



Our Ref: RID813/RF

8th October 2009

Judith Vokes
Development Control
Ryedale District Council
Ryedale House
Malton
North Yorkshire
YO17 7HH

RYEDALE D.C.

12 OCT 2009

DEVELOPMENT CONTROL

Dear Judith

**FORMER WAAF SITE, WOMBLETON AERODROME, COMMON LANE
WOMBLETON (09/00369/FUL) – LAWFUL USE OF THE SITE**

Further to our recent telephone conversation, please find enclosed four copies of the legal advice prepared by Walton and Co in respect of the use of the application site.

As you will see from their covering letter and associated report, they have addressed the issue of abandonment and advised on the significance of the 1981 planning permission, the Section 52 agreement and the current use of the site.

Their advice is summarised in the associated covering letter which confirms the use has not been abandoned, the condition attached to 1981 permission can no longer be enforced and that an injunction to compel the demolition of the buildings would fail.

I trust this additional supporting information provides you with greater clarity on the lawful use of the site and the issues relating to the previous permission and S52 Agreement, such that the application can now be taken to committee.

Should you have any further queries in relation to this, please do not hesitate to contact myself or my colleague Richard Irving.

Yours sincerely

**Rachel Flounders BA (Hons) PgDip MRICS
Senior Planner**

Encs

cc. Ron Smallwood

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RYEDALE D.C.

12 OCT 2009

Our ref:

JRC
DEVELOPMENT CONTROL

Your ref:

Date:

07 October 2009

FAO Mr R. Irving
ID Planning
Atlas House
31 King Street
Leeds
LS1 2HL

Dear Sirs

Our Mutual Client: Mr R Smallwood
Former WAAF Site, Wombledon Aerodrome, Wombledon ("the Site")
Planning Application 09/00369/FUL ("the Planning Application")

We write with reference to the above matter and the Planning Application which is under consideration by Ryedale Council. Our discussions and recent site visit have identified four particular legal issues which you would like our advice upon. These are as follows:-

1. Has the residential use of the nine existing dwellings on the Site been abandoned?
2. What is the significance of the fact that the last planning permission granted; namely planning permission 3/154/17B dated 8th April 1981 which was stated by condition to be a temporary planning permission expiring on 1st April 1986 when the use was required to be discontinued and the concrete huts demolished (unless an extension of time had been agreed with the local planning authority)?
3. What is the significance of the Section 52 Agreement dated 7th April 1981 (associated with planning permission 3/154/17B) which required the immediate demolition of each of the temporary dwellings as and when they became vacant, and the associated?
4. What is the significance of the current use of the Site?

We have enclosed a detailed Advice Note which sets out our conclusions on these four issues. These are based upon a review of your file, our instructions, a site visit and copies of the 1981 Planning Permission and Section 52 Agreement. For ease of reference, a summary of the conclusions on each of the four issues is also set out below:

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1. Abandonment

- (a) The precise period of non-use is unclear but is unlikely to have been long enough to represent conclusive evidence of abandonment. In any event, one of the buildings is still in residential use and the occupier also appears to use some of the other buildings for storage.
- (b) Although works would be necessary, the physical condition of the buildings is not such that further residential use would be impossible. There is clear evidence within the buildings of domestic features such as fireplaces and wallpaper.
- (c) The only potential intervening use appears to be the use of the land surrounding the buildings for open storage of motor vehicles and scrap. This appears to subsist alongside the residential occupation of the Site at the moment rather than replacing it.
- (d) Therefore there are strong grounds for concluding that the residential use of the Site has not been abandoned.

2. The 1981 Permission and the Condition

- (a) It is not known whether the cessation of use of the dwellings occurred on or before 1st April 1986 or not. However, it is clear that one of the dwellings is still being used for residential purposes and has in all probability been for well over four years and probably ten. On this basis, a breach of this element of the Condition is now incapable of enforcement.
- (b) With regard to demolition, the buildings have remained for some 23½ years following the expiry of the date by which they should have been demolished. This element of the Condition is also incapable of enforcement but even if it were not, it would not result in a cleared site because there is no requirement to restore the Site.
- (c) Therefore the condition attached to the 1981 planning permission is redundant and can no longer be enforced either to secure the demolition of the buildings, or in all likelihood, to prevent their continued residential use.

3. The 1981 Section 52 Agreement

- (a) Our conclusion is that there are strong grounds for concluding that any application to the High Court by the Council for an injunction to compel the demolition of the buildings pursuant to the Section 52 Agreement would fail because:
 - The Limitation Act 1980 prevents the enforcement of any breach of a deed after the expiration of more than 12 years from the date the breach first occurred. It is likely that the obligation to demolish the dwellings was triggered more than twelve years ago. Whether it is applied expressly, or (if this is not possible) by analogy in equity, a

claim for enforcement of the requirement to demolish is now time barred and/or would be considered to be a "stale claim" by the Court;

- In any event, the High Court will take some significant persuasion that a requirement which the Council has not enforced for some 23½ years should now be enforced, particularly having regard to the fact that the Site is still occupied for residential purposes (probably lawfully); and
- The Court would be unlikely to be convinced that demolition will necessarily have the desired effect because there is no requirement to remove rubble or restore the Site following demolition.

4. Intervening Uses

- (a) The occupier of the one dwelling that is still occupied has spread out and is storing motor vehicles and other scrap on the open land surrounding the buildings.
- (b) Given the length of time of his occupation, there is a strong possibility that the Site could now have a lawful mixed use for residential use and the unrestricted open storage of scrap materials, including motor vehicles, with an even greater impact upon the open countryside.

We trust this confirms our advice in this matter. However please do not hesitate to contact us if we can assist further.

Yours faithfully

Walton & Co

cc Mr R Smallwood

Enc.

RYEDALE D.C.

12 OCT 2009

DEVELOPMENT CONTROL

Mr R Smallwood

**Former WAAF Site
Wombleton Aerodrome
Wombleton**

Advice Note

October 2009

Mr R Smallwood

Former WAAF Site, Wombleton Aerodrome, Wombleton ("the Site")

Planning Application 09/00369/FUL ("the Planning Application")

Advice

1. Introduction and Background

- 1.1 Our understanding of the planning history is gleaned from the one page summary document on your file entitled "Former WAAF Site, Wombleton Airdrome, Nawton Application No. 3/154/17/PA, as well as your Planning Support Statement, submitted with the Planning Application.
- 1.2 The site is the former Women's Auxillary Air Force (WAAF) Site, associated with Wombleton Aerodrome ("**Site**"). Situated on the site are nine buildings. The Brooks Ecological Bat Roost Survey submitted with the Planning Application confirms that the buildings were originally temporary 'mess' dwellings dating from the Second World War (presumably associated with nearby RAF Wombleton which became operational in 1943).
- 1.3 It is understood that temporary planning permission for the residential use of the buildings on the Site as dwellings has been continuously renewed since 1949. In particular:
- In 1975, planning permission 5/4/66(3) for the temporary residential use was granted on appeal.
 - In 1979, planning permission was refused for the continued use of the buildings as dwellings because of the deterioration in their condition.
 - Subsequently, enforcement action was taken pursuant to the 1975 planning permission which had required the use to cease by 30th June 1978.

It has not been possible to obtain copies of these documents from the Council.

- 1.4 On 8th April 1981, planning permission was again granted for the "*continued use of 9 huts as residential accommodation*" ("**1981 Permission**"). This was granted notwithstanding the earlier refusal and enforcement action. The 1981 Permission was subject to a condition which stated that "*This shall be a temporary permission for five years only expiring on 1st April 1986, when the use hereby permitted shall be discontinued and the concrete huts demolished unless an extension of the period has previously been approved by the LPA*".
- 1.5 At the same time, a Section 52 Agreement dated 7th April 1981 was entered into by the Council and the then Owner, Mr Harry Wass pursuant to Section 52 of the Town and Country Planning Act 1971. Clause 1 stated that "*The Owner of the property hereby*

covenants that each of the temporary dwellings will be immediately demolished as and when it becomes vacant and that no replacement buildings whatsoever either of a temporary or permanent nature shall be erected on the property".

2. The Current Position

- 2.1 Today, only one of the nine dwellings remains in occupation. The occupant of that dwelling is using the remainder of the land for the open storage of motor vehicles and various other scrap items and has done for some time. None of the dwellings have ever been demolished.
- 2.2 It is not known when the other eight dwellings were vacated.

3. The Planning Application

- 3.1 Planning application 09/00369/FUL was submitted to Ryedale Council on 8th May 2009 and validated by the Council on 21st May 2009 ("**Application**"). The Application is for the "*demolition of existing unoccupied pre-fabricated dwellings and erection of 1 no. five bedroom dwelling with integral double garage*". The Application is currently under consideration by the Council.

4. Issues Arising and Summary of Conclusions

- 4.1 The planning history of the Site is clearly an important material consideration in the determination of the Application. During the course of determination of the Application, a number of issues concerning the planning history have arisen which Walton & co have been asked to advise upon. These are as follows:
1. Has the residential use of the nine existing dwellings on the Site been abandoned?
 2. What is the significance of the fact that the last planning permission granted; namely planning permission 3/154/17B dated 8th April 1981 which was stated by condition to be a temporary planning permission expiring on 1st April 1986 when the use was required to be discontinued and the concrete huts demolished (unless an extension of time had been agreed with the local planning authority)?
 3. What is the significance of the Section 52 Agreement dated 7th April 1981 (associated with planning permission 3/154/17B) which required the immediate demolition of each of the temporary dwellings as and when they became vacant, and the associated?
 4. What is the significance of the current use of the Site?
- 4.2 Our conclusions on the four issues set out above can be summarised as follows:

1. There are strong grounds for concluding that the residential use of the Site has not been abandoned, despite fact that eight of the buildings are not occupied;
 2. The condition attached to the 1981 planning permission is redundant and can no longer be enforced to secure the demolition of the buildings, and in all likelihood, to prevent their continued residential use.
 3. There are strong grounds for concluding that any application to the High Court by the Council for an injunction to compel the demolition of the buildings pursuant to the Section 52 Agreement would fail; and
 4. There is a possibility that the Site could now have a lawful mixed use for residential use and the unrestricted open storage of scrap materials, including motor vehicles, with an even greater impact upon the open countryside.
- 4.3 A detailed explanation of these conclusions is set out below. This is based upon a review of your file, our instructions, a site visit and copies of the 1981 Planning Permission and Section 52 Agreement.

5. Issue 1 - Abandonment

- 5.1 Part of the case for the grant of permission pursuant to the Planning Application, centres around the current permitted use of the existing buildings. In response to this issue, the Council has queried whether the residential use of the buildings has in fact been abandoned.

The law of abandonment

- 5.2 Abandonment is a judge made concept that has arisen out of court judgments. The overriding principle of abandonment is that if a use is permanently discontinued then the revival of that use constitutes development for which planning permission is required.
- 5.3 The abandonment of residential use is a particularly difficult matter to prove. It is possible for a property to remain unused and derelict for a significant period of time (e.g. 30 years or more) without use rights being lost. Whether this is in fact the case very much depends upon the relevant circumstances and whether the reasonable person with knowledge of those circumstances would consider that abandonment has in fact occurred. Those circumstances will include:-
- (a) The physical condition of the building(s);
 - (b) The period of non-use;
 - (c) Whether there has been any intervening use; and
 - (d) Evidence regarding the Owner's intention.¹

¹ Trustees of the Castel-y-Manach Estates v. Secretary of State for Wales & TaFF Ely BC [1985] J.P.L.

Application to the facts

- 5.4 The first and most important point to note with respect to abandonment is that one of the dwellings is still occupied for residential purposes. Moreover a site inspection suggested that the person living in that dwelling may have 'spread out' and is using some of the other properties for the storage of certain domestic items. This is clear evidence of an actual residential use as well as an intention not to abandon the residential use of the Site.
- 5.5 With regard to physical condition, the Brooks Ecological Bat Survey highlights that the buildings are somewhat in disrepair and some works would certainly be necessary in order to bring these buildings back into residential occupation. However, our site visit also revealed that one can still enter the buildings (subject to overgrown vegetation) and photographs taken highlight retained features such as wallpaper and fireplaces. Whilst repair works would undoubtedly be necessary to enable further residential use, on balance, it is not considered that the physical condition of the buildings alone would justify a conclusion that abandonment had occurred.
- 5.6 The period of non-use of the now vacant dwellings is unknown. Nevertheless, given the presence of domestic physical features such as fireplaces and wallpaper, it is not considered that the period of non-use of those unoccupied buildings would in itself justify a conclusion that their use had been abandoned. Moreover, one of the dwellings is still in residential use so any "non-use" does not encompass the Site as a whole.
- 5.7 The matter of intervening uses is considered in Section 8 below but it is considered that any current intervening use operates alongside the residential use not instead of it.
- 5.8 Overall, we conclude that abandonment of the residential use of the Site has not occurred.

6. The Condition on Planning Permission 3/154/17B dated 8th April

- 6.1 The one Condition imposed upon the 1981 Planning Permission contains two requirements as follows:-
- (a) That the residential use permitted was to be temporary and had to be discontinued on or before 1st April 1986 ("**requirement (a)**"); at which time
 - (b) That by 1st April 1986 the concrete huts must be demolished unless an extension of time has been agreed with the LPA in advance ("**requirement (b)**").
- 6.2 Interestingly, the requirements of the Condition are at odds with the requirements of the Section 52 Agreement which stated not that the buildings had to be demolished on 1st April 1986 but rather that each building had to be demolished "*as and when it becomes*

vacant". Where the Condition and the Section 52 Agreement are similar is that neither requires the reinstatement of the Site once demolition has occurred. Therefore neither can be relied upon to properly solve the problem they were intended to address.

Relevant Law – Time Limits for Enforcement Action

- 6.3 Section 171B(2) states that where there has been a breach of planning control consisting of the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
- 6.4 The recent case of *First Secretary of State v Arun DC and Brown*² has confirmed that the four year rule also applies to a change of use to a dwellinghouse which occurs in breach of a condition on a planning permission.
- 6.5 Section 171B(3) states that in the case of any other breach of planning control (i.e. other than change of use to a dwellinghouse or operational development), no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

Relevant Guidance – Temporary Permissions

- 6.6 The 1981 Permission pre-dated the Town and Country Planning Act 1990 and therefore the current provision of the 1990 Act which allows for an LPA to impose a condition upon a planning permission which requires the removal of any building or works authorised by a permission or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works for reinstatement of the land at the end of that period.³ Nevertheless, the guidance which underlies that provision is worthy of consideration here. In particular, paragraph 113 of Circular 11/95 (The Use of Conditions in Planning Permissions) states in part that:

"113. If the temporary permission is for development consisting of or including the carrying out of operations, it is important to make provision by condition for the removal of any buildings and works permitted-not merely for the cessation of the use-and for the reinstatement of the land, when the permission expires (model condition 41)."

- 6.7 Temporary conditions on planning permissions are normal conditions. Upon the expiry of the specified period, the planning permission does not 'expire' but remains subject to a condition which requires that the use shall have been discontinued. Enforcement is to be pursued by way of breach of condition rather than unauthorised development.

Application to the Facts

- 6.8 With respect to **requirement (a)** (the cessation of the use), the precise date upon which the majority of the dwellings were vacated is unknown. Therefore it is difficult to say

² [2006] EWCA Civ 1172

³ Section 72(1)(b)

whether or not the dwellings were ever vacated by 1st April 1986 in accordance with the condition.

- 6.9 However, it is a fact that one dwelling remains occupied. The circumstances which led to the current occupier of the other dwelling living on the Site are also unknown but it seems that at least one dwelling is being occupied in breach of the condition. The residential use of the Site has therefore continued (and is still continuing) in breach of the Condition for some time, and continuously for much longer than four years.⁴
- 6.10 With respect to **requirement (b)** (demolition) clearly none of the dwellings were ever demolished. The dwellings have therefore remained in breach of the requirements of the Condition for some 23½ years without enforcement action having been taken. Applying Section 171B(3) of the Town and Country Planning Act 1990, the requirement to demolish the dwellings set out in the Condition is therefore no longer enforceable.
- 6.11 Therefore, even if the Condition could be used to enforce against the continued use of the dwellings as residential accommodation (and applying the Arun case it seems highly likely that it could not), the Condition could not require the demolition of the dwellings. The Condition is therefore redundant.

7. The Section 52 Agreement dated 7th April 1981

- 7.1 The relevant covenant in the Section 52 Agreement (Clause 1) is couched in the following terms:

"...that each of the temporary dwellings will be immediately demolished as and when it becomes vacant and that no replacement buildings whatsoever either of a temporary or permanent nature shall be erected on the property"

- 7.2 It is important to bear in mind that the primary method of enforcing the Section 52 Agreement that is open to the Council is to make an application to the High Court for an injunction to compel demolition of the dwellings. In our view, there are at least four reasons why such an application would be likely to fail, namely:

- (a) The Limitation Act 1980 contains provisions which impose a time limit within which an action for a breach of contract must be brought. Where a contract is entered into under seal (i.e. as a deed) then an action for breach of contract cannot be brought after the expiration of twelve years after the date on which the cause of action accrued (i.e. when the breach happened first). The Section 52 Agreement was such a contract.

The dwellings that are empty have been empty for some time; in all probability more than twelve years. Whether applying the Limitation Act 1980 either directly, or (if this

⁴ First Secretary of State v Arun DC and Brown [2006] EWCA 1172.

is not possible) by analogy in equity, this would mean that any application by the Council for an injunction would be time barred and/or would fail as a "stale claim".

- (b) Whether or not the Limitation Act 1980 is applied to the Section 52 Agreement directly or by analogy, it is clear from reading it alongside the Condition on the 1981 planning permission that the dwellings were to have been demolished on 1st April 1986 after they had been vacated in accordance with the Condition. The Council has never sought to enforce the Condition or the Section 52 Agreement for 23½ years.
- (c) Moreover one of the dwellings is now in occupation and has been for some considerable time. The occupier of that dwelling is likely to be occupying it lawfully notwithstanding the provisions of Condition 1 of the 1981 Permission which can no longer be enforced. Furthermore, the occupier of that dwelling may have established another lawful use on the Site; namely use for open storage of motor vehicles and scrap (see Section 8 below).
- (d) As we have already pointed out in Section 4 above, the Section 52 Agreement does not require the removal of rubble or the reinstatement of the Site once demolition has occurred. In this respect the provision (like the Condition) is flawed and will not result in a cleared and open Site. It is for this reason that Wombledon Parish Council's opinion⁵ that the enforcement of the Section 52 Agreement or the Condition on the 1981 Planning Permission would have resulted in the Site now being agricultural land is mistaken. Even if a Court could be persuaded to consider granting an injunction, it would have to have in mind that the demolition of the buildings will not necessarily have the effect the provision originally intended.

7.3 In the above circumstances, our view is that the High Court would be highly unlikely to be persuaded that the granting of an injunction for the demolition of the dwellings now is in the public interest, desirable or compatible with the individual rights of our mutual client and the remaining occupier.

8. The Current Use of the Site

- 8.1 Today, only one of the nine dwellings remains in occupation. The occupant of that dwelling is using the remainder of the land for the open storage of motor vehicles and various other scrap items. None of the dwellings have ever been demolished.
- 8.2 It is clear that the open storage of vehicles and scrap has been ongoing for some time, in addition to the residential occupation of one of the dwellings. Therefore whilst we have concluded that the residential use of the Site is no capable of enforcement pursuant to the Condition on the 1981 Permission and has not been abandoned, it could be that the residential use has been joined by the presence of another lawful use. Given the length of time that the occupier of the dwelling has lived there, there may be a case

⁵ Parish Council letter dated 23rd June 2009

for the grant of a Certificate of Lawfulness of Existing Development for an unrestricted open storage use, which presumably could have a significant effect on the open countryside in this location.

9. Conclusion

9.1 To conclude:

Abandonment

- (a) The precise period of non-use is unclear but is unlikely to have been long enough to represent conclusive evidence of abandonment. In any event, one of the buildings is still in residential use and the occupier also appears to use some of the other buildings for storage.
- (b) Although works would be necessary, the physical condition of the buildings is not such that further residential use would not be possible. There is clear evidence within the buildings of domestic features such as fireplaces and wallpaper.
- (c) The only potential intervening use appears to be the use of the land surrounding the buildings for open storage of motor vehicles and scrap. This appears to subsist alongside the residential occupation of the Site at the moment rather than replacing it.
- (d) Therefore there are strong grounds for concluding that the residential use of the Site has not been abandoned.

The 1981 Permission and the Condition

- (a) It is not known whether the cessation of use of the dwellings occurred on or before 1st April 1986 or not. However, it is clear that one of the dwellings is still being used for residential purposes and has in all probability been for well over four years. On this basis, a breach of this element of the Condition is now incapable of enforcement.
- (b) With regard to demolition, the buildings have remained for some 23½ years following the expiry of the date by which they should have been demolished. This element of the Condition is also incapable of enforcement but even if it were not, it would not result in a cleared site because there is no requirement to restore the Site.
- (c) Therefore the condition attached to the 1981 planning permission is redundant and can no longer be enforced to secure the demolition of the buildings, and in all likelihood, to prevent their continued residential use.

The 1981 Section 52 Agreement

- (a) Our conclusion is that there are strong grounds for concluding that any application to the High Court by the Council for an injunction to compel the demolition of the buildings pursuant to the Section 52 Agreement would fail because:
 - The Limitation Act 1980 prevents the enforcement of any breach of a deed after the expiration of more than 12 years from the date the breach first occurred. It is likely that the obligation to demolish the dwellings was triggered more than twelve years ago. Whether applying the principles of the Limitation Act 1980 directly or,

if this is not possible, by analogy in equity, a claim for enforcement of the Section 52 Agreement is time barred;

- In any event, the High Court will take some significant persuasion that a requirement which the Council has not enforced for some 23½ years should now be enforced, particularly having regard to the fact that the Site is still occupied for residential purposes. Any action taken pursuant to the Section 52 Agreement now would be viewed by the Court as a "stale claim"; and
- The Court would be unlikely to be convinced that demolition will necessarily have the desired effect in any event because there is no requirement to remove rubble or restore the Site following demolition.

Intervening Uses

- (a) The occupier of the one dwelling that is still occupied has spread out and is storing motor vehicles and other scrap on the open land surrounding the buildings.
- (b) Given the length of time of his occupation, there is a strong possibility that the Site has a lawful mixed use for residential use and the unrestricted open storage of scrap materials, including motor vehicles, with an even greater impact upon the open countryside.

Walton & Co (JRC)

7th October 2009