Horsham District Council

DELEGATED APPLICATIONS - ASSESSMENT SHEET

APPLICATION NO./ADDRESS:

DC/24/0189
Little Rowfold, Rowfold Kennel , Coneyhurst Road, Billingshurst, West Sussex, RH14 9DF

DESCRIPTION:

Application to confirm that the works commenced under previously approved application DC/19/1870 (Lawful Development Certificate - Existing)

RELEVANT PLANNING HISTORY:

DC/19/1870	Erection of 4 No. detached single storey dwellings with associated access driveway and parking.	Application Permitted on 04.06.2020

PLANNING ASSESSMENT

The application relates to a Lawful Development Certificate Existing to confirm that works have commenced under previously approved planning permission reference DC/19/1870.

Article (2) of Section 191 of the Town and Country Planning Act 1990 states:

"For the purposes of this Act uses and operations are lawful at any time if –

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force."

Summary of Applicant's Evidence

- *Location Plan*
- *Planning Statement*

  Works commenced on the sit in May 2023 in accordance with planning permission reference DC/19/1870 dated 04.06.2020.

  All buildings had been mostly cleared for the start of demolition and all building areas cleared of tyres. Dug a footing for the start of the development at the site on 24.05.2023.

  The permission contained a number of pre-commencement conditions, however these did not go to the heart of the permission such that they needed to be complied with prior to the actual legal commencement of development.

- *Statutory Declaration of Mr T Brooker*

  Registered proprietor or Rowfold Kennels, Coneyhurst Road. On 04.06.2020, obtained planning permission to erect 4 detached single storey dwellings with associated access driveway and parking under reference DC/19/1870. A condition of this permission was that the development had to begin before the expiration of three years from the date of the permission.

  All buildings had been mostly cleared for the start of demolition. All building areas have been cleared of tires. Employed Mr Ian French who along with the Author, dug out footings with a mechanical digger on the site on 24.05.2023.

To the best of the knowledge and belief, the works had commenced within permitted time allowed by the Local Planning Authority under the planning permission granted on 05.06.2020 under reference DC/19/1870.

- *Statutory Declaration of Ian French*

  Have known the Applicant Mr Thomas Brooker for 10 years. Carry out general works of all kinds. Was employed by the Applicant to dig out footings with a mechanical digger on the site, which the Author carried out with the Applicant.

  Dug a footing for the start of the development at the site on 24.05.2023. Took photographs of the work which are date stamped.

- *Copy of planning permission reference DC/19/1870*

Summary of Council's Evidence

- *Planning permission reference DC/19/1870*

Discussion

Section 191(4) of the Town and Country Planning Act 1990 states that:

"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…they shall issue a certificate to that effect; and in any other case they shall refuse the application."

F W Gabbitas v SSE and Newham LBC [1985] JPL 630 held that the applicant's own evidence does not need to be corroborated by "independent" evidence in order to be accepted. If the Local Planning Authority has no evidence of its own, or from 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 the "balance of probability".

Relevant Legislation

Section 56(1) of the Town and Country Planning Act 1990 states that "…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).

Section 56(2) continues that *"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."*

Section 56(4) outlines that "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, or a building or to any such trench as is mentioned in paragraph (b);

(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."

Discussion

Section 56(4) of the Town and Country Planning Act 1990 outlines that a "material operation" includes "the digging of a trench which is to contain the foundations, or part of the foundation, of a building" or "the

laying of any underground main or pipe to the foundations, or part of the foundations, or a building or to any such trench as is mentioned in paragraph (b)".

Section 56(4) of the Town and Country Planning Act 1990 states "the digging of a trench which is to contain the foundations, or part of the foundation, of a building…". The wording does not suggest that the digging of a trench needs to be carried out in its entirety to be deemed a material operation.

In Spackman v SoS and Thamesdown BC [1977], the laying of drainage pipes was held to be a 'specified operation' even though the foundations' trenches did not exist.

Case law has established a number of tests concerning commencement of development. This includes quantum of works carried out and whether or not this is de minimis. In Malvern Hills DC v SSE (1983) it was concluded that it is not the 'quantum' of the work that is undertaken, but whether the work relates to the planning permission involved. In Connaught Quarries Ltd v SSETR & East Hants DC (2001) it was concluded that the beginning of a material operation under section 56(2) and 56(4) of the Town and Country Planning Act 1990 for the purposes of keeping a permission alive needed to be more than de minimis.

The evidence provided by the Applicant suggests that the Applicant (Mr T Brooker) and Mr Ian French dug a footing by mechanical digger on 24.05.2023. Three photographs have been provided, dated 24.05.2023 showing the corner of a footing, with several other undated photographs provided. These undated photographs indicate that the corner of a footing has been dug, albeit this has not been annotated on any submitted plans.

While it is recognised that photographic evidence has been provided to demonstrate that a trench has been dug, the photographs are not sufficiently clear to indicate how this relates to the development approved under planning reference DC/19/1870. There are no points of reference in the photographs to confirm that the trench relates to the development approved, and the copies of plans submitted as part of the Planning Statement have not been annotated to confirm the part of the development to which the trench relates. It is therefore considered that the evidence is imprecise and ambiguous in this regard.

It is acknowledged that the Statutory Declarations and photographs submitted confirm that a trench was dug on 24.05.2023. However, the evidence provided is not sufficiently precise to confirm that the trench is related to the development approved under planning reference DC/19/1870. The evidence is therefore insufficiently precise and unambiguous to demonstrate on the balance of probability that the material operation carried out on 24.05.2023 relates to the development approved under planning reference DC/19/1870.

It is recognised that planning approval reference DC/19/1870 is subject of several pre-commencement conditions as follows:

3 ***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).

4 ***Pre-Commencement 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).

5 ***Pre-Commencement Condition****: No development shall commence until precise details of the existing and proposed finished floor levels and external ground levels of the development in relation to nearby datum points adjoining the application site have been submitted to and*

approved by the Local Planning Authority in writing. The development shall be completed in accordance with the approved details.

Reason: As this matter is fundamental to control the development in detail in the interests of amenity and visual impact and to protect the development from flood risk in accordance with Policies 33 and 38 of the Horsham District Planning Framework (2015).

FG Whitley & Sons v SoS for Wales and Clwyd CC 24/3/92 established the general principle on development in breach of planning conditions and planning control. The Court 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.

The judgment in R (Hart Aggregates Ltd) v Hartlepool BC [2005] also determined that it is necessary to establish two things. Firstly, whether the breached condition is truly a condition precedent, and secondly, whether it goes to the heart of the permission, and if so, would it be reasonable to take enforcement action against the entire development because of non-compliance. The Court held that it is necessary to distinguish between a condition that explicitly prevents development from being started before specified actions are taken and which are subject to the test of reasonableness (the Whitley principle), and those that require that something be done before development commences. The principles established in Whitley should not be applied over-rigidly if that would be irrational and serve no useful planning purpose. So, if the breach is considered to be insignificant and relates to a matter of detail rather than a fundamental issue, it need not be fatal.

Condition 3 of the relevant planning approval requires that a drainage strategy detailing the proposed means of foul and surface water disposal be submitted to and approved in writing by the Local Planning Authority before development shall commence. It is stated that within the reasoning that the matter is fundamental to ensure that the development is properly drained and to comply with Policy 38 of the HDPF.

The condition specifies that no development should commence before a drainage strategy is submitted and approved, where the development should be carried out in accordance with the approved details. This condition explicitly prevents development from being started before the specified action of submitting a strategy is undertaken, outlining that this is fundamental to ensure that the development is properly drained. This condition is considered to be fundamental to the permission approved and therefore goes to the heart of the permission. To this effect condition 3 is considered to be a condition precedent, where the carrying out of development before the details were submitted and approved represent a breach of the condition that is unlawful.

Condition 4 requires the submission of a schedule of materials and finishes and colours to be used for external walls, windows, roofs, and doors. It is stated within the reason that 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 or visual quality in accordance with Policy 33 of the HDPF.

The condition specifies that no development above slab level of any part of the development shall take place until materials and finishes are submitted and approved. This condition allows for development up to slab level (including the digging of foundations and laying of underground services) to be undertaken prior to the submission of details. To this effect, this condition does not explicitly prevent development from being started before specific actions are undertaken, and does not therefore represent a condition precedent.

Condition 5 requires the submission of precise details of the existing and proposed finished floor levels and external ground levels of the development in relation to a nearby datum point. It is stated within the reason that this matter is fundamental to control the development in detail in the interests of amenity and visual impact and to protect the development from flood risk in accordance with Policies 33 and 38 of the HDPF.

The condition specifies that no development shall commence until precise details have been submitted and approved by the Local Planning Authority, where the development shall be completed in accordance with these details. This condition explicitly prevents development from being started before the specified action of submitting existing and proposed finished floor levels and external ground levels of the development is undertaken. The reason outlines that this is fundament to control the development in the interests of amenity and visual impact and to protect the development from flood risk. This condition is

considered to be fundamental to the permission approved and therefore goes to the heart of the permission. To this effect condition 5 is considered to be a condition precedent, where the carrying out of development before the details were submitted and approved represents a breach of the condition and unlawful development.

Conditions 3 and 5 of planning approval reference DC/19/1870 are considered to go to the heart of the permission and represent a condition precedent. While there is some ambiguity whether the material operation referred to in the supporting documents and carried out relates to the development approved under planning permission reference DC/19/1870, it is considered that such material operation would be unlawful.

Conclusion

The evidence submitted is considered insufficiently precise and unambiguous to demonstrate on the balance of probability that the material operation carried out on 24.05.2023 relates to the development approved under planning reference DC/19/1870. Furthermore, conditions 3 and 5 are considered to go to the heart of the permission and to this effect represent a condition precedent. Should the material operation be deemed to be associated with the development approved under planning reference DC/19/1870, the material operation would be unlawful. For these reasons, it is not considered that planning permission reference DC/19/1870 has lawfully commenced nor remains extant.

Recommendation: Application Refused

1 The evidence available is insufficiently precise and unambiguous to demonstrate on the balance of probability that the material operation carried out relates to the development approved under planning reference DC/19/1870. It has not therefore been demonstrated on the balance of probability that works to implement planning permission reference DC/19/1870 have commenced within the three year period as defined by condition 2 of the permission.

NOTE TO APPLICANT

Conditions 3 and 5 of planning approval reference DC/19/1870 go to the heart of the permission and represent a condition precedent. Notwithstanding refusal reason 1, the carrying out of any material operation and subsequent commencement of development to implement the relevant planning permission would represent a breach of condition and would amount to unlawful development.

Plans list for: DC/24/0189

Schedule of plans/documents **not approved**:

Plan Type	Description	Drawing Number	Received Date
Location plan	Location Plan	1810RO_Con.9 REV 00	05.02.2024

DELEGATED

Case Officer sign/initial Tamara Dale Date: 15.03.2024

Authorising Officer sign/initial RHERMITAGE Date: 15.05.2024