DELEGATED REPORT

Application Reference:	PL/2023/06242
Application Type:	Lawful Development Certificate
Site Address:	Land to the rear of 42 High Street, Corsham, SN13 0HF
Proposal:	Certificate of lawfulness for confirmation that the planning permission 18/06537/FUL is extant.
Recommendation:	That a certificate be GRANTED

PROPOSAL

An application for a Lawful Development Certificate (LDC) has been submitted to the Local Planning Authority (LPA). The purpose of the application is establish that development for which the planning permission was granted under permission 18/06537/FUL was lawfully begun before 5 March 2022 through a material operation, as defined in s56(4) of the Town and Country Planning Act 1990 .

LEGISLATION

The statutory framework covering lawfulness for lawful development certificates relating to existing use or development is set out in section 191 of Town and Country Planning Act 1990.

CONSULTATION RESPONSES & REPRESENTATIONS

There is no statutory requirement to consult third parties, including Town/Parish Councils or neighbours.

The Town Council and neighbours were consulted, and a site notice was sent to the applicant to display at the site.

Corsham Town Council provided the following response -

Resolved: that whilst the Town Council has no objection to an extension of time to allow the proposal to be accomplished that this should be limited to a further three years.

ASSESSMENT

The main issue is whether, on the balance of probability, the works carried out amount to a material commencement of the planning permission granted in 2019.

The LPA needs only to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application.

Evidence provided by the applicant -

- Application form

- Copies of Decision Notices for planning applications and listed building consents
- Copy of Building Control Full Plans Approval Notice
- Photos showing concrete floor slab in-situ cross referenced to approved floor plan extract

Other evidence available -

- Planning History
- Building Control records

Relevant Planning History

17/04196/FUL & 17/04728/LBC
Removal of 1 existing outbuilding, re-cladding/enhancement of existing single storey rear stone extension, conversion of existing outbuilding into extension of Rose Cottage and the provision of 4 new dwellings (3 new build and 1 change of use within existing land) REFUSED

18/06537/FUL (decision date 5 March 2019) & 18/06640/LBC (decision date 6 March 2019)
Small Housing Development and Improvement Works to the Rear of 42 High Street, Corsham. Consisting; 1. Removal of 1no. existing outbuilding 2. Re-cladding / enhancement of existing single storey rear stone extension 3. Conversion of existing outbuilding into extension of Rose Cottage 4. Provision of 3no. new dwellings (1no. new build and 2no. change of use within existing land.) APPROVED WITH CONDITIONS

PL/2021/04522 Discharge of condition 13 of 18/06537/FUL APPROVED 20 August 2021

PL/2021/03503 Discharge of condition 5 on 18/06640/LBC APPROVED 27 July 2021

19/05882/FUL & 19/06084/LBC (decision date 31 July 2019)
Small flat roof infill extension to Rose Cottage located between approved outbuilding conversion (to form part of Rose Cottage) and rear of 42 High Street. APPROVED WITH CONDITIONS

LPA review of evidence

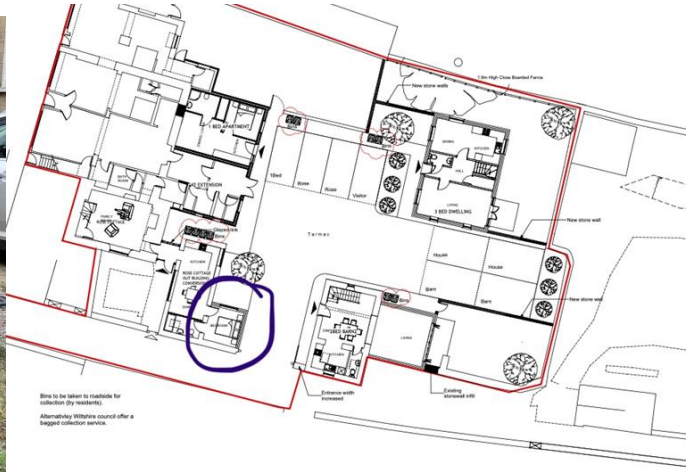
Has a material operation comprising of the permission taken place?

The photograph provided shows a partial floor slab installed pursuant to the scheme to extend and incorporate an existing outbuilding to Rose Cottage. This is part of the 2018 permission (as shown in the plan extract below). The building control records show site visits to inspect oversite preparation and foundation excavations took place in August and September 2021. It is noted that the description in the building control application refers to the infill extension subject of the later permission, however it seems probable that the works inspected covered elements from both permissions and that they were undertaken at the same time. It is relevant that the plans submitted to building control for a 'plans check' covered the whole Rose Cottage proposal.

The LPA is satisfied that, on the balance of probabilities, the evidence available demonstrates a *material operation* comprised of the permission was undertaken within the 3 years of granting the permission. The

laying of foundations and a floor slab do constitute a material operation within s56(4) of the Town and Country Planning Act 1990 and the works undertaken are comprised in the development permitted by the planning permission - 18/06537/FUL





If a “material operation”, as defined in Section 56 of the TCPA 1990, is carried out on a development granted planning permission then case law establishes the principle that if the development has been carried out in breach of a pre-commencement planning condition it does not amount to a lawful commencement of the development granted planning permission and would not ‘save’ the planning permission once it had expired. This is subject to the breached pre-commencement planning condition being a *true condition precedent* under case law. The test set out in the case law of whether a pre-commencement condition is a true condition precedent is whether it can be considered that the requirements of a pre-commencement condition go to the “heart of the planning permission”. It is further established in case law that an assessment of the facts and context of a condition is necessary in determining whether a condition goes to the heart of the planning permission and that this may require a planning judgment to be made.

The conditions on 18/06537/FUL

The permission was granted subject to 23 conditions. **Condition 1** relates to the standard 3 year time limit for development to begin. **Condition 2** relates to the approved plans. **Condition 3** relates to bat mitigation being implemented prior to occupation and maintained in perpetuity. **Condition 4** relates to access and parking being completed in accordance with plans prior to occupation. **Condition 5** is a compliance condition relating to working hours. **Condition 8** relates to implementation of an approved planting scheme prior to the first planting season following occupation or completion of the development. **Condition 11** relates to a sample panel of stonework being provided and approved prior to the construction of any of the stone elevations. **Condition 12** relates to stone tiles matching the existing building and samples being made available. **Condition 14** requires the submission of details prior to the installation of any railings, fences, gates, walls, bollards and other means of enclosure. **Condition 17** prevents the subdivision of Rose Cottage with the effect of creating an additional residential unit. **Condition 18, 19, 20 & 22** have the effect of removing permitted development rights. **Condition 21** seeks to ensure the flat roofs are not used as balconies, roof gardens or similar. **Condition 23** relates to access along the adjacent right of way and seeks to ensure there are no obstructions to the public right of way during construction.

Seven of the conditions are worded as pre-commencement conditions. These are conditions **6, 7, 9, 10, 13, 15 & 16. Condition 13** relates to large scale details and has been discharged under reference PL/2021/04522. The remaining conditions have not been discharged.

Condition 6 requires submission of a Construction Management Plan *in the interests of neighbouring amenity.* ***Condition 16*** *requires submission and approval of Arboricultural Method Statement.* A reason for the condition is missing from the Decision notice but the officer report sets out that a condition was required to manage any direct impacts to a yew tree in the garden of no.44 resulting from construction of the new unit.

Condition 6 relating to the Construction Management Plan does not relate to the essential subject of the application but seek to mitigate impact of the development during the construction phase. This does not go to the heart of the permission which is to provide residential development on the site. Similarly, **Condition 16** relating to the Arboricultural Method Statement seeks to protect trees within and adjacent to the site for the construction phase of the development, with particular regard to a yew tree on neighbouring land which could be affected during the construction of the new dwelling. This does not go to the heart of the permission which is to provide residential development on the site. At this time the purpose of the condition could still be met through submission of the appropriate information.

Condition 7 requires submission and approval of a hard and soft landscaping scheme *to ensure a satisfactory landscaped setting for the development and the protection of existing important landscape features.* **Condition 9** requires submission and approval of surface water drainage scheme *to ensure that the development can be adequately drained.* **Condition 10** requires submission and approval of foul sewerage scheme *to ensure that the proposal is provided with a satisfactory means of drainage and does not increase the risk of flooding or pose a risk to public health or the environment*

The landscaping and drainage schemes **(conditions 7, 9 & 10)** are detailed elements of the proposal which do not need to be installed until later stage in the development. These are not considered to go to the heart of the permission in this case.

Condition 15 requires submission and approval of a written programme of archaeological investigation *to enable the recording of any matters of archaeological interest.* The condition is worded as follows -

No development shall commence within the site area until:

a) A written programme of archaeological investigation, which should include on-site work and off-site work such as the analysis, publishing and archiving of the results, has been submitted to and approved by the Local Planning Authority; and

b) The approved programme of archaeological work has been carried out in accordance with the approved details.

REASON: The application contained insufficient information to enable this matter to be considered prior to granting planning permission and the matter is required to be agreed with the Local Planning Authority

before development commences in order that the development is undertaken in an acceptable manner, to enable the recording of any matters of archaeological interest.

Conditions intended to protect archaeological remains and features, and which require investigations and working methods to be agreed prior to the commencement of development, can often be considered true conditions precedent as their intention is to protect artefacts and remains which may be present, disturbed and ultimately lost forever as a result of excavation associated with an approved development.

In this case, there is no archaeology response on the 2018 planning application but representations by the archaeologist in relation to an earlier scheme have been considered by the LPA in determining the 2018 application. In these earlier representations, it was identified that *there is potential for below ground archaeological remains related to the medieval development of the town to be disturbed during the construction of the proposed new dwellings*. No site specific archaeological records have been identified. A standard condition was requested by the archaeologist to secure a program of archaeological observation and monitoring, funded by the developer. There was no requirement for up-front survey or trenching. The standard condition allows for a specific area to be identified.

It is relevant to consider that the permission relates to a previously developed site. The archaeologist seems to acknowledge this in referring to the construction of the *new dwellings* being of concern. This could be inferred to mean that the condition does not seek to prevent all works on site taking place in advance of the scheme being agreed only those which involve excavation of the ground and most critically, in those areas which are currently free of development where 'new dwellings' are proposed. It is clear that the application as a whole involves a significant amount of demolition and conversion works not involving excavation. These could take place without threatening the archaeological potential of the site or conflicting with the reason for applying the condition. On that basis, it would not be strictly necessary for the condition to prevent any and all development on site prior to a scheme of observation and monitoring being approved for those specific areas of undeveloped ground. On careful consideration of the very particular circumstances in this case, it is not considered that the archaeology condition goes to the heart of the permission and so is not a true conditions precedent. At this time the purpose of the condition could still be met through submission of the appropriate information.

In light of the above conclusions, and notwithstanding that there is a breach of conditions 6, 7, 9, 10,15 & 16, it is considered that the development has **been lawfully implemented**.

In light of the breach of conditions matter, the LPA consider it appropriate to amend the certificate description as follows. The applicant has been informed of this change and has agreed.

Certificate of lawfulness for confirmation that the planning permission 18/06537/FUL <u>is extant.</u>

CONCLUSION

The evidence provided in support of the applicant's claim and that is available on the public record is considered to be sufficiently unambiguous, precise and factual to demonstrate that a material operation within s56 of the TCPA Act (the laying of foundations and a floor slab) was comprised in the development permitted by the planning permission 18/06537/FUL and took place within 3 years of the grant of permission.

Notwithstanding that there is a breach of conditions 6, 7, 9, 10, 15 & 16, the LPA is satisfied that the permission has been lawfully implemented and a Lawful Development Certificate can be granted on that basis.

RECOMMENDATION

That the application for a Lawful Development Certificate is GRANTED