

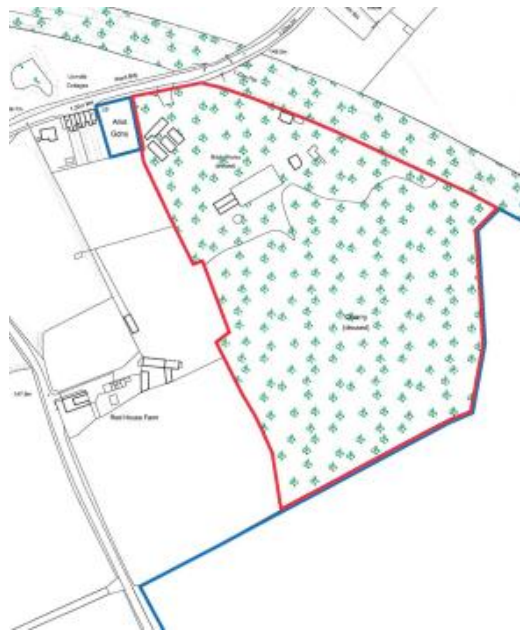
Reference: 14/00984/CL

Date submitted: 13.01.2015

Applicant: Caister Castle Trust

Location: Lionville Brickworks, Field Nos 6475 and 7262, Eastwell Road, Scalford.

Proposal: Application for Certificate of Lawfulness for part development of caravan park.



Application Details:

Site: The site lies wholly within the open countryside to the north west of Scalford and was a former quarry and brick work 'Scalford Bricks'. There are a number of derelict buildings on the site, originally used in connection with the operation of the brickworks. The site has remained unused for a substantial period of time, allowing the growth of many self-set trees forming a substantial woodland. The site is accessed directly off Eastwell Road via a gateway.

The site is neighboured by a disused railway cutting to the North and residential properties to the South.

Proposal: The applicant seeks to prove that the planning permission 72/1880/19 for the use of the site as a caravan site has lawfully commenced with the planting of trees in accordance with a landscaping scheme and the access to the site has been constructed, thereby rendering the planning permission extant.

A lawful development certificate may be granted where it is found that there is extant planning permission. But LDC should state that the development still needs to comply with any conditions

Relevant Planning History

72/1880/19 – Use of land as a caravan site: granted

72/2149/19 - Conversion of existing sheds into toilets, recreational centre and laundry – granted

07/01354/CL - Certificate of Lawfulness for residential caravan park: permitted on the 20.02.2010

20.12.2011 – Resolution that the Committee is minded to revoke the 2010 Certificate of Lawfulness (07/01354/CL) and to proceed to subsequent stages of the revocation process.

13.10.2014 - Certificate of Lawfulness (07/01354/CL) **Revoked**

Introduction:

The basis of the consideration and determination of an application for a Lawful Development Certificate for an Existing Use or Operation or Activity is upon the evidence that is submitted with the application, it does not consider the relevant planning policies or other material considerations for such a development as if it was a proposal for full planning permission.

The determination of the application rests on whether there was a lawful implementation of planning permission 72/1880/19, granted on 19 December 1972, i.e that works took place before 19th December 1977. As such, whether the permission remains ‘alive’ and cannot be enforced against and, therefore, can continue to be implemented.

For the purposes of the s.191(2) of the 1990 Act a use and/or development would be lawful in planning terms if at any time:

1. No enforcement action could be then taken against the development and;
2. The development is not in contravention of any requirements of an enforcement notice then in force.

The commencement of development is defined within s.56 of the Planning Act 1990, which states (the relevant sections highlighted in bold):

56 - Time when development begun

(1) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated—

(a) if the development consists of the carrying out of operations, at the time when those operations are begun;

(b) if the development consists of a change in use, at the time when the new use is instituted;

(c) if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b).

(2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.

(3) The provisions referred to in subsection (2) are sections 85(2), 86(6), 87(4), 91, 92 and 94.

(4) In subsection (2) “material operation” means—

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

(b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;

(c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);

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

(e) any change in the use of any land which constitutes material development.

Evidence submitted by applicant seeking to prove lawful development

The applicant has submitted the following evidence to prove the lawful commencement of the development.

1. A copy of the Statement of Truth by Mr John Hill, a Trustee of Caister Castle.
2. A copy of a letter from the Council dated 21st October 1977 confirming the details of the access.
3. A copy of two letters from Mr Powderly to Andrew Granger & Co. dated 16th April 2008 and 7th May 2008.
4. A copy of the design for the access as approved.
5. A letter from Mr Hill explaining why the development of the site did not continue
6. A copy of an undated email from Mr Powderly contradicting his earlier comments.
7. A copy of a letter from Mr Powderly contradicting his earlier comments.
8. A copy of a letter from Mr Fairhurst which seems to contradict the evidence from Mr Powderly and Mr Milburn.
9. A copy of a MBC letter to Mr Powderly.
10. A copy of a letter from Mr Stephenson.
11. A letter from Mr Hill confirming the tree planting schedule received by the Council in March 1972.
12. A copy of the case of Bedford Borough Council v S.o.S. for Communities and Local Government and Aleksander Stanislaw Murzyn [2008] EWHC 2304 (Admin).

Consideration of the Applicant’s Evidence

Information received	Assessment of Head of Regulatory Services
<p>A history of the site has been given, being that the applicants of the 1972 permission, Ferncombe Limited, owned by Dr Hill, transferred the site to another party in 1976, with it subsequently being left to another party upon their passing. The site was purchased back in 1999.</p> <p>Mr Hill states that he has first-hand experience of the site from September 1988 when he left the employ of the Valuation Office to work for the family business. He states that whilst he cannot prove the exact date that the access was created, he can state that the access road had already been installed prior to 1988.</p>	<p>Whilst this letter offers an insight into the history of the site, it does not evidence the construction of the access to the site, nor the carrying out of any landscaping works.</p>
<p>A copy of letter from Mr Beasley from MBC Planning Department dated 21st October 1977. This letter clarified that there was no need for the submission of an application to form an access to serve the caravan site as the position and details have been agreed. The letter also confirms that the details of the access had been agreed with the County Engineers and Surveyor’s Department.</p>	<p>This letter does not evidence the construction of the access to the site. The letter has merit in that it shows that the access to the site had been in discussion and had been approved at the date of the letter.</p>
<p>In the 3rd paragraph of the letter of 16th April 2008 Mr Powderly states:</p> <p>“The first recollection I have is not long after joining Melton BC as Borough Planner, driving past the site with the Council’s first CEO, the previous RDC Surveyor, Jack Milburn. We stopped briefly at his suggestion opposite the old</p>	<p>This letter establishes that there had been works to kerb the access to the site in the early 1970’s sometime after Mr Powderly joined Melton Borough Council as Borough Planner which is understood to be in 1974. It should be noted that this recollection is in context with the development of the site for caravans.</p>

<p>Brick Works entrance. He told me that permission had been given for “touring caravans” a couple of years before to Peter Hill, past Chair of both the LCC and RDC. He pointed to the newly kerbed entrance, saying that this engineering work was thought to be sufficient to keep the permission alive. I expressed doubt, but recall also saying that if for tourism and for touring caravans only, discretely sited, limited in number and with their own “self-contained” recreation facilities, it may be an asset.”</p>	
<p>A plan of the access ‘as approved’ dated August 1977.</p>	<p>The access to the site has been surveyed and the dimensions taken establish that the access is in compliance with this drawing.</p> <p>This evidences that the access has been constructed as per the approved plans, but it does not evidence the date it was constructed.</p>
<p>A letter from Mr Hill explains that his father, Dr Hill, ceased to continue developing the site due to other business interests.</p>	<p>This does not evidence the commencement of the development.</p>
<p>An email from Mr Powderly. This is an undated email to an MBC Officer, in which he seeks to clarify his earlier comments in the letter to Mr Granger, but it is quite clear that he accepts that there was an access to the site and he states “All that happened about ’72 was minimal surfacing”.</p>	<p>Even though it appears within the body of the email to be arguing that the Council were wrong to grant a certificate of lawfulness in 2010, he reiterates that there were minimal surfacing works across the grass verge to the site gate. This substantiates the claim that works took place after 1972, although there is doubt on the actual time that the works took place, but this confirms during the early 1970s.</p>
<p>Mr Powderly states in para.2 of his letter that “In early 1974 the first CEO and I toured the district looking at controversial sites. This, I well remember, included the ex brickyard. The CEO said that nothing had been done on the site since ’72.”</p>	<p>This contradicts his earlier letter of 16th April 2008 where he stated that the CEO had pointed out the newly kerbed entrance which he expressed that he thought that the “newly kerbed access ” works were enough to keep the permission ‘alive’.</p>
<p>Letter from Mr Fairhurst relating to the previous application in 2011.</p>	<p>The letter from Mr Fairhurst does not include evidence which serves to prove or disprove the applicant’s case.</p>
<p>The letter from MBC to Mr Powderly on 29 September 2011 explains the summary of the evidence that was used to grant the certificate of lawfulness under 07/01354/CL in 2010.</p>	<p>This letter does not hold any evidence to prove or disprove the applicant’s case, only circumstantial based upon the previous application.</p>
<p>A letter from Mr Stephenson, a Deputy Area Planning Officer who covered amongst others, Melton UDC and Melton and Belvoir RDC. He states “I remember that I was a little surprised that there was no sign of any work to put the ’72 permission into effect.”, “There was certainly no ‘material’ start to implement the permission to my certain knowledge” and “That we are told that a modest road access was apparently made across the grass verge to the site boundary in the early ’70s is of no relevance to the many acres of the site overall.”</p>	<p>This letter does not provide direct evidence of the commencement of works on the site. The comment on commencement of works is based on ‘hearsay’ rather than a personal account.</p> <p>The statement that “a modest road access was apparently made across the grass verge to the site boundary in the early ’70s is of no relevance to the many acres of the site overall” is unfortunately flawed because the provisions of the Act describe the extent of works required to constitute commencement and does not base them on scale (see extract of legislation at page 2 above)</p>

<p>A planting schedule for the landscaping of the site stamped with the corresponding application number 72/1880/19, dated 20.3.72.</p>	<p>This does not evidence that the landscaping of the site has been commenced or indeed agreed.</p>
<p>The case has been cited by the applicants, <i>Bedford Borough Council v S.o.S. for Communities and Local Government and Aleksander Stanislaw Murzyn [2008] EWHC 2304 (Admin)</i>.</p>	<p>This judgment relates to the determination of a Certificate of Lawful Use. The relevance of this case is that the judgement discusses the various cases relating to the determination of lawfulness. The basis of the judgement was to determine whether a breach of conditions relating to the requirement to submit landscaping and boundary treatments prior to commencement of a development meant that the development would not be lawful even if it had clearly started. In this case it was established that a breach of the conditions was not enough to render the development unlawful. Further consideration of this and other case-law relating to lawful development is discussed below.</p>

Representations

A number of representations have been submitted.

<p>Information received</p>	<p>Assessment of Head of Regulatory Services</p>
<p>Geoff Goodson - Eastwell</p> <p>Copy of representation made in 2011:</p> <ul style="list-style-type: none"> • Passes the site weekly • No works on the site until the entrance was kerbed in 1990's. • Only other works new gates post year 2000. 	<p>Sworn Statement : No actual evidence given to support their claim. This is a personal recollection of their travels past the site.</p>
<p>Mr Brewin – Salford</p> <p>He states that work on the access to the site did not take place until 1992/93. He evidences this by relating his recollection of the works taking place in relation to other land in the area.</p> <p>He also states that he has photographic evidence of the old gate that was on the access from 1955 through to 2007 when new gates and a post and rail fence were constructed, although none have been submitted to show the gates in 1955 to 2007. He states that this has been the only other work that has taken place at the site of the disused brickworks since the mid 1970's.</p>	<p>There is no actual physical evidence provided to support the claims that there was no works to the access.</p> <p>Photographs have been provided although they are undated and cannot be used to prove works or not to the access.</p> <p>The submission is a recollection is that the access works to the disused brickworks took place 18 months to 2 years after 1991.</p>
<p>D & D Mumford – Salford</p> <p>A copy of the representation submitted in 2011.</p> <p>Lived opposite the access since 1979 and have passed it twice daily for over 30 years.</p> <p>When they first moved there, the access was overgrown and dilapidated.</p>	<p>Sworn Statement : Confirm that there was an access to the site since they moved opposite the access in 1979.</p> <p>Advise that works commenced on the improvement of the access in early 1990s.</p>

<p>To the very best of their recollection, work commenced in the early part of the 1990s to improve the access.</p>	
<p>J Goodson – Eastwell</p> <p>Copy of 2011 representation:</p> <p>Travels along Eastwell Road numerous times each week as it is their main route into Melton.</p> <p>In 1968 there was no kerbed entrance to from the road to the gates into the land behind.</p> <p>In the early 1990’s the entrance on the Eastwell side of the Lionville Cottages was kerbed.</p> <p>Sometime after the year 2000 new gates were erected.</p> <p>At no time has there been any obvious sign of management of the land or work taking place in this area</p>	<p>Sworn Statement : Advice on the kerbing of the access in early 1990s consistent with other representations.</p>
<p>J Parrott – Scalford</p> <p>Copy of 2011 representation.</p> <p>Lived and farmed in the area since 10th December 1968.</p> <p>Confirms that there was no work carried out to the access before 1992.</p> <p>Has used the section of the road in front of the application site for 43 years (from 1968)</p>	<p>Sworn Statement : Recollection is consistent with other representations</p>
<p>J Pick – Scalford</p> <p>Sworn statement – copy of 2011 representation.</p> <p>Lived in Scalford since 1930.</p> <p>Has been involved in farming the land to the West of the disused brickworks since 1947.</p> <p>Has no knowledge of any construction work of any kind ever taking place off Eastwell Road before 1990.</p>	<p>Sworn Statement – Recollection is consistent with other representations</p>
<p>V Percival – Scalford</p> <p>Sworn statement - copy of 2011 representation.</p> <p>Lived in Scalford for 32 years and in Melton Borough for 39 years.</p> <p>Keen walker in the area and confirms that the access gateway was constructed in early part of 1990s and not during the 1970s.</p> <p>She remembers this as they would walk this site a lot during the springtime.</p>	<p>Sworn Statement : Recollection is consistent with other representations</p>

<p>Added for this application that during the 1970s no development took place on this site. The original access remained unaltered during the 1970s.</p>	
<p>T Pedlar – Eastwell</p> <p>Copy of 2011 representation.</p> <p>Has very clear recollection of the state of the site through the 1970's/1980's to present day.</p> <p>Hunted regularly from when they were 12 in 1976. The hunt accessed the site during the 1970's and 1980's when the hounds were hunting in the Scalford Area.</p> <p>The gateway was not constructed with edging stones and the same fencing as now. There was no evidence of recent work to the entrance, work to start a toilet block or cleared areas of earth, hard standing or concrete pads as might be expected for even part of a caravan site under development.</p> <p>Travelled back and forwards on that road many times a week. Their clear recollection is that the gateway was altered much later, in the 1990's when the entrance was set back, an enlarged area was covered in tarmac, coping stones were inserted, the fencing renewed and later still new gates were put on, to achieve the current appearance.</p>	<p>Sworn Statement - Recollection is consistent with other representations.</p> <p>Childhood recollection of the site in 1970s.</p>
<p>B Bryan – Scalford</p> <p>Lived in Scalford since 1966. Drove past the site daily throughout the 1970s. Visited the site from 1966 and throughout the 1970s with their children when they were young.</p> <p>The current access to the site was not constructed in the 1970s, nor was any alteration done to the entrance to the site during the 1970s. There was significant reconstruction of the entrance around the end of the 1980s.</p>	<p>Recollection is similar to others provided, whereas they state that the access was reconstructed in late 1980s rather than early 1990s.</p>
<p>E Bryan – Scalford</p> <p>Lived in the area since 1966 frequently travelled along Eastwell Road. No work undertaken at the site during the 1970s and no evidence of work seen when they were elected as a Borough Councillor in 1979.</p> <p>To argue that a conversation was held with regards to kerbing is not evidence of works to the site. In any case, had any such kerbing been undertaken it could have only been as repairs to the already existing entrance.</p> <p>To claim that the submission of a landscape scheme, if it were, is evidence of work being undertaken cannot, in any regard, be substantial.</p>	<p>Recalls no work in 1979 and if there had been it would have been as repairs to the existing entrance.</p>

<p>The landscaping scheme was a condition to be fulfilled before work started.</p>	
<p>The claim of lawfulness is not valid.</p>	
<p>Mr & Mrs Pizer – Scalford</p> <p>From the time they were 6/7 they used to check and feed animals kept around Red House Farm. Recalls no works to take place on the site in respect of</p> <ol style="list-style-type: none"> 1. No caravan ever been kept on site 2. No works took place involving the old access before 1990 3. No landscaping scheme being implemented to the North, South, East and West boundaries. 4. No buildings to my knowledge have been constructed on the site since 1969. <p>Is of the opinion that as tthe site was sold in 1976 and the access plans were not submitted until 1977 this brings into conflict the statement that Mr Hill makes in his letter that whilst he did not know when the access was constructed it would have been when it was owned by Dr Hill.</p>	<p>Recollection is consistent with other representations.</p> <p>Second point has been taken up with the agent for the application and will be added later.</p>

Consultations

Consultation responses have been received from Melton Mowbray and District Civic Society, LCC Ecology and Scalford Parish Council.

<p>Melton Mowbray and District Civic Society</p> <p>Gives a brief précis of the case and concludes that because the evidence does not appear to be incontrovertible permission should be refused</p>	<p>The burden of proof for the determination of the application is on the ‘balance of probability’ and as such the comments of ‘incontrovertible’ suggested is an incorrect approach..</p> <p>The evidence may not be incontrovertible, i.e. beyond all reasonable doubt, much the same as a criminal burden of proof, it does not give grounds to refuse to grant a certificate.</p> <p>There is no evidence provided to either confirm or counter that of the applicant.</p>
<p>LCC Ecology</p> <p>The response received relates to the previous application for full planning permission for the development of the site, 13/00276/FUL.</p>	<p>The response from ecology recommends works and surveys relating to the proposed development of the site.</p> <p>Whilst such matters are important in the development of the site, there is no weight that can be given such representations in this case.</p> <p>There is no evidence provided that either counters or supports the application.</p>
<p>Scalford Parish Council: oppose this application.</p> <p>In August 2014 Melton Borough Council rescinded the Certificate of Lawfulness that the Borough has issued, since then nothing has</p>	<p>Whilst there is no substantiating documentary evidence to prove the claims, the evidence that has been submitted must be considered on its own merits on the balance of probability.</p> <p>Whilst the view of the Parish Council is</p>

<p>changed. The applicant has not put forward any evidence to substantiate the claims that the work on the access was carried out in the timescale required ie. Between 1972 and 1977. Letters from residents of Scalford during this period confirm that no work to the access was done within the above timescale.</p> <p>It would appear from the correspondence provided that the applicant does not know who is supposed to have carried out this work. The Parish Council feel it is up to the applicant to prove when and how and by whom the said work was done.</p>	<p>understood with regarding to the statements of the applicant, it is the decision of the applicant to submit what they consider to be enough evidence to substantiate their claim.</p> <p>There is no evidence in the representation from the Parish Council to assist with this determination.</p>
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Considerations

The applicants submit that the planning permission 72/1880/19 has been lawfully implemented, therefore it remains extant and that the planning permission remains ‘alive’ and the development can continue. The evidence that has been submitted by the applicant seeks to prove that the development commenced with the carrying out of two elements of the development of the site:

- **Landscaping of the site has commenced in accordance with a landscaping scheme.**
- **The access to the site has been constructed and that this was carried out before the expiry of the planning permission, and/or**

The burden of proof for the evidence that has been submitted is on the balance of probability, not the criminal burden of proof of being in no reasonable doubt.

Due to the age of the planning permissions, the records held by the Borough and County Councils are lacking in detail and information. Indeed, some of the information provided by the applicant from the Borough and County Councils is not held in our records.

(a) The landscaping scheme

The landscaping scheme to which the applicant refers appears to have been the part of a scheme that was submitted at the time of the planning application, 72/1880/19. As the submitted scheme was intended to be part of the application documents and was not submitted later in discharge of condition 4 following the grant of planning permission. The application and the drawings and landscaping details were all submitted and received by the Local Planning Authority on 22 March 1972. Planning permission was granted on 9 December 1972. Indeed the description of the planning application states:

Specification of tree planting as required in detailed Planning Consents Nos. 6355/64 dated 29.12.64 and 446/67 dated 21.3.67 relating to two areas of land comprising the whole site (see note attached).

It can be assumed from the planning permission that was eventually granted and notes attached to the planning file that the landscaping schedule that was submitted was not acceptable and it was necessary for a condition requiring a further landscaping scheme, including surface treatments etc. The records held by the County Council have been checked and there is no record of a subsequent submission of a landscaping scheme, so it can be deduced, on the balance of probability that the requirements of the condition were not formally discharged.

This results in the need to consider whether condition 4 of the planning permission is a ‘condition precedent’ and whether failure to comply with it would result in an unlawful implementation of the planning permission. Case law in this area has developed over several years and the current position is that it the failure to fulfil conditions should not be interpreted as invalidating a commencement if development if any of the following apply:

- (i) the developer has done everything practicable to meet the condition;

- (ii) subsequent agreement has been reached on compliance with the condition, such as by retrospectively discharging the condition within the permissions lifetime by obtaining approval or carrying out works;
- (iii) the condition has been complied with in substance but written notice of approval had not been obtained;
- (iv) the planning authority has agreed that development could commence without compliance with the condition;
- (v) if it was irrational to take enforcement action against the works, they were effective to commence development.
- (vi) Whether such conditions “go to the heart of the permission”.

(i) Has the development done all they could do to meet the terms of the condition?

Comments have been received from those opposing the application that the landscaping scheme was not carried out. Certainly, it would be extremely difficult to establish that trees and shrubs were planted during the lifetime of the permission due to the site now being extremely overgrown and some 38 years passing since the permission would have expired.

There is no record of a landscaping scheme being submitted subsequent to the granting of the planning permission 72/01880/19. The applicant advises that some tree planting has been carried out on site in accordance with the landscaping scheme. In this regard, it is considered that this is irrelevant on the basis that there is no evidence of the submission and approval of an approved scheme.

(ii) Have the requirements been agreed retrospectively?

There is no record of the requirements of the landscaping condition being agreed at any time.

(iii) Has the local planning authority agreed that works could commence without full compliance with the relevant conditions?

There is no record of agreement that works could commence in breach of the condition, or of agreement being made between the developers and the Borough Council to permit the works to take place without discharging all of the required conditions.

(iv) The requirements of the condition have been complied with in substance, but the formalities have not been completed?

Whilst there is evidence of the submission of a landscaping schedule, this was submitted as part of the application. It is considered that whilst it may have been submitted it must not have been considered acceptable at the time or a condition requiring the submission of a landscaping scheme would not have been required or suggested (otherwise it would have no purpose). There is no evidence of the condition being complied with in any way.

(v) There has been a technical breach of planning control, but it would be irrational and an abuse of power for the Local Planning Authority to take enforcement action?

The Local Planning Authority has not considered whether enforcement action should be taken against any use of the site based upon the breach of the condition of the permission.

Planning case law has shown that breaches of a landscaping scheme *can* result in the unlawful commencement of development. However in this case it would be highly irrational for enforcement action to be taken as clearly there is a limited amount of development and no need for it to be screened by landscaping

(vi) Does the breach of the condition go to ‘the heart of the permission’

The landscaping works would be supplementary to the permission to which they relate and the main development works are not dependent upon them. (This is not to comment on the value or desirability of the landscaping, simply to explain that the physical works for which permission was granted could still proceed without the landscaping being present).

(b) Whether the access to the site has been constructed and that this was carried out before the expiry of the planning permission

There is a letter on file, dated 21.10.1977, which suggests that conversations took place between the applicant and the LCC Surveyor in respect of the access and that works were agreed. A drawing of the access has been provided and it is considered that the details of the access to the site were agreed at the relevant time

The letter from the Mr Powderly the then Borough Planner recalls a conversation with the CEO of Melton Borough Council whilst outside of the site RDC that the CEO stated that he considered that the creation of the access was deemed to keep the permission alive. This is also at the relevant time.

There is no actual 'physical' evidence in the form of photographs or invoices, only the recollections of those involved and those to have purported to have seen the access.

The majority of the submitted comments seek to establish, via different recollections, that there was no works to the access until a long time after the permission expired, that being between the late 1980s through to the early 1990s. Recollections vary from considerations that had any kerbing been carried out in the 1970s would have been for repair only to comments that there had been no kerbing until the early 1990s. Recollections of the access to the site in the 1970s was simply relating to what they considered to be the existing access into the site from the brickyard and Ordnance days.

Abandonment

It is considered that the use could not be considered dormant, as the use never actually commenced and as such the use never achieved the ten years necessary to be considered lawful, or an established use, as it would have been considered prior to the 1990 Act.

The issue of abandonment, from the information and case-law, considers actual uses that have taken place, albeit the criteria considered in respect of abandonment could be useful and applied to this application it would have the following outcomes:

The 4 criteria for abandonment, tested and accepted as being correct in *Hughes v Secretary of State for the Environment, Transport and Regions* are:

- (1) the physical condition of the property
- (2) the period of non-use
- (3) whether there had been any other use; **and**
- (4) evidence of the owner's intentions

Taking each in turn:

(1) The access has been created and this is in accordance with the approved drawing. There is the toilet block, but this cannot be considered as part of the alleged extant permission as this does not relate to it. Nevertheless, this is positioned in accordance with the approved plan at the time. The site is extremely overgrown and has never been used as a caravan site.

(2) The use never commenced on site. Construction allegedly commenced on the access some time, prior to the expiry of the planning permission, as well as the carrying out of some landscaping works. No evidence, nor mention, has been given advising that there were any further works to the site in line with the permission to develop as a caravan site.

(3) There is no indication that the site has been used for any other purpose since the development commenced. The site is in such a state, including the old brickyard buildings close to the entrance to the site, that it is considered that it was unlikely that the site had been put to any other use.

(4) It is understood from the letter from Mr Hill of 30 September 2014 that the owner of the site at the time, Dr Hill, that concentrating on other business ventures led to him losing interest in the development of the site.

Planning law has established that a valid planning permission that is capable of being implemented according to its own terms cannot be abandoned. In this case, whilst permission has been granted, the question is whether it remains extant following commencement rather than the question of abandonment.

The determination rests with the issue of whether there has been a lawful commencement of development under the permissions granted in 1972.

Conclusions

As the consideration of lawful development certificates revolves on the consideration of the evidence submitted on the balance of probability, rather than the criminal burden of proof being beyond reasonable doubt, the test of the evidence is considered to rest solely on the landscaping scheme submission and the creation of the access.

Case law has established that a breach of condition that merely states that something was to be done before development commenced did not preclude lawful commencement. In such circumstances, if development were to go ahead, the non-compliance would be a breach of condition only and the Local Authority would have to seek compliance with the condition.:

The landscaping works fall within this description and, accordingly, it is considered that the breach of this condition is not of a nature that precludes the lawful commencement of the development.

The access

A survey of the access revealed that the works are in accordance with the details submitted and approved.

One of the commenters has raised an interesting point and that is the sale of the site in 1976 and the purported carrying of the access works before the expiry of the planning permission in December 1977. There would have been around 12+ months during which the land was not in the ownership of Ferncombe and Dr Hill, a period during which the access was purported to be constructed. Indeed the drawings of the access were carried out during August 1977. The letter from the Borough Planner on 21 October 1977 followed a meeting at which Dr Hill attended along with representatives of the planning department and the County Engineer and Surveyors Department, which indicates Dr Hills continued interest in the site despite disposing of the site in 1976.

During the determination of the application 11/00329/VAC, a number of letters were received and these are covered in the attached **Appendix A**. At the time, these were considered to be sufficient to establish that the development had not commenced and that the development could not continue and resulted in the revocation of the Certificate of Lawfulness in October 2014.

The determination of the application rests upon the consideration of the evidence that has been supplied, both for and against. There has been no documentary or photographic evidence submitted that would categorically determine whether or not works to the access were in fact started by the date of the expiry of the planning permission.

The burden of proof to consider the evidence is that upon the balance of probability, not the criminal burden of proof being that beyond all reasonable doubt. Indeed there is no absolute proof given by either side that could be used to categorically prove the existence or not of the access.

For the purposes of s.56 of the Planning Act 1990, the commencement of development is to be taken as being began when a material operation is to have taken place, which could be ANY operation in the course of laying out or constructing a road or part of a road. **It is considered that the access currently present is sufficient to constitute commencement of the works (and therefore implementation of the permission) under s.56 and as such the key issue is the date it took place.**

The evidence does suggest, on the balance of probability, that the details were submitted and approved. The question of the date of works to commence the construction of the access is less clear, there are

reports from both the applicant and those who have submitted representations that there was an access to the site, but was this simply the old access or were other works carried out? Indeed there is an account from the Borough Planner of the time where he recalls in the early 1970s being pointed to a “newly kerbed access” by the then Chief Executive Officer of Melton Borough Council. There are several recollections of works to the access taking place in the late 1980s early 1990s.

It is noteworthy that the Committee considered the statements of those making representations against the granting of a Certificate of Lawfulness in 2010 was considered sufficient to revoke the Certificate of Lawfulness. There has been no further evidence submitted to reinforce these claims.

The consideration of the application rests upon the evidence that has been submitted to support both sides of the argument.

For:

- **The access is built and remains present, and accords exactly with the permission**
- **A letter from the then Borough Planner dated 21.10.1977 states that it will not be necessary to submit an application for the formations of an access to serve the proposed caravan site and that the details of the access were satisfactory.**
- **A letter from Mr Powderly, the Borough Planner at the key date of 1977, states his recollection of a meeting with the Chief Executive Officer of Melton Borough Council outside of the site where the CEO pointed to a newly kerbed access stating their opinion that the works would be enough to keep the permission alive.**
- **Various recollections that the access was constructed before the permission expired.**

Against:

- **There have been submitted various recollections from a number of sources that there were no works to the access to the site until the late 1980s/early 1990s, some taken as sworn statements.**

The argument falls largely upon recollections from various parties on the timing of the works. It is considered that there is no basis on which one version of events can be taken as more reliable than an opposing version. However the material ‘for’ granting the Certificate also includes some written material of appropriate date and relevant content and it is considered that in the exercise of assessing the ‘balance of probability’ (on which this decision must be based) these adds weight towards granting permission which is not counter-balanced by any material supporting the case ‘against’.

Recommendation: APPROVE

Reason: It is considered, on the balance of probability, that the evidence available demonstrates that the development comprising the use of the land as a caravan site, approved under planning permission 72/1880/19, lawfully commenced within the terms of the permission, by virtue of the laying out and construction of the access road from Eastwell Road . Accordingly; the planning permission for the use of the land, as a caravan site remains extant in planning terms and the development of the site in accordance with the permission can continue.