PLANNING STATEMENT to be read in conjunction with drawings submitted for:

Westlands Farm, Billingshurst Road, Ashington, Pulborough, RH20 3BB

Lawful Development Certificate to confirm that condition 2 of permission 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.

Introduction:

The application site is to the south-west of Billingshurst Road, some 1km north of Ashington and is outside of any built-up area. The site is located within a countryside location, characterised by other farmsteads, commercial uses and dwellings. To the south and west of the wider site are open fields with the neighbouring site to the east being in a commercial use and forming Sussex Equine Hospital.

Permission was granted on 26 NOVEMBER 2020 under application **DC/19/2196** for the **Erection of two x 3 bedroom semi-detached dwellings** at Westlands Farm Billingshurst Road Ashington Pulborough West Sussex RH20 3BB.

Development has legally commenced within the 3 years to 25 November 2023 and the applicant requires a Lawful Development Certificate to satisfy themselves and potential purchasers of the site that the permission remains extant.



Above and below – Extract from approved plans

Drawing		Drawn By	Checked By
Location Plan & Block Plans		MD	BK
Job No.	Drawing No.	Drawn Date	Issue Date
2008WE	000	05.08.2020	09.10.2020

Prepared by: Phil Rowe, BA Hons, BTP,
PROwe Planning Solutions - 07946 641835 – phil@proweplanning.co.uk



Planning History:

DISC/22/0318 - Approval of details reserved by conditions 3,4 and 5 to approved application DC/19/2196 Westlands Farm Billingshurst Road Ashington West Sussex RH20 3BB Validated: Wed 09 Nov 2022 Status: Awaiting decision

DC/19/2196 - Erection of two x 3 bedroom semi-detached dwellings
Westlands Farm Billingshurst Road Ashington Pulborough West Sussex RH20 3BB | Validated: Mon 28 Oct 2019 | Status: **PERMISSION GRANTED 26 NOVEMBER 2020.**

The following conditions are relevant to this application.

2 **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.

COMMENT –Sec.56(2) of the Town and Country Planning Act 1990 provides that development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. *The effect of sec.56 is that permissions may be kept alive indefinitely, viz. Remain legally extant and capable of full implementation despite expiry conditions if works or actions to implement them have commenced.*

A material operation was undertaken prior to 25 November 2023 on the basis that work was undertaken to demolish buildings; this also discharged the obligation under condition 5.

Material 'commencement' operations listed at sec.56(4) of the Town and Country Planning Act 1990 include:

AA) any work of demolition of the building

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).

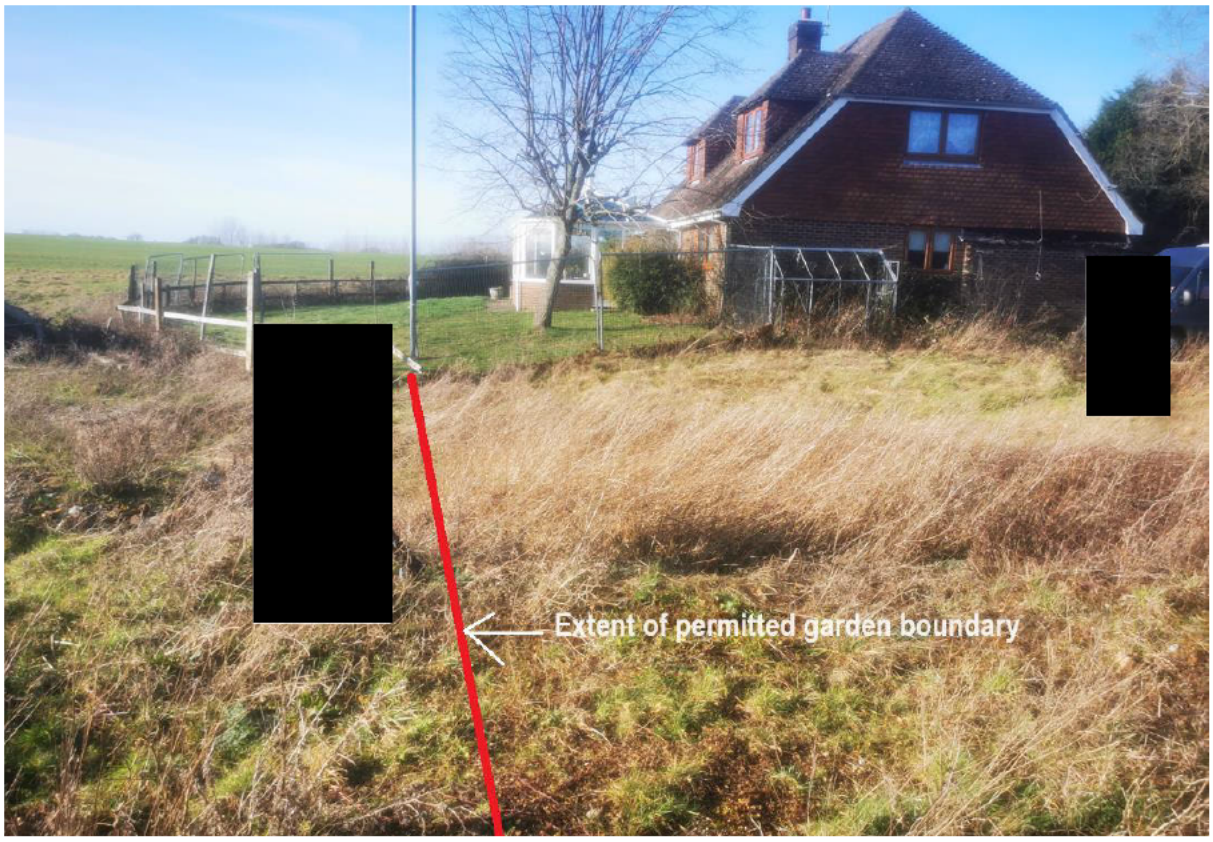
COMMENT – As noted above an application under DISC/22/0318 - Approval of details reserved by conditions 3,4 and 5 to approved application DC/19/2196 was Validated on Wed 09 Nov 2022.

N.B. The application was submitted with a whole year in advance of the expiration of three years from the date of the DC/19/2196 permission. To the applicant's frustration the **Status remains: 'Awaiting decision'.**

Having seen the 'contamination' report prepared by Sevenoaks Environmental in August 2022 that was submitted with application DISC/22/0318 I would comment as follows:

Cross referencing the approved site plan – the extent of the permitted garden boundary for the 2 dwellings is shown below. It is noted that the contamination trial holes have been **dug outside the red line area approved as garden** and on an area downslope of the approved garden.

On the basis that there is clearly **no made-up ground within the proposed garden areas** and any contamination downslope could not travel upslope with surface water **no weight can be given to any concerns regarding contamination.**





Combined Geo-Environmental
Desk Study and Site Investigation

At:

Westlands Farm,
Billinghurst Road,
Ashington,
West Sussex,
RH20 3BB

For:

Jennifer Hendriksen

Private and Confidential

Ref: 4852 22 08 03 Rpt 01 Rev A AW GM

Sevenoaks Environmental Consultancy Ltd,
145a Hastings Road, Pembury, Kent, TN2 4JU
Tel: 01892 822999 Fax: 01892 822992

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).

COMMENT – Given that the site is in the rural area and mains drainage is not available the solution would have to rely on a sewer treatment plants.

It is clear from the consultee response below that the submitted drainage details are acceptable.

From: Martin.Brightwell
Sent: 15 December 2022 09:57
To: Stephen.Astles
Subject: FW: Planning Application Consultation - DISC/22/0318
Attachments: ufm2_Internal_Consultation_memo.pdf

DISC/22/0318
Approval of details reserved by conditions 3,4 and 5 to approved application DC/19/2196
Westlands Farm Billingshurst Road Ashington West Sussex

I've no adverse comments to make on the Drainage Strategy described to discharge Condition 4 imposed on this application.
Any drainage details will be determined by compliance with the '*General Binding Rules under the Environmental Permitting (England & Wales) Regulations 2016*' & '*Building Regulations*'.

Regards

Martin Brightwell
Team Leader

[redacted]

Horsham District Council

Such matters are covered by building regulations and as such in accordance with the National Planning Practice Guidance extracts below should not have been a prior to commencement condition – it should have been an informative.

https://www.gov.uk/guidance/use-of-planning-conditions#Application-of-the-six-tests

Are there any circumstances where planning conditions should not be used?

Any proposed condition that fails to meet one of the 6 tests should not be used. This applies even if the applicant suggests or agrees to it, or it is suggested by the members of a planning committee or a third party. Specific circumstances where conditions should not be used include:

- ***Conditions which unreasonably impact on the deliverability of a development: Conditions which place unjustifiable and disproportionate financial burdens on an applicant will fail the test of reasonableness. In considering issues around viability, local planning authorities should consider policies in the National Planning Policy Framework and supporting guidance on viability.***

- ***Conditions requiring compliance with other regulatory requirements (eg Building Regulations, Environmental Protection Act):***

Conditions requiring compliance with other regulatory regimes will not meet the test of necessity and may not be relevant to planning. Use of informatives to remind the applicant to obtain further planning approvals and other consents may be more appropriate.

Paragraph: 005 Reference ID: 21a-005-20190723
Revision date: 23 07 2019

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.

COMMENT – COMPLIED - Each of the 3 buildings circled green were demolished prior to 25 November 2023.



Conclusion

- **On the balance of probabilities, it is clear that condition 2 of permission DC/19/2196 – 'Erection of two x 3 bedroom semi-detached dwellings' has been complied with and the permission remains extant.**

- **Material commencement has occurred prior to 25th November 2023.**

Case Law extracted from Development Control Practice Manual.

Material operations: commencement of development
By virtue of sec.56(1) development of land is 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).
Sec.56(2) provides that development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. The effect of sec.56 is that permissions may be kept alive indefinitely, viz. Remain legally extant and capable of full implementation despite expiry conditions if works or actions to implement them have commenced.

These so-called material operations (previously referred to as specified operations in sec.43 of the 1971 Act) are listed at sec.56(4) as:

A) any work of construction in the course of erection of a building;
AA) any work of demolition of the building;
B) the digging of a trench which is to contain the foundations, or part of the foundations of any building;
C) the laying of any underground main pipe to the foundations or part of the foundations of a building, or to any such trench mentioned in para.(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 the land which constitutes material development.

Over the years a large number of court and appeal cases have addressed the topic. **Most demonstrate the wisdom of the words of *Lord Scarman* in the *Pioneer Aggregates* judgment where he stated that planning permissions with only a meagre part implemented were hardy beasts with a great capacity for survival. All that is required is that the works must comprise part of the development authorised by the planning permission and be more than *de minimis*.**

Case Law Commentary in relation to the actions and intent of the applicant with regards to prior to commencement conditions 3,4 and 5.

Extracts from Development Control Practice Notes
"Keeping permissions alive - Commencement in breach of condition"

The question is often raised of whether a permission may be preserved where there has been breach of a condition requiring certain things to be done prior to commencement (*viz.* A condition precedent or pre-condition). Following on from this are related issues of enforceability and the status of any remaining conditions attached to the permission.

Although previous court cases had established the doctrine that development in breach of planning conditions could not be development to which the permission related, because it was a breach of planning control, such as *Etheridge v S.O.S. [1984],* the case that established a general principle on this matter is *F.G.Whitley & Sons v S.O.S. For Wales and Clwyd C.C. 24/3/92.* Here, the Court of Appeal held that the development permitted had to be read with the conditions imposed on it and if the (material) operations concerned contravened the conditions they would be unlawful. Thus they could not be relied upon as commencement of the development for the purposes of preventing the permission from lapsing.

A number of subsequent court cases have confirmed exceptions. The principle was reconsidered in *R. V Flintshire C.C. Ex parte Somerfield Stores 19/3/98,* where judicial review of a local authority decision not to enforce against the building of a roundabout was sought by Somerfield Stores. The works, by a developer of a large retail park at Broughton Park, near Chester, ostensibly kept alive the permission that would otherwise have expired. It was argued that the works had been in breach of a condition on the permission that required, prior to commencement, approval of a study of the developments traffic impact.

The local authorities view was that the condition had been satisfied by a report submitted and approved by the authority before permission had been granted. However, the court held that as there was no record of an application for approval under the condition, or a record of a decision being made and communicated to the applicant, strictly there had been a failure to comply with the condition.

Nevertheless, commonsense had to be applied and the condition had in substance been complied with, albeit without the formality of a written application and written notice of approval.

Prepared by: Phil Rowe, BA Hons, BTP,
PROwe Planning Solutions - 07946 641835 – phil@proweplanning.co.uk

Additional Case Law Commentary in relation to application:

The *Whitley* principle was then modified in *R. (on the application of Keith Hammerton) v London Underground Ltd 08/11/02.* This concerned works to extend the East London Line of the Underground through Bishopsgate Goods Yard. **The High Court held that although the works had commenced in breach of a pre-condition, since it would be irrational to take enforcement action against them, they were effective to commence the development. The permission had not therefore lapsed. This approach was subsequently approved by the Court of Appeal in *R. (on the application of Prokopp) v London Underground Ltd [2004].***

To sum up, while this area of case law is complicated it appears that commencement of development in breach of a true condition precedent (in the *Hart* sense) will render the entire development unlawful and not be considered effective to implement a permission and keep it alive **unless:**

1. the condition has been complied with in substance but written notice of approval had not been obtained (as in *R. v Flintshire*);

The judgment in *R v Flintshire C.C. ex parte Somerfield Stores*, related to a case where operations carried out in breach of condition had to be applied with commonsense. A draft landscape plan had been prepared and although no formal approval had been given, the condition had been complied with in substance. (Macclesfield 28/04/99 DCS No. 057-121-751).

2. subsequent agreement has been reached on compliance with the condition, such as by retrospectively discharging the condition by obtaining approval or carrying out works (as in *Whitley*);

An appeal case of interest concerned a situation where outline permission had been given for the development of a high technology park being promoted by Essex County Council. An application to extend the period in which reserved matters could be submitted had not been determined within the prescribed period by Chelmsford Borough Council. It was argued that reserved matters had in fact been approved despite the fact that no plan relating thereto could be traced. An inspector found that there was sufficient documentary evidence for the approval and as work had begun in terms of the construction of roadways with the intention to commence the development, the scheme had been begun lawfully. The fact that a landscaping scheme had not been submitted in accordance with another condition did not inhibit this conclusion, in accordance with the commonsense approach advocated in the court cases *R. v Flintshire C.C. ex parte* Somerfield Stores (Chelmsford 17/6/98 No.034-137-980).

2. in addition, it may be concluded that: **operations in breach of a condition precedent can keep a permission alive where it would be irrational to take action against them.**

A commonsense view must be taken and the *Whitley* rule should not be applied unduly rigidly.

Comments in relation to current application

Notwithstanding that condition 3,4 and 5 were conditions precedent, in relation to the case law extracts reproduced, a **common-sense view** must be taken.

- Condition 5 regarding demolition has been met.
- Condition 4 regarding drainage; it is clear that the submitted details are acceptable and in any event such matters ought not have been subject to a planning condition on the basis that they are covered under Building regulations.
- Condition 3 regarding contamination; with 12 months to spare details were submitted to the Council indicating **a firm intent to comply** with the condition.

In accordance with the tests in *R. v Flintshire* condition 3 relating to contamination (as with condition 4 relating to drainage) has been complied with in substance despite written approval having not been previously obtained.

In common with the other case law tests, a commonsense view must be taken, the *Whitley* rule should not be applied unduly rigidly and it would be irrational to take enforcement action against what has been carried out. The demolition that has been carried out to commence development during the lifetime of the original permission under DC/19/2196 is effective to commence the development. The permission had not therefore lapsed.

The development has commenced in law. A Certificate of Lawfulness is required to reflect this.