

Boyer

Former Nestle Factory – Block H

Lawful Development Certificate (Existing Use)

REPORT CONTROL

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1. INTRODUCTION

- 1.1 This Statement has been prepared on behalf of BDW Barratt London ('the Applicant'), in relation to development at Block H, Former Nestle Factory, Nestles Avenue, Hayes (the 'Site').
- 1.2 The Statement supports an application for a Lawful Development Certificate (Existing Use) pursuant to Section 191 of the Town and Country Planning Act 1990 (as amended) (the 'TCPA').
- 1.3 The Applicant seeks a Lawful Development Certificate to confirm that a material operation lawfully commenced pursuant to planning permission Ref. 1331/APP/2022/2553 and that, as a consequence, the permission has been lawfully implemented and remains extant.
- 1.4 The description of development for planning permission Ref. 1331/APP/2022/2553 is as follows:
- "Partial demolition and redevelopment of the Former Canteen Building to provide a new healthcare facility (Class E(e)), nursery (Class E(F)) and reconfigured residential building (Block H) (Class C3) with a commercial unit at ground floor (Class E), including associated landscaping, access, car parking and other engineering works."*
- 1.5 The decision notice is dated 5th July 2023 and therefore the permission was lawfully implementable until 5th July 2026 subject to all relevant pre-commencement conditions having been suitably discharged by the Local Planning Authority (LPA).
- 1.6 The following information has been submitted to support this application:
- Application Form;
 - Site Location Plan;
 - Photos of the excavation and demolition works carried out at the Site;
 - Demolition Method Statement;
 - Phasing Mark-up Plan;
 - Demolition Plans;
 - Phasing Plan;
 - Demolition Programme;
 - Supporting Statement; and
 - Decision notice for the relevant planning permission (Ref. 1331/APP/2022/2553 and Ref.1331/APP/2025/3055).
- 1.7 The application including all supporting information is submitted online and the requisite application fee has been paid via the Planning Portal (Ref. PP-15051938).

2. MATERIAL START

Context

- 2.1 Section 56 ('S56') of the Town & Country Planning Act 1990 (as amended) (TCPA) relates to the "*time when development begun*". Section 56 paragraph (1) provides that for the purposes of implementing a planning permission, '*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).'*
- 2.2 The planning permission granted approval for both building operations and a material change of use of the Site, namely residential (Class C3), healthcare facility (Class E(e)) and nursery (Class E(f)). S56(1)(c) is therefore most applicable in this case, i.e. the date on which the operations were carried out at the Site is the date on which the development approved by the planning permission began.
- 2.3 S56, paragraph (2) goes on to say that development is taken to have begun on the earliest date on which any material operation comprised in the development is carried out.
- 2.4 What exactly constitutes a start of development is set out in S56, paragraph (4) of the TCPA 1990. Here, a 'material operation' is defined as:
- (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; or*
 - (e) Any change in the use of any land which constitutes material development.*
- 2.5 The courts have shown themselves to be relatively liberal in the interpretation of S56(4). In the judgment of *Thayer v Secretary of State* [1992] JPL 264 it was held that the opening of a twelve-foot gap in a hedge and limited ground preparation was sufficient to implement a planning permission.
- 2.6 The *Malvern Hills DC v SSE* [1982] the Court of Appeal judgement held that the test for commencement is not the 'quantum' of work undertaken, but whether the work was related to the planning permission involved. *Connaught Quarries Ltd v SSETR & East Hants DC* [2001]

further established that the beginning of a material operation under S56(2) and (4), for the purposes of keeping a permission alive, has also to be more than de minimis.

- 2.7 The question, therefore, is whether what was undertaken had been done in accordance with the relevant planning permission and was material in the sense of not being de minimis. The appropriate test under S56 is objective and the assessment therefore requires a fact and degree approach.

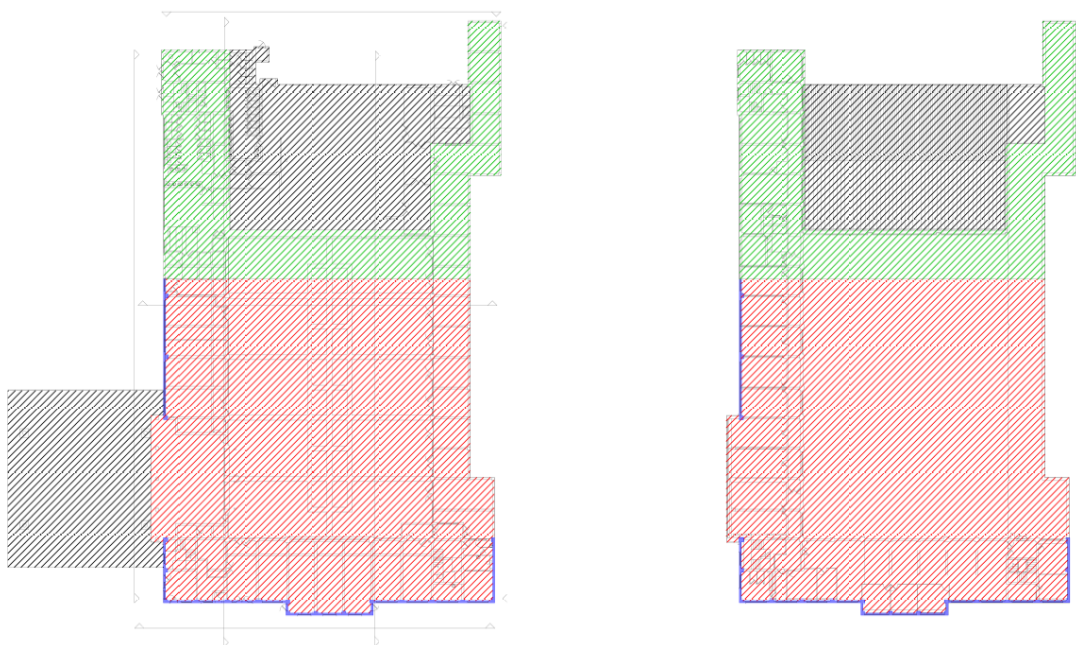
Works Undertaken

- 2.8 Works constituting a material start with respect to S56 of the TCPA commenced on the Site on 24th June 2026.
- 2.9 The works involved the demolition of part of the Former Canteen Building.
- 2.10 The demolition works undertaken at the Site are considered to satisfy S56 paragraph (4) (aa) for the reasons set out below.
- 2.11 Regarding sub paragraph (aa), the dictionary definition of ‘demolition’ is ‘the deliberate and controlled process of tearing down, razing, or dismantling buildings, bridges, or other structures.’
- 2.12 All areas that have been demolished are within the limits of the approved red line boundary for planning application (Ref. 1331/APP/2022/2553) and are within ‘Phase 1 Demolition’ of the approved demolition plan. The demolition plan is submitted as part of this application. The demolition of this part is required in order to construct Block H.
- 2.13 Demolition has been carried out using Kobelco SK300 demolition specification excavator, working top-down and within the existing building’s footprint. Demolition works have been carried out using a top-down stepped methodology where the structure is not undermined at any time.
- 2.14 Given that S56(2) provides 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 approved development materially commenced on 24th June 2026. This was when the demolition began.
- 2.15 The operational works carried out were material to the planning permission involved and were not de minimis. Accordingly, the works fall within the provision of Section 56 of the TCPA to materially implement a planning permission.

3. PLANNING CONDITIONS

- 3.1 Condition 1 (Standard Time Limit) imposed on the planning permission states the development must be commenced no later than the expiration of three years from the date of the permission. The relevant date is therefore 5th July 2026.
- 3.2 Condition 2 (Approved Drawings) includes the demolition and phasing plan which ensures that Block H can be regarded as its own separate development. The approved demolition plans separate out the demolition into two phases: Phase 1 Demolition – to enable construction of Block H and Phase 2 covers the rest of the demolition, shown in green and red on the below:

Image 1 – Demolition Plan



- 3.3 Following the determination of a non-material amendment application (S96a) (Ref.1331/APP/2025/3055) which separated out the conditions so it was clear which conditions related to Block H and which conditions related to the Canteen Building (Block I), of the 32 conditions attached to the decision notice, there was only one prior to commencement of demolition that included demolition – Condition 31 ‘Demolition Strategy’.
- 3.4 The other conditions specifically excluded demolition in the wording and therefore do not need to be discharged prior to demolition. The decision notice for application Ref. 1331/APP/2025/3055 is submitted as part of this application.
- 3.5 An application has been submitted (Ref. 1331/APP/2026/1447) to partially discharge Condition 31 (Phase 1, Block H).
- 3.6 Condition 31 states:

“Prior to commencement of each phase of development, including any works of site clearance and demolition, details of the contracts for demolition works and the demolition

strategy covering the Canteen Building to preserve the retained facades must be submitted to and approved in writing by the Local Planning Authority. Details shall include:

- (a) Evidence of the contracts or sub-contract(s) placed to demonstrate the timely commencement and completion of demolition works for the Canteen Building to preserve the retained facades;*
- (b) A full programme of demolition works, including phasing as appropriate for the Canteen Building to preserve the retained facades to be submitted and agreed.*
- (c) The locations and details of cut lines and propping, with scaled plans, sections and details to ensure that the Canteen Building retained façades stability will not be compromised;*
- (d) Detailed as to how the retained facades will be protected to ensure their integrity over the duration of the construction period;*
- (e) The programme of works on the site shall be carried out in complete accordance with the details approved unless otherwise agreed in writing with the Local Planning authority; and*
- (f) No development shall take place (including works of demolition to the Canteen Building) until the Local Planning Authority has approved the demolition strategy.*

Reason: To safeguard the structural integrity of the Canteen Building retained façades and to ensure that a partial façade retention scheme is successfully implemented to accord with the less than substantial harm identified in respect of the designated heritage asset (rather than substantial harm), in accordance with Paragraphs 201 and 202 of the National Planning Policy Framework (2021)."

- 3.7 This condition required the submission of the details of the contracts for demolition works and the demolition strategy covering the Canteen Building to preserve the retained facades. A method statement, demolition plans and a tender programme was submitted as part of this application.
- 3.8 This condition application does not address part (d) of the condition, as it is not relevant to Phase 1 of the works. During Phase 1, construction of Block H will proceed while the rear wall of the Canteen building is retained. The subsequent demolition of the Canteen Building will be undertaken as Phase 2 under a separate application.
- 3.9 As Phase 1 is being progressed independently, the demolition cut line remains clear of the interface with the retained façade. Accordingly, the works have not affected the retained façade at this stage.
- 3.10 Although part (d) remains outstanding, it relates exclusively to works that will occur during Phase 2. The omission therefore had no practical bearing upon the demolition undertaken in Phase 1.
- 3.11 It is accepted that the demolition of Phase 1 occurred in advance of Condition 31 being fully discharged. As such, for the purposes of this application for a Lawful Development Certificate it is necessary to assess whether Condition 31 is properly characterised as a true 'condition

precedent' (the Whitley principle) that would prevent the lawful implementation of the planning permission until the condition has been fully discharged.

- 3.12 Whether Condition 31 is a true condition precedent depends first, as a matter of interpretation, on whether the condition needs to be discharged prior to development beginning. If it does, the second test is whether, as a matter of planning judgment, the condition "*goes to the heart of the planning permission*", as expressed by Sullivan J in R (on the application of Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin).
- 3.13 Reading the first test, it is accepted that the wording of Condition 31 expressly prohibits the commencement of development, including any works of site clearance and demolition works until details have been submitted to the Council and approved in writing. The condition therefore satisfies the first 'test' of a true condition precedent. Next, it is necessary to consider whether the condition goes to the heart of the permission.
- 3.14 Following the approval of the S96a application (Ref.1331/APP/2025/3055), which distinguishes the conditions applicable to Block H from those relating to the Canteen Building, the Phase 1 demolition can properly be regarded as enabling development for Block H only. Those works did not affect the retained Canteen Building façade, which is the subject of Condition 31.
- 3.15 The reason for imposing Condition 31 was to safeguard the retained façade of the Canteen Building and ensure that the façade retention scheme could be successfully implemented. The Phase 1 demolition work did not involve demolition of the retained façade or works which compromised its structural integrity. Accordingly, the planning purpose served by Condition 31 was not undermined by the commencement of the Phase 1 works.
- 3.16 In those circumstances and having regard to the planning judgement required by Hart Aggregates, the outstanding element of Condition 31 cannot reasonably be said to go to the heart of the implementation of Block H. The planning permission could be lawfully implemented through the Phase 1 works without impacting the planning purpose of the condition.
- 3.17 The outstanding element of Condition 31 relates solely to the future retention and protection of the Canteen Building façade. Those matters have no bearing upon the lawfulness of Phase 1 demolition works undertaken to facilitate Block H. The purpose of the condition therefore remained capable of being fulfilled notwithstanding commencement of the authorised Phase 1 works.
- 3.18 Based on the above, we consider that the works constitute a lawful material commencement of the planning permission.

4. CONCLUSION

- 4.1 This Statement has been prepared in support of an application for a Lawful Development Certificate (Existing Use) pursuant to Section 191 of the TCPA 1990 (as amended), to confirm that planning permission Ref.1331/APP/2022/2553 was lawfully implemented before its expiry on 5th July 2026 and therefore remains extant.
- 4.2 The evidence submitted demonstrates that demolition works commenced at the Site on 24th June 2026. Those works comprised the partial demolition of the Former Canteen Building within the approved red line boundary in accordance with the approved demolition and phasing plan. The demolition works constituted a material operation for the purposes of Section 56(4)(aa) of the TCPA and were more than de minimis. Accordingly, the development was begun for the purposes of Section 56 prior to the expiry of the planning permission.
- 4.3 Whilst Phase 1 demolition commenced before Condition 31 had been fully discharged, the outstanding requirements of that condition relate solely to the future protection and retention of the Canteen Building façade during Phase 2 works. The Phase 1 demolition did not affect the retained façade or prejudice the planning purpose of Condition 31. In those circumstances, whilst Condition 31 contains pre-commencement wording, it is not considered to constitute a condition precedent that goes to the heart of the planning permission, applying the principles established in Whitley and Hart Aggregates.
- 4.4 It is therefore considered that the demolition works undertaken on 24th June 2026 lawfully implemented planning permission Ref.1331/APP/2022/2553. As the permission was lawfully commenced before its expiry, it remains extant and capable of completion in accordance with the approved plans and any subsequent approvals.
- 4.5 For the reasons set out in this statement, and having regard to the accompanying evidence the Local Planning Authority is respectfully invited to conclude, on the balance of probability, that the planning permission was lawfully implemented and to issue a Lawful Development Certificate under Section 191 of the Town and country Planning Act 1990 (As amended) confirming that planning permission Ref. 1331/APP.2022/2553 remains lawfully extant.

