



Appeal Decisions

Site visit made at 14.30 hours on 20 September 2023

by Jean Russell MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 November 2023

Appeal A: APP/G5750/X/22/3304638

292-294 Plashet Grove, East Ham, Newham, London, E6 1DQ

- Appeal A is made by Metro Properties Ltd under section 195 of the Town and Country Planning Act 1990 as amended against the decision of the Council of the London Borough of Newham to refuse to grant a certificate of lawful use or development (LDC).
 - The LDC application (ref 22/01249/CLE) was dated 24 May 2022, made under section 191(1)(b) of the Town and Country Planning Act 1990, and refused by notice dated 14 June 2022.
 - An LDC is sought to ascertain that 'operational development has lawfully implemented the planning permission ref 18/01733/FUL'.
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Appeal B: APP/G5750/W/22/3299664

292-294 Plashet Grove, East Ham, London, E6 1DQ

- Appeal B is made by Metro Properties Ltd under section 78 of the Town and Country Planning Act 1990 against the decision of the Council of the London Borough of Newham to refuse to grant planning permission.
 - The planning application (21/01863/VAR) was dated 26 July 2021 and refused by notice dated 29 March 2022. It was made under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with condition no. 3 imposed on the planning permission 18/01733/FUL granted on 23 December 2019.
 - Details of the development subject to planning permission 18/01733/FUL and condition no. 3 imposed on that permission are set out below.
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Appeal C: APP/G5750/W/22/3299663

Appeal D: APP/G5750/W/22/3311662

292-294 Plashet Grove, East Ham, London, E6 1DQ

- Appeals C and D are made by Metro Properties Ltd under section 78 of the Town and Country Planning Act 1990 against decisions of the Council of the London Borough of Newham to refuse to approve details submitted in accordance with condition no. 3 imposed on planning permission 18/01733/FUL.
 - The application (20/02893/AOD) subject to Appeal C was dated 24 December 2020 and refused by notice dated 28 April 2022.
 - The application (22/01831/AOD) subject to Appeal D was dated 28 July 2022 and refused by notice dated 21 September 2022.
 - The details that approval is sought for under Appeals C and D are set out below.
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SUMMARY OF DECISIONS: APPEALS A-D ARE DISMISSED.

PRELIMINARY MATTERS

The Site and its Surroundings

1. Appeals A-D are made by the same appellant business in respect of the same site. It covers approximately 0.5ha and it includes a three-storey unlisted office building plus a car park/service yard. The front elevation of the building, and the gates that provide access to the yard, stand at the back of the pavement on Plashet Grove, which runs to the north of the site.
2. Plashet Grove is a classified road (B165) and bus route; its crossroad junction with High Street North is a short distance to the east of the site. High Street North is also a classified road (A117) and bus route, and there are traffic light signals plus various utility covers at the crossroads. The Sri Mahalakshmi Temple, a notable local building, stands on the northern corner of Plashet Grove and High Street North.
3. Another important community facility is Plashet School for Girls, a secondary school with buildings to the west and northwest of the site. I understand that the school reception is in the building adjoining the site. Pupils and visitors enter the grounds from Plashet Grove, and the latter can park beside the site boundary. School staff access the car park from Milton Avenue to the south, while the two school sites are connected by a zebra crossing on and an enclosed walkway over Plashet Grove
4. To the east, the appeal site adjoins a four-storey building with flats above commercial units. One of the gates to the site yard is affixed to that block. Other properties to the east are those along High Street North which back onto the site. They are traditional terraced buildings again with ground floor commercial units plus flats above. As its name implies, High Street North leads to and beyond a commercial centre around East Ham tube station.
5. Milton Avenue, an unclassified one-way road off High Street North, runs to the south of but cannot be accessed from the site. Apart from the school and a few commercial uses at the high street end, Milton Avenue is dominated by residential properties, including flats to the south of the site. A substation adjoins the inset southwest corner of the site.



The '2019 Permission' and Condition 3

6. Appeals A-D relate to a planning permission (ref: 18/01733/FUL) granted by the Council on 23 September 2019 for the following development of the site:

'Complete demolition of the existing office building (Use B1) and construction of a 6 no. storey new build Hotel Scheme (Use C1) (plus plant room above). Scheme comprises of 85 no. hotel rooms with ancillary accommodation to include dining facility, bin/refuse stores and linen storage. Proposals also include illuminated signage'¹.

¹ The structures to be demolished include a bridge link from the existing building to the rear of 233/235 High Street, which explains the 'projection' in the eastern boundary of the site.

7. I shall summarise what is subject to the '2019 permission' as the '(approved) hotel scheme' or development. Such terms should be taken, unless stated, as including the approved works of demolition. The scheme would involve retention of the existing access, but the hotel would be larger as well as higher than the existing office block since it would extend almost to the back of the site. The building would oversail, from first floor up, a 'parking/loading bay' laid out off the access as shown in the approved block and ground floor plans appended to this decision letter.
8. The 2019 permission was granted subject to 22 conditions, and Appeals A-D are concerned with no. 3. It states that:

'No works shall commence unless and until a Demolition and Construction Management Plan has been submitted to and approved by the Local Planning Authority. The Demolition and Construction Management Plan shall include:

- A survey of the existing conditions of adjacent public highways.
- An assessment of the cumulative impacts of demolition, ground works (including decontamination) and construction traffic.
- Details of the likely volume of demolition and construction trips and any mitigation measures.
- Hours of operation.
- Site access and exit arrangements including wheel washing facilities and sweep-paths where required.
- Vehicular routes, booking systems and an assessment for the scope of consolidating loads to reduce generated road trips.
- Proposed temporary access and parking suspensions and any temporary access and parking solutions required.
- Site compound arrangements including arrival of vehicles, parking, loading, storage and waste arrangements.
- Methods for of [sic] protection of adjacent highway infrastructure.
- An assessment of all matters as are likely to cause nuisance to adjoining occupiers (including but not limited to noise, dust, smoke, road cleaning, odour control) accompanied by mitigation measures addressing all matters relevant to this particular site.
- Works shall be carried out in accordance with the approved Demolition and Construction Plan².

9. I shall abbreviate the term 'demolition and construction management plan' to DCMP. The reason given for condition 3 was:

To ensure that works do not prejudice the ability of neighbouring occupier's [sic] reasonable enjoyment of their properties and to ensure that works shall not represent any unacceptable level of vehicle movements such that the safety of pedestrians or other road users shall be unduly prejudiced. The imposition of this prior to commencement planning condition is considered necessary to prevent commencement of works until the requirements have been met because the timing of compliance is fundamental to the decision to grant planning permission.

² The final sentence should strictly not be formatted as a bullet point since it concerns not what the DCMP must contain but what must happen after the DCMP is approved.

The Purpose and Scope of Appeals A-D

10. Appeals A-D are made under various provisions of the Town and Country Planning Act 1990 (TCPA90). I shall deal with the appeals in this order:
11. **Appeals C and D, or the 'first' and 'second DCMP' appeal(s)** are made for the approval of the details required by condition 3 imposed on the 2019 permission³. In other words, the appellant has put forward two proposed DCMPs and I need to decide if their contents are acceptable so that condition 3 may be discharged. I shall start with Appeals C and D because my deliberations on the DCMPs will inform my reasoning on Appeals B and A.
12. **Appeal B or the 'variation appeal'** is made, in colloquial language, to 'vary' condition 3. Allowing Appeal B would mean that I grant planning permission afresh for the hotel development and impose the same conditions that were imposed on the 2019 permission, except that condition 3 would be worded differently. The proposed variation to condition 3 is to allow limited works – as set out below – on site before the submission and approval of the DCMP.
13. Representations from interested parties suggest they would like me to revisit the merits of the approved hotel development, but I do not have the remit or evidence to do so. I shall strictly consider the acceptability of the submitted DCMPs for Appeals C and D, and the wording of condition 3 for Appeal B.
14. **Appeal A or the 'Lawful Development Certificate (LDC) appeal'** is made to ascertain that the development subject to the 2019 permission had been lawfully begun on the date of the LDC application, namely 24 May 2022.
15. The questions for Appeal A will be, in short, whether works carried out on the ground served to 'begin' the approved hotel development and whether those works were lawful given that condition 3 – as imposed – purported to prevent the commencement of development before the approval of a DCMP.
16. Appeal A is strictly concerned with matters of lawfulness and not planning merits. The onus is on the appellant to make their case on the balance of probabilities; their evidence should be accepted so long as it is sufficiently precise and unambiguous, and there is nothing to contradict their version of events or make it less than probable.

Planning Policy

17. Appeals C, D and B must be determined on their merits, that is, in accordance with the development plan, unless material considerations, including the National Planning Policy Framework (the Framework) and Planning Practice Guidance (PPG) indicate otherwise.
18. The development plan includes the Newham Local Plan 2018 (the NLP) and the London Plan 2021. I set out relevant policies where appropriate in my reasoning on Appeals C, D and B below, but note here that the site is within the East Ham Major Centre as set out in the NLP.
19. On 5 September 2023, the Secretary of State for Levelling Up, Housing and Communities made a Written Ministerial Statement outlining amendments to

³ Although the truly first DCMP was subject to application ref: 20/01751/AOD. That was refused in respect of condition 3 on 8 October 2020 and the decision was not appealed.

the Framework. The amendments concern onshore wind energy developments and do not bear on any of these appeals.

APPEALS C AND D: THE DCMP APPEALS

20. As indicated above, the application subject to Appeal C was made on 24 December 2020. It was under consideration for 16 months – and the appellant submitted revised plans – before the Council refused the proposal on 28 April 2022. The final documents that comprise the ‘first DCMP’ are set out in a footnote⁴ and I shall refer for short to the ‘Management Plan D’, ‘Logistics Plan B’ and ‘vehicle tracking plan A’.
21. The Council’s report on the first DCMP states that Management Plan D, vehicle tracking plan A plus the application cover letter are approved, and only the Logistics Plan B is not. However, the decision notice does not set out a ‘split decision’ and I must consider the first DCMP holistically.
22. The documents that comprise the ‘second DCMP’ subject to Appeal D are again set out in a footnote⁵. I shall refer particularly to the ‘Management Plan G’ and ‘Logistics Plan F’. In this case, the Council’s report as well as decision notice suggests that all documents are ‘not approved’.
23. I also record that, while there are differences between the two DCMPs, either way the approved hotel would be prefabricated off site as much as possible to maximise construction speed and efficiency. There is no dispute or argument from me on any aspect of the design of the hotel building or the methods of demolition or construction.

Main Issues

24. For both Appeals C and D, the main issues are the effect of the DCMP on highway safety, and on the living, working and studying conditions of nearby residents plus staff and pupils of Plashet School for Girls.

Highway Safety and the first DCMP

25. I shall structure my reasoning here against the requirements of condition 3.

Highway Conditions Survey

26. The Management Plan D includes a survey or ‘review’ undertaken ‘in relation to the existing geometry and any key considerations in relation to vehicle movements for the demolition and construction phase’. Based on a site visit carried out on 16 November 2020, the survey describes the width of Plashet Grove and features of the road including street lighting, on-street parking provisions to the west, bus stop locations, crossings to the school and the

⁴ Letter from Nexus Planning dated 24 December 2020; site location/block plan 202PLA/EX-00/1; 7.5 tonne delivery vehicle tracking plan 24174_08_020_01.3/A (**vehicle tracking plan**); letter dated 22 February 2021 from Mewies Engineering Consultants (M-EC) to Nexus Planning; the ‘Demolition and Construction Management Plan March 2022, report ref: 24174_08_DCMP_01 rev D’ (**Management Plan D**) by M-EC; and the ‘Construction Phase Logistics Plan rev B’ (**Logistics Plan B**) by Peter Thompson Construction Management (PTCM). The Management Plan D superseded the December 2020 revision B.

⁵ Letter from Nexus Planning dated 28 July 2022 with Appendix A; site location/block plan 202PLA/EX-00/1; **site logistics plan** 202PLA PL-58 Rev D; the ‘Demolition and Construction Management Plan August 2022, report ref: 24174_08_DCMP_01 rev G’ (**Management Plan G**) by M-EC; the ‘Construction Phase Logistics Plan rev F’ (**Logistics Plan F**) by PTCM; Industrial Turntable Brochure and HTTR7 to HTTR10-300 Turntable Specifications by Australian Turntables; and letter from Nexus Planning dated 15 September 2022 with letter from M-EC of the same date plus minutes of a pre-application meeting held on 18 July 2022.

conditions of the pavements. It provides similar but less detailed information in respect of High Street North.

27. The Council's Transportation Officer found the survey acceptable, although Management Plan D notes that another would be needed 'post-demolition'. I agree that the survey shows the 'existing conditions of adjacent public highways' as condition 3 requires. However, beyond statements that Plashet Grove and High Street North are capable of accommodating all demolition and construction traffic, there is little information on background volumes of vehicular and pedestrian traffic⁶. I find that a little surprising since condition 3 was imposed in part '...to ensure that works shall not represent any unacceptable level of vehicle movements...'
28. Before going further, then, I will add my own notes:
- Double yellow lines run along Plashet Grove from High Street North to and past the site gates to the eastern side of the existing office block. From there to the far side of the school, there are continuous yellow zigzag 'keep clear' markings on the carriageway. On the opposite side of the Plashet Grove, double yellow lines again end roughly in line with the eastern end of the site, while a bus stop stands across from the boundary between the site and the school. Thus, vehicles cannot be parked or kept waiting along, beside or opposite the site frontage.
 - I saw that Plashet Grove is subject to 'significant levels of vehicle traffic and pedestrian footfall' as the Council suggests. On the far side of the road, for example, I saw drivers queuing past the temple and bus stop, back towards the overhead walkway, when waiting at the traffic lights at the crossroads. A few visitors came and went from the school car park even before children were collected.
 - Most drivers were in cars, but I saw business vans as one would expect in this Major Centre, and enough buses to accept the Council's estimate that around 40 would be driven along Plashet Grove per hour during peak times. There is no information to suggest that traffic conditions at the time of my visit were not typical of those on any wet term-time afternoon.

Vehicular Routes, Site Access and Exit Arrangements and Volume of Trips

29. It is proposed in the first DCMP that 'all construction traffic will access and exit the site' using the existing access off Plashet Grove. Drivers would turn onto the road from High Street North on the near side since they would approach from the south. Directional signs would be erected because 'certain' heavy goods vehicles (HGVs) could not approach the site from a westerly direction under the enclosed walkway over Plashet Grove.
30. The vehicle tracking plan A shows that 7.5 tonne (7.5t) lorries could be turned on the site, so that they could access and exit the land via the existing crossover (or dropped kerb) in a forward gear, and not be reversed or turned on Plashet Grove. But this would involve drivers manoeuvring over the centre

⁶ Condition 2 on the 2019 permission states that the approved plans included a Framework Travel Plan and Transport Statement (both rev A). Those documents are not before me, but it seems likely that, since there is no dispute as to the need for a DCMP, they did not consider transport in the context of demolition and construction.

line of the road almost immediately after turning from High Street North⁷ and, once on the site, moving over the footprint of the hotel by the parking/loading area.

31. There is no tracking plan for vehicles heavier than 7.5t⁸. Yet the Logistics Plan B indicates that, during the ten-day demolition period, 8-wheel/4-axle or 30t tippers would need to remove about seven loads of material per day. It estimates that construction works up to internal fit out would then take up to seven months, when one or two mostly 30t vehicles would on average be brought to the site each day.
32. The Logistics Plan B also states that, while 'no vehicle will reverse onto the highway', 'readymix concrete lorries...will reverse in'. M-EC accepted, in their 22 February 2021 letter to Nexus Planning, that 'it may be that the largest vehicles haven't got turning space within the site and may therefore need to reverse out onto Plashet Grove' albeit with a 'banksman and appropriate measures in place'. The subsequently prepared Management Plan D also indicates that mobile plant and vehicles will be reversed.
33. The Logistics Plan B says that 'full-length articulated lorries will not be allowed without special arrangement and due consultation with Newham Highways/ [Transport for London]...' But condition 3 requires the approval of access and exit arrangements at this stage. I will proceed on the basis that the first DCMP would necessitate the reversing of 30t lorries into the site particularly during the demolition but also during the construction phases of work.



Access and Parking Solutions, and the Site Compound

34. The 'site plan' appended to Management Plan D shows that deliveries would be unloaded at the end of the site access (shown in green) next to a site office (in pink), while waste materials would be stored in and loaded from the existing yard (in orange). Wheels would be washed by jet and brush before vehicles are driven out of the site, so that mud or debris is not deposited on the public highway.
35. I share the Highways Authority's (HA) concern that the orange waste storage area would not be accessible after the hotel footings are in place⁹. The Logistics Plan B describes that the crane to be used 'for lifting the heaviest items [such as] precast columns, stair, landings (around 2.5t)' would be ideally located 'within one of the lift shafts' of the hotel. The plan does not explain how lorries could reach the orange or green areas when there is a crane in the way and any part of the hotel is being built above the ground.



⁷ A letter from SHA Ltd dated 25 May 2022 concedes that any 7.5t truck coming from the east and entering or leaving the site in a forward gear would require 'a manoeuvre onto [the] opposite side of the road'; Appendix H to the appellant's statement for Appeal D.

⁸ The Council advised the appellant at a meeting prior to the submission of the second DCMP that using vehicles only up to 7.5t would be impractical and undesirable because it would generate excessive vehicle movements.

⁹ That observation was made in relation to the proposed site drawing included as Appendix B to the superseded Management Plan B, but the same drawing was included as Appendix C to the Management Plan D.

36. The Logistics Plan B further states that completion of the part of the hotel that would oversail the parking/loading bay would need to be postponed and 'infilled, bottom-up, floor by floor, just prior to striking the tower crane'. A full width section of the site (at its southern end) would also remain unbuilt until close to the end of the project to form the turning area for vehicles.
37. However, the hotel would have ground floor areas to the west and south of the parking/loading bay, as well as bedrooms above. The parts of the building to be postponed or left unbuilt until close to the end of the project would not be insignificant. The evidence does not properly show how or where the construction materials then needed could be unloaded from lorries on the site.
38. The Logistics Plan B and Management Plan D are both clear that parking suspensions on Plashet Grove will not be needed and there will no loading or unloading from the public highway. That does not tell me where loading or unloading **will** realistically happen. It is said in paragraph 8.5 of Management Plan D that 'site operatives parking, material storage and operative's facilities shall be positioned in locations approved by [the] Council' but, again, condition 3 requires the submission and approval of such details at this stage.

Methods of Protection

39. The Logistics Plan B states that scaffolding will rarely be needed but there will hoarding within the site boundary along Plashet Grove. The plans show that the site boundary is more or less in line with the four-storey mixed use building to the east, while the existing office block on the site is set back compared to the adjacent property.
40. If the hoarding is positioned within the site boundary but further forward than the existing office, it could impede pedestrian movements and/or views to the right of drivers seeking to exit the school premises. But even if that scenario can be avoided, or the effect would not be unacceptably harmful, I share the HA's concern that the hoarding could make it even more difficult to drive construction lorries into and out of the site access.

Hours of Operation and Other Information

41. The Management Plan D confirms that the hours of operation for demolition and construction will accord with condition 20 on the 2019 permission and thus be limited to 8.00-18.30 hours on Mondays to Fridays and 8.00-13.00 hours on Saturdays. I welcome the additional proposal in the first DCMP to carry out the most traffic-intensive works – demolition of the existing building – during the school summer vacation to minimise the impact on children.
42. The appellant further suggests that construction vehicles could be scheduled to arrive outside of the school rush hours; that would be appropriate since over one thousand pupils come and go from Plashet School for Girls each day. The construction working day might thus be practically limited to around 09.15 to 15.30 hours during term time but that does not strike me as intrinsically problematic in highway safety terms, even if it would mean that construction takes longer.
43. To reduce risk of congestion or collision, the arrival of one demolition or construction vehicle at a time would be scheduled via a booking system and controlled by qualified construction site traffic marshals or banksmen. While I agree with the Council that the submission of more details would have been

desirable, online vehicular booking systems are well-established and indeed subject to Transport for London guidance.

44. I see no reason why a booking system could be not relied upon to schedule the arrival of demolition and construction vehicles especially if – as proposed in Appeal D – bulky materials are delivered to a nearby Logistics Consolidation Centre before being brought on a 'just in time' basis to the site. However, the use of a booking system, marshals and a consolidation centre together could not ensure that drivers would never need to reverse or wait on Plashet Grove, because that will be a question not of timing but what vehicles are required and can physically enter and exit the site in a forward gear.

Assessment of the First DCMP

45. The appellant has not been able to appoint a contractor to carry out the approved demolition and construction work. That is not in itself a problem, since condition 3 does not require the submission or approval of contractor details, and M-EC and PTCM have given the appellant expert evidence.
46. Equally, however, the requirements of condition 3 are clear. It would not be possible for me to discharge the condition if the DCMP does not have the contents prescribed pending the appointment of a contractor. And there is a lack of detail in the first DCMP; I agree with the Council's Transportation officer that, even as revised, the scheme 'is still considered as a framework and further information will be needed...' However, my main concern is what the DCMP does, rather than does not show.
47. Where vehicle tracking plan A could be followed, drivers of 7.5t lorries would need to turn from High Street North and cross the centre line to the north side of Plashet Grove, before crossing back to the south side and into the site. Yet Plashet Grove would not be closed to other traffic. The first DCMP does not show what would happen if lorry drivers could not manoeuvre because of vehicles being driven past or standing in a queue by the traffic lights. If a lorry could not be turned as shown, it could block drivers approaching from behind, that is, around the corner on High Street North.
48. And the first DCMP relies upon not just 7.5t but also 30t trucks being able to access the site via Plashet Grove during both the demolition and construction phases. Such larger lorries would be unable to enter and exit the site in a forward gear. They would need to be reversed into the site, and that would mean even more complicated manoeuvring on Plashet Grove than is shown on the vehicle tracking plan A.
49. I consider that a driver seeking to reverse a large lorry into the site would physically impede and be impeded by drivers of other vehicles. There would be a direct risk of driver collision, and the movements would also obstruct the views of nearby highway users plus the free flow of traffic back around to High Street North. It is probable, then, that construction drivers would instead seek to stop on Plashet Grove for loading and unloading. However, that would be unlawful in the keep clear zone and again cause serious risk of collision particularly to school users and oncoming drivers from behind.
50. That the operations would avoid term time and school peak hours as far as possible, and drivers would be scheduled and marshalled to arrive singly, is not enough to overcome my objections. The first DCMP would result in levels

57. If the bus stop was temporarily relocated – and that is proposed – lorries could be driven into the site from the far side of the road. However, condition 18 on the 2019 permission requires that 'local access to the public footways and bus stops surrounding the development shall be maintained during the construction phase'. Perhaps for that reason, there is no tracking plan to show whether moving the bus stop would enable lorry drivers to access the site without causing and indeed being subject to unacceptable risk.
58. It is proposed that waste materials would be stored at the south end of the site and medium-sized excavators 'variously equipped with demolition pliers and buckets to feed' tippers would be used for demolition of the remainder of the building. As before, the volume of material to be removed would amount to about seven loads of an 8-wheel tipper per day over a ten-day period. That the tracking plan does not show waste materials or excavators on the ground causes me some anxiety as to whether lorries could be readily driven onto the turntable, but I need not pursue this issue.
59. After the slab is cast, however, the turntable would be relocated to the front of the site. Drivers heading to it would need to make a sharper turn onto the land. While the existing building would by this stage have been removed, and the crossover would still be widened, I again consider that drivers seeking to enter the land would need to carry out unsafe manoeuvring on Plashet Grove, especially but not only if the hoarding and/or bus stop are in the way.

Construction

60. In a letter dated 2 September 2022, following a pre-application meeting, the Council suggested that the appellant should investigate 'creating an entrance/exit to the site off Milton Avenue'¹⁰. It seems improbable that direct access could be created across third party land and close to the school staff gates. However, the appellant proposes that, after ground works are carried out, a crane on the site would lift construction materials off lorries parked on Milton Avenue in a temporary pit lane or loading/unloading area.
61. Thus, a tower crane would be erected on the site using a mobile crane located on Milton Avenue. Both the erection and later striking of the crane would require a two-day weekend road closure of the eastern part of Milton Avenue, and up to 11 flatbed trucks to deliver or remove 'the tower crane mast, jib, cab, counterweights and winding gear'. Once the tower crane components are on the site, the turntable would be removed¹¹.
62. The appellant would apply for another temporary traffic regulation order to establish the pit lane on Milton Avenue with a gantry over the footpath. The tracking plan appended to Management Plan G shows that the pit lane could accommodate two tipper lorries, be reversed into by such lorries, and be bypassed by a refuse collection vehicle.
63. The Logistics Plan F shows that the tower crane would be on the site for some 23 weeks while the superstructure, bathroom pods and external envelope of the hotel are constructed or fitted. The crane would need to 'oversail' the flats to the south or southeast of the site but not the school. Oversailing licences are subject to separate regulations, but I struggle to see how one would be

¹⁰ Appendix J to the appellant's statement for Appeal D

¹¹ See email dated 25 August 2022 at Appendix K to the appellant's statement of case for Appeal D

approved when the HA objects to the lifting of materials here¹². There is also little information to show that consent would probably be granted to 'run a pipe from the pit lane to the site...to allow concrete pumping'.

64. The highway conditions survey in Management Plan G is essentially the same as that submitted for Appeal C, so it does not encompass Milton Avenue. I saw that this road is subject to parking restrictions and heavily parked up during the working day; the tracking plan indicates that there would only just be room for large tippers to be driven (and reversed) through residents' parking bays.
65. However, the appellant would apply for a parking bay suspensions order and, again, only one or two lorries would be driven to the site each day during the construction phases. I am also satisfied that Milton Avenue is – save perhaps at the start and end of the school day, when works would be avoided – likely to be generally quiet in terms of vehicular activity.

Assessment of the Second DCMP

66. The Council's letter of 2 September 2022 asked that details of how additional trip generation would be managed are submitted for approval if the use of large HGVs would be reduced through reliance on 7.5t or smaller vehicles. The second DCMP does not need to include such information because it is based again on use of 30t lorries for demolition and construction.
67. If the appellant secured the relevant temporary orders for a pit lane and parking bay suspensions on Milton Avenue, and for weekend closures of part of that road when the tower crane is erected and dismantled, it may be that the approved hotel building could be put up without causing an unacceptable loss of highway safety. But that would rely upon authorisation being gained to lift materials over nearby properties and to run a pipe from the pit lane to the site. If such consent is not granted, I deduce that concrete mixers and/or other lorries might have to be loaded or unloaded on Plashet Grove.
68. I also note that the schedule of vehicle movements in Logistics Plan F shows the tower crane being on site until the hotel external envelope is complete, but there is no explanation as to how that would be possible when the crane base would be roughly in the position of the back stairwell in the hotel. But even if those concerns are misplaced or surmountable, my view remains that the demolition of the existing office and groundworks for the approved hotel would necessitate unacceptably dangerous manoeuvres on Plashet Grove. The second DCMP does not demonstrate that risks arising from the level and type of vehicular movements required would be reduced to an acceptable level.

Living Conditions and both DCMPs

69. Condition 3 was also imposed to protect the living conditions of nearby occupiers plus, in effect, the working and studying conditions of staff and students at Plashet School for Girls. The first and second DCMPs include assessments, as required by the condition, of all matters likely to cause nuisance to adjoining occupiers (including but not limited to noise, dust, smoke, road cleaning, odour control) accompanied by mitigation measures that are based on relevant legislation, policy and guidance.

¹² Nexus Planning stated in their letter of 15 September 2022 that a crane lifting plan would be produced prior to the works, that is, outside of the process of discharging condition 3.

70. Management Plans D and G commit to keeping local people informed of progress and dealing with any complaints fairly and 'expeditiously'; if any inappropriate environmental risk is identified, action would be taken through design changes, re-scheduling work or alternative methods of working. While such 'wriggle room' might in practice be limited, I find that the mitigation measures set out in the DCMPs – including the commitments to avoid work when children are arriving at or leaving school – are acceptable.
71. Some neighbours have raised concerns, and I must be candid that they would experience some discomfort and disruption from noise or other pollution when the site is being developed. That is regrettable, but the Council did not refuse the first or second DCMP on amenity grounds. I am satisfied that, under either plan, the impacts of demolition and construction on the living, working and/or studying conditions of nearby residents plus school staff and pupils would be mitigated as far as possible, and not unacceptable for temporary periods.

Other Matters

72. The appellant has referred me to construction management plans approved by the Council pursuant to development at Plashet School for Girls and Little Ilford School. I have accepted that, on the appeal site as in those other cases, vehicle movements and deliveries, as well as the actual demolition and construction works, could be scheduled around school holidays and/or pupil drop off and collection times. However, my concern is not the proposed hours of construction but the access constraints which are specific to the appeal site.
73. PTCM has managed the construction of hotels on other 'high impact' sites, but the projects they described can be distinguished from what is before me. In the case of Wombats hostel, the existing building was refurbished in phases over ten years. A temporary traffic order was granted and there was an alternative access. A loading bay was created by order for works in the same square as English Martyrs School, while parking bays were suspended to facilitate development next to Channing School for Girls. There is no proposal here for parking or loading/unloading by the site on Plashet Grove and the HA is emphatic that no order to such effect would be granted.
74. I accept the appellant's broader point that it is not unusual to see demolition and/or construction works on constrained sites in London and indeed other cities. The occupiers and users of any thriving neighbourhood, such as the East Ham Major Centre, will sometimes suffer temporary disruption from the presence of a building site. Drivers and pedestrians are expected to take due care on the highway and deal with inconvenience – if not increased risk – when passing construction sites or, similarly, road works.
75. However, the impacts of any given development on highway safety or living conditions will be site-specific and fact sensitive. The acceptability of the first or second DCMP depends on whether they satisfy the requirements of condition 3 as well as their real-world effects. That complex sites have been developed elsewhere, and that disruption from construction is to an extent part and parcel of urban life, do not make the schemes before me acceptable.

Conclusions on Appeals C and D

76. The constraints to carrying out the approved hotel development are the width of Plashet Grove and the volume of bus, other vehicular and pedestrian traffic

using it; the double yellow and keep clear lines along Plashet Grove; the proximity of the site access to a signalised crossroads junction, a bus stop, school gates and an overhead walkway; the size of the site; the layout of the existing and approved buildings on the land; and the proximity to the site access of the adjoining building to the east.

77. My objections are not that highway users might be inconvenienced by the first or second DCMP, but that the level and type of vehicular movements required would be highly and unacceptably dangerous. It would be necessary for 30t lorry drivers to manoeuvre across Plashet Grove in order to get through the site access. They would impede and be impeded by other drivers passing in both directions, potentially so as to affect the flow of traffic around on High Street North. It is possible that up to 30t trucks are brought onto the site now, but I am not aware of how often, and the yard is not likely to be simultaneously used for moving other plant or storing demolition materials.
78. That there are information gaps in the first and second DCMPs reinforces my unease. Management Plans D and G state that the Council 'will be consulted to discuss methods of working and measures planned throughout the demolition and construction works' and that site operatives parking and facilities and materials storage shall be positioned in locations to be approved. Those are details which should be before me for consideration now.
79. But even if I put that question and others to one side, the first and second DCMPs demonstrably fail to show that use of the existing site access from Plashet Grove as proposed – whether through the whole development project or simply during the demolition and groundworks phases – would be reasonably safe. The evidence before me is that the manoeuvring of lorries on that road would cause a very serious loss of highway safety.
80. Notwithstanding that there would be no undue harm to the living, working or studying conditions of nearby residents or school staff and pupils, I conclude that both DCMPs would unacceptably reduce highway safety in conflict with London Plan Policies T1, T4 and T7. They seek to ensure mitigation of any impacts on London's transport networks and supporting infrastructure so that development does not increase road danger, and that, during construction, inclusive and safe access for people walking or cycling should be prioritised and maintained at all times.
81. The DCMPs also conflict with NLP Policies INF1 and SP8, which require that development is compatible with the ongoing viable operation of transport infrastructure and achieves good neighbourliness from the outset by avoiding negative social impacts¹³. They conflict with the Framework, which requires that safe and suitable access to the site can be achieved for all users and significant impacts on highway safety can be cost effectively mitigated to an acceptable degree. Appeals C and D must be dismissed.

APPEAL B: THE VARIATION APPEAL

The Proposed Change to Condition 3

82. As noted above, condition 3 imposed on the 2019 permission states that 'no works shall commence unless and until a [DCMP] has been submitted to and

¹³ The Council referred to development plan policies bearing on the original decision to grant the 2019 permission and impose other conditions. I have referred only to those policies that are relevant to my decisions here.

approved by the Local Planning Authority...’ The appellant initially applied to vary condition 3 so that the DCMP would need to be submitted ‘prior to demolition or above ground works...’

83. Following discussions with the Council, the appellant revised their proposal¹⁴. They now seek the variation of condition 3 to state: ‘no works shall commence (with the exception of the digging of a trench measuring 3 metres in depth and 0.6 metres in width as approved on drawing ‘Foundation Plan – Structural Details – 1001 Revision B)...’ with that plan having been approved as part of the 2019 permission. The Council determined the application as revised, and I shall do the same¹⁵.
84. The trench has already been dug (and infilled); the works took place on 3 March 2022. That does not matter because I can consider Appeal B on a retrospective basis. The application was made under s73 of the TCPA90 but may be treated as though it was made under s73A, which empowers me to grant planning permission for development already carried out without complying with a condition imposed on a previous permission.

Main Issues

85. The Council’s reason for refusing the application was that the proposal would not ‘facilitate the delivery of the approved development’ but is rather ‘a device to extend the life of the [2019] permission with no reasonable prospect of the site being brought forward’ – and allowing that would be ‘contrary to the national approach to prevent land banking of planning permissions...’
86. From that and other matters raised, the main issues are whether:
- Varying condition 3 would have the unlawful effect of extending the time within which the approved hotel development must be started,
 - Varying the condition would be ‘contrary to the national approach to prevent land banking of planning permissions’,
 - There is otherwise a clear justification for condition 3 to be a ‘pre-commencement’ condition as imposed, and
 - It would be reasonable to vary condition 3 given other considerations.

Reasons

Extending the Time Limit

87. Condition 1 imposed on the 2019 permission required that the approved hotel development ‘shall be commenced before the expiry of three years from the date of the permission’. The effect of condition 1 is that the 2019 permission will have lapsed on 23 September 2022 unless the approved development was lawfully begun before that date. Whether the permission has in fact lapsed is a question for Appeal A and therefore parked for now.
88. Condition 1 was imposed in accordance with s91(1)(a) and s91(5)(a) of the TCPA90 which provide that every planning permission is deemed to be subject to, in short, a ‘three-year commencement’ condition. Where it is necessary to

¹⁴ See the Council’s email of 11 October 2021 and the revised application cover letter of 13 January 2022.

¹⁵ I have therefore disregarded revision C of the Foundation Plan, which shows a 3.4m x 0.7m trench.

establish whether any development is commenced on time, s56(2) and (3) of the TCPA90 provide that development shall be taken to be begun – for the purposes of s91 and thus condition 1 – on the earliest date on which any material operation comprised in the development begins to be carried out.

89. S56(4)(b) provides that 'material operation' means, amongst other things, the digging of a trench which is to contain part of the foundations of a building. I find for Appeal A below that the digging of the trench was a 'material operation' comprised in the approved hotel development, and I have already noted that the works were begun before 23 September 2022. But if digging the trench served to begin the hotel on time for the purposes of condition 1, it also commenced the development before any DCMP was approved. Allowing this variation appeal would ensure that the works did not breach condition 3.
90. The Council objects that varying condition 3 as proposed would be unlawful because, as set out in s73(5)(a) of the TCPA90, permission cannot be granted under s73 'to the extent that it has effect to change a condition...by extending the time within which a development must be started'¹⁶. In other words, the Council suggests that varying condition 3 would serve to change condition 1 and extend the time within which the approved hotel scheme must be started.
91. However, that is not what Appeal B is about. The appellant seeks to vary condition 3 not to gain more time to begin the development, but rather to ensure (retrospectively) that the trench represented a lawful start within the three-year period. The Council is correct that varying condition 3 would have the effect of 'keeping the [2019] permission alive' and I appreciate that is at the heart of their objection. I shall and indeed must return to that point. But keeping the permission alive is not the same thing as extending the time within which development must be started. Allowing Appeal B would not result in any unlawful change to condition 1.

'Land Banking'

92. The term 'land banking' refers to an alleged practice of landowners to hold onto land that is capable of development while delaying the development itself. I share the appellant's frustration that this issue was raised in the reason for refusal because, as they rightly say, the intentions of developers in carrying out operations do not determine whether the works are lawful or acceptable. Moreover, as discussed below, the appellant has shown as much commitment to this site as any developer could – and the phrase 'land banking' does not appear in any national statement of planning policy.
93. S73(5), as discussed above, was inserted as an amendment to the TCPA90 via s51 of the Planning and Compulsory Purchase Act 2004. The explanatory note to that legislation sets out what s73(5) does – 'prevent an extension to the agreed period of validity [of a planning permission] without the submission of a new application' – but not why the subsection exists. There is no suggestion that the TCPA90 was thereby amended in order to prevent land banking, and I have found s73(5) irrelevant to Appeal B in any event.
94. The Council has referred generally to the Framework and PPG but not to any paragraphs of specific relevance therein. That is unsurprising given that

¹⁶ Government policy, as set out in PPG chapter 'flexible options for planning permissions' and paragraph ref ID:17a-014-20140306, is also that planning permission cannot be granted under s73 to extend the time limit within which development must be started.

Government policy not only omits to mention land banking, but also cautions against the use of pre-commencement conditions at all. The Framework states that conditions which 'are required to be discharged before development commences should be avoided unless there is a clear justification'. That brings me to the next main issue, and so I now conclude that varying the condition would not be contrary to any national approach to prevent land banking.

Clear Justification

95. The TCPA90 was amended again before the 2019 permission was granted, through the insertion of s100ZA(5)¹⁷, to provide that planning permission for the development of land may not be granted subject to a pre-commencement condition without the applicant's written agreement to the terms.
96. While the parties have omitted to share the documents with me, it seems undisputed that the Council properly gained the appellant's written agreement to the imposition of condition 3 before the 2019 permission was granted¹⁸. However, it does not follow that condition 3 cannot be varied now and the appellant is again correct that there is no particular legal or policy restriction on s73 or s73A applications to vary pre-commencement conditions.
97. The PPG explains that a 'clear justification' for a pre-commencement condition 'is likely to mean that the requirements of the condition (including the timing of compliance) are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission'¹⁹. The reason for condition 3 includes similar words: '...the timing of compliance is fundamental to the decision to grant [the 2019] permission'. But there is nothing in the reason or condition 3 itself to explain why timing might be so crucial.
98. The reason for the condition only really explains why a DCMP is needed, not why approval is required pre-commencement. That was an oversight on the part of the Council, and Highways, Transportation and Environmental Health officers made no objection to the variation application. Despite the fears of local residents, digging the trench did not cause any highway, environmental or amenity harm that condition 3 seeks to avoid²⁰.
99. However, I must return to the Council's suggestion that condition 3 should not be varied to keep the 2019 permission alive. That is plainly the appellant's objective, and it not unusual for any developer to dig a trench for that purpose. It is not by accident that, under s56, such minor works are all that is required to begin development – but it is also no accident that there is an end date under s91 as to when that can be done. It can take more than three years to make substantive progress but sometimes development does not prove feasible or viable at all despite the best efforts of those involved.
100. Before one even looks at the contents of any DCMP, it is clear that the appeal site has only one access which is onto a classified road and close to a signalised junction; the site is surrounded on other sides by vulnerable land uses; and the approved hotel would be larger than the existing building. The Council has said that agreement to condition 3 being a pre-commencement condition was reached because of the sensitive location of the site on a busy

¹⁷ Via s14(1) of the Neighbourhood Planning Act 2017

¹⁸ In accordance with the Town and Country Planning (Pre-commencement Conditions) Regulations 2018

¹⁹ PPG chapter 'use of planning conditions' and paragraph ref ID: 21a-007-20180615

²⁰ Concerns about ongoing safety issues are addressed by the fact that the trench was infilled.

road adjacent to a school with significant pedestrian footfall. It is entirely understandable that the parties exercised that caution in 2019.

101. Now I have reviewed the first and second DCMPs, it is also clear that carrying out the approved hotel development would involve the manoeuvring of 30t lorries into the site from Plashet Grove. I would not go so far as to say there is no reasonable prospect of the scheme being brought forward, but that is a moot point. On the evidence before me, the level and type of vehicular movements required during demolition of the existing office, if not also construction of the hotel, could have such adverse effects on highway safety that the acceptability of a DCMP goes to whether the development is permissible and feasible. A DCMP should be agreed before any works begin.
102. Adding weight to that assessment, the appellant admits that they have been unable to appoint a contractor – or set out in their DCMPs such information that a contractor would provide – partly because of ‘site constraints and the surrounding sensitive uses’²¹. They referred to the ‘difficulties of the site’ in explaining why they would be unable to make a start on development, beyond digging the trench, before the end of the three-year period²².
103. The extent to which the requirements of any condition are fundamental will depend on the facts of the case²³. Had the 2019 permission related to (say) a greenfield site with straightforward access and no neighbouring development, I would not say that development should not begin before a DCMP is approved; there might not even be a need for a DCMP at all. But that is not the situation here. The ‘site constraints and surrounding sensitive uses’ are such that whether demolition and construction can be carried out without unacceptable risk is fundamental to the acceptability of the hotel scheme.
104. I do not make those findings to dispute the appellant’s intentions but rather to recognise the obstacles they objectively face in carrying out the approved development. It may be that the appellant would be willing to prepare another DCMP which at least provides more information to fill the gaps I identified in the first and second plans. However, I cannot see any unexplored **ideas** in the evidence before me. The appellant said in support of Appeal A that they have ‘done everything possible to discharge condition 3...’
105. I therefore understand why Councillor Blaney objected that varying condition 3 would allow a trench ‘to exist on site with insufficiently robust controls to ensure development proceeds in a timely manner...the matter [would be] allowed to drift [with] nothing the planning authority can do. The current condition does not allow endless drift...’ If this appeal is allowed but no DCMP is agreed and the risks arising from demolition and construction are not demonstrably reduceable to an acceptable level, there would be uncertainty as to the fate of the site.
106. The appellant suggests that, if the Council had thought ‘that condition 3 was not capable of being satisfied, [they] should not have imposed that condition and [should have] refused the [2019] application on that basis...’²⁴ I take a different view; neither party could have been expected to foresee, back in

²¹ Paragraph 2.23 of the appellant’s statement for Appeal B

²² Revised cover letter dated 13 January 2022 for the s73 application.

²³ Greyfort Properties Ltd v SSCLG [2011] EWCA Civ 908, cited in the letter from Paul Nash at Path Legal dated 24 May 2022; Appendix T to the appellant’s statement for Appeal A.

²⁴ Letter from Path Legal dated 23 May 2022; Appendix M to the appellant’s statement for Appeal B.

2019, quite how difficult it would be to carry out the approved development. It must be to the Council's credit, not fault, that they granted the 2019 permission and gave the appellant a chance to make the development work.

107. In making that representation, however, the appellant has touched on the central issue. The Framework requires that development is only prevented or refused on highways grounds if there would be an unacceptable impact on highway safety or the residual cumulative impacts on the road network would be severe. My view is not that condition 3 is incapable of being satisfied, but that it is reasonable and necessary to prevent the approved development from starting unless and until it is shown that the vehicular movements involved in demolition and construction works – and not just in digging a trench – would not unacceptably affect highway safety.
108. Strictly on the evidence before me, nearly four years and two DCMPs after the grant of the 2019 permission, I consider the 'site constraints and surrounding sensitive uses' to be such that condition 3 was necessarily, reasonably and clearly justifiably imposed as a 'pre-commencement' condition. The requirements of the condition, including that a DCMP is approved before the hotel development is commenced, are so fundamental to that it would otherwise be necessary to refuse to grant the permission.

Other Material Considerations

109. There are other reasons why the appellant has been unable to secure a contractor, with the main one being that the Covid-19 pandemic resulted in construction sector problems which are still widely affecting development today. The problems include shortages of labour plus delays to the start or completion of projects. The Business and Planning Act 2020 extended the deadline for commencement of permissions that were due to lapse between 19 August and 31 December 2020 to 1 May 2021, meaning there was a significant backlog of extant permissions after the various 'lockdowns' ended.
110. However, no legislation has extended the three-year date for permissions where the period ended in 2022. I also note that the appellant worked during the pandemic to secure the discharge of other conditions imposed on the 2019 permission and they have had more time to progress the approved development from the regrettable delays to these appeal decisions. It is now more than a year since the expiry of the 2019 permission and there is still no evidence of an acceptable DCMP. The pandemic and allied construction sector issues would not justify my varying condition 3 as proposed.
111. Another material consideration is that the appellant, upon digging the trench, issued a Commencement Notice and Assumption of Liability to the Council for the purposes of the Community Infrastructure Levy (CIL). They paid the required CIL contribution before the end of March 2022 and the sum paid was 'eye-watering' as the saying goes. The same is probably true of the cumulative costs to the appellant of preparing the DCMPs plus the reports required to discharge other conditions on the 2019 permission.
112. For those reasons, the appellant has my utmost sympathy in this case, but they are represented by professional planning agents who in turn sought specialist engineering, construction management and legal advice. They must have known that digging a trench before any DCMP was approved could represent commencement of the development at risk. Having found a clear

justification for condition 3 to be a pre-commencement condition, the appellant's CIL and other expenditure would not justify the variation.

113. The appellant made a 's106' planning obligation pursuant to the 2019 permission. They have submitted a deed of variation to the agreement; it is not signed by either the Council or mortgager, but I would not dismiss this appeal on that basis. The original s106 makes express provision to deliver the obligations pursuant to any permission granted under a future s73 application.
114. The Council officers initially recommended that the application subject to this appeal be approved, but that is not binding on me, and I cannot comment on any aspect of the Council's decision-making procedures. For that reason, and because internet content is subject to change, I did not click on the link provided by the appellant to a video of the committee meeting on YouTube.

Conclusion on Appeal B

115. Under s73(2) of the TCPA90, a local planning authority should refuse an application to 'vary' a planning condition if they decide that planning permission should be granted subject to the same conditions as before. An Inspector must do the same when deciding a s73 appeal, and the principle also applies where variation is sought retrospectively.
116. Other conditions imposed on the 2019 permission which required the submission and approval of details prior to 'above ground works' have been discharged. The reasons why a DCMP has not been approved are related to why condition 3 was the only pre-commencement condition. On the evidence before me, the requirements of condition 3, including that a DCMP is approved before the development is begun, are fundamental to the acceptability of the 2019 hotel scheme.
117. There is a clear justification for condition 3 to be a pre-commencement condition. Varying the condition as proposed would conflict with London Plan Policies T1, T4 and T7, NLP Policies INF1 and SP8 and the Framework as set out above. Appeal B is dismissed.

APPEAL A: THE LDC APPEAL

Main Issue

118. Under s191(2) of the TCPA90, operational development is lawful at any time if no enforcement action may be taken in respect of it, perhaps because it did require planning permission²⁵. The main issue is whether the Council could have taken enforcement action against the digging of the trench on the date of the LDC application, namely 24 May 2022, with regard to:
- Whether the trench represented a 'material operation' for the purposes of s56 of the TCPA90,
 - Whether condition 3 is a 'condition precedent' and what that means for the 2019 permission, and
 - If the trench was dug in breach of a condition precedent, whether that means development took place without planning permission.

²⁵ Lawfulness also depends on the development not being in contravention of any of the requirements of any enforcement notice in force, but that is not applicable to this case.

Reasons

Material Operation

119. As set out above, condition 1 imposed on the 2019 permission required, in accordance with s91 of the TCPA90, that the approved hotel development be commenced within three years of 23 September 2019. And s56(2) and (4)(b) of the TCPA90 provide that development shall be taken to be begun on the earliest date on which any 'material operation' comprised in the development, such as the digging of a trench to contain part of the foundations of a building, begins to be carried out.
120. I find on the balance of probabilities that the trench dug by the appellant on 3 March 2022 was a material operation comprised in the approved hotel development, as a matter of fact and degree, because it would contain the part of the foundations of the hotel as shown on the Foundation Plan -1001/B. It follows that, even though the trench was backfilled, so that the existing site yard remains usable, the hotel development was commenced for the purposes of s56 before the 'three-year' date of 23 September 2022.
121. However, it does not follow that the approved hotel development was **lawfully** commenced by the digging of the trench. That conclusion could not be drawn or inferred from the Council's acceptance that 3 March 2022 was the 'deemed commencement' date of the development for CIL purposes, or indeed from the fact that the appellant gave initial notice of the works to the Council for Building Regulation purposes in February 2022.

Condition Precedent

122. As set out in the appellant's legal opinion, it was held by the Court of Appeal in F G Whitley & Sons Co Ltd v SSW [1992] WL 895744 that if development is begun in contravention of conditions, it cannot be said that the development was commenced as permitted. The works would constitute a breach of planning control and be unlawful. This is known as the 'Whitley principle'.
123. Under s171A(1) of the TCPA90, a breach of planning control may constitute carrying out development without the required planning permission, or failing to comply with any condition or limitation subject to which permission has been granted. The Courts have clarified the Whitley principle by holding that a breach of condition will only amount to development without planning permission where the condition is a true 'condition precedent'. The condition must contain an express prohibition on any start to development until the requirements are met **and** it must go to the heart of the permission²⁶.
124. As imposed, condition 3 states that 'no works shall commence unless and until a Demolition and Construction Management Plan has been submitted to and approved by the Local Planning Authority'. Thus, the condition contains an express prohibition on any start of the approved development²⁷. I also find that condition 3 goes to the heart of the 2019 permission for essentially the same reasons why I dismissed Appeal B: given the size, layout and location of

²⁶ R (oao Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin), endorsed and applied by the Court of Appeal in Greyfort Properties Ltd v SSCLG [2011] EWCA Civ 908.

²⁷ Richards LJ noted in paragraph 27 of Greyfort that 'In substance...the prohibition in [the] condition [before him] on the commencement of "any work ... on the site" was at the very least equivalent to a prohibition on the commencement of "development"'.

the site, and the highway safety reasons for imposing it, the condition goes to whether the approved development is acceptable and feasible.

125. The appellant does not dispute that condition 3 is a condition precedent, and I am satisfied that it is on the balance of probabilities. It follows that, since the digging of a trench was a material operation which served to commence the approved hotel development, but was carried out before any DCMP was approved, there has been a breach of a condition precedent.

Development without planning permission

126. The Courts have also held that the Whitley principle may be disapplied if, on the facts of the case, an exception may be made. In Whitley itself, the exception was that, where the condition requires the submission and approval of some information before a given date, and the developer applies for that approval on time, then – if approval is granted, albeit later – the works carried out before the deadline in accordance with the ultimately approved scheme can amount to a lawful start to the development.
127. What that means here is that if an application to discharge condition 3 was made before the expiry of the three-year date, and the submitted DCMP was subsequently approved, the digging of the trench on the site would be taken retrospectively as representing a lawful start to the approved hotel development. The applications subject to Appeals C and D were both made on time, on 24 December 2020 and 28 July 2022 respectively.
128. It follows that, had I allowed the first and/or second DCMP and discharged condition 3, it would not be possible for the Council to take enforcement action against the digging of the trench. However, I have considered the first and second DCMPs carefully on their merits and concluded that neither should be approved. The 'Whitley exception' does not therefore apply.
129. There can be other exceptions to the Whitley principle and the appellant considers that set out in R v Flintshire CC ex parte Somerfield Stores [1998] PLCR 336 to be apt; where the condition has been complied with in substance, but the notice of approval is not issued. The appellant is entitled to their view that they have substantively complied with condition 3, but I am not bound to agree and do not. The discharge of the condition via Appeals C and D was not a mere formality and the 'Flintshire exception' does not apply.
130. Had I allowed Appeal B and varied condition 3, I would have treated that decision as resulting in an exception to the Whitley principle. It would have had the retrospective effect of meaning that the Council could not have taken enforcement action on the date of the LDC application. But, again, I made the opposite decision in that case and the appellant has not shown that other exceptions established by the courts could be relevant.

Other Matters and Conclusion on Appeal A

131. The appellant has referred to the Council's decision to grant an LDC (ref: 21/00959/CLE) in respect of another site on the basis that the lawful 'implementation' of a planning permission was not precluded by a failure to discharge specified conditions. However, the evidence does not tell me whether either of the conditions in question was a true condition precedent.

132. I have also considered the appeal decision (ref: APP/V5570/X/19/3237171) where the Inspector granted an LDC for development begun on another site in breach of a pre-commencement condition. The Inspector concluded that the condition – which concerned a tree – was ‘peripheral to the realisation of the approved development’ and thus not a true condition precedent.
133. In this case, by contrast, I find that the digging of the trench on the site represented a material operation comprised in the approved hotel development. The works were carried out before the 2019 permission lapsed but in breach of condition 3, which is a true condition precedent and has not been discharged or varied. It follows that the digging of the trench was development carried out without the requisite planning permission.
134. The appellant suggests, with reference to R (oao Hammerton) v London Underground Ltd [2002] EWHC 2307 (Admin) that development may be commenced ‘where it would be unlawful, in accordance with public law principles, notably irrationality or an abuse of power, for a local planning authority to take enforcement action to prevent [the] development from proceeding’. I do not disagree, but the question for this LDC appeal is simply whether enforcement action ‘may’ be taken for the purposes of s191.
135. I conclude that, on the date that the LDC application was made, the Council could have taken enforcement action, on the balance of probabilities, against the digging of the trench carried out in breach of a condition precedent. It is not for me to speculate as to whether any actual taking of such action would have been irrational, an abuse of power or even expedient. The Council’s refusal to grant an LDC was well-founded, and Appeal A should fail. I will exercise accordingly the powers transferred to me in s195(3) of the TCPA90.

THE ‘2021 APPLICATION’ AND OVERALL CONCLUSION

136. I understand that another planning application (ref: 21/02657/FUL) has been made for, in short, the development of the site to include a new seven storey hotel building with basement. I am not aware of whether the application has been decided and so I state for the avoidance of doubt that my conclusions on all four of these appeals are made entirely without prejudice to that proposal.
137. I cannot prejudge what evidence may be before the Council or any future Inspector as to the merits of the latest hotel scheme. I have not seen the drawings and do not know how the building would be laid out, accessed or constructed. I would caution every party to consider the 2021 application on its merits and not make assumptions on the relevance of my findings here.
138. However, that the appellant may have other options for the site adds a little weight to my decisions to dismiss Appeals B, C and D, and therefore Appeal A. I regret that the outcomes will disappoint the appellant but, with regard had to all other matters raised, I conclude that there are compelling highway safety objections to the first and second DCMPs. There was a ‘clear justification’ for the imposition of condition 3 as a pre-commencement’ condition on the 2019 permission, and the digging of the trench was a material operation carried out in breach of that condition precedent.

FORMAL DECISIONS

139. Appeal A (APP/G5750/X/22/3304638) is dismissed.

140. Appeal B (APP/G5750/W/22/3299664) is dismissed.

141. Appeal C (APP/G5750/W/22/3299663) is dismissed.

142. Appeal D (APP/G5750/W/22/3311662) is dismissed.

Jean Russell

INSPECTOR

APPENDIX A: SCREENSHOTS OF THE APPROVED BLOCK AND GROUND FLOOR PLANS

