Re: Certificate application at land adjoining Bromiley, Clayton-Le-Dale

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ADVICE

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1. I am asked to advise Mrs Kenny with regard to an application for a Certificate of Lawful Existing Use and Development (CLEUD). The application relates to a site at 'land adjoining Bromiley, Ribchester Road, Clayton-Le-Dale, Blackburn' ('the Site'). Mrs Kenny is in the process of purchasing the Site.

2. Planning permission was granted in 1955 for a 'detached bungalow' (ref:6/9/548) (decision notice date stamped 3rd February 1955 but dated 31st January 1955). The bungalow was never built but I am instructed that Mrs Panniker (the current owner of the Site) maintains it was implemented by the creation of an access pursuant to plans approved under a consent in 1974.

3. A planning application was submitted in 1974 to revise the access to the proposed bungalow and consent was granted under ref:3/1974/0357.

4. Mr and Mrs Panniker purchased the Site in 1958 on the basis that it had an extant planning permission for the erection of a bungalow.

5. In January 2015 those instructing me applied for a Certificate of Lawfulness on behalf of Mrs M Kenny[1] to establish whether planning permission 6/9/548 [the 1955 permission] (amended under 3/1974/0357) [the 1974 permission] is extant.

6. The case pursued was essentially:

   i. The 1974 permission had been commenced prior to it expiring by virtue of the construction of an access.
   ii. The statutory declaration of Mrs Panniker demonstrates this implementation.
   iii. Correspondence from the Council in 1984 and 1985 makes clear that the Council accepted that the provision of the access had kept the 1955 permission alive.
   iv. The Council had approved the 1974 planning application revising the access to the bungalow (after the 21/9/73 'expiry date') thereby implicitly accepting the implementation of the 1955 permission.

7. The Certificate was refused by Ribble Valley Borough Council ('the Council') by decision notice dated 14th March 2016. The decision notice gave the following reason for refusal:

   > '1. Evidence has not been provided that proves beyond reasonable doubt that any 'specified operation' (as defined by Section 43 of the Town and Country Planning Act 1971) has been carried out in respect of planning permission 6/9/548 dated 31 January 1955 and that (by virtue of Section 65 of the Town

[1] Letter dated 26th January 2015

and Country Planning Act 1968) that permission therefore lapsed on 25 February 1973'.

8. The officer report to the Certificate application sets out in further detail the reasons why the Certificate was refused. The officer concluded that the 1955 permission had lapsed without it being implemented before the statutorily imposed implementation date of 25th February 1973 (by operation of the 1968 Town and Country Planning Act a retrospective 5 year time limit was applied forwards from 1968). The officer concluded that the 1974 permission was 'fundamentally flawed' because the 1955 permission had lapsed on 25 October 1973. The Council considered that the evidence of implementation (Mrs Panniker's statutory declaration and photograph provided) were insufficient. The officer's report states, 'there is no categorical evidence of exactly when the works were carried out. I consider the undated photograph and reference to the hen coup [sic] to be rather weak'[2].

9. I am asked to advise:

i. Whether Mr and Mrs Panniker have grounds to make a resubmission, accompanied by my advice, on the basis that the 1955 permission is extant.

ii. Whether the owner, Mrs Panniker, has grounds for any form of compensatory action against the Council on the basis that she has been led to believe that she benefited from an extant planning permission.

i.

10. I must advise that I consider the Council's consideration of the Certificate application to have been 'fundamentally flawed'. The decision notice and officer report evince **multiple legal errors**. Specifically:

[2] The presence of a hen coop is used to date the photograph to 1978 at the latest, prior to the longstop date for implementation.

1. the Council considered the application for the CLEUD under the wrong legal test requiring evidence 'beyond reasonable doubt' and of a 'categorical' nature;
2. the Council refused to accept the Applicant's evidence (through Mrs Panniker) as sufficient in spite of possessing no contrary evidence in breach of the principle in Gabbitas and engrossed within the NPPG.
3. the Council failed to understand the legal effect of the issuing of the 1974 permission.

11. The reason for refusal proceeds on the basis that the CLEUD application was required to provide evidence of lawfulness to the standard of beyond a reasonable doubt. This is a startling misstatement of the law as it is well understood that the test in civil matters generally, and planning, specifically is 'the balance of probabilities'. That is the evidence is required simply to satisfy the decisionmaker on a more likely than not basis. If the refusal of the Certificate was appealed against and the Council maintained this position on appeal it would be liable to a costs application for unreasonable behaviour.

12. Further, case law has established specific considerations for the assessment of evidence in cases where evidence of historic fact is under review. I quote para.8.15 of Annex 8 to the now revoked Circular 10-97 which cites the following (still current case law):

> 'Moreover, the Court has held (see *F W Gabbitas v SSE and Newham LBC* [1985] JPL 630) that the applicant's own evidence does not need to be corroborated by "independent" evidence in order to be accepted. If the LPA have no evidence of their 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'.

13. The same principle is engrossed in the following provision of the NPPG:

> 'In the case of applications for existing use, if a local planning authority has no evidence itself, nor any 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'[3].

14. In this case Mrs Panniker has provided an affidavit (which is a piece of evidence despite the officer report only referring to the photograph provided by her) and a photograph. Mr Panniker's affidavit dates the photograph to 1978 at the latest on the basis that it shows her daughter's hen coop and that her daughter ceased to keep hens in 1978. In the circumstances of seeking to show works had commenced prior to the 1974 permission lapsing Mrs Panniker's evidence is sufficiently precise and unambiguous that those works occurred prior to that date. It is not necessary that she be any more precise.

15. The photograph shows a gap in the hedge line and lighter material on the ground at the access point to the north west of the site. I am instructed that the access as implemented through the laying of hardcore (the material apparent in the photograph) and that this material is still on the ground today. Further, the Council's own 20th December 1984 correspondence (from P Bailey) confirms that a site visit at that time showed an access had been provided onto the land[4]. I consider this sufficient evidence of Mr and Mrs Panniker having implemented the access to the Site pursuant to the 1974 permission.

16. Mrs Panniker's affidavit states that the photograph 'shows an access into the building plot having been created'. No further detail is given in the text of the affidavit and if

[3]Paragraph: 006 Reference ID: 17c-006-20140306

[4] At that time the only query raised was to confirm the purpose of that access.

resubmitted Mrs Panniker could helpfully expand on the nature of the implementation. I am instructed that Mrs Panniker is confident this implementation occurred within a couple of years of the 1974 permission.

17. The officer report is critical that no further information is given. As a matter of good practice I would have expected the Council to have requested clarification if the affidavit was considered insufficient.

18. The officer report concludes that 'no real evidence' has been provided. This is incorrect, a statutory declaration/affidavit is real evidence. In any event the officer concludes that 'if it was only the making of a gap in the hedge (even if the gap was gated) this would not, in my opinion, constitute a 'specified operation' under section 43 of the 1971 Act'. However, the officer has already conceded that s.43(2)(d) 'any operation in the course of laying out or constructing a road or part of a road' would be relevant to implementation of the 1974 permission. I would note that the relevant provision is based upon 'any operation'. In this case Mrs Panniker relies upon opening of the hedge line and the laying of hardcore. These 'operations' is not one of the excluded operations which cannot amount to development under s.55 of the current Town and Country Planning Act 1990 or its equivalent provision in the Town and Country Planning Act 1971, s.22.

19. So the work relied upon by Mrs Panniker is not excluded from being development under the relevant Acts and the provision in question is widely drawn to apply to 'any operation in course of laying out or constructing a road or part of a road'. The Council's conclusion that the works relied upon by Mrs Panniker to implement the 1974 were not sufficient is legally unsafe.

20. The officer report concluded that the 1974 permission was 'fundamentally flawed because the approval for the bungalow had lapsed on 25 October 1973'.However, the

officer report shows that the Council has misunderstood the legal effect of the 1974 planning permission. The 1974 permission is a freestanding permission granted consent in 1974. It was not subject to any criticism or legal challenge at the time it was granted[5]. It is therefore a lawful permission which as it was implemented is extant. The officer report shows a 'fundamental' misunderstanding in so far as it proceeds on the basis that the 1974 permission is reliant upon the continuing existence of the 1955 permission.

21. I consider that the Council considered the previous certificate application wrongly in applying the wrong legal test of the evidence and in failing to accept Mrs Panniker's sufficient evidence as to the implementation of the 1974 permission through the creation of the access on to the site. Further, the Council showed an egregious misunderstanding of the status of planning permission documents in considering the 1974 permission to be wholly dependent upon the 1955 permission. If the 1955 permission is no longer extant it has no impact upon the lawfulness of the implemented 1974 permission. If the previous refusal of a certificate were appealed I consider the Council would be open to significant criticism for the way in which it approached the decision. One would hope that a resubmitted application for a certificate would be considered in a lawful manner by the Council and that an appeal against the refusal would not be necessary.

ii.

22. With regard to ii. I would note that the Council's correspondence of 1984 is referenced TJH/OB/3/74/357. The 74/357 show this to be a reference to the 1974 permission and not the 1955 permission. So in 1984 an officer was of the opinion that the 1974 permission was implemented. This opinion was confirmed in terms in a subsequent letter of 14th March 1985, 'Having taken legal opinions on the matter I am satisfied that the provision of the access constitutes a specified operation and the planning consent therefore, remains valid'.

[5] It was granted prior to the institution of modern judicial review procedure but could still have been legally challenged through the courts at that time.

23. The case law is clear that the opinion of an officer offered in correspondence cannot legally bind a Council in its decision making. Nor would that correspondence bind any decision maker in determining what permissions had been implemented. The letter of 1984 as a piece of evidence closer to the relevant time period would have persuasive effect and is of evidential value. It is not however binding in the planning process. The letter might have relevance in any future complaint to the Local Government Ombudsman.

24. Further, as those instructing me have noted, the correspondence of 1984 and 1985 led Mr and Mrs Panniker to take certain actions (or more specifically refrain from certain actions) on the basis that the consent for the construction of a bungalow was extant. That is, the Pannikers took no action to seek a fresh bungalow permission. In light of that reliance it suggested that a claim may lie against the Council. Such a claim would not be within the planning process. I would advise that specialist advice on an action in tort or equity be sought.

25. I advise accordingly. If I can be of any further assistance please do not hesitate to contact me.

ANTHONY GILL

28th JULY 2017

KINGS CHAMBERS

MANCHESTER, LEEDS, AND BIRMINGHAM

RE: CERTIFICATE APPLICATION AT LAND ADJOINING BROMILEY, CLAYTON-LE-DALE

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