fact and degree to constitute development or an operation.[7] The work must relate to the planning permission.[8]

However, in order to lawfully begin development in accordance with s.56, any material operation relied on must not be in breach of a condition precedent (i.e. the "Whitley principle").[9] Such a condition precedent must though go to the heart of the permission i.e. it must be a "true condition precedent".[10]

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[2] *France v Kensington and Chelsea Royal London Borough Council* [2017] EWCA Civ 429.
[3] Ibid.
[4] *Field v First Secretary of State* [2004] EWHC 147 (Admin).
[5] *Riordan Communications Ltd v South Buckinghamshire DC* (2001) 81 P. & C.R. 85.
[6] *Malvern Hills DC v Secretary of State for the Environment* 81 L.G.R. 13; (1983) 46 P. & C.R. 58 CA.
[7] *High Peak BC v Secretary of State for the Environment* [1981] J.P.L. 366 DC.
[8] *Commercial Land Ltd v Secretary of State for Transport and Local Government* [2002] EWHC 1264 (Admin).
[9] *F G Whitley & Sons Co. Ltd v Secretary of State for Wales & Clwyd CC* [1992] WL 895744.
[10] *R (Hart Aggregates) v Hartlepool BC* [2005] EWHC 840 (Admin).

Extinguishing a Planning Permission

Once a planning permission has been lawfully implemented, it cannot be abandoned.[11]

However, the case of *Pilkington*[12] established that where two inconsistent planning permissions are granted the implementation of one may render it impossible to carry out the other. The "Pilkington principle" was subsequently considered by the Supreme Court[13], where it was clarified that where there are two planning permissions for the same site, what matters is whether it is physically possible to carry out the unimplemented planning permission. However, a mere inconsistency between the two planning permissions does not prevent the second planning permission from being carried out; the differences between the planning permissions must be material.

As the Court summarised (at para. 68):

> *"[F]ailure or inability to complete a project for which planning permission has been granted does not make development carried out pursuant to the permission unlawful. But (in the absence of clear express provision making it severable) a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible."*

The Effect of a s.73 Grant

The history of the site, and consents relied upon by the Applicant, turn on multiple approvals issued under s.73 of the 1990 Act. The Applicant in making the application states that the original 2000 permission was "amended" by the subsequent approvals.

However, whilst s.73 applications are commonly referred to as variation applications, that is a misnomer. They result in an *independent planning permission* to carry out the same development as previously permitted, but subject to the new or amended conditions.[14]

Thus, each of the references cited by the Applicant are in fact all separate planning permissions. What the Applicant is seeking is confirmation that if choosing between the various approvals they can lawfully rely upon the 2000 planning permission in bringing forward the detached retail element.

[There is a related issue in this case that the s.73 permissions subsequent to the 2000 permission, and notably the 2004 permission, permitted changes that were in conflict with the operative part of that 2000 permission. The Court of Appeal has since judged that such an approach is unlawful.[15] However, as the 2004 permission has been long since carried out, and the certificate application seeks confirmation of the lawfulness of continuing to implement the 2000 permission, nothing turns on this point.]

Assessment:
Considering the foregoing, an assessment of the application can be carried out succinctly.

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[11] *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132.
[12] *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527.
[13] *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30.
[14] *London Borough of Lambeth v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33.
[15] *Test Valley Borough Council v Fiske* [2024] EWCA Civ 1541.

i. The Applicant has provided little evidence to explain why the 2000 permission was lawfully commenced and is extant.

ii. There are two issues arising from this. Firstly, it is not clear what material operation is to be relied upon in suggesting that the development was started within the five-year time limit imposed by condition 1 of the permission. As objectors rightly point out, there is some doubt that this would have occurred prior to 2nd June 2004 because the 2004 permission (like the other s.73 permissions before it) all included the same time limit condition. This would suggest that the development had not yet begun at that stage. The Applicant has not confirmed when the 2000 permission was implemented and if this occurred within the five-year window for that particular permission.

iii. Secondly, and moreover, the 2000 permission included a number of pre-commencement conditions. In light of the subject matter of those conditions which go to the heart of the permission, they are considered to represent true condition precedents. The Applicant has provided no evidence that those condition precedents were complied with.

iv. Furthermore, in review of the four planning permissions cited by the Applicant, it is evident that each of the subsequent permissions granted under s.73 were materially different from the 2000 permission. Again, there is no compelling evidence from the Applicant to suggest that any development was carried out consistent with or with an intent to pursue or further that 2000 permission. Indeed, on the evidence available it would appear that it is the 2004 permission that was implemented and carried out.

v. Therefore, the Applicant's claim that the 2000 permission was lawfully commenced is not considered to be well-founded.

vi. However, even if that position is wrong and the Applicant were somehow in a position to prove it more likely than not that the 2000 permission were lawfully commenced and capable of being carried out, it is necessary to consider its compatibility with the 2004 permission.

vii. As noted, the two permissions are materially different. The 2004 permission does not have retail buildings as part of its plans and also provided for a different quantum and mix of residential accommodation configured on the site and within the proposed building.

viii. Implementation of the 2000 permission, whether in whole or in part, is physically irreconcilable with the 2004 permission that has been carried out. This is not a mere inconsistency.

ix. In respect of the detached retail until to the south of the site in the 2000 permission, this was part and parcel of a development that can no longer be carried out. Even in isolation the detached unit overlaps or is contiguous with the boundary of the 2004 permission courtyard, and land associated with the retail unit has been taken up by the 2004 development (for example its northern courtyard area and parking space). As an objector rightly points out, "it would not be possible to build the southern retail unit as drawn in [the 2000 permission] because the windows would overlook the outside amenity spaces of the two ground floor flats. The Town Council make a similar point in identifying that a 450mm wide boundary wall has been built where the external wall of the retail unit permitted by the 2000 permission would be positioned.

x. Therefore, even if the 2000 permission had been lawfully commenced and were capable of further implementation insofar as the retail element, to do so would be in direct conflict with the 2004 permission that has been carried out. This would offend the Pilkington principle and renders the 2000 permission unlawful in that respect where none of the exceptions in *Hillside* apply.

Conclusion:
Accordingly, it is concluded that the claimed matters are not lawful, and it is, therefore, recommended that a Certificate of Lawfulness be refused.

Considerations under Human Rights Act 1998 and Equalities Act 2010:
The provisions of the Human Rights Act 1998 and Equalities Act 2010 have been taken into account in reaching the recommendation contained in this report.

The above report has been checked and the plan numbers are correctly recorded within the computer system. As Determining Officer I hereby clear this report and the decision can now be issued.
Name and signature: Lucy Hall
Date: 25 February 2025