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## Appeal Decision

Site visit made on 8 May 2019

by **A Thompson BSc BTP MRTPI MRICS**

an Inspector appointed by the Secretary of State

Decision date: 5<sup>th</sup> July 2019

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**Appeal Ref: APP/V2255/W/18/3209727**

**Newington Working Men's Club, High Street, Newington, Kent, ME9 7JL**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
  - The appeal is made by Mr Paul Giles against the decision of Swale Borough Council.
  - The application Ref 18/500767/FULL, dated 4 February 2018, was refused by notice dated 12 June 2018.
  - The application sought planning permission for retrospective demolition of former Working Men's Club and erection of 9no. dwellings and 1 no. maisonette together with carports for garaging of cars without complying with conditions attached to planning permission Ref 17/504342/FUL, dated 20 December 2017.
  - The conditions in dispute are Nos 2 and 11 which state that:  
Condition 2 No development shall take place other than in complete accordance with the mitigation measures set out in the acoustic survey submitted and agreed under reference 17/504046/SUB.  
Condition 11: All windows on the front façade of the block fronting onto the High Street shall be non-openable only. Before the development is occupied a scheme of mechanical ventilation to be fitted in each dwelling to draw air from the rear façade to the front rooms shall be submitted to and approved in writing by the Local Planning Authority. The scheme to be approved shall also include details of long-term maintenance.
  - The reasons given for the conditions are:  
Condition 2: To minimise impacts to future residents from road noise.  
Condition 11: In the interests of residential amenity.
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### Decision

1. The appeal is allowed and planning permission is granted for retrospective demolition of former Working Men's Club and erection of 9no. dwellings and 1 no. maisonette together with carports for garaging of cars at Newington Working Men's Club, High Street, Newington, Kent, ME9 7JL in accordance with the application Ref 17/504342/FUL, made on 21 August 2017, without compliance with condition number 11 previously imposed on planning permission Ref 17/504342/FUL dated 20 December 2017 and subject to the conditions set out in **Annex A**.

### Procedural and Preliminary Matters

2. Work on the development commenced in July 2017. Since the appeal was submitted in August 2018 construction work has continued and appeared largely complete at the time of my site visit. I am unclear whether further construction work is still required and what conditions have or have not been

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fully discharged. Having regard to these factors, and subject to my conclusions in respect of Conditions 2 and 11 that are the subject of this appeal, I have imposed all the planning conditions attached to planning permission Ref 17/504342/FUL, apart from Condition 1 ( as it is evident that work has commenced) and Condition 10 ( as I have clear evidence that this condition has been satisfactorily discharged).

3. Since the Council's decision letter was issued, the National Planning Policy Framework (the Framework) has been revised and updated. Although paragraph numbering has changed, the thrust of the Paragraph 109 of the 2012 Framework , which is referred to in the Council's decision notice, has been carried forward into Paragraph 170 of the current version published in February 2019. During a reference back exercise, the Council has drawn my attention to Paragraph 180 of the current Framework. As this policy also accords with the thrust of the earlier Framework<sup>1</sup>, I consider that there has been no material change in national policy of direct relevance to this case since the Council's decision.

### Main Issues

4. There are two main issues. The effect that removing Condition 11 would have on living conditions for occupiers of the block of properties fronting onto the High Street and the effect that varying Condition 2 would have on living conditions for occupiers of the block of properties fronting onto the High Street.

### Reasons

#### *Condition 11*

5. The Council has two principal concerns with the deletion of this condition. First that allowing openable windows on the front façade of the block that fronts the High Street would be potentially harmful to the health of future occupants of the dwellings by virtue of potentially drawing vehicle pollution into habitable rooms. Second, that allowing openable windows in that location would also increase potential for significant noise and general disturbance from traffic on the A2.
6. In relation to the concern about air quality, Condition 10 of planning permission reference Ref 17/504342/FUL required that before the dwellings on the appeal site were occupied, an Air Quality Assessment (AQA), undertaken by a competent person in accordance with current guidelines and best practice, be submitted and agreed in writing by the local planning authority.
7. The required AQA<sup>2</sup>, dated January 2018, was submitted to the Council and on 16 March 2018, a memorandum from the Council's Environmental Protection Officer confirmed that he had reviewed the AQA and concluded it was a competent report which met the requirements of Condition 10.
8. Amongst other details, the AQA predicted air pollutant concentrations for future residents of the development at 10 locations on the proposed development, including at 5 locations on the façade of the development facing the High Street. It is stated by the appellant that the AQA was based on the provision of

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<sup>1</sup> Paragraphs 120 and 123 National Planning Policy Framework 2012

<sup>2</sup> Air Quality Assessment: Former Working Men's Club, High Street, Newington: Air Quality Consultants: January 2018

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natural ventilation to the residential units and did not take account of a sealed façade. The AQA concluded that the effects of local traffic on the air quality for residents living in the proposed development were considered to be acceptable at the worst-case locations assessed, with pollutant concentrations being below the air quality objectives.

9. Given that the AQA is a detailed and thorough report, of direct relevance to this appeal and its findings have been agreed by the Council<sup>3</sup>, I give the AQA considerable weight at a material consideration in this case.
10. The appellant's air quality report<sup>4</sup> submitted in support of the current appeal, draws heavily on the AQA, but also includes monitoring results for nitrogen dioxide (NO<sub>2</sub>) levels in 2017, that were not available when the AQA was drafted, at two sites outside and opposite the proposed development. The data from 2017, while suggesting a small increase compared to 2016, confirmed that measured concentrations did not exceed the Government's relevant air quality criteria for NO<sub>2</sub>.
11. The appellant has also submitted a detailed report<sup>5</sup> setting out the results of an investigation of internal air quality in one of the new dwellings<sup>6</sup> that fronts the High Street. The investigation, albeit of only limited duration, was designed to test a worst-case scenario during the morning rush hour, including with open windows on the front facade. This investigation found that there were no significant gaseous elevations and although some particulate elevations were recorded, they were all within the Health and Safety Executive recommended healthy levels.
12. Both the additional NO<sub>2</sub> data from 2017 and the findings of the internal air quality investigation, which have not been substantively challenged by the Council, add further weight to the appellant's case that air quality conditions at the façade of the new development fronting the High Street are acceptable.
13. The appellant also argues that the introduction of ultra-low emission vehicles and the continued tightening of international/national vehicle emission standards are likely to result in a decline in pollutant concentrations, in particular NO<sub>2</sub>, in locations such as Newington High Street. The appellant's have also submitted a report<sup>7</sup> prepared in support of the Swale Strategic Air Quality Action Plan (AQAP). Amongst other findings, this report indicates that the Newington Air Quality Management Area (AQMA) is likely to be compliant with air quality standards for NO<sub>2</sub> by 2020.
14. While I accept changes in technology and legislation are likely to lead to a reduction in harmful vehicle emissions, the likely level of impact of these changes in relation to air quality conditions at the façade of the properties fronting the High Street is not clear. Similarly, while I agree that the AQAP report appears encouraging, that report relates to a very early stage in the AQAP process and refers to conditions in the AQMA as a whole, rather than being site specific and, for these reasons, I consider these elements of evidence have only limited weight in this case.

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<sup>3</sup> Application Reference 18/500760/SUB

<sup>4</sup> Air Quality Report: Air Quality Consultants: July 2018

<sup>5</sup> Indoor Air Quality Report: Safe Air Quality Limited: 2018

<sup>6</sup> 2 Charlotte Court

<sup>7</sup> Swale Strategic AQAP 2018-2022 Report 1: Source Appointment and Options Assessment: March 2018



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15. The Council states that the development is situated within the Newington AQMA where there is evidence of an "exceedance" of NO<sub>2</sub> along the High Street, including at a monitoring site outside the development site, referred to as Site No. SW19.
16. The Council's decision to allow the development to go ahead was, in part, on the basis that planning conditions could be imposed that ensure satisfactory living conditions for occupiers of the new development by requiring that windows on the High Street elevation of the development could not be opened and that ventilation for those properties that fronted the High Street would be drawn from the rear elevation.
17. The evidence set out in the AQA<sup>8</sup> indicates that predicted air quality at the rear of the properties fronting the High Street would be better, in terms of lower levels of pollutants, than at the front. This is most notably the case in relation to NO<sub>2</sub>, where predicted levels at the rear elevation are around half the level at the front elevation. The Council is also concerned about the "street canyon" effect of introducing building facades close to the road, although the appellant directly addresses this issue in his evidence<sup>9</sup>.
18. In support of their case the Council has submitted a spreadsheet of NO<sub>2</sub> tube readings for a number of monitoring sites, including Site No. SW19. The spreadsheet shows NO<sub>2</sub> levels in excess of the annual mean objective of 40 µg/m<sup>3</sup> for most months in 2018.
19. In response to this spreadsheet evidence, the appellant submitted a detailed explanation of why the "raw" monthly measurements cannot be compared directly to an annual average objective. The Council acknowledge that the spreadsheet information is only raw data, that there are not enough readings to calculate an annual average, and that ratified data is not yet available. Having regard to these considerations, I consider the Council's spreadsheet data for 2018 has very limited weight as a material consideration in this case.
20. I have also had regard to the detailed submission by Newington Parish Council who share the Council's concern about changing the planning conditions attached to the permission.
21. My attention has been drawn to detailed air quality evidence submitted in relation to a recent appeal that was dismissed and an application that was approved, for developments that are near the appeal site. Although I accept that the appeal site lies between these two developments, I have very little information about each of the schemes and the air quality submissions do not add substantive evidence (beyond that set out by the appellant and Council) that is of direct relevance to this appeal and therefore the evidence carries limited weight in this case.
22. For the reasons I have explained earlier in this letter, I agree with the Parish Council's view that only limited weight can be placed on assumptions about future air quality conditions in the Newington AQMA, or the impact of changes in vehicle technology. I note the Parish Council's evidence regarding additional lorry movements generated by a new quarry. However, there is insufficient evidence for me to identify what the impact of this permission might be on air

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<sup>8</sup> Table 9 Predicted Concentrations of Nitrogen Dioxide, PM<sub>10</sub> and PM<sub>2.5</sub> in 2018 for New Receptors in the Development Site

<sup>9</sup> Paragraphs 2.9-2.13 Air Quality Report: Air Quality Consultants: July 2018

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- quality conditions at the appeal site and accordingly I give this matter limited weight.
23. Paragraph 170 of the Framework makes it clear that decisions should prevent those who occupy new development being put at unacceptable risk from unacceptable levels of air or noise pollution. Policies ST1 and Policy DM14 of the local plan, in addition to promoting good design and accordance with national policy on pollution, seek to ensure that development is appropriate to its location and causes no significant harm to amenity. Paragraph 180 of the Framework reinforces the importance of considering the appropriateness of location in terms of the likely effects (including cumulative effects) of pollution on health and living conditions. The Council's evidence also refers to paragraph 91(c) of the current Framework which I consider is less relevant than paragraphs 170 and 180 in this case.
24. Having regard to this policy context and the evidence before me, I find that the overall balance of evidence clearly supports the view that air quality conditions (both existing and predicted) at the façade of the buildings fronting the High St are acceptable. I acknowledge that the Council's position on this matter is reasonable, insofar as air pollutant levels at the rear of the properties fronting the High Street are better than the front and that drawing air from the back of the building may improve air quality conditions in these dwellings. However, in view of the findings of the Indoor Air Quality assessment, I do not think that this is a decisive point in favour of the existing condition.
25. Furthermore, having regard to the air quality evidence overall and the policy context, I do not consider that imposing a requirement that the windows on the High Street are unopenable and that air should be drawn from the rear of the block is necessary in order for the development to be acceptable in planning terms from an air quality perspective.
26. Turning to the concern about noise and general disturbance, the key substantive evidence on this point is set out in the appellant's noise impact assessment<sup>10</sup> (NIA).
27. Consistent with my observations at the site visit, the NIA notes that the A2 High Street is a busy main road with fairly constant levels of road traffic, including numerous Heavy Goods Vehicles, during the daytime period. In the light of a noise level survey and assessment, the NIA concludes that development site is exposed to fairly high levels of external environmental noise during both the daytime and night-time periods.
28. Having regard to the policies in noise in the Framework<sup>11</sup>, the NIA sets out the Recommended Acoustic Design Criteria in British Standard 8233:2014 "Guidance on sound insulation and noise reduction for buildings".
29. The NIA states that with the windows open, the internal noise limits outlined in BS8233:2014 for living rooms, bedrooms and dining rooms within the block fronting the High Street will be exceeded. In addition, the internal noise limits for bedrooms<sup>12</sup> during the night-time will also be exceeded and therefore a scheme of mitigation measures is required.

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<sup>10</sup> Noise Impact Assessment: MRL Acoustics Limited: July 2017.

<sup>11</sup> NIA refers to Paragraph 123 of the Framework (2012). The thrust of this policy is now set out in Paragraph 180 of the Framework (2019).

<sup>12</sup> As set out in BS8233:2014

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30. The NIA then sets out a scheme of mitigation measures to ensure that the internal noise limits are achieved without the need to open a window for ventilation<sup>13</sup>.
31. In the absence of any further substantive evidence on noise beyond the NIA, I find that allowing openable windows on the front façade of the block fronting onto the High Street would lead to potentially harmful levels of noise and disturbance in the habitable rooms on that frontage.
32. Thus in conclusion on Condition 11, I find that:
- (a) the requirement that all windows on the front façade of the block fronting onto the High Street shall be non-openable is necessary in order to avoid traffic noise giving rise to significant adverse impacts on the health and quality of life of occupiers of the development. This element of the condition would accord with the Framework and with policies ST1 and DM14 of the local plan insofar as these seek to ensure that new development provides a healthy environment for occupants of new development.
  - (b) the requirement for a scheme of ventilation to be fitted and maintained in each dwelling to draw air from the rear façade to front rooms, whilst reasonable, is not necessary from an air quality perspective.
  - (c) subject to the provision of the noise mitigation measures required in the NIA (which I consider further in relation to Condition 2 below), the requirement for a scheme of ventilation to be fitted and maintained in each dwelling to draw air from the rear façade to front rooms is not necessary from a noise perspective.
33. Turning to other matters raised by the appellant, I note it is argued that imposing a requirement that windows should be non-openable in perpetuity is potentially unenforceable or otherwise contrary to national policy on planning conditions. However, for the reasons set out above, I find that this element of the condition is necessary, relevant to planning and to the development to be permitted, precise and reasonable in all other respects. Furthermore, I see no basis for concluding that this requirement is unenforceable. No substantive evidence has been submitted in relation to the Planning Court case referred to by the appellant and therefore it does not change my conclusion on this point.
34. It is also stated that planning permission reference SW/11/0906 allowed openable windows on the block fronting the High Street. I do not agree. Condition 29 of SW/11/0906, is identical to Condition 11 of planning permission 17/504342. Condition 29 states that all windows on the front façade of the block fronting onto the High Street shall be non-openable only. The earlier permission reference SW/06/0115 is not included in the evidence before me, but as SW/11/0906 was a renewal of SW/06/0115, it is on balance likely that the same planning condition was also imposed in relation to the earlier permission.

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<sup>13</sup> NIA Paragraph 5.5.



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*Condition 2*

35. The Council has identified three principal concerns about modifying Condition 2 to include reference to "Titon-Sonair" ventilation system (the system).
36. First, that the system, if installed on the front façade of the development, would draw harmful air pollution into the habitable rooms in the block fronting the High Street. Second, that the system would require a filter to be installed and maintained in order to reduce particulate matter and that it would be difficult to enforce retention and replacement of the filters. Third, that installation of the system would be contrary to the requirements of condition 21 of planning permission 17/504342/FULL.
37. I have found that air quality at the front façade would be acceptable and therefore the installation of a ventilation system that draws air from the front façade would not create unacceptable health risks for occupiers of the habitable rooms in the block fronting the High Street.
38. In relation to the concern about retention or replacement of filters. The appellant's evidence is that the system does not include a filter to improve air quality. That accords with my understanding of the evidence submitted about the system i.e. that it is designed to attenuate noise only. The reference to "filter" in the manufacturer's information appears to refer to different filters achieving differing levels of noise attenuation and is not a reference to air quality.
39. Condition 21 requires prior approval by the Council of any proposal to install, amongst other things, vents, ducts, grilles and trickle vents on the High Street elevation of the development. Airbricks, which I consider to be a form of vent, have been installed on the front elevation in each of the appeal properties that front the High Street.
40. There is no evidence before me that approval was sought for the installation of airbricks on this elevation, but whether or not, is not a matter for this appeal.
41. The reason why the Council imposed condition 21 was to preserve or enhance the character and appearance of the Newington High Street conservation area. I consider the airbricks that have been installed are unobtrusive and have no impact on the character or appearance of the conservation area. Accordingly, variation of condition 2 proposed would preserve the character or appearance of the conservation area and thus accord with the provisions of Policy DM33 of local plan.
42. Notwithstanding my findings that the Council's concerns are unfounded, I do not consider that modification of Condition 2 is necessary or appropriate. Condition 2 requires that all development should be in complete accordance with the acoustic survey submitted and agreed under reference 17/504046/SUB, which means, in this case, the NIA.
43. Section 5 of the NIA sets out recommended mitigation measures in relation to development. In addition to the provision of adequate double glazing, paragraphs 5.15-5.18 deal specifically with ventilation of living rooms, dining rooms and bedrooms in the dwellings fronting onto the High Street (which are referred to in the NIA as Block A). Paragraph 5.16 identifies 3 alternative options for providing acoustically treated ventilation that would ensure that the

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required internal noise limits are met, without the need to open the windows for ventilation and cooling.

44. The first of the options set out in Paragraph 5.16, at bullet 1, identifies a suitable option as ... provision of acoustically screened wall mounted mechanical (i.e. powered) acoustic ventilators such as Titon Sonair F+ or [Silvavent Energex SHHRV units].
45. Given that NIA already states that the Titon Sonair system is an appropriate means of ensuring the necessary internal noise limits are met and Condition 2 requires compliance with the NIA, revision to explicitly make reference to the Titon Sonair system is unnecessary and would lack precision, as it would not be clear what the additional reference means in the context of the condition as a whole.
46. In conclusion on this issue, varying Condition 2 to include reference to the Titon Sonair system would not cause harm to the living conditions for occupiers of the block of properties fronting onto the High Street, because it is identified in the NIA as an effective approach. Thus I do not consider that the variation of the condition in this way would conflict with policies ST1, CP4 and DM14 of the local plan or the Framework insofar as these seek to ensure that new development is well designed and provides satisfactory living conditions for occupiers of the development. And I do not consider the variation in Condition 2 would conflict with Policy DM33 for the reasons set out earlier.
47. However, I find that varying the condition as proposed would make the condition imprecise and, in any event, is unnecessary. Accordingly, amending the condition would be contrary to the Framework<sup>14</sup> which amongst other things requires that planning conditions should be precise and necessary.

### **Conclusion**

48. For the reasons I have set out above, I conclude that Condition 11 should not be removed, but should be varied to simply require that all windows on the front façade of the block fronting onto the High Street shall be non-openable only. I do not agree that Condition 2 should be varied and this element of the appeal fails.

*Anthony Thompson*

INSPECTOR

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<sup>14</sup> Paragraph 55.



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#### **ANNEX A – PLANNING CONDITIONS**

Condition 1: No development shall take place other than in complete accordance with the mitigation measures set out in the acoustic survey submitted and agreed under reference 17/504046/SUB.

Condition 2: No development shall take place other than in complete accordance with the following drawings (all prefixed 1603/B): 01revC, 04revA, 05revA, 06revA and 09revA, drawing 1603/P07revA, and the gates detail submitted by email Saturday 16.12.2017.

Condition 3

(i) No development shall take place other than in accordance with the details, including the implementation, maintenance and management strategy, provided under the sustainable surface water drainage scheme agreed under application reference 17/504046/SUB.

(iii) No infiltration of surface water drainage into the ground is permitted other than with the express written consent of the Local Planning Authority, which may be given for those parts of the site where it has been demonstrated that there is no resultant unacceptable risk to controlled waters. The development shall be carried out in accordance with the approval details.

Condition 4: The external materials to be used on the development hereby permitted shall be those as specified and agreed under application ref. 17/504046/SUB.

Condition 5: The brickwork on the entirety of the frontage block hereby permitted shall be laid in Flemish bond, and the remainder of the development shall be laid in Flemish Garden Wall bond, unless otherwise agreed in writing by the Local Planning Authority.

Condition 6: No windows or doors shall be installed until detailed drawings, at a suggested scale of 1:5, of all new external joinery work and fittings together with sections through glazing bars, frames and mouldings, have been submitted to and approved in writing by the Local Planning Authority before any development takes place. The development shall be carried out in accordance with the approved details.

Condition 7: No external joinery work shall take place until constructional details, at a suggested scale of 1:5, of the eaves, ridges, gable bargeboards, and verges to be used on the development hereby permitted have been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved details.

Condition 8: No dormer windows shall be constructed until constructional details of the dormer windows and High Street frontage boundary walls and railings hereby permitted have been submitted to and agreed in writing by the Local Planning Authority. The development shall thereafter be carried out in accordance with the agreed details.

Prior to occupation

Condition 9: All windows on the front facade of the block fronting onto the High Street shall be non-openable only.

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Condition 10: The dwellings hereby permitted shall not be occupied until full details of both hard and soft landscape works have been submitted to and approved in writing by the Local Planning Authority. These details shall include existing trees, shrubs and other features, planting schedules of plants, noting species (which shall be native species and of a type that will encourage wildlife and biodiversity), plant sizes and numbers where appropriate, means of enclosure, hard surfacing materials, and an implementation programme.

Condition 11: The dwellings hereby permitted shall not be occupied until a scheme of biodiversity enhancements, such as bat boxes, bird nesting boxes, or other improvements, has been submitted to and approved in writing by the Local Planning Authority. The enhancements shall be implemented as agreed and thereafter retained in perpetuity.

Condition 12: Before the dwellings hereby approved are first occupied, a properly consolidated and surfaced access (not loose stone or gravel) shall be constructed, details of which shall have been submitted to and approved by the Local Planning Authority. The first 5m of the access from the highway edge shall be constructed in a bound surface.

During construction

Condition 13: The dust suppression measures agreed under application ref. 17/504046/SUB shall be implemented throughout the construction phase of the development.

Condition 14: The measures to prevent deposit of mud on the highway agreed under application ref. 17/504046/SUB shall be implemented throughout the construction phase of the development.

Condition 15: During construction provision shall be made on the site to accommodate operatives' and construction vehicles loading, off-loading or turning, and parking for site personnel / operatives / visitors. Such parking shall be provided prior to the commencement of the development.

Condition 16: No construction or demolition work shall take place on the site on any Sunday or Bank Holiday, nor on any other day except Monday to Friday between 0730 - 1900 hours and Saturday between 0730 - 1300 hours, unless with the prior written approval of the Local Planning Authority.

Other

Condition 17: All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with the programme agreed in writing with the Local Planning Authority.

Condition 18: Upon completion of the approved landscaping scheme, any trees or shrubs that are removed, dying, being severely damaged or becoming seriously diseased within five years of planting shall be replaced with trees or shrubs of such size and species as may be agreed in writing with the Local Planning Authority, and within whichever planting season is agreed.

Condition 19: No meter boxes, vents, ducts, grilles or trickle vents shall be installed on the High Street elevation without the prior written approval of the Local Planning Authority.

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Condition 20: The vehicle parking spaces shown on the approved drawings shall be provided, surfaced and drained before the dwellings hereby permitted are first occupied, and shall thereafter be retained for the use of the occupiers of, and visitors to, the premises, and no permanent development, whether or not permitted by the Town and Country Planning (General Permitted Development) Order 1995 (or any Order revoking and re-enacting that Order), shall be carried out on that area of land so shown or in such a position as to preclude vehicular access to this reserved parking space. No doors, gates, or other means of enclosure shall be installed to the front of the car ports hereby permitted unless otherwise agreed in writing by the Local Planning Authority

Condition 21: Upon completion, no further development, whether permitted by Classes A, 8, C or D or E of Part 1 of Schedule 2 Town and Country Planning (General Permitted Development) Order 1995 or not, shall be carried out without the prior permission in writing of the Local Planning Authority.