Horsham District Council

DELEGATED APPLICATIONS - ASSESSMENT SHEET

APPLICATION NO./ADDRESS:
DC/24/0257
Westlands Farm, Billingshurst Road, Ashington, West Sussex, RH20 3BB

DESCRIPTION:
Application to confirm that condition 2 of previously approved application DC/19/2196 (Erection of two x 3 bedroom semi-detached dwellings) has been complied with and that the actions and intent of the applicant with regards to prior to commencement conditions 3,4 and 5 ensures the permission remains extant (Lawful Development Certificate - Existing)

RELEVANT PLANNING HISTORY:

DISC/22/0318	Approval of details reserved by conditions 3,4 and 5 to approved application DC/19/2196	Application Refused 19.07.2024
DC/19/2197	Creation of an agricultural access track and field gate access	Application Permitted on 23.06.2020
DC/19/2196	Erection of two x 3 bedroom semi-detached dwellings	Application Permitted on 26.11.2020
DC/19/1421	Prior approval for the change of use from an agricultural building to dwellings (C3 Use class)	Prior Approval Required and PERMITTED on 04.09.2019

ASSESSMENT

The application seeks to confirm that the development granted under DC/19/2196 commenced within the limits of the time condition attached to the consent (condition 2) and that the permission is therefore extant.

Relevant Legislation and Guidance

Section 56 of the Town and Country Planning Act (TCPA) states:

(1) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated—
  (a) if the development consists of the carrying out of operations, at the time when those operations are begun;
  (b) if the development consists of a change in use, at the time when the new use is instituted;
  (c) if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b).

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

(3) The provisions referred to in subsection (2) are sections (5) and (7), 85(2), 86(6), 87(4), 91, 92, and 108(3E)(c)(i) and paragraph 13 of Schedule 7A.

(4) In subsection (2) “material operation” means—
(a) any work of construction in the course of the erection of a building;
(aa) any work of demolition of a building;
(b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;
(c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);
(d) any operation in the course of laying out or constructing a road or part of a road;
(e) any change in the use of any land which constitutes material development.

(5) In subsection (4)(e) “material development” means any development other than—
(a) development for which planning permission is granted by a general development order, a local development order or a Mayoral development order for the time being in force and which is carried out so as to comply with any condition or limitation subject to which planning permission is so granted;
(b) development of a class specified in paragraph 1 or 2 of Schedule 3; and
(c) development of any class prescribed for the purposes of this subsection.

(6) In subsection (5) “general development order” means a development order (within the meaning of section 59) made as a general order applicable (subject to such exceptions as may be specified in it) to all land in England and Wales.

S.191(4) of the TCPA states:

> *“If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.”*

Paragraph 006 of the relevant planning practice guidance (PPG) explains that the applicant is responsible for providing sufficient information to support an application. This paragraph, furthermore, explains that, in the case of applications for an existing use, if the authority holds no evidence itself, nor from any others, to contradict or otherwise make the applicant’s version of events less than probable, there is no good reason to refuse the application, provided the applicant’s evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on a balance of probability.

Case law, furthermore, would confirm that in the determination of an application for a certificate of lawfulness, the applicant’s own evidence does not need to be corroborated by independent evidence in order to be accepted. If the authority holds no evidence itself, or from others, to contradict or call into question the probability of the applicant’s version of events there is no good reason to refuse an application.

The Permission

The application dwelling was subject to planning application reference DC/19/2196. Condition 2 attached to that permission required:

> ***Standard Time Condition****: The development hereby permitted shall begin before the expiration of three years from the date of this permission.*
>
> *Reason: To comply with Section 91 of the Town and Country Planning Act 1990.*

A number of pre-commencement and pre-commencement slab level conditions were attached to the permission (conditions 3 through 8), none of which have been successfully discharge by the applicant within the three year time limit as imposed by condition 2.

The Test

TCPA 1990 s191(1) provides that if any person wishes to ascertain whether:

- *Any existing use of buildings or other land is lawful;*
- *Any operations which have been carried out in, over or under land are lawful; or*
- *Any other matter, constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful;*

he may apply to the local planning authority specifying the land and describing the use, operations or other matter.

If on such an application, the local planning authority is satisfied with the lawfulness of the use, operations, or other matters described in the application, or that description as modified or substituted by them, it shall issue a certificate or refuse the application.

The Act provides that in respect of a failure to comply with any condition or limitation subject to which planning permission has been granted, any matter constituting such a failure is lawful at any time if:

(a) The time for taking enforcement action in respect of the failure has expired; and

(b) It does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.

The Whitley Principle

The case Whitley & Sons v Secretary of State for Wales [1992] involved a legal dispute concerning planning law in the UK. The 'Whitley principle' holds that if any works are carried out in violation of conditions precedent, they cannot be considered as lawfully starting the development. If lawful commencement is ***not*** achieved within the prescribed timeframe, the planning permission will expire.

In the case R (on the application of Hart Aggregates Limited) v Hartlepool BC [2005], it was established that the Whitley principle does not apply to all planning conditions. A distinction is made between conditions that must be fulfilled 'before development starts' and those that are fundamental to the permission, known as 'true conditions precedent'. Breaching the former can be enforced but does not invalidate the development, while breaching the latter means the development cannot be considered lawful.

This was further clarified in Bedford Borough Council v The Secretary of State for Communities and Local Government and Aleksander Stanislaw Murzyn [2008], where it was determined that if a breached condition is not central to the development, the breach does not render the development unlawful. The exact wording, purpose, and importance of the condition must be analysed to determine its impact on the validity of the development.

The Evidence

The Applicant's Evidence

The applicant has provided a planning statement detailing that the works permitted under DC/19/2196 commenced (undefined) prior to the expiration of the three-year time limit as imposed by condition 2 (26.11.2023). An application to discharge the pre-commencement conditions (DISC/22/0318) (3, contamination; 4, drainage and; 5 removal of the existing buildings) was validated by the Local Planning Authority on 09.11.2022, a year before the expiration of the consent. This application was subsequently refused by the Local Planning Authority on 19.07.2024 (further detailed below).

The Council's Evidence

The Council holds the following evidence relating to this certificate:

- Aerial photography of the site, dated 2001, 2007, 2012 and 2018
- Decision notice for DC/19/2196
- Decision notice for DISC/22/0318

Assessment of the Evidence

Full planning application DC/19/2196 was granted permission for the erection of two x 3 bedroom semi-detached dwellings on 26.11.2020. An application to discharge the pre-commencement conditions (3, 4 and 5) attached to the consent was refused in July 2024 following the CG Fry v SoS and Somerset Council High Court decision. This follows the publication of Natural England position statement on the adverse effects of water neutrality on the designates sites within the Arun Valley, as consenting the detail would enable a consented scheme that has not previously demonstrated water neutrality

This application is for a Lawful Development Certificate Existing to confirm commencement of development in relation to condition 2 of previously approved application DC/19/2196 (Erection of two x 3 bedroom semi-detached dwellings) has been complied with and that the actions and intent of the applicant with regards to prior to commencement conditions 3,4 and 5 ensures the permission remains extant.

Whilst the applicant contends that development commenced prior to the expiration of the three-year limit, no such evidence is forthcoming that definitively establishes this to be the case (dated photographs, witnessed statutory declarations etc.). The statement details that trial pits have been dug to inform the contamination report- however, relates to work pertaining to the condition (3) only, and are not commensurate to the commencement of the development itself. In any case, as noted above, the relevant pre-commencement (and slab level condition) attached to the 2020 consent also have not been discharged. The Conditions that are considered most relevant to the consent that 'go to the heart' of the planning permission are the following:

3 ***Pre-Commencement Condition**: No development shall commence until the following components of a scheme to deal with the risks associated with contamination, (including asbestos contamination), of the site be submitted to and approved, in writing, by the local planning authority:*
(a) A preliminary risk assessment which has identified:
- *all previous uses*
- *potential contaminants associated with those uses*
- *a conceptual model of the site indicating sources, pathways and receptors*
- *Potentially unacceptable risks arising from contamination at the site.*

The following aspects (b) - (d) shall be dependent on the outcome of the above preliminary risk assessment (a) and may not necessarily be required.

(b) An intrusive site investigation scheme, based on (a) to provide information for a detailed risk assessment to the degree and nature of the risk posed by any contamination to all receptors that may be affected, including those off site.

(c) The intrusive site investigation results following (b) and, based on these, a detailed method statement, giving full details of the remediation measures required and how they are to be undertaken.

(d) A verification plan providing details of the data that will be collected in order to demonstrate that the works set out in (c) are complete and identifying any requirements for longer-term monitoring of pollutant linkages, maintenance and arrangements for contingency action where required.

The development shall thereafter be carried out in accordance with the approved details. Any changes to these components require the consent of the local planning authority.

Reason: As this matter is fundamental to ensure that no unacceptable risks are caused to humans, controlled waters or the wider environment during and following the development works and to ensure that any pollution is dealt with in accordance with Policies 24 and 33 of the Horsham District Planning Framework (2015).

4 ***Pre-Commencement Condition**: No development shall commence until a drainage strategy detailing the proposed means of foul and surface water disposal has been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved scheme.*

Reason: As this matter is fundamental to ensure that the development is properly drained and to comply with Policy 38 of the Horsham District Planning Framework (2015).

5 ***Pre-Commencement Condition**: Prior to the commencement of relevant works for the erection of the dwellings hereby approved, the existing buildings, as shown on drawing no. 000 and received 5 August 2020, indicated on the plan as 'To be removed' shall be fully demolished (including the removal of foundations) and all materials arising from such demolition removed from the site.*

Reason: In the interests of the amenities of the locality and in accordance with Policy 33 of the Horsham District Planning Framework (2015).

6 ***Pre-Commencement (Slab Level) Condition**: No development above ground floor slab level of any part of the development hereby permitted shall take place until a schedule of materials and finishes and colours to be used for external walls, windows, roofs and doors of the approved building(s) has been submitted to and approved by the Local Planning Authority in writing and all materials used in the construction of the development hereby permitted shall conform to those approved.*

Reason: As this matter is fundamental to enable the Local Planning Authority to control the development in detail in the interests of amenity by endeavouring to achieve a building of visual quality in accordance with Policy 33 of the Horsham District Planning Framework (2015).

7 ***Pre-Commencement (Slab Level) Condition**: No development above ground floor slab level of any part of the development hereby permitted shall take place until confirmation has been submitted, in writing, to the Local Planning Authority that the relevant Building Control body shall be requiring the optional standard for water usage across the development. The dwellings hereby permitted shall meet the optional requirement of building regulation G2 to limit the water usage of each dwelling to 110 litres per person per day. The subsequently approved water limiting measures shall thereafter be retained.*

Reason: As this matter is fundamental to limit water use in order to improve the sustainability of the development in accordance with Policy 37 of the Horsham District Planning Framework (2015).

8 ***Pre-Commencement (Slab Level) Condition**: No development above ground floor slab level of any part of the development hereby permitted shall take place until a Biodiversity Enhancement Layout providing details and locations of enhancement measures, integrated and external bat roosting opportunities and new bat friendly planting has been submitted to and approved in writing by the Local Planning Authority. The inclusion of hedgehog homes and cut-outs in fences, bug boxes and nest boxes for birds should also be considered. The enhancement measures shall be implemented in accordance with the approved details and all features shall be retained in that manner thereafter.*

Reason: To enhance Protected and Priority Species and allow the Local Planning Authority to discharge its duties under Section 40 of the NERC Act 2006 (Priority habitats & species) and in accordance with Policy 31 of the Horsham District Planning Framework.

Regardless of whether or not the development commenced within the prescribed timeframe, the pre-commencement / slab level conditions attached to the initial planning application have not been discharged. It is a well-established principle that operations carried out in contravention of a planning condition cannot be relied on as beginning the development authorised by the permission (commonly referred to as the 'Whitley principle'). The details for conditions relating to the planning permission for Erection of two x 3-bedroom semi-detached dwellings (application ref. DC/19/2196) have not been

discharged by the Council prior to any works commencing on the site. It would therefore not have been possible for the permission to have lawfully taken place, even if the owner considered that the works commenced would implement the planning permission. On expiry of the commencement period (26.11.2023) the permission would have lapsed.

Notwithstanding the Whiltey Principle, and whether or not the relevant conditions have been discharged to enable the consent to be carried out, the applicant has not provided any substantive evidence to assure that the development commenced within the statutory timeframe. The provisions of s56 of the TCPA are noted, which defines material operations and the like. Of particular relevance, the digging of trial pits in relation to the works carried out of the contamination report (as required under condition 3), does not constitute the development being carried out, rather works in relation to a condition required for discharge. The very nature of the wording of the condition may well require some level of works to be carried out. However, this should not be conflated with the commencement of the development as advanced by the applicant.

On the basis of the above, the development (DC/19/2196) can now no longer be lawfully implemented, and thus no longer benefits from planning permission as the conditions most relevant to the consent being carried out have not been discharged.

Conclusion

As the conditions precedent of approval have not been discharged by the Local Planning Authority it is considered that commencement of development in relation to condition 2 of previously approved application DC/19/2196 (Erection of two x 3 bedroom semi-detached dwellings) has not been complied with and that the actions and intent of the applicant with regards to prior to commencement conditions 3, 4 and 5 does not ensure the permission remains extant.

Recommendation: Application Refused

Reason for refusal:

1 It has not been demonstrated to the satisfaction of the Local Planning Authority that the works in connection with erection of two x 3 bedroom semi-detached dwellings as approved under DC/19/2196 lawfully commenced within statutory time limit of implementation imposed under Condition 2 of that permission, as the relevant pre-commencement conditions were not discharged by the Local Planning Authority prior to that date.

POSITIVE AND PROACTIVE STATEMENT
Statement pursuant to Article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015. The Local Planning Authority has acted positively and proactively in determining this application by assessing the proposal against all material considerations, including planning policies and any representations that may have been received, in order to be able to, where possible, grant permission.

Plans list for: DC/24/0257
Schedule of plans/documents **not approved**:

Plan Type	Description	Drawing Number	Received Date
Location plan		NONE	16.02.2024
Photos	Dwelling	NONE	16.02.2024
Supporting Statement	Planning	NONE	16.02.2024

DELEGATED

Case Officer sign/initial	Steve Astles	Date:	22.07.2024
Authorising Officer sign/initial	RHERMITAGE	Date:	16.09.2024