1 INTRODUCTION

1.1 This statement has been prepared by KR Planning in support of an application for planning permission for the construction of three residential units at Former Kentish Town Tube Station, NW5.

1.2 The application follows the beneficial grant of Prior Approval for a 2-unit scheme within the building the subject of this application.

1.3 The larger context of this application is the pressing need for new homes in Camden, and where new site starts are significantly down on historical levels. It is critical to note the significant material consideration that the presumption in favour ('tilted balance') under paragraph 11d of the National Planning Policy Framework (NPPF) (February 2025) applies by reason that the borough has failed to deliver the number of homes that are required under the government's Housing Delivery Test (HDT). The latest HDT results confirm that the borough delivered 53% against its housing target meaning the 'presumption in favour' applies. This means that permission should only be refused if the adverse impact of approving the development would significantly and demonstrably outweigh the benefits.

1.4 The development will deliver the following public benefits:

- The redevelopment of an underutilised brownfield site to provide new homes. Paragraph 125 of the NPPF gives substantial weight to the value of using suitable brownfield land within settlements to provide new homes;
- The provision of 3 homes for the Council's housing stock. This should be given substantial weight given the acute housing shortage in the borough;
- The ongoing economic benefit of 3 net additional households (Council Tax payments, net spend of residents into the local economy etc.);
- The provision of an affordable housing payment;
- Improvement of the overall fire safety of the building through introducing new fire safety measures;
- Improvements to local infrastructure through a Community Infrastructure Levy (CIL) contribution; and
- Creation of construction jobs throughout the construction of the development.

2 SITE AND SURROUNDS

2.1 The site is located on the west side of Kentish Town Road near the junction with Castle Road. The front former LU station building is the original London Underground South Kentish Town designed by Leslie Green. It is two storeys plus basement with a mix of uses including an 'escape room' (Sui Generis) at basement level, retail at ground floor level (A1) as well as a Pilate's studio (D2) at first floor level. South Kentish Town Station is a prime example of a Green Station. Opened in June 1907 as Castle Road, it closed just 17 years later in 1924. The building was later converted to a public air-raid shelter during World War II.

2.2 The site does not fall within a Conservation Area, nevertheless it is close to Rochester and Kelly Street Conservations Areas. It also lies in Camden Tier 2 Archaeological Priority Area.

3 PLANNING HISTORY

3.1 Of particular relevance is the crystallization of planning permission for a Class G Prior Approval in 2024.

3.2 The PD right granted by Class M is to make a change of use to a use falling within Class C3 (dwellinghouses) of the Schedule to the Town and Country Planning (Use Classes) Order 1987, and is subject to the procedural requirements found within Para W of Part 3.

3.3 Paragraph W is a provision that applies to a number of other classes of permitted development in Schedule 2 of the Order as well as Class O. It requires any application for a determination whether prior approval will be required to contain a written description of the proposed development, a plan indicating the site and showing the proposed development and certain other information: see paragraph W(2). The local planning authority has power to require information from the applicant including details of any proposed operations; assessments of impacts or risks, and statements of how they are to be mitigated: see paragraph W(9).

3.4 The authority may refuse the application if they consider that the proposed development does not comply with any conditions, limitations or restrictions specified in Part 3 of Schedule 2 as being applicable to the development in question or if they consider that insufficient information has been provided to enable the authority to establish whether the proposed development does so: see paragraph W(3). Such a refusal is to be treated for the purpose of section 78 of the 1990 Act, which governs appeals to the Secretary of State, as a refusal of an application for approval: see paragraph W(4). If they do not refuse the application on that basis, paragraph W also requires the authority to consult other specified persons about any of the relevant impacts or risks and to advertise the application: see paragraphs W(4) to W(8).

3.5 Paragraph W (11) of Part 3 of Schedule 2 of the GPDO provides

(11) The development must not begin before the occurrence of one of the following—

(a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

(b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or

(c) the expiry of 56 days following the date on which the application under sub-paragraph (2) was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused.(my emphasis)

3.6 The planning permission granted by the GPDO for the change of use of retail to residential will accrue or crystallise on the receipt of a favourable response from the Council to an application for Prior Approval OR if the LPA were to fail to notify the applicant within a period of 56 days beginning with the date on which the LPA received the application.

3.7 In this instance, the application was received on 14/08/24 and the 56 days expired at the end of the business day on 09/10/2024 (S336 of the Town and Country Planning Act 1990) with no decision having been conveyed by the LPA, and the website showed it as undetermined at the close of business (it remains so today). The lead authority for this is *Murrell & Anor v Secretary of State for Communities and Local Government & Anor [2010] EWCA Civ 1367* (03 December 2010) and is determinative on the point. I attach both the Murrell authority but also an appeal decision where the Inspector grapples with decision notices issued out of time.

4 THE PROPOSAL

4.1 The scheme seeks to convert the existing Class E space to three residential units, arranged as a 1 bed, 2 bed and 3 bed flats.

4.2 The following works are proposed as part of the proposal to deliver three units:

- Internal remodeling works to the first floor of the former Station
- Building containing 2 existing flats to provide 3 new flats
- Creation of a new residential entrance to the side of the building with a new entrance canopy and a lift
- Replacement of the existing first floor windows
- Provision of secure on-site cycle and refuse storage.
- Biodiversity enhancements through provision of green roof areas and private external amenity with raised planters.
- Car-free development including restrictions to new residents from eligibility for parking permits.

5 POLICY CONTEXT

5.1 Section 38 of the Planning and Compulsory Purchase Act 2004 requires planning applications to be determined in accordance with the development plan unless material considerations indicate otherwise. The Camden Local Plan 2017, Kentish Town Neighbourhood Plan together with the Mayor's London Plan, form the statutory development plan for the Borough. The NPPF is a relevant and material consideration, as is the Camden's Supplementary Planning Documents.

5.2 The National Planning Policy Framework (NPPF) was last updated in December 2023 and promotes the delivery of sustainable development that meets the needs of the community. Paragraph 8 sets out that there are three overarching objectives to sustainable development which are; an economic objective, a social objective and an environmental objective.

5.3 The theme of sustainable development is consistent throughout the NPPF. Paragraph 11 highlights that plans and decisions should apply a presumption in favour of sustainable development, which means approving development proposals that accord with an up-to-date development plan without delay.

5.4 Section 5 of the NPPF refers to the delivery of a sufficient supply of homes. Paragraph 60 states as follows:

"To support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay."

5.5 Paragraph 70 refers to small and medium sites for new housing and states that small and medium sized sites can make an important contribution to meeting the housing requirement of an area.

5.6 Section 11 refers to the effective use of land with Paragraph 124e stating that decision makers should support the use of air space for additional homes, yet this material consideration is not mentioned by Officers in refusing the application despite is being directly relevant to the issues at hand!

<u>London Plan 2021</u>

5.7 **Policy GG2 'Making the best use of land'** – to enable the development of brownfield land, prioritise sites which are well connected by existing or planned public transport and proactively explore the potential to intensify the use of land to support additional homes and workspaces, promoting higher density development in locations that are well-connected.

5.8 **Policy GG4 'Delivering the homes Londoners need'** – to create a housing market that works better for all Londoners, planning and development must ensure that more homes are delivered, support the delivery of the strategic target of 50% of all new homes being genuinely affordable, create mixed and inclusive communities, with good quality homes that meet high standards of design.

5.9 **Policy D3 'Optimising site capacity through the design-led approach'** – seeks to make the best use of land by following a design- led approach that optimises the capacity of sites. Development proposals should enhance local context by delivering buildings and spaces that positively respond to local distinctiveness through their layout, orientation, scale, appearance and shape, with due regard to existing and emerging street hierarchy, building types, forms and proportions.

5.10 **Policy D6 'Housing quality and standards'** – sets out standards for the design of buildings, including private internal and outside space. It identifies that developments should maximise the provision of dual aspect dwellings and normally avoid the provision of single aspect dwellings. A single aspect dwelling should only be provided where it is considered a more appropriate design solution to meet the requirements in optimising site capacity. The design of development should provide sufficient daylight and sunlight to new and surrounding housing that is appropriate for its context, whilst avoiding overheating, minimising overshadowing and maximising the usability of outside amenity space.

5.11 **Policy D7 'Accessible housing'** – to provide suitable housing and genuine choice for London's diverse population, including disabled people, older people and families with young children, residential development must ensure that at least 10 per cent of dwellings (which are created via works to which Part M volume 1 of the Building Regulations applies) meet Building Regulation requirement M4(3) 'wheelchair user dwellings' and all other dwellings meet Building Regulation requirement M4(2) 'accessible and adaptable dwellings'.

5.12 **Policy H1 'Increasing housing supply'** – sets out that borough councils should optimise the potential for housing delivery on all suitable and available brownfield sites through Development Plans and planning decisions especially sites within PTAL levels 3-6 and housing intensification on low density sites in commercial, leisure and infrastructure uses.

5.13 **Policy H2 'Small sites'** – Boroughs should pro-actively support well- designed new homes on small sites (below 0.25 hectares in size) through both planning decisions and plan-making in order to significantly increase the contribution of small sites to meeting London's housing needs, diversify the sources, locations, type and mix of housing supply and support small and medium-sized housebuilders. Boroughs should recognise in their Development Plan that local character evolves over time and will need to change in appropriate locations to accommodate additional housing on small sites.

5.14 **Policy H4 'Affordable housing'** – the strategic target is for 50% of all new homes delivered across London to be genuinely affordable, as such major development which trigger affordable housing requirements are to provide affordable housing through the threshold approach.

5.15 **Policy H5 'Threshold approach to applications'** – the threshold level of affordable housing on gross residential development is initially set at a minimum of 35%. To follow the fast track route the application must meet certain criteria, if those are not met then the application must follow the Viability Tested Route.

5.16 **Policy H10 'Housing size mix'** – schemes should generally consist of a range of units size, having regard to robust local evidence of need.

5.17 **Policy HC1 'Heritage conservation and growth'** – development proposals affecting heritage assets, and their settings, should conserve their significance, by being sympathetic to the assets' significance and appreciation within their surroundings. The cumulative impacts of incremental change from development on heritage assets and their settings should also be actively managed. Development proposals should avoid harm and identify enhancement opportunities by integrating heritage considerations early on in the design process.

5.18 **Policy T5 'Cycle parking'** – developments should provide cycle parking at least in accordance with the minimum standards set out in the London Plan. **Policy T6 'Car parking'** – car-free development should be the starting point for all development proposals in places that are (or are planned to be) well-connected by public transport, with developments elsewhere designed to provide the minimum necessary parking ('car-lite'). Car-free development has no general parking but should still provide disabled persons parking. All residential car parking spaces must provide infrastructure for electric or Ultra-Low Emission vehicles. At least 20 per cent of spaces should have active charging facilities, with passive provision for all remaining spaces.

Camden Local Plan 2017

5.19 **G1 'Delivery and location of growth'** – the council will create the conditions for growth to deliver the homes, jobs, infrastructure and facilities to meet Camden's identified needs. To do this the Council will deliver growth by securing high quality development and promoting the most efficient use of land and buildings in Camden by supporting development that makes best use of its site, taking into account quality of design, its surroundings, sustainability, amenity, heritage, transport accessibility and any other considerations relevant to the site.

5.20 **H1 'Maximising housing supply'** – the Council will aim to secure a sufficient supply of homes to meet the needs of existing and future households by maximising the supply of housing and exceeding a target of 16,800 additional homes from 2016/17 – 2030/31. They will seek to exceed the target for additional homes, particularly self-contained homes by regarding self-contained housing as the priority land-use of the Local Plan.

5.21 **H4 'Maximising the supply of affordable housing'** – aims to maximise the supply of affordable housing and exceed a borough wide strategic target of 5.300 additional homes from 2016/17 – 2030/31. As such a contribution is required from all development that provide one or more additional homes and involve a total addition to residential floorspace of 100sqm GIA or more.

5.22 **H6 'Housing choice and mix'** – seeks to secure high quality accessible homes in all developments that include housing and expects all self- contained homes to meet the nationally described space standards, requires 90% of new build self-contained homes to be accessible and adaptable in accordance with Building Regulation M4(2).

5.23 **H7 'Large and small homes'** – identifies that the Council will seek to ensure that housing development contributes to meeting the priorities set out in the Dwelling Size Priorities Table and includes a mix of large and small homes. The policy allows for a flexible approach in each development having regard to a number of factors set out in the policy. The dwelling size priority table (table 1 in the Local Plan) identifies a high need for 2 and 3 bedroom market dwellings and social-affordable rented.

5.24 **A1 'Managing the impact of development'** – identifies that the Council will seek to protect the quality of life of occupiers and neighbours. They will grant permission for development unless this causes unacceptable harm to amenity. The factors which will be considered include visual privacy and outlook, sunlight, daylight and overshadowing, transport impacts, impacts of the construction phase, noise and vibration levels and odour, fumes and dust.

5.25 **A4 'Noise and Vibration'** – identifies that the Council will seek to minimise the impact on local amenity from the demolition and construction phases of development.

5.26 **T2 'Parking and car-free development'** – identifies that the Council will limit the availability of parking and require all new developments in the borough to be car-free. The Council will not issue on-street or on- site parking permits in connection with new developments and will use legal agreements to ensure that future occupants are aware that they are not entitled to on-street parking permits.

Camden Supplementary Planning Guidance

5.27 This document has various generic policies regarding new development within the Borough.

6 PLANNING ASSESSMENT

6.1 The main planning considerations for the proposed development include:

- Principle of development;
- Heritage and design;
- Housing mix;
- Affordable housing;
- Quality of accommodation;
- Amenity considerations;
- Transport;
- Energy and sustainability;
- Fire.

Principle of development

6.2 There exists a fallback consent to convert the planning unit from a Class E premises to 2 residential units. This permission is entirely free of conditions and represents a significant material consideration as outlined in R (*Zurich*) v Lincolnshire Council [2012] EWHC 3708, which elaborated on the "fall-back" argument established from the *Samuel Smith Old Brewery* case: "*The prospect of the fall back position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Where the possibility of the fall back position happening is "very slight indeed", or merely "an outside chance", that is sufficient to make the position a material consideration.*

6.3 Turning to other planning policy support, paragraph 125(c) of the NPPF states that planning decisions should give **substantial weight** to the value of using suitable brownfield land within settlements for homes, and such proposals **should be approved unless substantial harm would be caused** [our emphasis].

6.4 Increasing the housing stock for the borough is key objective as set out in policy H1 of the Camden Local Plan. Policy H1 of the London Plan sets a target for the Borough of 10,380 housing completions between 2019/20 and 2028/29. London Plan policy H2 also supports well-designed new homes on small sites (below 0.25 hectares in size).

6.5 The latest 2023 Housing Delivery Test shows the Council had delivered 53% of its housing target against the three years between 2020 and 2023. As a consequence of failing the HDT test, paragraph 11d of the NPPF is engaged (the 'tilted balance'). This means that planning permission should be granted for new homes unless there are *"adverse impacts which would significantly and demonstrably outweigh its benefits, when assessed against the policies of the Framework as a whole"* [our emphasis]*."* The Council is not able to meet its current housing targets due to its highly constrained urban nature and following the publication of the updated NPPF, the borough target has increased putting more pressure on the Council's constrained land supply.

6.6 The proposed scheme provides 3 new residential units, which delivers one more than the exant consent plus a contribution towards affordable housing. This optimisation of this highly accessible brownfield site will provide a small but valuable contribution to the Council's housing stock and delivery backlog and is strongly supported by policy.

Heritage and design

6.7 Policy D3 of the London Plan states that development proposals should be of high quality, enhancing local context by delivering buildings and spaces that positively respond to local distinctiveness through their layout, orientation, scale, appearance and shape, with due regard to existing and emerging street hierarchy, building types, forms and proportions.

6.8 London Plan policy HC1 states that development proposals affecting heritage assets, and their settings, should conserve their significance, by being sympathetic to the assets' significance and appreciation within their surroundings.

6.9 Policy D1 of the Local Plan states that the Council will seek to secure high quality design in development through respecting local context and character, preserving or enhancing the historic environment, sustainable design and construction, ensuring that development is inclusive and accessible for all and provides a high standard of accommodation. Policy D2 of the Local Plan states that the Council will preserve and, where appropriate, enhance Camden's rich and diverse heritage assets and their settings, including conservation areas.

6.10 The external expression of the scheme from public views will be limited to new entrance canopy and new timber framed double glazed windows. In view of the above, the proposed development is in accordance with policies D3 and HC1 of the London Plan and policies D1 and D2 of the Local Plan.

Housing mix

6.11 Policy H7 of the Local Plan states that the Council will aim to secure a range of homes of different sizes that will contribute to creation of mixed, inclusive and sustainable communities and reduce mismatches between housing needs and existing supply. The 'Dwelling size Priorities Table' sets out the Camden have a high priority for 2-bed and 3-bed market homes, and that 1-bed and 4-bed homes are a 'lower priority.'

6.12 The proposals include a mix of one 1-bedroom unit, a 2-bedroom unit and one 3-bedroom unit. The proposed development is therefore in accordance with policy H7 of the Local Plan as it delivers the priority 2 and 3 bed units.

Affordable housing

6.13 Policy H4 of the Local Plan states that the Council will aim to maximise the supply of affordable housing and that the Council will expect a contribution to affordable housing from all developments that provide one or more additional homes and involve a total addition to residential floorspace of 100sqm GIA or more.

6.14 A policy compliant affordable housing contribution can be secured via a S106 agreement, which again weighs heavily in favour of the scheme as the extant fallback delivers no such planning benefit.

Quality of accommodation

6.15 Policy D6 of the London Plan requires that all new housing developments achieve a high quality of design. The policy also refers to the Technical Housing Standards – Nationally Described Space Standard and is supported by the Mayor of London Housing SPG.

6.16 Policy D6 of the London Plan also sets out that housing development should be of high-quality design and provide adequately sized rooms (as set out in Table 3.1) with comfortable and functional layouts which are fit for purpose and meet the needs of Londoners without differentiating between tenures. With regards to internal space standards, Camden's Housing SPD requires compliance with the floorspace standards and minimum floor to ceiling heights set out in national space standards but encourages the London Plan ceiling height of 2.5m for at least 75% of its gross internal area (GIA). Housing development should maximise the provision of dual aspect dwellings.

6.17 The proposed scheme can provide three dwellings have been designed to be M4(2). All flats will be accessed by Part M compliant lift shaft and communal stairs.

6.18 The proposals exceed the minimum space standards and minimum floor to ceiling heights required under London Plan policy D6. All habitable rooms have been designed to receive good levels of natural light, satisfactory outlook and natural ventilation. All flats are proposed to be double or triple aspect, delivering good levels of light intake and outlook, as confirmed in the submitted Internal Daylight Assessment for the new units, which confirms that the new residential units will benefit from daylight levels in excess of the requirements of BSEN 17037:2018 recommendations.

6.19 Policy D6 of the London Plan states that a minimum of 5sqm of private outdoor space should be provided for 1-2 person dwellings and an extra 1 sq.m. should be provided for each additional occupant. In addition, the private outdoor space should have a minimum width and depth of 1.5m.

6.20 Two of the three residential units all have access to policy compliant balconies, with only the 3b4p being oversized by 10sqm to compensate for its lack of balcony as per the advice at 2.3.32 of the Housing SPG.

Amenity considerations

6.21 Policy A1 of the Local Plan states that the Council will seek to protect the quality of life of occupiers and neighbours ensuring that proposals will not cause unacceptable harm to amenity. As there is no increase in heoght and mass, it is deemed that impact on daylight/sunlight and/or outlook will not change from the current circumstance.

6.22 As to privacy, the scheme will utilize existing windows so little to no change from the existing circumstance, particularly when considered against the fallback. No plant is required, so the noise element of the policy is deemed to be met.

Transport

6.23 Policy T2 of the London Plan states that development proposals should deliver patterns of land use that facilitate residents making shorter, regular trips by walking or cycling. This policy also states that development proposals should reduce the dominance of vehicles on London's streets whether stationary or moving.

6.24 Policy T6 of the London Plan states that car-free development should be the starting point for all development proposals in places that are (or are planned to be) well-connected by public transport, with developments elsewhere designed to provide the minimum necessary parking. This is echoed in Local Plan policy T2 which states that the Council will limit the availability of parking and require all new developments in the borough to be car-free.

6.25 Policy T5 of the London Plan sets out the cycle parking requirements. The proposed development is 'car free' in line with local and London Plan standards/policies which encourage mode shifts to alternate modes of transport, for example public transport, walking and cycling, and this will be confirmed in a legal agreement. Policy compliant cycle parking facilities are provided adjacent to the entrance, as per the arrangement shown on the fallback consent.

6.26 The proposals also include additional refuse provision at ground floor level to meet the Council's requirements. The arrangements for the existing Class E units in the building remains unchanged.

6.27 The proposals are therefore considered to be in accordance with policies T2, T5 and T6 of the London Plan and T2 of the Local Plan.

Energy and sustainability

6.28 Policy CC1 of the Local Plan states that the Council will require all development to minimise the effects of climate change and encourage all developments to meet the highest feasible environmental standards that are financially viable during construction and occupation. Policy CC2 of the Local Plan requires any development involving 5 or more residential units or 500 sqm or more of any additional floorspace to submit a Sustainability Statement. Policy CC4 of the Local Plan seeks to ensure that the impact of development on air quality is mitigated, to ensure that exposure to poor air quality is reduced in the borough.

6.29 As the proposed development is not a major (CC1) nor does it yield 5 units (CC2) no additional reports are required to justify the proposal.

Ecology and biodiversity

6.30 Policy G6(D) of the London Plan states that development proposals should manage impacts on biodiversity and aim to secure net biodiversity gain. Policy CC2 of the Local Plan states that all development should adopt appropriate climate change adaptation measures such as incorporating bio- diverse roofs, combination green and blue roofs and green walls where appropriate.

6.31 The site currently has no vegetation or soft landscaping, and the existing building footprint covers the majority of the site with the remaining site made up of hard surfaces. The proposed development is therefore exempt from Mandatory Biodiversity Net Gain under the 'de minimis' ('below the threshold') exemption, which is defined as follows:

"A development that does not impact a priority habitat and impacts less than:

25 square metres (5m by 5m) of on-site habitat

5 metres of on-site linear habitats such as hedgerows

A development 'impacts' a habitat if it decreases the biodiversity value."

Fire

6.32 Policy D12 of the London Plan states that to ensure the safety of all building users, all development proposals must achieve the highest standard of fire safety. The proposal is not a major and as proposed building does not meet the threshold of a high-risk building, and as such no fire strategy is required.

7 CONCLUSION.

7.1 This statement demonstrates that the proposed development complies with the development plan. In summary, 3 much needed new homes will be provided, future occupiers are provided with good quality living accommodation, neighbouring residential amenity is preserved, there are no adverse transport impacts, and the development provides an affordable housing contribution.

7.2 The titled balance under paragraph 11(d) of the NPPF also applies which is a significant material consideration. It has been demonstrated in this statement that the proposed development complies with the development plan.

7.3 However, if the planning balance is weighed at any stage, the balance is significantly in favour of permitting the development. There are no adverse impacts which significantly and demonstrably outweigh the benefits that the development will deliver. The planning balance weighs heavily in favour of permitting and planning permission should therefore be granted.

7.4 As set out earlier in this statement, the development will deliver the following public benefits:

- The redevelopment of an underutilised brownfield site to provide new homes. Paragraph 125 of the NPPF gives substantial weight to the value of using suitable brownfield land within settlements to provide new homes;
- The provision of 3 homes for the Council's housing stock. This should be given substantial weight given the acute housing shortage in the borough;
- The ongoing economic benefit of 3 net additional households (Council Tax payments, net spend of residents into the local economy etc.);
- The provision of an affordable housing payment;
- Improvements to local infrastructure through a Community Infrastructure Levy (CIL) contribution; and
- Creation of construction jobs throughout the construction of the development.

7.5 The Council is therefore respectfully requested to grant planning permission for the proposed development.

England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2010] EWCA Civ 1367
Case No: C1/2010/0934

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Beatson
[2010] EWHC 1045 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL
03/12/2010

B e f o r e :

LORD JUSTICE RIX
LADY JUSTICE SMITH
and
LORD JUSTICE RICHARDS

Between:

(1) David Sidney Murrell
(2)Christine Ruth Murrell **Appellants**

- and -

(1)Secretary of State for Communities and Local Government
(2)Broadland District Council **Respondents**

Mr Niall Blackie (solicitor-advocate of FBC Manby Bowdler LLP) for the Appellants
Mr Daniel Kolinsky (instructed by The Treasury Solicitor) for the Secretary of State
The Second Respondent did not appear on the appeal or in the court below

Hearing date : 18 November 2010

HTML VERSION OF JUDGMENT

Lord Justice Richards :

1. The appellants run a farm at South Walsham in Norfolk. They proposed to erect a cattle shelter on the farm, which constituted development requiring planning permission. The development was permitted by Class A of Part 6 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 ("the GPDO"), subject, so far as material, to the conditions set out in paragraph A2(2) of Part 6. Those conditions require the developer to apply to the local planning authority for a determination as to whether the prior approval of the authority is required to the siting, design and external appearance of the building. The appellants applied to the local planning authority, Broadland District Council ("the council"), for such a determination. The council determined that prior approval was needed and in the same decision it refused approval. A planning inspector appointed by the Secretary of State dismissed an appeal. A challenge under s.288 of the Town and Country Planning Act 1990 ("the 1990 Act") to the inspector's decision was dismissed by Beatson J. An appeal against his order is now brought to this court.

2. The first issue on the appeal is procedural, namely whether the council's determination was made more than 28 days from the date of receipt of a valid application (the period specified in paragraph A2(2)), with the consequence that permission for the development accrued on the expiry of the 28 day period and the subsequent refusal of prior approval was of no legal effect. Permission to appeal on that ground was granted by Beatson J.

3. The second issue concerns the correct approach when determining whether prior approval should be given. It involves consideration of the permitted development right under the GPDO and of the guidance in Annex E, *Permitted Development Rights for Agriculture and Forestry*, to Planning Policy Guidance 7 ("PPG7"). The appellants' contention is that the inspector failed to take into account Annex E or misinterpreted it, and that she erred by approaching the case as if it were an ordinary application for planning permission as opposed to an application for prior approval in which the principle of development was not in issue. Permission to appeal on the grounds relevant to that issue was granted by Sullivan LJ, on the basis that they raise an important point of principle as to the ambit of the GPDO permission for agricultural buildings.

The legislative framework

4. The general rule laid down by s.57(1) of the Town and Country Planning Act 1990 ("the 1990 Act") is that planning permission is required for the carrying out of any development of land. By s.58(1)(a), planning permission may be granted by a development order made by the Secretary of State pursuant to s.59. By s.60(1) and (2), planning permission granted by a development order may be granted either unconditionally or subject to such conditions or limitations as may be specified in the order, including conditions as to prior approval.

5. The GPDO is the principal development order made pursuant to those powers. It provides in article 3:

> "3.(1) Subject to the provisions of this Order …, planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.
>
> (2) Any permission so granted is subject to any relevant exception, limitation or

condition specified in Schedule 2."

6. Part 6 of Schedule 2 relates to agricultural buildings and operations. The relevant class of development within Part 6 is Class A which reads, so far as material:

> "Permitted development
>
> The carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of –
>
> (a) works for the erection … of a building; …
>
> which are reasonably necessary for the purposes of agriculture within that unit."

7. Such permission is subject to the exceptions in paragraph A1 (e.g. that development is not permitted by Class A if the ground area which would be covered by the building would exceed 465 square metres) and to conditions contained in paragraph A2. The relevant conditions are these:

> "A2(2) Subject to paragraph (3), development consisting of –
>
> (a) the erection … of a building; …
>
> is permitted by Class A subject to the following conditions –
>
> (i) the developer shall, before beginning the development, apply to the local planning authority for a determination as to whether the prior approval of the authority will be required to the siting, design and external appearance of the building …;
>
> (ii) the application shall be accompanied by a written description of the proposed development and of the materials to be used and a plan indicating the site together with any fee required to be paid;
>
> (iii) the development shall not be begun before the occurrence of one of the following –
>
> (aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
>
> (bb) where the local planning authority give the applicant notice within 28 days following the date of receiving his application of their determination that such prior approval is required, the giving of such approval;
>
> (cc) the expiry of 28 days following the date on which the application was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination.
>
> (iv) (aa) where the local planning authority give the applicant notice that such prior approval is required the applicant shall display a site notice by site display on or near the land on which the proposed development is to be carried out, leaving the notice in position for not less than 21 days in the period of 28 days from the date on which the local planning authority gave

the notice to the applicant …."

8. Save for the matters set out in para A2(2)(i) and (ii), there are no specific requirements as to the form of an application. At the material time the GPDO provided by Article 4E for applications for *planning permission* to be made in a standard form published by the Secretary of State, but those provisions did not apply to applications for a determination as to whether *prior approval* is required: see, now, article 6 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 which is to similar effect. The Secretary of State has in fact published a model form for use in the making of applications for a determination as to whether prior approval is required, but use of the form is not mandatory: that is apparent from the terms of the GPDO itself and is spelled out in para 10 of Circular 02/2008 issued by the Department for Communities and Local Government. The fee payable for an application is prescribed by separate regulations.

Annex E to PPG7

9. National planning policy guidance concerning the prior approvals process in respect of Class A permitted development is to be found in Annex E to PPG7, which is very helpful for the light it casts on the operation of the prior approvals process and to which a decision-maker should have regard as a material consideration when considering whether prior approval is required and whether it should be given. The following passages, under the main heading "The determination procedure", are of particular relevance to this case:

> "Introduction
>
> E12. In certain cases, the permitted development rights for development on agricultural units of 5 hectares or more and forestry cannot be exercised unless the farmer or other developer has applied to the local planning authority for a determination as to whether their prior approval will be required for certain details …. The local planning authority have 28 days for initial consideration of the proposed development. Within this period they may decide whether or not it is necessary for them to give their prior approval to these details of development involving new agricultural and forestry buildings ….
>
> E14. The determination procedure provides local planning authorities with a means of regulating, where necessary, important aspects of agricultural and forestry development for which full planning permission is not required by virtue of the General Permitted Development Order. They should also use it to verify that the intended development does benefit from permitted development rights, and does not require a planning application …. There is no scope to extend the 28 day determination procedure, nor should the discretionary second stage concerning the approval of certain details be triggered for irrelevant reasons. A local planning authority will therefore need to take a view during the initial stage as to whether Part 6 rights apply.
>
> E15. Provided all the General Permitted Development Order requirements are met, the principle of whether the development should be permitted is not for consideration, and only in cases where the local planning authority considers that a specific proposal is likely to have a significant impact on its surroundings would the Secretary of State consider it necessary for the authority to require the formal submission of details for approval. By no means all the development proposals notified under the Order will have such an impact.
>
> E16. In operating these controls as they relate to genuine permitted development, local authorities should always have full regard to the operational needs of the agricultural and forestry industries; to the need to avoid imposing any unnecessary or excessively costly requirements; and to the normal considerations of reasonableness. However, they

will also need to consider the effect of the development on the landscape in terms of visual amenity and the desirability of preserving ancient monuments and their settings, and sites of recognised nature conservation value. They should weigh these two sets of considerations. Long term conservation objectives will often be served best by ensuring that economic activity, including farming and forestry which are prominent in the rural landscape, is able to function successfully.

Handling

E17. The 28 day determination period runs from the date of receipt of the written description of the proposed development by the local planning authority. If the local planning authority give notice that prior approval is required they will then have the normal 8 week period from the receipt of the submitted details to issue their decision, or such longer period as may be agreed in writing (see Article 21 of the Town and Country Planning (General Development Procedure) Order 1995) ….

E18. The Secretary of State attaches great importance to the prompt and efficient handling of applications for determination and of any subsequent submissions of details for approval under the provisions of the General Permitted Development Order. Undue delays can have serious consequences for agricultural and forestry businesses, which are more dependent than most on seasonal and market considerations. The procedures adopted by authorities should be straightforward, simple, and easily understood ….

E19. Authorities should prepare forms which developers can use to apply for determination, along the lines of the example in the Appendix. This will help to minimise the number of cases in which submission of details may be necessary. Authorities should acknowledge the receipt of the written description, giving the date of receipt. Where the authority do not propose to require the submission of details, it would be helpful and courteous to inform the developer as soon as possible, to avoid any unnecessary delay or uncertainty.

E20. There will often be scope for informal negotiations with the developer, as an alternative or preliminary to requiring a formal submission of details. Developers for their part may find it useful to provide more than the minimum information required by the Order when informing authorities of their proposals, if this is readily available. For example, a sketch showing the proposed elevation of a building may clarify the effect of the proposal ….

Scope of controls

E22. The arrangements do not impose full planning controls over the developments to which they apply - those developments remain 'permitted development' under the General Permitted Development Order. The principle of development will not be relevant providing the Order conditions are satisfied, nor will other planning issues. When details are submitted for approval under the terms of the Order, the objective should be to consider the effect of the development upon the landscape in terms of visual amenity, as well as the desirability of preserving ancient monuments and their settings, known archaeological sites, listed buildings and their settings, and sites of recognised nature conservation value … Details should be regarded in much the same light as applications for approval of reserved matters following the grant of outline planning permission ….

Siting, design and appearance

E24. Local planning authorities may concern themselves with:

- the siting, design and external appearance of a proposed new agricultural or forestry building and its relationship to its surroundings ….

Siting

E27. The siting of a new agricultural or forestry building … can have a considerable impact on the site and the surrounding landscape. Developments should be assimilated into the landscape without compromising the functions they are intended to serve. New buildings should normally form part of a group rather than stand in isolation, and relate to existing buildings in size and colour ….

Design and appearance

E31. The choice of design and materials, and the relationships of texture and colour to existing development, local traditions, and the landscape, can be important considerations for both agricultural and forestry buildings and roads. For example, a single large building may have a greater impact on the countryside than one or more smaller buildings, which can be more easily incorporated into an existing group and provide greater flexibility, although the function of the building will be material to shaping its form ….

The facts

10. By an application dated 28 November 2008, the appellants applied to the council for a determination as to whether prior approval would be required in respect of the erection of the cattle shelter. The application was on one of the council's standard forms, though by this date the particular form used had been superseded by a new form based on the model form issued by the Secretary of State (see para 8 above). All relevant details on the form were completed, including a description of the proposed development, its dimensions and the materials to be used. The required fee of £70 was enclosed. A location plan was also enclosed: that was a matter of debate before Beatson J but is now common ground, as a result of further evidence filed since the hearing before the judge.

11. The application form was date-stamped as received by the council on 1 December 2008. Receipt of the fee was noted in manuscript on the top of the form. On the same day the council wrote to the appellants, stating:

"Invalid Application

Your application has been received and upon inspection it does not comply with the statutory requirements and as such is invalid for the following reasons:

- 4 copies of proposed elevations are required to a scale of 1:50 or 1:100.
- 4 copies of a block plan to a scale of 1:500 are required showing the size and position of the proposed development.
- The Government has introduced new standard planning application forms, which are now the only forms that we can accept. Please complete and return the 4 enclosed application forms.
- Please supply a further 3 copies of the location plan.

> The statutory period for determination of your application cannot commence until these requirements have been fulfilled and a formal letter of acknowledgement giving details of the statutory period for the determination of the application will then be sent to you. Please reply to this letter within 14 days from the date specified at the top of the page to inform us if you wish to withdraw the application or proceed."

The letter did nevertheless assign an application number (20081652) to the application.

12. Whether the council was in error in treating the application as invalid and, if so, what are the consequences of that error are the subject of the first issue on the appeal.

13. The appellants' reaction to the council's letter was to complete the new form and to send it to the council, together with the requested elevations and plans and the requested number of copies. The new form was dated 4 December 2008 and was date-stamped as received by the council on 9 December. The form was endorsed on receipt by the council with the application number given in the letter of 1 December. It was also endorsed with a manuscript note referring to the payment of the fee of £70 on 1 December.

14. By letter dated 9 December 2008, the council acknowledged receipt of the new form. The letter gave the application number assigned on 1 December and stated:

> "The application was validated on 09/12/2008, with fees of £70.00. Every effort will be made to reach a decision within the statutory 28 day period which expires on 05 January 2009".

By paragraph A2(2)(cc) of Part 6, the statutory period ends on "the expiry of 28 days following the date on which the application was received". If a valid application was made on 1 December 2008, the period expired on 29 December.

15. The next the appellants heard about the matter was when they received a written determination dated 31 December 2008, by which the council decided that prior approval was required and that such approval was refused, on the ground that the proposed development did not comply with a number of planning policies referred to in the determination. One of the points noted in the course of the determination was that no detailed landscaping scheme had been provided.

The appeal to the inspector

16. The appellants appealed against the council's decision on grounds to the effect that (1) the council had not made a determination as to the need for prior approval within the statutory 28 day period and permission for the development was therefore granted within the terms of the GPDO; (2) the appellants had been given no opportunity to submit further details, in particular about landscaping, because the council had combined the decision that prior approval was needed with the decision refusing it; and (3) the proposed development was consistent with the relevant policies and approval should be granted.

17. The inspector who decided the appeal was Ms Janet L Cheesley. On the procedural matters, she held that the correct procedure had been followed and that the council's refusal notice of 31 December 2008 was valid. She accepted that use of the new standard form was not required for prior approval applications but considered that "the Council needed sufficient details to judge the design, siting and appearance of the proposed building" and had acted reasonably in requesting the additional information referred to in the letter of 1 December. She was not persuaded that it was impermissible for the council to combine in one decision its determination that prior approval was required and its refusal of approval. She observed that there had been nothing to prevent landscaping details being submitted at any time before the council made its decision.

18. Turning to the substantive appeal, the inspector considered the main issue to be "the effect of the proposal on the character and appearance of the surrounding countryside". Under the heading "Planning Policy", she first quoted key principle 1(iv) (mistakenly described by her as key principle 1(vi)) in Planning Policy Statement 7: *Sustainable Development in Rural Areas* ("PPS7"):

> "New building development in the open countryside away from existing settlements, or outside areas allocated for development in development plans, should be strictly controlled; the Government's overall aim is to protect the countryside for the sake of its intrinsic character and beauty, the diversity of its landscapes, heritage and wildlife, the wealth of its natural resources and so it may be enjoyed by all."

19. She then referred to the development plan, which included the Broadland District Local Plan (Replacement) 2006, and she stated that the most relevant policies in the local plan were "Policy GS1, restricting development outside settlement limits; GS3 with regard to protecting the character and appearance of the surrounding area; ENV1 protecting the character and appearance of the countryside; ENV2 seeking a high standard of layout and design respecting the wider setting; and ENV8, protecting the inherent visual qualities and distinctive character of Areas of Landscape Value". She also referred to policy EMP8, which "permits agricultural development if it meets a list of criteria including that a building is designed to help maintain and improve the appearance of the locality, it integrates with existing features and respects the character of the area".

20. The inspector then gave these reasons for dismissing the substantive appeal:

> "10. The appeal site lies within open countryside characterised by large open fields with small woodland areas. … [T]he essential characteristic and appearance of the area is one of an open rural working landscape within which are farm complexes.
>
> 11. The appeal site is situated on open rising land. The proposal includes a cattle shed within a new woodland landscape setting. Whilst being designed as an agricultural building, due to its size and prominent position, I consider that it would appear as an unduly prominent form of development, which would have an unacceptably adverse visual impact on this part of the Area of Landscape Value. Therefore, I conclude that the proposal would have an adverse effect on the open character and appearance of the surrounding countryside. This would not be in accordance with the objectives of PPS7 and Local Plan Policies GS1, GS3, ENV1, ENV2, ENV8 and EMP8.
>
> 12. Whilst the landscaping details were not submitted with the application, I have been provided with details, which I consider appropriate to take into consideration in my determination of this appeal. These details include new woodland and hedgerow planning. Due to the scale and position of the proposed building, it would be many years before an appropriate substantially significant screen could be established. I consider it unacceptable, due to the adverse visual impact of the proposed building, to allow such development in such an open location, which would be open to public views for a considerable time.
>
> 13. I note the presence of large modern farm buildings in the surrounding area, but these are characteristically generally within established farm complexes, rather than isolated buildings.
>
> …
>
> 15. In reaching my conclusion, I have had regard to all other matters raised upon which I have not specifically commented including the need to relocate an existing family beef cattle business. Whilst I recognise the operational needs of the agricultural business, it is necessary to weigh this consideration against the harm I have identified

with regard to impact on the character and appearance of the area. In the light of the significant harm I have identified above, I do not consider this matter justifies allowing the appeal."

The case before Beatson J

21. The appellants challenged the inspector's decision by an application under s.288 of the 1990 Act. There was a related judicial review claim in respect of the inspector's decision on costs, but that fell away in the light of the judge's decision on the s.288 application and is not pursued before this court.

22. The main issues before Beatson J on the s.288 challenge were the same as those before this court, relating first to whether the council's determination was made outside the 28 day period and secondly to whether the inspector erred in her approach when assessing whether approval should be given. The appellants did not pursue the separate procedural point that the council had been wrong to combine in a single decision its determination that prior approval was needed and its decision refusing it. Their reason for not pursuing the point was that the prejudice they had suffered by being denied the opportunity to submit landscaping details was cured by the appeal process in which the inspector received and took into account those details.

23. On the issue relating to the 28 day period, Beatson J described the appellants' position as technical and observed that it was striking that no complaint or challenge was made by the appellants at the time. Having made a number of observations about the facts, he referred to the submission by counsel for the Secretary of State that the inspector approached the matter in a practical way, that both parties proceeded on the basis of a common understanding as to the council's time for determining the application, and that there was no challenge to that common assumption until after the decision. He continued:

> "34. The Inspector took what I accept is a practical approach. There was certainly no prejudice to the claimants of the sort that the 28-day rule is designed to prevent in this case, because the council acted with speed. The letter indicated that on the material it had, it was not able to state whether prior approval was required. In this context, given the speed at which this letter was sent, and given the common assumption of both parties, the implication must be that the Council had effectively, although not in very straightforward language, stated that they would require prior approval because it did not have enough information to assess this matter.
>
> 35. Mr Blackie submitted that if one looks as the regulations, all the Claimants had to do was to provide a written description of the development materials and a plan indicating the site: that is seen from A2(2)(i). The materials submitted must have been ones which enabled the Council to operate the statutory procedure. I conclude that it was entitled to ask for what it asked for, that had the effect of stopping the clock, and therefore the procedural challenge is not made out."

24. On the substantive issue, Beatson J rejected various submissions on behalf of the appellants as to the nature of permitted development rights. He referred to the guidance in Annex E to PPG7, and to the absence of reference to that guidance in the inspector's decision. He said that it was unfortunate that the inspector made no explicit reference to Annex E but the inspector weighed the effect of the development on the landscape in terms of visual amenity and her reference to the planning policies reflected the cases put to her by the parties. He had regard to *South Somerset District Council v Secretary of State for the Environment* [1993] I PLR 80, 83. He concluded:

> "In this case I accept Mr Kolinsky's submission that the Inspector addressed the right questions. Her failure to refer to Annex E must be seen in the light of the fact that she addressed the criteria set out in it and balanced them. Her reference to the other policies

must be seen in the light of the emphasis placed on those policies and their relevance in the submissions of both parties …."

25. The judge went on to reject an argument as to inadequacy of reasons, which is not pursued in that form before us.

The procedural issue

26. The appellants' case on the procedural issue is straightforward. Mr Blackie submits that the application received by the council on 1 December 2008 met the requirements in paragraph A2(2)(ii) and was a valid application; the council was not entitled to require the completion of the new standard form or the submission of further material before treating the application as valid; the 28 day period specified in paragraph A2(2)(iii)(cc) therefore expired on 29 December; and the permission granted by the GPDO accrued or crystallised on the expiry of that period without a determination having been made or notified.

27. For the Secretary of State, Mr Kolinsky stressed, by reference to para E15 of Annex E, that the purpose of the prior approval procedure is to fast-track simple applications but to enable local planning authorities to regulate more controversial applications where necessary. He accepted that in this case the council made errors, both in its assessment that the original application was invalid and in proceeding to make a composite decision dealing at the same time with the need for prior approval and the refusal of approval, but he submitted that those errors were not material in the circumstances and that it would be contrary to the public interest to allow the appellants' overly technical approach to prevail. In the absence of any challenge at the time to the council's decision of 1 December that the original application did not comply with the statutory requirements, or to the timetable set out in the council's letter of 9 December, the practical reality was that everyone proceeded on the basis of that timetable and it was not open to the appellants to turn round thereafter and dispute it. The letter of 9 December gave rise to a common understanding between the parties. Another way in which he put the argument was that, if the original application received on 1 December was valid, it was withdrawn or superseded by the later application. He also relied, in the alternative, on the judge's reasoning at para 34 of his judgment that by its letters the council had effectively stated that prior approval was needed.

28. In my judgment, the appellants' case on this issue is well founded. The original application received on 1 December complied with the statutory requirements and was a valid application. The statutory 28-day period for consideration of the need for prior approval ran from that date. The mistakes made by the council in the handling of the application, and the fact that the appellants submitted a new form and further plans in accordance with the council's request, did not stop the clock running or otherwise affect the position. On the expiry of the statutory period, on 28 December, permission for the development accrued under the GPDO. The council's determination of 31 December came too late to have any legal effect.

29. The prior approval procedure for Class A permitted development, as set out in paragraph A2(2) itself and explained in Annex E to PPG7, is attended by the minimum of formalities and should be simple to operate. The application for determination as to whether prior approval is required does not need to be in any particular form and does not need to be accompanied by anything more than a written description of the proposed development and of the materials to be used and a plan indicating the site, together with the required fee (see paragraph A2(2)(i) and (ii)). In practice it will be advisable to use an up-to-date standard form and to provide the information referred to in the standard form, because that will facilitate the council's consideration of whether prior approval is needed and, if so, whether it should be given, and will minimise the need for the provision of further information at a later stage. It is not, however, mandatory to use the standard form or to provide any information beyond that specified in paragraph A2(2)(ii).

30. When an application is submitted, it engages a two-stage process, the nature of which is set out

clearly in Annex E (see, in particular, paragraphs E12-E20). The first stage involves consideration of whether prior approval is required. If the council determines that it is not required, it should notify the applicant accordingly. If it determines that prior approval is required and notifies the applicant of the decision, it moves into the second stage, in which it has 8 weeks or such longer period as may be agreed in writing to decide whether to give approval (see article 21 of the Town and Country Planning (General Development Procedure) Order 1995, which applied to applications for approval other than those under Part 24 of Schedule 2 to the GPDO; now replaced by article 30 of the Town and Country Planning (Development Management Procedure) (England) Order 2010). The existence of a discrete second stage is underlined by the requirement in paragraph A2(2)(iv) as to the display of a site notice where the local planning authority has given notice that prior approval is required.

31. The council can request further details at any time, though Annex E appears to contemplate that they will generally be called for only at the second stage, after it has been determined that prior approval is required.

32. Paragraph E18 of Annex E emphasises the importance attached by the Secretary of State to the prompt and efficient handling of applications at both stages and states that the procedures adopted by authorities should be straightforward, simple and easily understood.

33. It is plain to me that the appellants' original application received on 1 December complied with the requirements of the GPDO and was a valid application. Each of the points made in the council's letter of 1 December was a bad one. The GPDO does not require an application to be accompanied by proposed elevations or a block plan. It does require a location plan, but such a plan was provided with the application. It does not require multiple copies of any documents. Since use of the new standard application form is not mandatory, the council was mistaken in stating that these were the only forms they could accept and in requesting the appellants to complete and return, in quadruplicate, the new standard form. Accordingly, the council's assertion that the application was invalid was wrong in law.

34. Since the application was valid, the 28 day period referred to in paragraph A2(2)(iii)(cc) began to run on 1 December, despite the council's assertion to the contrary. Mr Kolinsky sought to rely on the absence of any challenge at the time to the council's "decision" that the application was invalid. The GPDO, however, does not make the running of time dependent on a decision by the local planning authority to accept an application as valid. Whether there was a valid application or not is an objective question of law. Mr Kolinsky referred us to *R v Caradon District Council, ex parte Lovejoy* (1999) 78 P&CR 243, at 244-5, where Jowitt J stated that a local planning authority has first to consider whether it has an application which complies with the procedural requirements and that "[i]f there is no compliance, then there is no application under the order". But the converse is that if there is compliance, then there is an application; and Jowitt J said nothing to support Mr Kolinksy's argument as to the significance of the council's decision for the question when time starts to run.

35. Nor do I think that the running of time was affected by the fact that the appellants complied with the council's request to submit the new forms and further information. The submission of that material did not constitute a fresh application superseding, or amounting to an implied withdrawal of, the original application. The new form was given the same application number as that assigned on 1 December to the original application. No further fee was paid: the new form was endorsed with a reference to the fee received with the original application. Nothing was said by the appellants to suggest that they were withdrawing the original application or that the new form superseded it. They simply sent to the council the further material requested. It was the decision of the council alone to treat the receipt of that further material on 9 December as the point at which a valid application was made and time began to run.

36. For the same reasons I cannot accept Mr Kolinsky's submission as to the existence of a common understanding between the parties that time was to run from 9 December. In any event, even an express agreement between the parties could not have altered the time limit under the GPDO, which makes no provision for extension of the 28-day period by agreement. As stated in paragraph E14 of Annex E, "[t]here is no scope to extend the 28 day determination procedure". If it cannot be extended by express agreement, I do not see how it can be extended – or how time can be somehow be stopped from running – by a common understanding of the kind contended for.

37. The substance of the arguments advanced by Mr Kolinsky came close at times to a case of estoppel – that since the appellants raised no challenge at the time to the council's decision of 1 December that the original application was invalid or to the timetable contained in the letter of 9 December, and since they did not even enter any reservation or warning that they regarded the original application as valid, it was not open to them subsequently to assert that time started to run from 1 December. But estoppel cannot operate in the circumstances of this case to deny the appellants the benefit of the statutory time limit, and Mr Kolinsky expressly disavowed any reliance on it.

38. With great respect to Beatson J, I cannot accept the reasoning upon which he decided the case in favour of the Secretary of State. No doubt the inspector took a practical approach, as the judge said at paragraph 34 of his judgment, but practicality cannot displace the legal effect of the GPDO. So too, although it is no doubt true that the delay of a few days did not of itself cause the appellants prejudice, the start-point and end-point of the 28 day period are fixed by the terms of the GPDO and the question of prejudice is of no legal relevance. Further, it cannot be right, as suggested by the judge, that the letter of 1 December was effectively stating that prior approval was required, so as to take the case into the second stage. That is not what the letter states, nor can it be implied: since the letter asserted in terms that there had been no valid application, it cannot have been purporting at the same to make a determination, pursuant to the application, that prior approval was required. No determination as to the need for prior approval was made until the decision of 31 December.

39. In paragraph 35 of his judgment, Beatson J said that the council was entitled to ask for what it asked for in the letter of 1 December and that this had the effect of stopping the clock. I have accepted that the council was entitled to ask for further information. It was not, however, entitled to refuse to treat the application as a valid application until that further information was received. The clock carried on ticking from 1 December until the expiry of the statutory period on 29 December.

40. It was common ground before us that if a determination as to the need for prior approval was not made or notified to the appellants before the expiry of the 28 day period, the permission granted by the GPDO for the proposed development accrued on the expiry of the period and could not be affected by a subsequent determination that prior approval was needed. Paragraph A2(2)(iii) states that "the development shall not be begun" before the occurrence of one of the events listed, including the expiry of the 28 day period, but it is clear that the permission accrues on the expiry of the 28 day period rather than when the development is begun.

41. That conclusion is supported by *R (Orange Personal Communications Services Ltd) v Islington LBC* [2006] EWCA Civ 157, [2006] JPL 1309. In that case, which arose under Part 24 of Schedule 2 to the GPDO, prior approval had been applied for and a notice had been issued that prior approval was not required, but at a later date the area had been designated a conservation area. There were certain factual complications but the essential issue was whether the developer had an accrued right to develop the site (in accordance with the details submitted in the application for prior approval) at least from the date of issue of the prior approval notice, so that the right to develop was unaffected by the subsequent designation of the conservation area. The court answered that issue in the affirmative. Laws LJ, with whom the other members of the court agreed, stated at para 28:

> "In a prior approval case the planning permission accrues or crystallises upon the developers' receipt of a favourable response from the planning authority to his

> application. I acknowledge the court, in dealing with the conundrum presented by this case, has had to deploy ideas such as accrual and crystallisation which do not appear on the face of the legislation. But the two extremes to which I referred earlier demonstrate the need for an approach to be taken to the statute – notwithstanding that it requires assistance from such sources – that produces in the end fairness and overall conformity with the scheme and the planning legislation."

In reaching that conclusion, Laws LJ considered and rejected a contention that the benefit of the permission did not accrue or crystallise until work had been started (see paras 23 and 25 of his judgment).

42. The court in *Orange Personal Communications Services Ltd* was not considering a case where an application for prior approval has been duly made but there has been no determination or notification within the 28 day period. Application of the court's reasoning, however, leads inevitably to the conclusion that planning permission in such a case accrues or crystallises on the expiry of the 28 day period. There can be no principled basis for adopting a different approach in such a case.

43. It follows that in my view the inspector ought to have allowed the appeal before her on the basis that the appellants had an accrued permission for the proposed development and the question of prior approval did not arise.

The substantive issue

44. It is not strictly necessary for me to go on to consider the second issue, concerning the inspector's approach to the question whether, if prior approval was required, it should be given. But since permission to appeal on that issue was granted because it raised an important point of principle, and since we heard full argument on it, I think it right to make some observations on it.

45. The question of prior approval under paragraph A2(2) can only arise in respect of "permitted development" within Class A (i.e. development falling within the terms of Class A and not excluded by paragraph A1). Such development is permitted subject to the conditions in paragraph A2, including the condition relating to prior approval, but those conditions do not affect the principle of development. In recognition of the importance of agriculture and its operational needs, the GPDO has already taken a position on the issue of principle. Thus, as the guidance in Annex E spells out, if the GPDO requirements are met, "the principle of whether the development should be permitted is not for consideration" in the prior approval procedure (paragraph E15).

46. Paragraph E22 draws an analogy with outline planning permission, stating that details submitted for prior approval "should be regarded in much the same light as applications for approval of reserved matters following the grant of outline permission". The analogy is not a precise one and is not put forward as such in Annex E. One obvious difference is that in the case of an outline planning permission there exists an accrued permission, whereas in a Class A prior approval case no permission accrues until the occurrence of one of the events in paragraph A2(2)(iii). In practice there may also be differences of detail: for example, although both cases may involve the approval of siting, design and external appearance, in the case of outline planning permission there is likely to have been an assessment of the general suitability of the site at the permission stage, leaving less flexibility at the reserved matters stage. Nevertheless, the two situations call for a broadly similar approach, and the analogy with outline planning permission has a real value in underlining the point that the assessment of siting, design and external appearance has to be made in a context where the principle of the development is not itself in issue.

47. What troubles me about the inspector's decision on the substantive appeal in this case is that, far from acknowledging that the principle of development was not in issue, she appears to have based herself on policies where the principle of development was very much in issue, so that on the question of impact on visual amenity her decision reads more like the determination of an ordinary

planning application than the determination of an application for prior approval of a Class A permitted development. Thus:

i) She makes no explicit reference to Annex E, the most important policy guidance for the decision she had to make. I accept that there are indications that she had the guidance in mind: in particular, the passage in paragraph 13 of her decision about isolated buildings (cf. paragraph E27 of Annex E) and the passage in paragraph 15 about the operational needs of the agricultural business (cf. paragraph E16 of Annex E). All the same, the absence of explicit reference to Annex E is very surprising and there is insufficient in her reasons to show that she took the guidance properly into account.

ii) The only policy that she actually quotes is key principle 1(iv) of PPS7, which provides for strict control of new building development in the countryside. It is not apposite in the context of a Class A permitted development, and we were told that neither party referred the inspector to that sub-paragraph. The Local Plan policies to which she refers are likewise concerned with the principle of development in rural areas, and a number of them (Policies GS1, GS3 and ENV8) provide that development will not be permitted unless specified criteria are met. It is true, as Beatson J pointed out, that her reference to those policies reflected the cases put to her by the parties, but that does not meet my concern about the use she made of them.

48. It was permissible for the inspector to take the policies into account in so far as they bore on the question of impact on visual amenity, and it is possible that she did in fact use them only for that limited purpose: she said in paragraph 11 that the adverse effect of the proposed development on the open character and appearance of the surrounding countryside would be contrary to the "objectives" of the policies. I have borne in mind what was said by Hoffmann LJ in *South Somerset District Council v Secretary of State for the Environment* [1993] 1 PLR 80 as to how a decision letter of this kind should be read. Reading the decision letter in that way and as a whole, I am far from persuaded that the inspector did adopt the correct approach.

49. The question whether the particular form of development proposed is acceptable in terms of siting, design and appearance involves a balancing exercise. Paragraph E16 of Annex E refers to the weighing of two sets of considerations: on the one hand, the operational needs of agriculture and related matters; on the other hand, the effect of the development upon the landscape in terms of visual amenity, as well as the implications for ancient monuments, archaeological sites and sites of recognised nature conservation value. That exercise involves potentially difficult planning judgments, which are the province of the local planning authority and, on appeal, the planning inspector and with which the court will not interfere otherwise than on grounds of irrationality. That makes it all the important for the court to be satisfied that the decision-maker has approached the exercise from the right perspective when attributing weight to the competing considerations. An approach premised, for example, on the need for strict controls over development in the countryside could produce a different result from an approach premised on an acceptance of the principle of development in the countryside. This adds to my concern about the inspector's decision in this case.

50. Accordingly, if the substantive decision as to prior approval had been a live issue, I would have been in favour of allowing the appeal on that issue, quashing the inspector's decision and remitting the matter for a fresh decision.

Conclusion

51. As it is, however, I would allow the appeal on the procedural issue for the reasons already given. Subject to any further submissions, it seems to me that the only relief required is to quash the inspector's decision, without remittal of the case or any further order. The judgment of this court will make clear the existence and scope of the permitted development right for the proposed development.

Lady Justice Smith :

52. I agree.

Lord Justice Rix:

53. I also agree.

The Planning Inspectorate

Appeal Decision

Site visit made on 18 November 2014

by Nick Palmer BA (Hons) BPl MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 16 February 2015

Appeal Ref: APP/Z3825/A/14/2224715
Redundant agricultural barn, Horsham Road, Five Oaks, Billingshurst, West Sussex RH14 9AT

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under a development order.
- The appeal is made by Mr Ben Kirk against the decision of Horsham District Council.
- The application Ref DC/14/0711, dated 9 April 2014, was refused by notice dated 3 June 2014.
- The development proposed is the conversion of a redundant agricultural building to two number C3 (dwelling houses) to include timber cladding to walls, timber windows and doors and seamed metal roof.

Decision

The appeal is allowed and approval is granted under the provisions of Schedule 2, Part 3, Class MB of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) (GPDO) for the conversion of a redundant agricultural building to two number C3 (dwelling houses) to include timber cladding to walls, timber windows and doors and seamed metal roof at the redundant agricultural barn, Horsham Road, Five Oaks, Billingshurst, West Sussex RH14 9AT in accordance with the terms of the application Ref DC/14/0711, dated 9 April 2014, and the plans submitted with it.

Reasons

1. The proposal is for the conversion of an open-fronted barn to two dwellings. The external works would consist of the provision of external walls, windows and doors and roof cladding. Further details of the proposal are provided on the application form. The proposal falls within Class MB of the GPDO and is not one of the exceptions as listed in paragraph MB.1. It is therefore permitted development subject to the conditions and limitations as set out in the GPDO and the prior approval procedure is applicable.

2. The appellant has claimed that he did not receive notification of the Council's decision within the 56 day period from receipt of the application which is required by paragraphs MB.2.3 (b) and N (9) (c) of Schedule 2 to the GPDO.

3. The parties agree that the application was accepted as valid by the Council on 10 April 2014. The 56 day period following that date would have expired on 4 June 2014. The Council's decision is dated 3 June but the delegated applications assessment sheet was not authorised until 4 June. It is clear therefore that the decision could not have been sent out any earlier than the 56th day following the date of receipt of the application.

4. The appellant states that he received the decision by post on 9 June and that the Council's website was updated with details of the decision on the same day. The Council has not commented on this statement or provided any evidence to the contrary. If the decision was posted on 4 June it is clear that it would have been received by the appellant after the 56 day period and therefore that the postal notification did not take place within the statutory period.

5. The appellant states that the decision was not e-mailed to him. The Council has not commented on this statement. There is no evidence that the Council notified the appellant electronically within the statutory period. For these reasons, on the balance of probability I find that the Council did not notify the appellant of its decision within the statutory period. The GPDO grants deemed planning permission in these circumstances.

6. The Council's decision is on the basis that the proposal would conflict with paragraph 55 of the National Planning Policy Framework (the Framework). Paragraphs MB.2 (1) and (2) of the GPDO set out the matters for which prior approval must be sought from the local planning authority. These include whether the location or siting of the building makes it otherwise impractical or undesirable for the change of use. Paragraph N(8) requires the local planning authority to have regard to the Framework so far as relevant to the subject matter of the prior approval.

7. I saw on my visit that there is a garage with a convenience shop in close proximity to the site and that a bus stop with regular services to Billingshurst is within easy walking distance. The site is not isolated and the proposal accords with the core planning principles in paragraph 17 of the Framework in terms of the sustainability of the location.

8. For these reasons there is no conflict with any of the conditions or limitations in Class MB or paragraph N of the GPDO that would render the prior approval procedure inapplicable.

Conclusions

9. I conclude that the appeal should be allowed on the basis that permission has been deemed to be granted. The appellant should be aware that Class MB.2 (3) of the GPDO requires that the development shall begin within a period of three years beginning with the date on which the 56 day period from receipt of the application by the Council expired.

Nick Palmer

INSPECTOR