Bourne Valley Associates Ltd

Planning Statement

in support of an application for

A Certificate of Lawful Existing Use

At

Cedar Bungalow, Fox Amport, Andover, Test Valley, Hampshire, SP11 8JA

For Mr Patrick Langdown

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1. *Introduction*

This Statement is in support of an ap[plication for a Certificate of Lawful Established Use submitted to Test Valley Borough Council (TVBC) for Cedar Bungalow, Fox Amport, Andover, Test Valley, Hampshire, SP11 8JA. The application is submitted by Bourne Valley Associates, acting as agent on behalf of Mr Patrick Langdown, who owns the freehold of the site and the adjacent agricultural land, part of the Fox Estate.

The application is made under Section 191 of the Town and Country Planning Act 1990 (as amended), to seek to confirm *"whether an existing use of buildings, land, operational development or activity in breach of a planning condition is lawful."*

If one were to review the planning history of the site one might initially infer that the bungalow, which has been on the site for many years, benefits from a legitimate planning permission. However, detailed examination shows that this inference would be incorrect, as the development does not accord with the permission, and therefore there is a need to regularise, or legitimise, matters.

In investigating matters, we have sought and benefitted from Counsel's opinion. In this statement we draw from that opinion, providing clear quotations which support a case for a Certificate.

A Certificate of Lawfulness of Existing Use regularises a breach of planning control and has the effect of making the breach exempt from enforcement action by the planning authority. Where the change of use of a building to a single house has taken place, enforcement action must be taken within four years from the date of the breach of planning control. In this case, it is certainly a single house and was constructed on what was previously agricultural land. Therefore, the so-called "4 year rule" applies, and not the "10 year rule" that is appropriate in non-residential cases or where there have been multiple residential developments. There are exceptions to the 4 year rule, such as where the applicants have hidden or secreted the dwellinghouse, but that is certainly not the case here: it should be common ground between the applicant and the local planning authority that the property has been open to public view.

We are aware that the onus of proof in such cases lies with the applicant. Therefore, we provide photographic evidence showing the bungalow on site over the requisite period of four years. Moreover, we also provide objective evidence of residential occupation of the dwelling for over that period. Together, they amount to robust proof to support our case.

Determination of this application is based upon scrutiny of evidence. It does not turn on whether a development accords with policy. Therefore, in this statement we do not set out policy. Moreover, although a certificate may be granted on the basis that there is an extant planning permission so that development still needs to comply with any conditions or limitations imposed on the development by that original grant of permission, in this case we show that there is no such permission, and therefore no planning conditions can be applied.

2. *Site Context and Planning History*

The geographical context of Cedar Bungalow is shown in Figure 1, in which the arrow points to the cottage. The location plan shown in Drawing 02451-00 is formally submitted. It shows the property is located to the East of Hay Down Lane. The site is set outside any settlements and is thus would be subject to planning policies for the open countryside.

Figure 1 - Geographical context of Cedar Cottage

The site lies within the Fox Estate, owned by the applicant. The building is currently occupied by a worker on the estate, but he is shortly to retire, and wishes to move away from the area. Details of occupancy by the worker and his wife are set out at Section 4.2, which provides evidence of continued occupancy of the site.

We have previously requested and obtained full files relating to planning history from Test Valley Borough Council (TVBC). The information now available to both TVBC and the Estate is thus understood to be the full information that is available, but much less than would be expected of a modern planning file. There were no officers' reports at that time, for example.

The former Andover Rural District Council granted what was, in effect, an outline planning permission dated 11th October 1968 under reference 364/68 for "*the use of the site for the erection of **2 detached cottages** and garages at Fox Farm, Amport* "- further to an application dated 9th September 1968. The emphasis is ours. The application was submitted by Weller, Edgar and Co on behalf of Mr Peacock, who was the owner of the Estate at the time.

"and the plans and particulars submitted in connection therewith and subject also to due compliance with the conditions specified on attached sheet." That attached sheet set out the conditions thus:

"CONDITIONS FOR ARD 3978, 364/68

1. Plans and particulars, showing the detailed proposals for the following aspects of the development shall be submitted to and approved by the Local Planning Authority before development commences:

(a) The means of access to all buildings;

(b) The siting, design, including colour and texture of facing materials of all buildings;

(c) The layout of foul sewers and surface water drains.

2. This permission shall lapse unless detailed plans showing the particulars referred to in (1) above are submitted within three years from the date of this certificate.

3. The access- layby, including the footpath crossing and the piping of any ditch shall be constructed (and lines of sight provided and maintained) to the satisfaction of the Local Planning Authority.

4. The access shall be splayed back at an angle of 45 [degrees] and any gates provided shall be set back a distance of 15 feet from the edge of the carriageway.

5. Adequate turning space shall be constructed within the curtilage to enable vehicles to enter and leave in a forward direction and this shall be maintained to the satisfaction of the Local Planning Authority.

6. The occupiers of the dwellings shall be persons employed at Fox Farm, Amport, or employed or last employed in agriculture, as defined by Section 221(1) of the Town and Country Planning Act, 1962, or in forestry, or the dependants of such persons."

The only plan associated with that application is titled "Site Plan. Agricultural Workers Cottage, Fox Farm, Amport, Hants." The plan shows the extent of various field enclosures – the position of two cottages from a single access well into Haydown Lane and a central garage. We have submitted that plan separately as "ARD 3978 Site Plan" but, of course, it is also held in TVBC records.

In terms of discharge of reserved matters, further such matters were submitted on the 17th of February 1969. This reserved matters approval under 74/69 is dated the 12th March 1969 and stamped on the 24th March 1969. It explicitly deals with materials on the gable ends. The approval, as relevant, states:

"In pursuance of their powers under the above-mentioned Act and Order, the Council, on behalf of the local planning authority, hereby approve the detailed plans, drawings and particulars relating to

-Erection of 2 Guildway detached bungalows with attached garages on

-Pt. O.S 185, Fox Farm, Amport,

submitted on 17th February, 1969 in accordance with the conditions subject to which outline planning permission was granted under Article 5(2) of the Town and Country Planning General Development Order, 1963 under Plan ARD 3978 , in respect of use of site for the erection of 2 detached cottages and garages at Fox Farm, Amport.

This approval is subject to due compliance with the conditions imposed on the grant of the aforementioned outline planning permission and to the following:

The cedar boarding to the gable ends shall be omitted and replaced by continuing the rendered walls to eaves level."

This detailed approval [74/69] is titled Plan No ARD/3978/1.

There are four informative notes the first two of which are as follows:-

"NOTES: (1) Notwithstanding the terms of the condition attached to the outline permission requiring detailed plans to be submitted before development commences, the approval hereby granted authorises the commencement of so much of the development as is specified above. Attention is, however, drawn to the need to submit such further detailed plans, if any, as are required by the outline permission before any development other than that specified above is commenced.

(2) It is essential that this approval is read in conjunction with the outline planning permission originally granted for the development in question and with any conditions then imposed."

The elevational and internal plan details dated February 1969 for a bungalow were submitted under application ARD/3978/1 are provided by drawing 3636/1. It is our belief that the single bungalow on site has been built essentially built in accordance with the design shown on that drawing, dated 17/2/69. The information provide approved details of design and materials [outline condition 1b], some details of the nature of the drainage approved [outline condition 1c] and show the associated garage as integral to the bungalow.

A plan of the same date, 17th February 1969, is a site plan which carries the number 74/69 and ARD/3978/1. It has been stamped although the stamp is not now very clear, and is titled *"Site Plan. Agricultural Workers Cottage, Fox Farm, Amport, Hants."*

This plan, which we show as Figure 2, does **not** show a siting of a bungalow and yet curiously does show written on to the plan a hatched block marked "*Proposed Implement Shed*" and a further marked block within the main courtyard of Fox Farm, which is, of course, some distance from Cedar Bungalow, and to the South. Also within the Fox Farm complex there are written word or words, the first of which is probably "*Grain*", but the second is not legible. These written words are not material to the Cedar Bungalow site, and therefore are not reproduced in total in Figure 2.

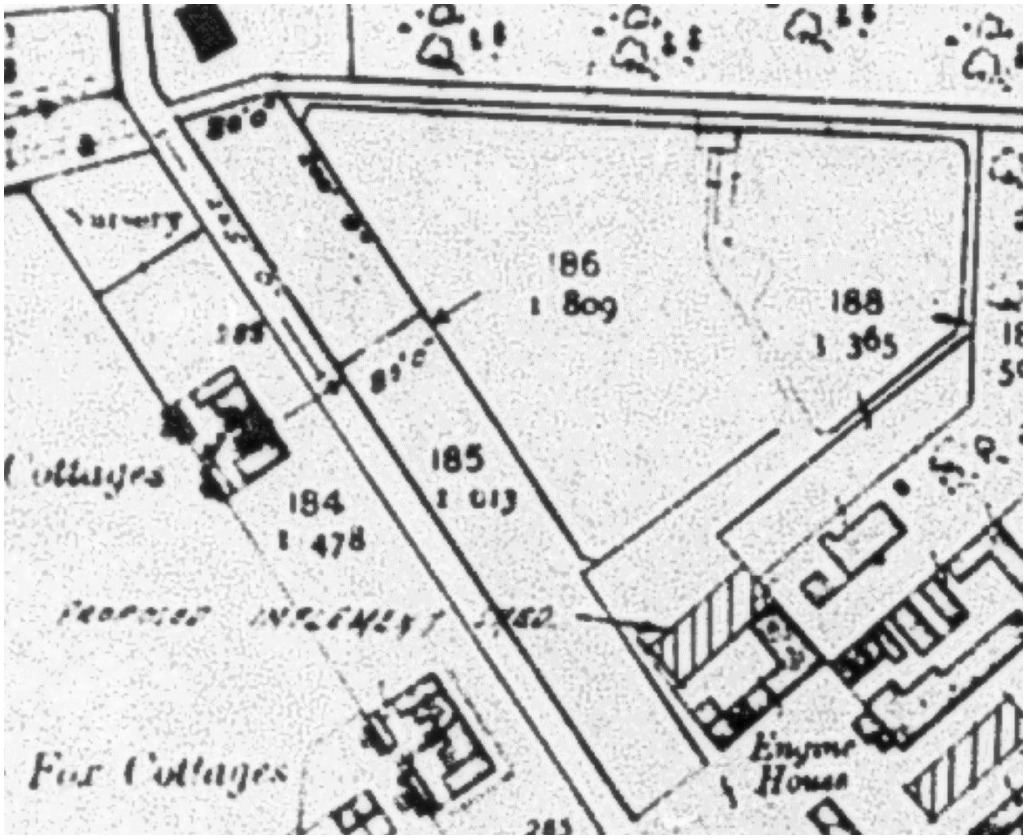

Figure 2 - Plan of site accompanying application ARD3978/1

3. *Legal interpretation of planning history and what has been built*

The interpretation of a planning permission is guided by case law, all of which directs the relevant decision maker to address the matter as a matter of interpretation and construction of such public documents in an unstrained manner. Plainly, here it was intended that the two dwellings would be subject to occupancy restrictions, to limit their use to (in short) agricultural workers. However, in this case other case law is relevant, as is described below.

To guide us on such caw law, we sought opinion from Gary Grant of Kings Chambers, a specialist practitioner in Planning and Environmental Law. He wrote the following:

"Limiting words within the wording of the permission can have a functional significance as was the case in relation to the permission for the "erection of farm worker's dwelling" in the case of East Suffolk County Council v SoSE [1972] 70 LGR at 595, but to restrict the use to lead to enforcement a condition would need to be imposed. This is particularly so following the approach adopted by the court in the case of I'm Your Man Ltd v SoSE [1998] 4PLR in which Robin Purchas QC, sitting as a Deputy Court Judge, explained that a time-limited planning permission could only be achieved in a manner which could be enforced against by means of the imposition of an effective planning condition and not by wording within the earlier description of development."

"In terms of the correct approach to interpretation of a full planning permission to construct a new dwelling on previously non-residential land this is best explained in the Court of Appeal by Keene LJ in

the case of Barnett v SSCLG [2010] 1 P&CR at [29] confirming the approach of Sullivan J (as he then was): -

> *"Permission to construct a new dwelling on non-residential land will carry with it permission to use the new building for residential purposes: see section 75(3) of the 1990 Act. Thus there is in a sense a built-in application for a change of use of land in such cases, and the extent of the land covered by the implicit permission for a change of use will normally be ascertained by reference to the site as defined on the site plan. Thus that part of the site not built on can be used for purposes ancillary to the dwelling unless there is some obvious restriction shown on the permission itself. The site boundary shown on the plans defines the area of the new use."*

A further statement endorsed in the Court of Appeal in Barnett by Keene LJ at [19] was the proposition that:-

> *"Where a full planning permission for the erection, alteration or extension of a building is granted, it is unnecessary for that permission to expressly incorporate the application plans and drawings. Precisely because the permission is a 'full', and not an outline permission, any member of the public will know that there will be plans and drawings which will describe the development that has been permitted."*

This case made clear the distinction between interpretation of an outline or in turn a full permission. Plainly - and in this case - it is important to have regard to the true meaning of each in turn.

In Handoll v Warner Goodman & Streat 70 P&CR at 627 [CA/1994] the Court of Appeal the Court were considering a case in which outline planning permission was given for a dwelling subject to an agricultural occupancy condition. A bungalow was subsequently built some 90 feet (27.4 metres) from the approved site. The relevant part of judgement of McCowan LJ is set out over the following paragraphs:-

> *"The first of those cases is Noble v. Armitage [1962 J E.G.D. 534 a decision of the Divisional Court. I need do no more than read this short passage from the first judgment, given by Lord Parker, Chief Justice, the other two judges agreeing with him.*
>
> *The short point here is really whether that enforcement notice is a good and sufficient notice. The point that is taken is that it is* ***nowhere recited or alleged that the development for which permission was given was ever carried out[1],*** *and accordingly there can be no breach of a condition attached to a development until the development is carried out. For my part, I think it is necessary and it certainly follows the cases to which I need not refer, that in an enforcement notice alleging a breach of condition the development in question must be recited and referred to.*
>
> *Here it is to be observed that what is recited is merely that planning permission was granted for the storage of coal and parking of lorries. It does not go on to say that coal has been stored and lorries parked, but that the conditions have not been complied with.*

[1] Our emphasis, and not that of Mr Grant

On that short ground, and that alone, I would allow this appeal and send the case back to the justices with a direction that they should acquit.

The other decision is Sheppard v. Secretary of State for the Environment and Another [1975] E.G.D. 837, a decision of Willis J. It is only necessary for me to read one short passage from Willis J. 's judgment at page 848:

It is clear from a number of cases dealing with enforcement notices that a planning authority cannot succeed for breach of condition unless the development to which it was attached by the planning permission has actually been carried out.

In my judgment, in the light of those previous decisions, there is force in Mr Howell's contention that the reasoning of the Divisional Court in Kerrier is flawed.

"He has a further point to make upon it however. What he says is:

"works which do not comply with the permission and any conditions to which it is subject do not constitute the implementation or commencement or a planning permission."

He continues:

"A permission is not implemented in any sense when something is done which the permission does not authorise merely because it would not have been done if permission had not been granted. He relies here on the decision of the Court of Appeal in F G Whitley & Sons Ltd v. The Secretary of State for Wales [1992] 3 P.L.R. 72. To make the point, it will suffice if I read one short passage from the judgment of Woolf L.J. at page 80:

As I understand the effect of the authorities to which I am about to refer, it is only necessary to ask the single question: are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful. This is the principle which has not been clearly established by the authorities. It is a principle which I would have thought made good sense since I cannot conceive that when section 41(1) of the 1971 Act made the planning permission deemed subject to a condition requiring the development to be begun by a specified date, it could have been referring to development other than that which is authorised by the permission.

It seems to me that that authority fully supports Mr Howell's contention. Mr Howell then makes the point that what underlay the decision in the Kerrier case was the fear that if it went the other way, the wrongdoer would get a benefit. I have some sympathy with that contention. But, Mr Howell says that on a correct analysis of the situation, the

wrongdoer is actually worse off because he has no permission to use the building, and the local planning authority could serve an enforcement notice to prevent any use of the building by alleging that there had been an unpermitted change of user. I would accept that contention. "

In seeking opinion from Counsel, we made particular reference to conditions 1 and 6 of the outline permission. He agrees with their significance. However, although we had pointed out that the wording of Condition 6 (the occupancy condition) is not repeated on the permission under ARD 3978/1, he did not *"see this as a necessarily decisive point in the present case as the approval is stated to be subject to "due compliance with the conditions imposed on the grant of the aforementioned outline planning permission and informative 2 underscores this point."*

We had summarised in our instructions to Counsel the differences between the permission and what was actually built, and Mr Grant has seen the differences on site for himself. Mr Grant summarised these differences as follows, and they are central to our case:

"As my instructions note the ARD 3978 Site plan under the outline shows 2 dwellings on a narrow rectangular plot.

This plan shows a point of access midway down the plot with a single detached garage and the two small dwelling buildings either side within the plot.

This plan [ARD 3978 Site Plan] is attached to the outline and is not determinative of the location or siting of any building which is a matter expressly left to be determined under the reserved matter approval under condition 1(b) of the outline permission as is the means of access to all buildings under 1(a);"

We provided Mr Grant with a plan showing what development is on site today. He interpreted that as follows:

"The area that is associated with the dwelling currently on the site extends to the east beyond the area allowed for under the planning permission. However, that existing curtilage has plainly been enjoyed as such for a substantial period and subject to production of evidence to that effect a CLEUD should be obtained with the agreement of the LPA."

That advice generated the concept of applying for a Certificate of Lawful Established Use (CLEUD) to regularise the present position.

"The means of access which has been developed is in the top north-western part of the site. It bears no relation to that shown on ARD 3978 Site Plan. The means of access has been reserved. However, no particulars of the access are provided under the only available reserved matter approval details. The reserved matter details either do not provide an approved means of access or insofar as a means of access is shown on the ARD 3978 site plan the means of access provided fails to comply with it. Condition 2 on the outline states that the permission lapses unless detailed particulars under condition 1 are provided within 3 years (by 1971). This access is in any event lawful as it has been in existence for well in excess of 10 years and again the LPA should be able to issue a CLEUD to that effect."

We assume that Mr Grant referred to 10 years because his statement related to the access and not to the dwellinghouse.

"The residential building that has been developed on the site has a slightly larger footprint than that shown on the ARD 3978 Site Plan, but the size and dimensions have been permitted within the reserved matters approval of the details of the design. The building is located within the site the subject of the outline permission but no permission for that siting has been obtained under the reserved matter details. The actual siting is much further to the north of the site than that shown on the ARD 3978 site plan to which it bears no relation. Accordingly, the position is the same as with the access – either there is no lawful siting approval obtained or the position as built is materially out of keeping with it. The current position has become lawful over time."

The garage built is caught by the same analysis – so the integral nature of it is lawful but there is no permission for the siting."

Based upon his analysis of the facts, Counsel drew the significant conclusion below:

"From the above it can be seen that I do not consider that the dwelling was constructed in accordance with the relevant planning permission. Equally and for this reason I do not believe that the agricultural occupancy ever did attach following the above case law and in particular Handoll."

He went on further:

"I do consider that the current building is in a materially different position, and I do consider that this forms an important component of why the permission has not been duly implemented. However, if a lawful development certificate were applied for or issued, I do not consider that a properly drawn application – could properly or lawfully have an occupancy condition attached to it."

"The development was not lawfully commenced in accordance with the permission - and further and in accordance with the permission – that permission has now lapsed so that no permission subsists for detailed approval to be sought for a second bungalow."

"… a CLEUD would provide clarity and certainty – at least in terms of a larger dwelling on the existing curtilage.

"…."the occupancy condition does not subsist in my view."

Given that the present occupant of the property is shortly to move to other accommodation, it is entirely reasonable for Mr Langdown, as freeholder, to be informed of any limitations of use of the property. Counsel, Mr Grant, has drawn the firm conclusion that the permissions previously granted at the site were not implemented in accordance with conditions. In order words, they have not been *"duly implemented",* and that therefore it is appropriate to apply for a CLEUD in order to regularise matters. This application seeks that Certificate, to which we argue, based upon Counsel's advice, no occupancy or other restrictive conditions could reasonably apply, because there is no permission to which conditions could be attached.

4. *Evidence in support of this CLEUD application*

4.1 Documentary evidence of presence on site

It is incumbent on the applicant to provide adequate evidence in support of an application for a Certificate. This evidence comprise two elements, the first seeks to demonstrate the physical presence on site of the bungalow over the appropriate four years. If one follows Mr Grant's comments about the status of the access, then - despite being development ancillary to a dwellinghouse - it should be subject to the "10 year rule". Therefore, in order to ensure legitimacy could apply to dwellinghouse (bungalow) and all associated development, including the access and the garden, we intentionally have sought to provide at least 10 years' worth of evidence of presence on site.

Therefore, we have sought photographic evidence of the development, as it presently exists, being present for at least 10 years. Fortunately, aerial photographs exist for a longer period, and we set out a clear time line of such photographs.

So far as we can determine, the property was constructed and first occupied in 1969 by a Mr Burton, who was a worker on the Estate.

Aerial photographs are readily available from 2000 onwards, so easily earlier than the 2014 threshold for the 10 year rule to apply. Figure 3 shows the 2000 situation. It purports to have been taken in January, but the green leaves on the trees suggest it was actually later in the year. The simple rectangular form of the bungalow was then as it is now. The photograph also shows the current position of the access and the boundaries of the curtilage (the garden fences) also are in the same positions as today.

There have since been many aerial photographs of the area: January 2001; December 2005; September 2008; April 2017; September 2019; July 2020; and April 2022. The last photograph can be found readily on Google Earth, but it is of poor quality and so it is not reproduced here. Nonetheless, one can see the bungalow in its unchanged form.

To demonstrate continuity of presence, we set out below three representative aerial photographs:

- Figure 3 - January 2000
- Figure 4 – April 2017
- Figure 5 - July 2020

Figure 3 - Aerial photograph Cedar Bungalow 2000

Figure 4 - Aerial photograph, April 2017

The latest aerial photograph was taken in July 2020.

Figure 5 - Aerial photograph, July 2020

All of the aerial photographs show that there has been no material modification in form of the bungalow over the time-series. All show the means of access and the size of the garden. We accept that the time series, even if one were to include the image from April 2022, do not reflect the current status of the site. However, evidence can be provided using personal cameras. Figure 6 shows the bungalow in June 2021. Figure 7 shows the situation in October 2023, and shows the vehicular access along the northern side of the property.

Figure 6 – Cedar Bungalow from Hays Down Lane 2021

Figure 7 - Cedar Bungalow, October 2023

Together, these images, especially those with certainty of date, provide clear and objective evidence of the presence of the bungalow since the beginning of the 21st Century.

We contend that, together, they provide irrefutable evidence not only of the bungalow's presence, but that of its associated access, outbuildings and gardens, in their present form, for well over the necessary period to avoid prosecution, whether that be 4 or 10 years.

4.2 Evidence of occupation

It is also necessary to provide sound evidence of the building's occupation as a residence over the appropriate period. This evidence is necessary to show that change of use to a dwellinghouse has been continuous.

We provide this evidence in the form of a sworn affidavit from Mr Pettit, the worker at the Estate, and who has, with his wife, lived in the property continually since 1976, having succeeded Mr Burton, to whom reference has previously been made. The affidavit, or declaration, was signed on 21st March 2024, and witnessed by a solicitor. It is submitted as a separate document. Mr Pettit has confirmed that the property has remained fundamentally unaltered over their period of occupancy, and that the curtilage of the property, and its boundary with the adjacent paddock to the South. Mr Pettit also confirms that there has been no agricultural activity in the paddock since 2005, and that he kept it in good order. Prior to 2005, the paddock had been used for a short time for growing Christmas Trees. No horses or other livestock have grazed the land this century.

Mr Pettit's testimony provides, in our opinion, irrefutable documentary evidence of continued occupancy for much longer than even the 10 years' threshold for prosecution, even if one takes the longer – perhaps precautionary – time period suggested by Mr Grant.

5. *Conclusion*

We contend that the information provided within this statement, together with the additional information submitted with this application clearly show that Cedar Bungalow has existed in its present form, with its present access and associated garden and outbuildings for a period well in excess of that necessary to be immune from prosecution or enforcement action. Moreover, this application is supported by sound, objective evidence of the property's continuous occupation for the requisite period as a dwellinghouse. Therefore, the applicant should be granted a Certificate of Established Lawful Use as a dwellinghouse for the property.

Moreover, following the legal argument set out by Gary Grant, barrister, it is clear that the previous planning permissions for this site were not implemented in accordance with the approved plans and conditions, so that they have no legal standing. Therefore, no conditions previously associated with them can be applied to any Certificate the local planning authority were to granted. In consequence, there can not be a condition limiting the occupation of the property to any particular class or category of persons.