The Planning Inspectorate

Appeal Decision

Site visit made on 12 November 2018

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 21 November 2018

Appeal Ref: APP/Y2620/X/18/3196579
Land known as 'Mattocks Field' between Heathfield Road and Warren Lane, High Kelling, Norfolk

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Colin Forster (Colimarc Construction Ltd) against the decision of North Norfolk District Council.
- The application Ref CL/17/0500, dated 28 March 2017, was refused by notice dated 19 December 2017
- The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is a housing development site.

Decision

1. The appeal is dismissed.

Procedural Matters

2. The application and decision notice both give the address as "Warren Lane". In some documentation the same road is described as "Warren Road" which is how it is marked on the road sign. I have used the address given by the parties which is how it is most commonly appears in the historic files to which I refer.

3. I have utilised the description of development as given in the original application form, noting that the Council's decision notice refers instead to "residential development".

4. The decision was made on the basis of an existing use of land for residential development (i.e. section 191(1)(a)) whereas the application was made for existing building works (section 191(1)(b)). The land in question remains as a field and the application is for 'housing development'. I therefore queried with the appellant if the application should be treated as one for proposed operations under section 192(1)(b).

5. The appellant drew my attention to his Counsel's Opinion which advised him to apply under section 191 for a LDC "that the existing development, comprising the works of implementation were lawfully carried out". I shall determine the appeal on that basis. If a LDC were to be granted, the description could be modified under section 191(4) as necessary.

Background

6. The appeal site is a field of approximately 8 acres. On 16 August 1966, Erpringham Rural District Council granted outline planning permission pursuant to reference E4811 for "for residential development at Warren Lane". On 30 January 1973 planning permission was granted under reference E6881 for the "layout of estate roads and 40 residential plots". The applicant seeks to establish that these two historic planning permissions for housing development were implemented and subsist.

7. An earlier application for a LDC in similar terms was refused by the Council on 6 April 2016. The application was re-submitted with further information. It is the Council's decision to refuse the later application which is appealed.

Main Issue

8. The main issue is whether the Council's refusal to issue a LDC was well-founded. That turns on whether the appellant can demonstrate, on the balance of probabilities, that the 1966 and/or the 1973 permissions were lawfully implemented and subsist.

Reasons

9. In order for a LDC to be granted under section 191 of the 1990 Act, the burden of proving relevant facts in this appeal rests firmly on the appellant, and the test of the evidence is the balance of probabilities.

10. In a LDC application the planning merits cannot be considered and the appeal must be determined solely on the basis of the lawfulness of the development applied for. That being so, arguments concerning the potential impacts of housing development on this site cannot be considered. Similarly, the appellant's grievances with the Council's handling of the application do not fall within my remit. They would need to be taken up with the Council separately.

The 1966 Permission

11. When the 1966 permission was granted it was subject to two conditions. Condition 1 said "See attached schedule of conditions". Condition 2 said "The Local Planning Authority reserve for their subsequent decision the precise layout of the site which shall not make provision for any estate road junction with Warren Road."

12. The reasons for the Council's decision to grant permission for the development, subject to compliance with the conditions, were given as:

    1. These conditions relate to the outline application only.

    2. Warren Road is of inadequate width to cater for any significant increase in traffic and to permit the traffic from the whole of the proposed development to discharge onto this road would be likely to result in conditions detrimental to the safety of highway users.

18. No related schedule of conditions has been found. The appellant argues that the Council is the public repository of planning records and their completeness is not the responsibility of those members of the public consulting the files.

19. A Memorandum of 13 August 1966 from the County Planning Officer to the

Council Clerk contains the recommendation for E811 that "Permission be granted, subject to the normal conditions, and for the reasons applicable to an outline application and to the following additional conditions:-". It then sets out the text as it subsequently appears in Condition 2. This provides a clear steer that the schedule would have been the "normal conditions" whatever they might be. I find it implausible that no schedule at all was attached at the time of issue. The applicant would have had every reason to ensure the document received was complete in order to know what conditions must be discharged.

20. Without the schedule of conditions or any other indication of what those 'normal conditions' would be, I simply have no means of knowing how significant those conditions were and whether or not there was likely to have been compliance with them. It is clear on the face of the planning permission that other conditions were incorporated. They would not cease to apply just because the schedule cannot now be found. Moreover, the appellant has not been able to produce any written evidence of discharge of the conditions.

21. Condition 2 does not explicitly prohibit development until the precise layout was approved, but it raises the question of how development could be begun in accordance with the permission if those details were yet to be approved.

22. A location plan accompanied the application but there is no indication it was approved. If it was intended as the final layout there would appear to be no reason to impose condition 2. Furthermore, there was no mention of an approved plan or revised layout in subsequent correspondence from the appellant's agent when a layout was submitted for approval.

23. In an affidavit, the appellant Colin Forster explains how following a bricklayer apprenticeship he went to work for his father's building firm in 1960. In 1966, the landowner identified in the planning application was C.R. Mattocks. The appellant refers in his affidavit to how his father (C.W. Forster) got together with Mr and Mrs Mattocks, as co-owners, to make the application. They were represented at the time by a Chartered Surveyor and agent by the name of John B. Shrive.

24. In a letter dated 25 November 1966 addressed to the County Planning Officer, Mr Shrive wrote in relation to planning reference E4811 that he had prepared "*a draft lay-out for residential development of the land in question*". He requested "*an informal indication as to whether this is likely to meet with the Council's approval*".

25. On 29 November 1966 the County Planning Officer sent a copy of the "suggested layout" to the County Surveyor requesting preliminary observations. The County Surveyor responded on 22 December 1966 to say "*I note that the layout indicates frontage development to Warren Road. I would refer you to my memoranda of 6th July when I intimated that I would raise objections to any layout giving vehicular access to Warren Road. I regret, therefore, that I cannot accept the layout proposed*."

26. Mr Shrive was advised by the County Planning Officer on 23 December 1966 that the County Surveyor would not be prepared to support the layout suggested. He went on to say that "*There would not, however, be any objection to a layout on the lines suggested in the plan which was sent to you earlier, provided the access to the dwellings is confined, as far as possible, to the proposed new*

estate road." Mr Shrive sent an acknowledgement noting the contents of the letter on 5 January 1967.

27. Clearly, the Council must have supplied a plan of a layout which was acceptable to it in principle, but the plan was expressed to be subject to the access arrangements. Various hand drawn plans are annotated 'suggested road layout', but there is no indication as to their status.

28. The appellant suggests that the various plans submitted by the agent would have been an attempt to maximise the benefits of the scheme. Having failed to do so it is submitted that it is more likely than not that he adopted and used the layout plan provided by officers. The appellant produces a copy plan and highlights that it is drawn to scale with a 'Northing' and contains the agent's details. It shows 34 plots and has no provision for any estate road junction with Warren Lane. The appellant points out that the only possible access was via Heathfield Road.

29. However, there is no evidence beyond mere supposition that this plan was ever approved. It is also entirely speculative that Mr Forster's Solicitor would not have completed his purchase of the site in April 1967 unless an acceptable layout was approved. This also does not appear to tally with accounts of what followed.

30. The appellant describes his father's attitude to planning start dates as always careful, promptly doing the necessary work to retain the planning permission in perpetuity for all sites. Having secured the outline planning permission, the appellant's father purchased the appeal site and with changes pending in the law, the appellant says that his father was concerned not to lose the permission.

31. During the 1960's the appellant explains that reliance was placed upon public professionals and their word, not paperwork and there was no such thing as a 'certificate of a start'.

32. The appellant engaged a Chartered Surveyor to produce a report in 2016 which describes how pending changes not only in the Town and Country Planning Act 1968 but also new development tax to be introduced by the Land Commission Act 1967 prompted urgent action by builders to get their sites started. The practice of the day was for officers of Local Planning authorities to witness starts to planning permissions. An inspection did not result in any paperwork.

33. This is verified in a witness statement from a retired town planner who was a trainee with Norwich City Council during the 1960's. He recalls the Planning Department being almost overrun with requests for planners to witness 'starts'. At that time, a 'start' might occasionally be noted down for internal use, but he describes it as an age when ones word was good enough.

34. Things may well have been done differently then, but that does not help the appellant discharge the burden of proof. Assumptions as to what happened are not enough.

35. When the 1966 permission was granted, section 21 of the Town and Country Planning Act 1962[1] stated that a grant of planning permission would enure for the benefit of the land. In other words, there would have been no need to commence development in order to keep the permission alive.

[1] The Council incorrectly refers to the 1963 Act

36. That changed with the implementation of the Town and Country Planning Act 1968. If development had not been begun before the beginning of 1968, then the effect of section 66 of the Act was that the outline planning permission would be deemed to have been granted subject to time limit conditions.

37. In particular, application for any reserved matter approval would need to have been made not later than the expiration of three years beginning with the date of the commencement of section 66. Development would need to be begun not later than whichever is the later of (i) the expiration of five years from the date of the commencement of section 66 or (ii) the expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved.

38. For the purposes of section 66, development was taken to be begun on the earliest date on which any specified operation (as defined in section 64(3) of the Land Commission Act 1967) comprised in the development began to be carried out. The definition within section 64(3) is:

    (a) any work of construction in the course of the erection of a building;

    (b) the digging of a trench which is to contain foundations, or part of foundations, of a 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 as is mentioned in the last preceding paragraph;

    (d) any operation in the course of laying out or constructing a road or part of a road;

    (e) any change in use of any land, where that change constitutes material development.

39. If the development was begun by a specified operation before the beginning of 1968 then the 1966 permission would have been implemented and not subject to the limitations of the 1968 Act.

40. Notwithstanding the missing schedule of conditions pertinent to condition 1, the appellant considers there is sufficient evidence of implementation of the 1966 permission in late 1967 by the specified operations listed below:

    (1) removal of livestock from the poultry farm and bringing building materials on site.

    (2) importing building materials.

    (3) pegging out the site entrance road (and some plots) from Heathfield Road into the site in order to construct a minimum amount of the entrance

    (4) minor construction to the entrance road.

41. Photographs are produced with a view to showing that groundworks materials and construction materials continued to be stored on site through 1968. Nevertheless, clearing the site and introducing materials in readiness for works as per (1) and (2) above does not fall within a category of ‘specified operation’.

42. The appellant describes in his affidavit being involved in pegging out the site entrance and undertaking the first of many pegging out exercises that were re-

done for each layout. He recalls a Council Officer inspecting and confirming the entrance 'start'. At one time it appears the Council did not recognise the name of the Officer who is now confirmed as a Clerk of Works. Later that same day, the appellant remembers Hubert Smith visiting the site.

43. Mr Smith was a lorry driver and construction plant operator for the firm from 1968 until 1991. In his statement he recalls visiting the appellant's father at the appeal site in 1967 to discuss possible employment with the firm. Mr Smith describes being reassured that the Heathfield Road site would offer employment stability having observed some plots and part of the road already pegged out.

44. Thus, there are consistent accounts that plots and an entrance road were pegged out. Indeed, the Council accepts the evidence of the appellant's Chartered Surveyor that, bearing in mind recognised building practices of the time, "*parts of the roadway and individual plots were physically pegged out prior to 1 January 1968*". That does not necessarily mean that a 'specified operation' had been carried out. There could be other reasons for those works, such as marketing purposes. A photograph of a board advertising building plots for sale said to be taken at the site is produced. It does not signify that the permission had been implemented. It simply indicates that building plots were available for sale at some point.

45. A 'company notebook' was kept in which all enquiries were entered about prospective purchases of any and all building plots and sites. Extracts are provided, but the entries are for the most part undated and unclear as to which site they refer. It supports the likelihood of plots being pegged out, but it does not follow automatically that there was approval of a site layout plan.

46. The Court of Appeal judgment in *Malvern Hills DC v SSE & Barnes and Co Ltd*[2] is authority that pegging the lines of part of a new estate road is sufficient to constitute "laying out" of a road.

47. Works in relation to buildings are addressed separately in the definition of 'specified operations'. Pegging out plots does not amount to work of construction, digging a trench or involve the foundations to suffice as a specified operation. However, the pegging out and works of construction for the entrance road *could* have been an operation in the course of laying out or constructing a road or part of a road. Not much is required in terms of physical works to trigger implementation.

48. Both parties cite the case of *East Dumbartonshire DC v Secretary of State for Scotland & Mactaggart Mickel Ltd*[3] which in relation to an equivalent provision within Scottish legislation held that the state of mind of the applicant is irrelevant as to whether development has started.

49. It is clear from *Malvern* that the test for commencement is not the amount of works undertaken, but whether the work was related to the planning permission involved. That is entirely objective. Even if the works were carried out solely to keep the planning permission alive, and with no intention to proceed, the works may still suffice to initiate the development comprised in the planning permission.

[2] [1982] JPL 439
[3] [1999] 1 PLR 53

50. As the Council points out, it is the appellant's own case that the plots laid out in 1967 did not represent, and were not intended to represent, the layout that would be submitted to the Council for approval. Subsequent plans were submitted for approval.

51. In theory, development could be begun without approval of the layout plan. However, the works could only relate to the 1966 permission if they were in accordance with its terms. That must include the layout which was reserved for the Council's approval. Whilst the appellant maintains that the pegging out and other works for the site entrance were undertaken to keep the permission alive, that could only be so if it was consistent with the approved layout.

52. Correspondence on the County files confirms that in 1966 and 1967 the site layout was under discussion, but it falls well short of indicating that the layout was ever approved as required by condition 2. The appellant's case on this is not sufficiently clear and appears to be contradicted in later documentation.

53. From the accounts given, steps were being taken to market plots and the pegging out helped in that process. It does not necessarily mean that the site entrance was approved. Indeed, the documentary evidence appears inconsistent with the appellant's case on implementation, as set out below.

54. After the layout was discussed without any evidence of approval, the trail appears to go cold until an application was made for planning permission approval in 1970 for 39 plots and estate roads at the site. In the accompanying covering letter of 14 April 1970, the Chartered Architect acting as agent states "*I believe the Outline Planning permission for residential development was granted for this area several years ago but my client cannot trace his records of it.*" Had that permission been implemented then it seems somewhat odd why the appellant's father was unable to trace the details.

55. The appellant recalls being told by a Council Officer some years later and possibly in 1970 that the 1966 permission had not been properly started as kerbs had not been laid at the site entrance. The Officer was not one of the usual Council officials the firm dealt with. Whilst the appellant was surprised by this news, he and his father apparently felt compelled to accept the situation as they were attempting to obtain planning permission for further plots (i.e. the 1973 permission) and did not wish to challenge the Council in those circumstances.

56. As an explanation it does little to assist the appellant prove his case. I read nothing into the Council's reasons to suggest that works were started and abandoned. It merely notes that no challenge was made to the Council's decision that the 1967 works did not constitute a 'start' and the firm elected to proceed with another planning application.

57. Further reliance is placed by the appellant upon the analysis of aerial photography by an 'airphoto expert'. The report interprets the images in 1967 as land occupied by a low intensity open range poultry farm. The report goes on to say "*I don't detect anything that suggests a start to work in 1967. I see the possibility that something begins in 1969 but this evidence is not strong*." Given the small amount of work involved to the entrance, the appellant says he is unsurprised by the works being undetectable from aerial images some 2 years later. The fact remains that the report does not support the appellant's claim of implementation in late 1967.

58. When planning permission was refused by the Council on 4 February 1997 for the erection of four houses and two affordable houses for rent, the current appellant brought an appeal. In the Appeal Decision of 8 December 1997, the Inspector remarked "*I am aware that permissions were granted for housing development on land including the appeal site in 1966 and 1973, but were not implemented.*" The Inspector was not making a finding of fact on those matters as it was not the issue before him. However, it is unlikely that the Inspector would have made those comments unless it reflected the information before him. It indicates the understanding of the parties at that time.

59. Ultimately, the appellant's evidence that development was begun is to my mind not sufficiently clear. It is contradicted by the 1997 Appeal Decision and there was no indication of a previous permission having been implemented when a further application was made in 1970. The evidence is also vague and uncertain over approval of the site layout plan for works undertaken to accord with approved details. Thus, there is a lack of clarity that a start in operations was undertaken pursuant to the 1966 permission. The absence of the schedule of conditions further presents a major gap in the documentary evidence. Even if works were undertaken pursuant to an approved layout, it is unknown if they were in breach of a condition precedent without knowing what conditions appeared in the missing schedule.

60. The appellant has not discharged the burden of proof to show on the balance of probabilities that the 1966 permission was implemented and subsists.

The 1973 Permission

61. Turning now to the 1973 permission. Outline permission was granted with details of the siting, design, external appearance and means of access reserved for future approval. Condition 1 said that "*No development whatsoever shall take place until full details of the siting, design, external appearance and means of access of that development have been submitted to and approved by the Local Planning Authority…*". Condition 3 required application for the approval of reserved matters within three years beginning with the date of the permission.

62. Condition 5 identified that the details required by condition 1 "shall include:- (a) Detailed drawings of the proposed dwellings, including full details of external materials, together with detailed drawings of the [proposed[4]] estate roads, including method of construction, sections and means of drainage thereof." Conditions (b) and (c) require submission of a tree planting scheme and details of screen walls and fences, respectively. Conditions 1 and 5 must therefore be read together.

63. Of the other conditions, condition number 6 required the length of Heathfield Road to be made up to the satisfaction of the Local Planning Authority "before any development on the application site is commenced." The reason for the condition was to safeguard the amenities of the adjoining dwellings.

64. The Council considers both conditions 1 and 6 to be conditions precedent so that any implementation of the 1973 permission could not lawfully be achieved due to non-compliance.

65. The appellant argues that the burden of proof passes to the Council to show, on the balance of probabilities, the implementation of the 1973 permission was in

[4] Inserted by hand

breach of condition on the basis that it is for the asserter to prove. This misconstrues the position. The reasons for refusal set out in the Council's decision explain the legal argument for its contention that there would have been a breach of condition precedent. It is established law that the burden of proof is on the appellant in an LDC appeal. In bringing the appeal, the onus is thus on the appellant to overcome those grounds of refusal to show that the Council's decision was not well-founded.

66. In *F G Whitley & Sons v SSW and Clwyd CC*[5], the Court of Appeal said that the only question to be asked was whether the development was permitted by the planning permission read together with its conditions. If the development contravenes the conditions it cannot be properly described as commencing that authorised by the permission. Thus, *Whitley* established the principle that development commenced in contravention of a condition is development without permission.

67. In subsequent cases, the Courts have applied the principle flexibly. The *Whitley* principle was considered further in *R (oao Hart Aggregates Ltd) v Hartlepool BC*[6]. It was held that a distinction had to be drawn between a condition which required some action to be undertaken before development is commenced, and a condition which expressly prohibits any development taking place before a particular requirement has been met. Mr Justice Sullivan took the view that it is necessary for the condition both to be expressly prohibitive of commencement of development and to go to the heart of the permission; only when both tests are satisfied is it a condition precedent to which the *Whitley* principle applies and there would be development without planning permission.

68. Thus, even if works were undertaken in pursuance of the 1973 permission, it would not be taken to have been implemented if such works were in breach of any condition precedent.

69. The subsequent Court of Appeal decision in *Greyfort Properties Ltd v SSCLG*[7] applied both the *Hart Aggregates* judgment and the principles set out in *Whitley*. It specifically endorsed the need for the condition to go to the "heart of the matter" to be a true condition precedent, but rejected the contention that only conditions that prohibited development before a particular matter was approved could be a condition precedent.

70. By stating that "*No development whatsoever shall take place…*" before details are submitted, it is absolutely clear that Condition 1 was prohibiting any development until details were approved. Moreover, the matters reserved are siting, design, external appearance and means of access which are clearly fundamental in nature to the scheme that was to be brought forward. Until details of the siting, design and external appearance were submitted it could not be known what the development would look like to ascertain if it was acceptable on amenity grounds. Without suitable access arrangements the housing scheme would be unviable and the need for road safety must be inherent. Those details would have been core to the delivery of the scheme. They most certainly go to the heart of the permission. It is plain to me that this was a condition precedent.

71. The appellant has submitted various documents to seek to establish that there

5 [1992] JPL 856
6 [2005] EWHC 840 (Admin)
7 [2011] EWCA Civ 908

was a start to the 1973 permission. They include affidavits from individuals who worked at the site or observed what was going on. It is undisputed by the Council that the site was pegged out. As before, this does not necessarily constitute a start of development by a specified operation nor do the entries in the company notebook. Indeed, it appears from the letter from Mr Thomas to the County Planning Officer in July 1972 that a plot was provisionally allocated to him before the 1973 permission was granted.

72. An application would need to have been made in respect of all the reserved matters. Whilst a wealth of documents are copied and I have read all of these, my attention has not been drawn to any specific documents which demonstrate that an application was made and approved for all the details required by condition 1. That is enough to defeat the appellant's application given my conclusion that it is a condition precedent.

73. The Council says that condition 5 goes to the heart of the permission also. The Council must mean condition 6 because its explanation concerns Heathfield Road which condition 6 required to be made up to adoption standard before commencement of development. According to the Council, the reason the application was held in abeyance and took so long to be determined was due to the need to resolve vehicular access to the site and for a deed to be entered into for the making up Heathfield Road. This is verified in a letter from the County Surveyor of 17 August 1972 explaining why the application had not been determined.

74. The Deed had been entered in May 1972 between C.W. Forster and the various resident owners of Heathfield Road whereby Mr Forster agreed to make up the road before 1 June 1973 in return for rights of way over the road. Condition 6 concerns the upgrade of Heathfield Road only. The appellant's evidence of Heathfield Road being resurfaced is supported by other witnesses. As advised by the appellant's own Counsel, such works would not comprise a specified operation as it did not form part of the development itself.

75. Condition 6 does not explicitly prohibit development taking place in the same way as condition 1, but it does require the length of Heathfield Road to be made up to the satisfaction of the Local Planning Authority *before any development on the application site is commenced*. The importance of Heathfield Road as a means of access of suitable standard is apparent from the communications with the local highway authority which is reflected in how the condition has been framed. It was pivotal to the decision to grant planning permission. As a matter of judgement, I consider there is cause to conclude that it is a condition precedent but it is of little consequence given my findings on condition 1 and more generally.

76. From the viewpoint of fairness, the appellant considers that the making up of over 130m of road for subsequent adoption should not defeat the appellant's case. Whilst I understand that sentiment, the issue I must determine is whether on the facts before me the permission was implemented without being in breach of condition precedent.

77. On 24 May 1978 North Norfolk District Council gave notice under the Public Health Acts of 1936 and 1961 that work at Heathfield Road had not commenced within the requisite 3 years from 31 January 1975. The plans deposited in accordance with Building Regulations were declared to be of no effect. The notice confirms that plans were submitted and passed for the purposes of Building

Regulations, but it does not verify that plans were submitted and approved for planning purposes. What is does firmly indicate is that the works for roads and sewers had not commenced. Leading Counsel for the appellant describes the 1978 Notice as "erroneous" as it conflicts with the witness accounts produced by the appellant.

78. An expert report is produced for the appellant of the private drain connections. It follows discovery of a manhole in Mattocks Field in which a stub pipe was installed to connect with the foul sewer. I was able to see the manhole on my site visit and a series of other manhole covers along Heathfield Road. Despite the legal advice obtained by the appellant, the laying of the pipe would not constitute a 'specified operation' under section 66 of the Town and Country Planning Act 1968 as it was not done for a building. The means of drainage required approval by condition 5. The report concludes that the private drain connection can only have been constructed after Heathfield Road was built to adoptable standard.

79. Even if that is so and there was compliance with condition 6, the issue remains that all the details specified in condition 1 needed to be subject to an application and approval. From the information produced there is no evidence that the Council gave approval to <u>all</u> the reserved matters. Thus, any works which might constitute a specified operation to begin the development were in breach of condition precedent.

80. In fact, there is strong documentary evidence confirming expiry of the permission.

81. On the Council's file is a letter responding to an enquiry from the 'Roads Committee of High Kelling', from the Chief Planning Officer dated 2 September 1976. It refers to the 1973 permission and states "*This permission has now time-expired..*". A similar response is given by the Chief Planning Officer to the occupier of Warren Farm on 21 September 1976 to say "*This permission was valid for three years only and has now time-expired…*".

82. Significantly, when a new planning application was made on 4 November 1976 by the appellant's father to develop the land with estate roads and 41 residential building plots, the accompanying letter addressed to the Chief Planning Officer of North Norfolk District Council[8], headed up 'Renewal of Planning Permission for Residential Development at High Kelling, Norfolk W.47', said:-

"*I have been asked by my client to apply for renewal of the planning permission for the above development. This was originally granted on the 30th January, 1973 (County Ref. E6881) and expired at the beginning of this year. This was allowed to lapse partly due to the lack of demand for new houses and partly due to a misunderstanding by my client who thought he had three years from the approval of roads and sewers under the Building Regulation Act before he need commence work.*"

83. This letter provides compelling evidence that the 1973 permission was not implemented. It was the clear understanding of both the applicant and the local planning authority that the permission had expired. This is reinforced in subsequent correspondence concerning the new scheme (reference 01/76/1614/0). Among the file is a letter dated 18 January 1977 from the Chief

[8] Successor authority to the Erpingham Rural District Council

Planning Officer to the Clerk to Kelling Parish Council which says:

"Perhaps it would be helpful to your Council if I explain the history of this site. Outline planning permission was granted for an identical application in January, 1973, and has since time expired under the three year rule."

84. Similar comments were made in a letter from the Chief Planning Officer on 21 April 1977 that "*The application is, in fact, for renewal of the Outline Planning permission, reference E.6881, which was granted in January, 1973, and has now time expired."* Other handwritten notes on the file similarly refer to the permission as having lapsed.

85. When describing the planning history, the Inspector in the Appeal Decision of 8 December 1997 mentioned previously, refers to both the 1966 and 1973 permissions as 'not implemented'.

86. The Council has additionally provided a file of papers for a further outline planning application for the site (ref: 01/78/0510/0). Some of the copies are of poor quality and illegible, but notably when the planning application was submitted the agent's covering letter of 23 March 1978 said "*In 1973 our client was given Planning Consent to develop this land with 39 dwellings. Unfortunately, this consent expired before it was acted upon and a re-application in November 1976 was refused by the Norfolk County Council in 1977.*"

87. The correspondence submitted on behalf of C.W. Forster from both the 1976 and 1978 planning applications could not be clearer that the 1973 application had expired. It directly conflicts and contradicts the arguments now being advanced. I find the culmination of all the documentary evidence to be highly persuasive that the 1973 permission had expired.

88. This correspondence does not appear to have been put before Queens Counsel who advised the appellant that there was sufficient cogent evidence of implementation of both permissions.

89. There is documentary evidence directly contradicting the appellant's case that the 1973 permission subsists. Moreover, on the materials before me I am not satisfied that any works of specified operations were carried out without being in breach of condition precedent. The appellant has failed to discharge the burden of proof to show on the balance of probabilities that the 1973 permission was implemented and subsists.

Conclusion

90. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a housing development site was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

KR Saward

INSPECTOR